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In this issue:

The income sources of Civil Society Organizations (CSOS) under the Ethiopian CSO laws: a lesson Drawing analysis

'Ethiopian Red-terror' Trial before the District Court of The Hague: Critical Analysis of the 'Context' and 'Nexus' Elements of War Crimes

The Constitutionality of Election Postponement in Ethiopia amidst COVID-19 Pandemic

Dealing with the Legacies of Repressive Past: Transitional Justice in 'Transitional' Ethiopia

The Practicability of Farming Product Secured Credit in Ethiopia: Some Insights

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Jimma University Journal of Law

Volume 12 **December 2020**

About the Law School ………………………………....………………...1

Articles

The income sources of Civil Society Organizations (CSOS) under the Ethiopian CSO laws: a lesson Drawing analysis…………………………………………………………………………. 5

Belete Addis

'Ethiopian Red-terror' Trial before the District Court of The Hague: Critical Analysis of the 'Context' and 'Nexus' Elements of War Crimes ...………….. 34

Kasaye Muluneh Aynalem

The Constitutionality of Election Postponement in Ethiopia amidst COVID-19 Pandemic… 53

Marew Abebe Salemot and Mequanent Dube Getu

Dealing with the Legacies of Repressive Past: Transitional Justice in 'Transitional' Ethiopia………………………………………………………………………………………… 80

Marshet Tadesse Tessema

Note

The Practicability of Farming Product Secured Credit in Ethiopia: Some Insights………………… 110

Tajebe Getaneh Enyew

About the Law School

The Law School commenced its academic work on the 19th of December 2002 as the Faculty of Law of Jimma University. Later, the Faculty of Law and the Faculty of Humanities and Social Sciences were merged to form the College of Social Sciences and Law in 2009. As of 2014, it has been restructured as College of Law and Governance and it is joined by the Department of Governance and Development Studies.

The Law School has been producing high-caliber and responsible graduates since its inception in 2002. For the first year, it accepted 158 advanced diploma students who graduated three years later. Then, the School has been accepting and teaching students in four first degree programs, namely, in the regular, evening, summer, and distance programs. Thus far, it has graduated thousands of students in these programs. Moreover, the Law School is currently offering **LL.M** in **Commercial and Investment Law** and **LL.M** in **Human Rights and Criminal Law**. These are two years of programs. Indeed, the School will open new postgraduate programs in the future.

In addition to its teaching jobs, the Law School has been publishing its law journal, **Jimma University Journal of Law** since 2007/2008. It is a journal published at least once a year.

Finally, the Law School is making its presence in the community felt by rendering legal services to the indigent and the vulnerable parts of the society (such as children, women, persons with disabilities, persons with HIV/AIDS, and old persons) in Jimma town, Jimma Zone and the surroundings through its Legal Aid Centre. Currently, the Centre has ten branches and they are all doing great jobs to facilitate the enjoyment of the right of access to justice for the indigent and the vulnerable groups. Of course, this also helps equip our students with practical legal skills before they graduate.

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The income sources of civil society organizations (CSOS) under the Ethiopian CSO laws: a lesson drawing analysis

Belete Addis*

Abstract

Civil society organizations (CSOs) can raise income from diverse sources, which, basically can be categorized as businesses, passive investments, and non-trading. This article seeks to examine the nature and regulation of these income sources under the CSO laws of Ethiopia. Employing the doctrinal legal research method, the article argues that though the existing legal framework attempts to play its social role through relaxing the income-generating activities of CSOs, it also suffers from several shortcomings. To name the main ones: the way CSOs are allowed to engage in business activities is not sufficiently considerate of competing interests; no adequate place is given for differential treatment approach; and there are also legal gaps, with potential practical difficulties, regarding the non-trading income sources of CSOs. The CSOs Proclamation has to be redrafted in light of these. Otherwise, the subsequent enabling regulation and directives should be framed in a way to counter the concerns, through the lens of best practices available in other jurisdictions.

Key terms: civil society organizations (CSOs), public benefit organizations (PBOs), differential treatment, the CSOs Proclamation, business.

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1. INTRODUCTION

Civil society organizations (CSOs) are one of the three important sectors in society.[1] Despite the term 'civil society' being a sweeping concept, it can be defined to include all non-market and non-state organizations outside of the family in which people organize themselves to pursue shared interests in the public domain and encompass organizations that are known variously as, nonprofit organizations, non-governmental organizations (NGOs), charities, foundations, associations, community-based organizations, and the not-for-profit media.[2] All these play a vital role under different capacity including as **a** service provider, as an advocator, as a watchdog, and other roles including building active citizenship.[3]

Based on the nature of their beneficiaries, CSOs are generally divided into public and private benefit organizations.[4] Those established to pursue the public benefit purpose are known as public benefit organizations (PBOs), and the rest are referred to as private or mutual benefit organizations (MBOs). The latter types are mainly allowed to engage in any lawful purpose, including, for example, the advancement of one family's interest such as trust funds for a founders' children's education.[5] But, PBOs are established and required to benefit the public at large, thus, they have the public benefit status.

Irrespective of their type, it is obvious that CSOs need to derive income, to carry out the objectives they are established for. This is why, despite the approach varies, countries around the world allow CSOs to generate income from diversified sources.[6] There is a common practice of classifying these sources into three: business activities that generate 'business income'; passive investments that generate 'passive income'; and non-trading or gratuitous

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[1] World Economic Forum (WEF), The Future Role of Civil Society, World Economic Forum in collaboration with KPMG International, (2013), p. 5, available at http://www3.weforum.org/docs/WEF_FutureRoleCivilSociety_Report_2013.pdf last accessed on 20 June, 2020. The other two sectors are the government (state) and the commercial sector.

[2] UNDP, NGOs and CSOs: A Note on Terminology, Annex 1, p. 123, available at https://www.undp.org>publications last accessed on 25 July, 2020.

[3] Rachel Cooper, What is Civil Society? How is the term used and what is seen to be its role and value (internationally) in 2018, *K4D Helpdesk Report*, (2018), p. 9.

[4] Klaus Hopt *et al*, Feasibility Study on a European Foundation Statute, Final Report to European Commission, (2015), p. 52.

[5] European Foundation Centre (EFC), Comparative Highlights of Foundation Laws: the Operating Environment for Foundations in Europe, Brussels, Belgium, (2015), p. 8.

[6] The practices of the various jurisdictions in this regard, can be, for instance, grasped from *Id*; Hopt *et al*, *supra* note 4; and Natalia Bourjaily and Melanie Lyon, Comparative Study of Laws and Regulations Governing Charitable Organizations in the Newly Independent States, *International Charity Law: Comparative Seminar*, Beijing, China, (2004).

income sources.[7] The regulation of these activities and the factors taken into account are different from jurisdiction to jurisdiction.

In Ethiopia, the concept of CSO, in its modern sense has emerged recently, mainly after the 1974 famine and the 1984 drought.[8] The earliest forms of CSOs in Ethiopia were traditional community-based organizations such as *idir, iqub*, and other informal self-help organizations.[9] For a long period, the sector was mainly regulated by the 1960 Civil Code of Ethiopia, without having a separate legal regime and regulator.[10] It was in 2009, that the country enacted a law that separately and specifically deals with CSOs; the Charities and Societies Proclamation (hereinafter, the CSP).[11] After overwhelming critics, mainly for the foreign fund restriction imposed on Ethiopian Charities and the restriction on the area of operations of the Ethiopian Resident and Foreign Charities,[12] the CSP was repealed and replaced by the Civil Society Organizations Proclamation No. 1113/2019 (hereinafter, the Proclamation).[13]

The Proclamation recognizes CSOs as non-governmental, non-partisan, not-for-profit entities, voluntarily established, and registered entities to carry out any lawful purpose.[14] Looking into the classification, based on for whose interest they are established for, the Proclamation recognized two forms of CSOs: Charitable Organization and Association. While the latter is established primarily to protect the interest of its members, a Charitable Organization is established to benefit the general public.[15] Thus, both PBO and non-PBO forms of CSOs are recognized under the Proclamation.

The Proclamation allows CSOs to raise income from different sources.[16] In general, they are permitted to generate income from business activities, passive investments and non-trading sources. Within this, there are several issues that trigger this work. For instance,

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[7]Peter Pajas, Economic Activities of Not-for-Profit Organizations, *Conference Report in Regulating Civil Society Conference,* Hungary, (1996), pp. 3-5.
[8]International Center for Not-for-Profit Law (ICNL), NGO Law Monitor: Ethiopia, available at http://chilot.files.wordpress.com last accessed on 19 December, 2020.
[9]*Id*.
[10] Civil Code Proclamation, *Negarit Gazzeta*, (1960), Arts. 404-544. [Here in after, Civil Code].
[11] Charities and Societies Proclamation No. 621/2009, *Federal Negarit Gazzeta*, (2009).
[12]*Id*, Arts. 2 (2), (3) (4) and 14 (5). To have the glimpse of the critics, see Debebe Hailegebriel, Restrictions on Foreign Funding of Civil Society: Ethiopia, *International Journal of Not-for-Profit Law*, Vol. 12, No. 3, (2010), pp. 18-27.
[13]Organizations of Civil Societies Proclamation No. 1113/2019, Federal *Negarit Gazzeta*, (2019). As of September 2019, the Government is preparing a draft regulation to supplement this Proclamation; the Civil Society Organizations, Council of Ministers Regulation, (2019.) [Here in after, draft Regulation].
[14] *Id,* Art. 2 (1).
[15] *Id*, Arts. 2 (4), (5), 18 and 19.
[16] *Id*, Arts. 63 (1) and 64 (1).

the Proclamation allows CSOs to engage in business and passive investment activities without attaching the necessary restrictions. The way these activities regulated is inviting for CSOs extensive commercial engagement. This begs the question, whether the Proclamation takes in to account other competing interests, most importantly, unfair competition on the commercial sector and abuse of non-profit entities for personal gains. The other main concern is that the opportunity to engage in business undertakings is provided equally for all CSOs, irrespective of their nature and objectives. The author finds it worthy to analyze the potential implications of this inclination to 'one fits all' approach than 'a differential treatment' approach.[17] There are also other gaps, such as lack of the required specificity in regulating the non-trading income sources of CSOs and inadequate incentives towards domestic charity giving, whose potential practical impacts need to be assessed.

Making a critical assessment on the nature of the income sources and their regulation under the Ethiopian CSOs legal regime,[18] from the perspective of the above (and related) point of concerns, is at the heart of this article. To this end, doctrinal research method is dominantly used, where the relevant legislations and literatures are exploited to analysis the core issues of the paper. The general literature and prevalent international practices are used as a mirror to reflect on the case in Ethiopia and to draw relevant lessons.

The article is organized in six parts, including this introduction. Part two intends to shed light on the income sources of CSOs and their regulation in light of the prevalent international practices. The context of Ethiopia's CSO laws is discussed under part three, four and five; each respectively examines the business activities, passive investments and gratuitous income sources of CSOs in Ethiopia. The article offers concluding remarks, in the final part.

2. INCOME SOURCES OF CSOS: GENERAL OVERVIEW OF PREVALENT INTERNATIONAL PRACTICES

[17]For the purpose of this article, the expression "one fits all approach" refers to providing similar or largely similar legal treatments or opportunities for CSOs, irrespective of their type, purpose, areas of operation, financial capacity, etc. In contrast, "differential treatment approach" is employed to refer to the differential legal treatment of CSOs taking in to account various factors (such as the type, purpose, areas of operation, and financial capacity of CSOs) and circumstances like potential impacts on competing interests.

[18]Regional governments do have the power to enact their own CSO laws that govern CSOs operating only in one region. Currently, only the Amhara Region has such laws. These regionally enacted laws are a direct replica of the federal laws. Thus, it is not a mistake to consider the Proclamation as the main CSO law of Ethiopia and the points raised in the paper are mainly true to the regional laws too.

2.1.Business Activities of CSOs

By their nature, CSOs are non-profit legal entities.[19] Thus, they shall be organized and operate primarily without the aim to gain profit. This does not however mean that a CSO cannot engage in business activities[20] and generates profit to advance its objectives.[21] Generating some profit is not prohibited as long as the organization's primary purpose is not for profit and abides by the general principles of non-profit operation including the principle of non-distribution which prevents distributing profits to owners, members, officers, directors, agents, employees and other private parties that may directly or indirectly exercise control over the organization.[22]

The business activities of CSOs raise two basic questions. First, to what extent CSOs should be permitted to conduct them at all and second, how should profits from such activities is to be taxed?[23] The focus of this article is the former question. When it comes to permissibility of CSOs engagement in business activities, there are various regulatory approaches, but, in one way or another they can be grouped under the following three basic models.[24]

The first model allows CSOs to operate in any kind of business activities without limitations, except the basic restrictions that normally arise from the non-profit nature of CSOs, such as the principle of non-distribution of profit and not taking business activities as their primary purpose.[25] This model sometimes referred as a 'non-primary purpose business model' since it allows CSOs to engage in businesses despite they are not related to their primary purpose.[26] From countries adopting this mode, we can name France,[27] Venezuela,[28] Slovakia,[29]

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[19]European Center for Not-for-Profit Law (ECNL), Legal Regulation of Economic Activities of Civil Society Organizations, Policy paper, (2015), p. 3.
[20] The term 'business activities' in the context of CSOs, can be defined as an active sale of goods or services that is pursued with frequency or continuity. See Volker Then *et a*l, *the European foundation, a New Legal Approach*, Cambridge University Press, (2006), p. 329. Passive investments and irregular sale of goods and services that does not create any competition against the commercial entities are traditionally excluded from this definition. See also ECNL, *Id*, p. 5. Countries also use the term 'economic activity' to refer active trade activity of CSOs, excluding passive investments. In common understanding, passive investments are also considered as economic activities, so, to avoid confusions this article employs the term 'business activities'.
[21] *Id*, p.3.
[22] *Id*.
[23]Leon Irish, *et a*l, China's Tax Rules for Not-for-Profit Organizations, A Study Prepared for the World Bank, (2004), p. 32.
[24] ECNL, *supra* note 19, p. 7.
[25] *Id*, p. 8.
[26] Hopt *et al*, *supra* note 4, p. 87.
[27] Law No. 2003-709, 2003 on Philanthropy, Associations, and Foundations; in ICNL, Non Profit Law in France, available at https://www.cof.org/content/nonprofit-law-france last accessed on 13 April, 2021.
[28]ICNL, Non Profit Law in Venezuela, (as updated in December, 2020), available at https://www.cof.org/content/nonprofit-law-venezuela last accessed on 13 April, 2021.

Germany,[30] Denmark,[31] Kenya,[32] and Montenegro.[33] These countries, however, strictly regulate the business activities from various perspectives such as unfair competition,[34] tax exemption,[35] and adverse effect on the primary mission.[36] Some countries in this model also require CSOs to establish subsidiaries to carry out unrelated business activities such as Bosnia and Herzegovina,[37] Czech,[38] and Romania.[39]

Under the second model CSOs are allowed to engage in business activities but attached with certain conditions. The most important condition is the 'relatedness' rule, which require a relationship between the business activities and the purpose of the organization.[40] The required relationship is expressed in different ways, but can be summarized into three. Firstly, the business activities pursued by the CSO should be related to its 'statutory purpose'.[41] This is also known as the doctrine of primary purpose, and adopted by many jurisdictions including Russian,[42] England and Wales,[43] Australia,[44] Serbia,[45] Poland,[46] Malta,[47] Croatia,[48]

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[29] Act No. 213/1997 on Non-Profit Organizations Providing Generally Beneficial Services, Section 30(1) and (2); in ICNL, Non Profit Law in Slovakia, available at https://www.cof.org/content/nonprofit-law-slovakia last accessed on 13 April, 2021.

[30] German Federal Civil Code, Chapters II, Sections 80-88 and Fiscal Code of 1976, as amended, Art 65; in ICNL, Non Profit Law in Germany, available at https://www.cof.org/country-notes/nonprofit-law-germany last accessed on 13 April, 2021.

[31]EFC, *supra* note 5, p. 23.

[32]Public Benefit Organizations Act, 2013, Section 65 (1); in ICNL, Non Profit Law in Kenya, available at https://www.cof.org/content/nonprofit-law-kenya last accessed on 13 April, 2021.

[33]Law of Non-Governmental Organizations, as amended in 2017, Art 29; in ICNL, Non Profit Law in Montenegro, available at https://www.cof.org/country-notes/montenegro last accessed on 13 April, 2021.

[34] For example, France. See ECNL, *supra* note 19, p. 8.

[35] *Id*. Such as Germany.

[36] *Id*, p. 10.

[37] Law on Associations and Foundations, (2002), Art 4; in ICNL, Federation of Bosnia and Herzegovina, Law on Associations and Foundations, available at https://www.legislationline.org/download/id/4643/file/BiH_law_associations_foundations_2002_en.pdf last accessed on 13 April, 2021.

[38] Civil Code of the Czech-Republic, Act No. 89/2012 as amended; in ICNL, Non Profit Law in Czech-Republic, available at https://www.cof.org/content/nonprofit-law-czech-republic last accessed on 13 April, 2021.

[39] Ordinance 26 on Associations and Foundations, 2000, Art 47; in ICNL, Non Profit Law in Romania, available at https://www.cof.org/content/nonprofit-law-romania last accessed on 13 April, 2021.

[40]ECNL, *supra* note 17, p. 8.

[41]*Id.*

[42] The Civil Code of the Russian Federation, Parts One, Two, Three and Four; and Federal Laws No. 231-FZ, 2006 Art 50(4); in ICNL, Non Profit Law in Russia, available at https://www.icnl.org/resources/civic-freedom-monitor/russia last accessed on 13 April, 2021.

[43] Charities Acts of 1992 and 2016; in ICNL, Non Profit Law in England and Wales, available at https://www.cof.org/country-notes/nonprofit-law-england-wales last accessed on 13 April, 2021.

[44] The Australian Charities and Not-for-profits Commission Act, 2012; in ICNL, Non Profit Law in Australia, available at https://www.cof.org/content/nonprofit-law-australia last accessed on 13 April, 2021.

[45] Decree No. 88/2010 on Endowments and Foundations, Art 45; in ICNL, Non Profit Law in Serbia, available at https://www.cof.org/content/nonprofit-law-serbia last accessed on 13 April, 2021.

[46] Law on Public Benefit Activity and Volunteerism, Art 20 (4): in ICNL, Non Profit Law in Poland, available at https://www.cof.org/content/nonprofit-law-poland last accessed on 13 April, 2021.

Philippines,[49] Sweden,[50] Portugal,[51] Slovenia,[52] and Indonesia.[53] Secondly, the business activities should be 'incidental⁄auxiliary' to the primary purpose of the CSO.[54] This is the case, for instance, in South Africa,[55] Finland,[56] Hungary,[57] Latvia,[58] Italy,[59] and Austria.[60] Lastly, CSOs may be obliged to identify the business activities that they wish to carry out in their 'establishing documents'.[61]

Within the second model, still, there are other limitations that can be exploited. For instance, the organization's legal form can be used as a factor, where the possibility to engage in business activities is permitted only for certain legal forms.[62] Qualify the purpose of the business activity, register the business activities as any other for profit legal entity and limitation on the utilization of the earned income are also among the requirements.[63] Countries use a mix of the limitations discussed above, not necessarily stick to one or two of them.

The third model prohibits CSOs from engaging in business activities. This is also known as the exclusive doctrine and it is founded on the premise that CSOs must exclusively pursue the non-commercial purposes for which they are established.[64] Thus, CSOs should not spend their resource on business activities, but must retain it or spend excess funds on their statutory

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available at:

[47] EFC, *supra* note 5, p. 23.

[48] Law on Foundations, No. 106/2018, Art 34; in ICNL, Non Profit Law in Croatia, available at https://www.cof.org/content/nonprofit-law-croatia last accessed on 13 April, 2021.

[49] Revised Corporation Code of the Philippines, 2019, Section 86; in ICNL, Non Profit Law in Philippines, available at https://www.cof.org/country-notes/nonprofit-law-philippines last accessed on 13 April, 2021.

[50] EFC, *supra* note 5, p. 24.

[51] *Id*.

[52] Foundations Act, No. 70/05, Art 2; in ICNL, Non Profit Law in Slovenia, available at https://www.cof.org/country-notes/slovenia last accessed on 13 April, 2021.

[53] Law No. 16 on Foundations, 2001, Art 7; in ICNL, Non Profit Law in Indonesia, available at https://www.cof.org/content/nonprofit-law-indonesia last accessed on 13 April, 2021.

[54] ECNL, *supra* note 17, p. 9. 'Incidental', means, less important than the main purpose of the organization, which does not necessarily have to be 'related' to the statutory purpose.

[55] Non-Profit Organizations' Act 71 of 1997, as amended; in ICNL, Non Profit Law in South Africa, available https://www.cof.org/content/nonprofit-law-south-africa last accessed on 13 April, 2021.

[56] EFC, *supra* note 5, p. 23.

[57] *Id*, p. 23-24.

[58] *Id*.

[59] *Id*.

[60] *Id*.

[61]ECNL, *supra* note 19, p. 9. In such cases, the organizations are allowed to engage only in activities indicated in their governing documents that are related to their primary purposes.

[62]*Id,* p. 10. As highlighted in the introduction, there are different legal forms of CSOs such as charities, associations, foundations etc.

[63]*Id*, p. 11.

[64]Barbara Bucholtz, Doing Well by Doing Good and Vice Versa: Self- Sustaining NGO/Nonprofit Organizations, *Journal of Law & Policy*, Vol. 17, (2009), p. 412.

purposes.[65] But, the number of countries applying this regulatory model is decreasing.[66] Even those few countries which generally prohibit CSOs from engaging in business activities, allow them to engage indirectly through establishing a business corporation.[67]

Within the permissibility framework there are other important issues, worth to mention. First, whether the CSO can directly carried out the business activities or indirectly by establishing affiliated/subsidiary commercial organizations.[68] In this regard, the approaches are diversified. For instance, countries which generally allow operation only through subsidiaries, may allow direct operation for small CSOs since setting a subsidiary business entity creates significant administrative and financial burden for them.[69] Second, in permitting CSOs to engage in business activities there is a need to take into account competing interests such as the effect on the commercial sector and possible abuses of the organizations for personal gains.[70] In most cases, unrestricted or extensive business activities are not allowed. Third, the business activities of a CSO may aim at generating surplus/profit for support of charitable activities of the organization or to recover costs of the organization (cost sharing).[71] The latter involves charging a small price for the goods/services the CSO provides, for the sake of recovering its cost, not to generate profit from the activities. Regulating the two differently is recommended, even to the extent of not considering cost sharing activities as business activities.[72]

2.2.Passive Investments of CSOs

If they are allowed, CSOs may engage in passive investment activities such as investing in stocks and hold minority ownership interests in profit-making enterprises, place funds that are not immediately needed in interest-bearing bank accounts, lease buildings they own to other organizations or sale of assets.[73] From such activities, it is possible to derive 'passive

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[65] *Id*.
[66]ECNL, *supra* note 19, p. 12.
[67]*Id*. See also TUSEV: Monitoring Matrix on Enabling Environment for Civil Society Development, Country Profile Turkey, (2013), available at http://monitoringmatrix.net/wp-content/uploads/2013/12/Matris-Turkey-report_-22.05.2014_final.pdf last accessed on 5 May, 2020.
[68] Then *et a*l, *supra* note 20, p. 219. In the second case, the affiliated organization transfers profit generated from the business activities to the CSO.
[69] ECNL, *supra* note 19, p. 12.
[70] Gallagher, J. G., 'Peddling Products: The Need to Limit Commercial Behavior by Nonprofit Organizations'; in Competing Visions: The Nonprofit Sector in the Twenty-first Century, Washington, DC: The Aspen Institute, (1997), p. 6.
[71] Irish *et al*, *supra* note 23, p. 32.
[72] Then *et al*, *supra* note 20, p. 333.
[73] Irish *et al*, *supra* note 23, p. 57.

income', which in common understanding includes interest, dividends, rents, royalties, and gains from the sale of assets.[74]

Though, CSOs are permitted to invest, being subject to the same regulations as any other for-profit legal entity, they may be imposed with some restrictions, mainly on the type of investments.[75] This is intended to limit the risk involved in certain types of investments and for other concerns. However, imposing restrictions that are too severe are not recommended since they may unnecessarily impede the growth of CSOs.[76] Since, passive investment activities are not considered as 'business activities', most of the requirements imposed on the latter, such as the 'relatedness rule', are mainly not applicable to them.[77] This gives an option for some CSOs which because of their nature may not be able to engage in business activities that have direct relationship with their objectives.

2.3.Gratuitous Income Sources of CSOs

These are income sources from purely gratuitous transfers made to CSOs, in which the transferor receives nothing of substantial value. The typical ones include donations/gifts, government subsidies, inheritances and membership fees.[78] CSOs can also derive such income by engaging in fundraising activities.[79] Unlike business activities, there are no strict substantial restrictions on gratuitous income sources of CSOs, except for some procedural prescriptions.[80]

3. THE REGULATION OF CSOS' BUSINESS ENGAGEMENT UNDER THE CSO LAWS OF ETHIOPIA

3.1.The Permissibility to Engage in Business Activities

Thus far, CSOs in developing countries, like Ethiopia, have been enjoying generous support from foreign sources.[81] In the long term, it is difficult to assess whether this assistance will remain wax and wane. Therefore, it is important for CSOs to diversify and secure their sources of funding by engaging in business activities. In this regard, Art 63 (1) (b) of the Proclamation reads as follows;

[74] *Id*, p. 30.
[75] ECNL, *supra* note 19, p. 18.
[76] *Id*, p. 30.
[77] Then *et al*, *supra* note 20, p. 329.
[78] Irish *et al*, *supra* note 23, p. 45.
[79] *Id*.
[80] *Id*.
[81] Yntiso Gebre, Civil Society and Income Generation Activities in Ethiopia, *Tracking Trends in Ethiopia's Civil Society (TECS)*, Research Paper, (2012), p. 23.

> Any Organization have the right to *engage in any lawful business and investment activity* in accordance with the relevant trade and investment laws in order to raise funds for the fulfillment its objectives. However, the profit to be obtained from such activities *may not be transferred for the benefit of members*. (Emphasis added).

Reading the above provision, it is possible to discern that CSOs are given with a wider opportunity to engage in business activities. The conditions attached are: First, it should be lawful. Thus, CSOs should not engage in business activities outlawed or declared illegal under the relevant laws and also should respect the relevant trade and investment laws. Second, the profit derived from the business activities may not be transferred for the benefit of 'members'. Art. 64 (5) of the Proclamation extends the restriction to 'workers'. However, the Organization's income and resources may be distributed to members or employees for payment of 'legally permitted service fees'.[82] For instance, salaries paid to employees will not be considered as a violation of the non-distribution principle as it fits to the expression, 'legally permitted service fees'.

The 'non-distribution' provisions of the Proclamation failed to mention founders, officers, or board members of CSOs. It may be argued that the fact that CSOs by definition are non profit entities entails the application of the non-distribution principle to these individuals too. One of the concerns here is that profit may be indirectly distributed to leaders of CSOs through paying them excessive salaries.[83] The Proclamation allows payment of 'legally permitted service fees' (for members or employees). However, unless a clear description is made for the expression 'legally permitted service fees', this alone cannot solve the possible abuses associated with excessive salaries. The '80/20 rule' adopted by the Proclamation, which requires CSOs established for the benefit of the general public to allocate 80% of their total income for operational activities and 20% for administrative costs, may give some guidance in this regard.[84] The logic behind dividing the expenses of CSOs as operational and administrative and put a cap on the latter stems from allegations that CSOs spent more than 60% of their budget on administrative matters, including payment of excessive salaries or

[82] Proclamation, *supra* note 13, Art. 60 (1) (d).

[83] Irish *et a*l, *supra* note 23, p. 34. For instance, in France, one of the criteria used for distinguishing between taxable and nontaxable business income of a PBO is whether the managers of the organization receive more than a minimal salary or whether the required "financial disinterestedness" exists for the organization's board and management. Excessive payments may pave a way to treat the PBO as a commercial entity. See the Tax Code Art 261, 7.1 and French Tax Administration Guidelines; in ICNL, Non Profit Law in France (as updated in January 2021), available at https://www.cof.org/sites/default/files/documents/files/France/france-country-note-032020.pdf last accessed on 10 April, 2021.

[84] Proclamation, *supra* note 13, Art. 63 (2).

benefits for their leaders.[85] The Proclamation, considers salaries and benefits of administrative employees as administrative costs, thus, may help to address the concern.[86] Previously, income generated from business activities was not allowed to be used to cover administrative costs.[87] However, the Proclamation fully lifted this restriction.[88] The author believes that this move is not considerate of the fact the restriction was one means of fighting potential abuses of CSOs for personal benefits. Thus, even if absolute prohibition may found inappropriate, at least, providing a threshold regarding the level of income [derived from businesses] that can be used to cover administrative costs should be the way forward.

There are also few prescriptions under Art 64 of the Proclamation that are relevant to business activities of CSOs. It provides general guidelines as to 'income generating activities' (IGAs), including business activities. Among other things, it requires a CSO engaged in IGAs to inform the Agency within fifteen days.[89] Here, the purpose of the notification is not clear, for instance, whether the Agency has a power to prohibit a CSO from engaging in business activities.[90] As the Proclamation attached no other substantial pre-condition to the business engagement of CSOs, it seems that what the Agency can cross check is whether the business activity the organization engaging is lawful or not. However, once a CSO is permitted to operate in business activities, it is required to comply with the relevant tax, commercial registration and business licensing, and investment laws, including opening separate bank account and keeping separate books of account for its business.[91]

[85]Yntiso Gebre, Reality Checks: The State of Civil Society Organizations in Ethiopia, *African Sociological Review,* Vol. 211, (2017), p. 27.

[86] For the details regarding costs considered as administrative expenses, see the Proclamation, *supra* note 13, Art. 63 (2). The '80/20 rule' of the Proclamation is imposed on only Charitable Organizations, which, are required to be established for the benefit of the general public (Art. 2 (4) of the Proclamation). But, the author sees no tenable reason why this should be the case, since the problems resulting the rule are not peculiar to Charities and the income generation opportunities are also equally provided for other forms of CSOs too.

[87]Income Generating Activities by Charities and Societies Directive No. 7/2011, Art. 6 (1). [Here in after, IGA directive].

[88] Proclamation, *supra* note 13, Art. 64 (4).

[89] *Id,* Art. 64 (7). The notification to the Agency is after a CSO started the business activity, not in advance.

[90]The draft Regulation, *supra* note 13, Art 15 (4), also requires CSOs to notify the Agency within ten consecutive working days since they have received their business license. It is not helpful to understand the concerns being raised against the Proclamation. Besides, while, the Proclamation requires the notification to be made 'within fifteen days from engaging in IGAs', the draft is saying 'within ten consecutive working days from receiving their business license'. It is confusing; hence, the draft should be reconsidered in this regard. In this regard, lesson can be drawn from the CSP since it had clearly stated that a CSO must first obtain a written approval from the Agency to engage in IGAs (CSP, *supra* note 11, Art. 103 (1)). Then, the IGA directive had set out the conditions the Agency has to look for, to permit or not.

[91] Proclamation, *supra* note 13, Art. 64 (2) and (3).

When it comes to the way CSOs can engage in business, the Proclamation allows them to engage either directly or through establishing separate subsidiary business organization.[92] It also allows them to operate as a sole proprietorship, though; it is not clear how a CSO can operate as a sole proprietorship. Besides, from business organizations it only mentions company.[93]

As highlighted under part two, CSOs may undertake business activities just to recover the costs they incur. This is known as 'cost sharing', where CSOs collect fees and charges with the intention to recover the full or part of their cost of providing services for their beneficiaries, but not to generate surplus/profit.[94] These activities are, especially important for CSOs operating in communities who cannot afford to buy their services. The best alternative, for such instances, is to at least demand payment from those who can afford to pay for the services.[95] However, the Proclamation has no indication in this regard, but, the draft Regulation does and it defines cost sharing as follows;

> [Cost sharing] means an arrangement whereby, in order to achieve their objectives, Organizations operating *for the benefit of third parties*, share costs in cash or in-kind with the beneficiaries of their services; and includes an arrangement whereby, an Organization provides chargeable services for individuals who are not beneficiaries of its charitable aim in order to maintain and expand its free services.[96]

The plan seems to allow cost sharing for Charitable Organizations, which are recognized as a PBO under the Proclamation. This is a good stand that the final version of the Regulation should take. The draft also empowers the Agency to issue cost sharing directive and the author is of the opinion that the Regulation must incorporate detailed prescriptions towards the clear implementation of 'cost sharing' including which CSOs can take part in it and under what circumstances. In general, it is possible to say that the Proclamation permits CSOs to engage in any profit making activities without serious substantive limitations being attached. The first condition, being 'lawful', is the obvious one for any kind of activity. The same can be said for the other condition, which restricts the distribution of profits to members. Even in

[92] *Id*, Art, 64 (1).
[93] *Id.*
[94] Getachew Zewdie, The Cost Sharing Directive (1/2006 EC), *Tracking Trends in Ethiopia's Civil Society (TECS*), Policy Brief 11, p. 4.
[95] *Id*, p. 2. Income generated from secondary beneficiaries enables cross subsidization of primary beneficiaries.
[96] The draft Regulation, *supra* note 13, Art. 18 (1). Sub article two of the same also declares that "Any Organization operating for the benefit of third parties can provide its services to its beneficiaries for free or a nominal fee in accordance with the principles of cost sharing."

the absence of such stipulation, the nature of CSOs does not allow distribution of profits to members.[97] The ramifications of this stance of the Proclamation are discussed below.

3.2.Business Activities of CSOs *vis a vis* Competing Interests

The repealed CSO laws used the 'relatedness rule'; hence, CSOs were allowed to engage in business activities that are directly related to their statutory purposes.[98] This requirement was subject to criticism, since it places CSOs which cannot produce marketable goods and services, in a disadvantaged position.[99] Accordingly, suggestions were made for its elimination, which the current Proclamation has bought. While it is important to enable CSOs to engage in business activities, there is also a need to ensure that other risks do not emerge. Key among these would be that a business activity either poses a challenge to the CSO core mission itself causing mission drift (such as too much attention on the business/profit) and adversely affects the commercial sector such as when CSOs use certain competitive advantages to unfairly compete with the commercial sector.[100] The 'relatedness' requirement is a good instrument to mitigate these risks, so, the fact that the Proclamation totally scrapped it is not considerate these. Of course, CSOs working in areas such as governance, democracy and rights rather than service provision, are least likely to be able to comply with the 'relatedness' requirement and engage in business activities. However, their concern could have been addressed through differential treatment, such as allowing small scale unrelated business activities.[101]

The prevalent international practice is indicative that the business activities of CSOs are permitted in a way that balances competing interests, such as unfair competition with the commercial sector and abuse of non-profit entities for private gains.[102] These concerns will be high when wider tax privileges are granted to CSOs. In Ethiopia, for instance, income tax exemption is granted for non-profit organizations (including CSOs).[103] This exemption

[97] Proclamation, *supra* note 13, Art. 2 (1) - being 'not-for-profit' is one of the defining features of CSOs.
[98] CSP, *supra* note 11, Art. 103 (1). See also IGA directive, *supra* note 87, Arts 3 (5) and 5.
[99] Yntiso, *supra* note 81, p. 51.
[100]Gallagher, *supra* note 70, p. 6.
[101]For instance, in France, if the business activity of a PBO is considered as creating unfair competition with the commercial sector, it will be imposed with the 'relatedness rule', which otherwise is not applicable. See Tax Code of France, Art 206, 1 and French Tax Administration Guidelines; in ICNL, Non Profit Law in France, available at https://www.cof.org/content/nonprofit-law-france last accessed on 10 April, 2021.
[102]For details about the experiences of various jurisdiction in this regard, see Hopt *et al*, *supra* note 4; EFC, *supra* note 5; Bourjaily and Lyon, *supra* note 6; ECNL, *supra* note 19; Then *et a*l, *supra* note 20; Irish *et al*, *supra* note 23; and OECD, Report on Abuse of Charities for Money Laundering and Tax Evasion, (2008).
[103]Income Tax Proclamation No. 979/2016, Federal *Negarit Gazzeta*, (2016), Art. 65 (1) (m). [Here in after, ITP].

includes, the income derived from business activities of CSOs, excluding unrelated business income, i.e., income derived from business activities not related to the non-profit organizations core missions.[104] Since there is neither serious substantive limitation nor a restriction on the scale and types of business activities, there is a possibility for CSOs to operate in wider business activities, all income tax exempt, as long as the income is construed as 'related business income'.

It may be argued that as long it is for non-profit ends, the business activities of CSOs and its tax exemption should not be restricted. However, such arguments failed to appreciate the adverse impacts it may inflict on the commercial sector. It needs to be remembered that the commercial sector has also its own key role to play in the economy of the country.[105] So, there should not be confusion between business and non-profit activities that would distort the market and put private businesses at a competitive disadvantage.

The ever expanding commercial involvement of CSOs can be further thriven due to the absence of clear regulation over the re-investment power of their subsidiary business entities. This could be problematic in the context of modern competitive trading practices. These profit-making enterprises are intended to raise funds for non-profit purposes, but in practice the profits may rather re-invested to grow the business or increase market share, which would give rise to questions as to where the altruism and public benefit really lies. It should be also clear that if the parent CSO (the one that established the business organization) do not receive sufficient amount, it cannot fully undertake its charitable activity. Not only the business organizations established under a CSO, but also the re-investment power of the CSOs themselves should be clearly regulated. The initial capital of IGAs, such as the starting capital of a subsidiary commercial entity, is to be allocated from the CSO's fund. Unless there is a clear restriction in this regard; the CSO may use the profit it derived from its business

[104] *Id*. This prescription was made in the Income Tax Proclamation because the CSP required 'relatedness' between the business activity of a CSO and its statutory purpose. Since the current CSO Proclamation erased the relatedness requirement, it is not clear whether the income tax laws are going to operate as they are or need to re-shape themselves in line with the prescription of the new CSO laws.
[105] As a matter of fact, it is not charitable activities that can realize sustainable economy for one society, but the market economy. For details in this regard, see Dambisa Moyo, *Dead Aid: Why Aid is Not Working in Africa and How There is a Better Way for Africa*, Penguin Books Limited, (2011). This book reiterates that over the past fifty years $1 trillion of aid has flowed from Western governments to Africa. This has not helped Africa, but, ruined it. Using empirical data, the book shows how, with access to capital and with the right policies, even the poorest nations can turn themselves around. For this, the book underlines that first we must destroy the myth that aid works and make charity history.

activities, to expand or to start another business, while it was expected to use it for its non-profit purpose.[106] It may not also allocate adequate fund for its primary purpose.

The large scale commercial involvement of CSOs will also blurred the distinctive role of the third sector. As part of the third sector, CSOs are supposed to engage in needy areas where the government and for profit enterprises are not this much taking part, for different reasons.[107] For instance, the CSP had a list of activities which considered as charitable purposes and tests of public benefit.[108] The current Proclamation has neither of them. In such scenario, CSOs (especially, Charities) may adopt too broad objectives; hence, many of their business activities may be construed as related for the purpose of business income tax exemption. This will invite for large scale commercial involvement of CSOs and confused it with the commercial sector. When there is a need to engage in broad profit undertakings while having non-profit goals, CSOs should not be the choice (since it will deviate from their core character - 'not for profit'), rather 'social enterprises' might be preferred.[109]

The factors mentioned above, especially if taken cumulatively, grant CSOs the incentive to compete unfairly with the commercial sector. There are views which asserted that this is not an issue in Ethiopia as the market is underdeveloped.[110] However, the author believes that such assertions are not tenable, at least, for the following reasons. To begin with, the stances were largely reflected when the business activity of CSOs was imposed with the relatedness requirement and when there were no extensive income tax privileges. Now, the former is totally lifted and income tax exemptions are provided. In addition, it is improper to assume that the adverse effects CSOs business undertakings on the commercial sector, is only the concern of countries with developed market. Even if the level of the impact can be different,

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[106]The draft Regulation, *supra* note 13, Art 15 (1), made an attempt in this regard as it requires Charities to ensure that the amount *of the start-up capital of their IGAs do not harm the rights and benefits of their beneficiaries.* However, this prescription is not sufficient to address the concern. First, it worries about the beneficiaries of the Organization, not the commercial sector. Second, it is not clear why it singled out Charities, since the right to engage in IGAs, including by establishing separate business entities, is allowed for all forms of CSOs. Third, it left the determination for the CSOs themselves. This self regulation may not be as effective as providing specific mandatory prescription (such as setting a threshold as to the extent of the income from business can be re-invested or used to start new business. So, before its ratification, the draft should be reframed considering these concerns.

[107]Bucholtz, *supra* note 64, p. 412.

[108] CSP, *supra* note 11, Art. 14 (2).

[109]Social enterprises refer to organizations which engage in commercial activities yet having social objectives as their prime mission. Unlike CSOs, they reward some sort of return to investors, as an incidental to their non-financial mission. While profit-making is the primary motive of for-profit businesses, it is "incidental" for social enterprises. See Mystica Alexander, A Comparative Look at International Approaches to Social Enterprise: Public Policy, Investment Structure, and Tax Incentives, *William & Mary Business Law Review*, Vol.7, No. 2, (2016), pp. 1-34.

[110]Yntiso, *supra* note 81, p. 22.

the risk may exist in developing markets too.[111] As the CSOs scale of commercial undertaking increase together with their ability to use tax shelters; it is more likely that the issue of unfair competition will come in to picture, and this is what evidences pointed to.[112]

Most importantly, empirical evidences clearly showed that in Ethiopia, party affiliated Charitable Endowments are highly affecting the commercial sector.[113] The extensive commercial engagement of the subsidiary commercial entities of these Endowments in profitable areas, compel the private business to compete unfairly with these huge economic conglomerates.[114] Since a lot has been said and wide ranges of issues are entangled with these endowments, this article has no intention to get detail about them.[115] The point the author wants to make here is that unless the regulatory framework put the necessary limitations in place, even in Ethiopia, the third sector can adversely affect the commercial sector. Let alone in the unrestricted trading model as adopted in the Proclamation, even at the time the 'relatedness rule' was intact, there were "charities" that engaged in business undertakings widely to the extent of being characterized as a commercial enterprise by the general public. Though it is undisputedly true their political affiliation is the main factor, it should be also underlined that as there is no legal barrier, other CSOs can do the same (as long as they can develop their financial capacity). Besides, having the legal restriction will help to limit the unwarranted business undertakings of party affiliated Endowments too.

In order to protect the commercial sector from the unfair competition of CSOs business engagement, countries adopt different safeguarding measures. Here are some highlights. Based on their potential to pose serious competition to the for profit sector, some countries create a conceptual distinction between 'economic activities' and 'business/commercial

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[111]Kendall Stiles, International Support for NGOs in Bangladesh: Some Unintended Consequences, *World Development*, Vol. 30, Issue 5, (2002), pp. 835-846.

[112] Belete Addis, Income Tax Privileges of Charities and Charity Giving in Ethiopia: A Critical Legal Analysis, LL.M Thesis, Bahir Dar University, (2018), pp. 61-66. This research provides some instances where the tax-exempted non-profit organizations adversely affected the 'for profit entities' in Bahir Dar City Administration.

[113]The notable ones are the Endowment Fund for the Rehabilitation of Tigray (EFFORT) affiliated to the Tigray Peoples Liberation Front (TPLF) and *TIRET* Corporate affiliated to the Amhara National Democratic Movement (ANDM - now operating as branch of the national Prosperity Party/PP in Amhara Region). These entities identify themselves as Charitable Endowments, though, they aggressively engage in profit making activities all over the country using their big and numerous business corporations.

[114]Kibre Moges *et al*, The State of Competition and Competition Regime in Ethiopia: Potential Gaps and Enforcement Challenges, Research Paper Produced by Organization for Social Science Research in Eastern and Southern Africa (OSSREA), (2015), pp. 33-35.

[115]See for instance, Sarah Vaughan and Mesfin Gebremichael, Rethinking Business and Politics in Ethiopia: The Role of EFFORT, the Endowment Fund for the Rehabilitation of Tigray, *the Africa Power and Politics Programme Research Report Series*, (2011); and Mamenie Endale, Some Legal Controversies Regarding Party-affiliated Endowments and Their Participation in Business Activities: The Case of EFFORT and TIRET Endowments, *Bahir Dar University Journal of Law,* Vol .9, No.1, (2018), pp. 72-96.

activities', treating the former more permissively.[116] The permissibility of CSOs to engage in those activities fall under the 'commercial' category is either prohibited or attached with strict conditions.[117] Taking this as a lesson, the Proclamation may define "business" in the context of CSOs than using the broad definition provided under the commercial and tax laws. There are also countries which employed a threshold on the extent/scale of the business activities of a CSO or on the amount of income to be derived from business activities or on the extent of contribution of income from business activities to the annual income of the CSO.[118] If the threshold is surpassed, the organization will not be treated as non-profit entity, but a commercial one.[119] This is presumably on the theory that if the organization has a lot of business activities or generates most of its revenue from business activities, it is more like a business entity than a CSO. Requiring specific purposes which the profit derived from business activities can be utilized for, is also used by some jurisdictions.[120] The intention is that if CSOs are allowed to utilize the profit for whatever or wider purposes, they will tend to increase their scale of commercial involvement. Some empowered the regulator to decide whether the business activity of a CSO would negatively affect the organization's primary aim.[121] The Agency may be entrusted with this task in Ethiopia too, but with clear guidelines in order to sidestepping potential abuse of power and inconsistent decisions. There are also countries which maintain that engaging in business activities should be found necessary for the CSO to meet its statutory goals.[122] For instance, if the organization can meet its goals otherwise, may be because it can raise the required fund from other sources or has sufficient

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[116] ECNL, *supra* note 19, p. 5.

[117] For example in Germany, economic activities necessary to pursue statutory purposes of the CSO are fully tax exempt, whereas commercial activities are considered as unnecessary to pursue the statutory purposes and above certain threshold are taxed at the full rate. See the Fiscal Code of Germany, Art 64 and 65; in ICNL, Non Profit Law in Germany, available at https://www.cof.org/sites/default/files/documents/files/Germany/germany-country-note-032020.pdf last accessed on 10 April, 2021.

[118] ECNL, *supra* note 19, p. 9. For example, in Hungary, if 60% or more of the organization's revenue comes from business activities, it will be considered as if established primarily for business motive. See Section 2 (7) of Act CLXXV/2011 on the Freedom of Association, Public Benefit Status, and the Operation and Support of CSOs; in ICNL, Non Profit Law in Hungary, available at https://www.cof.org/sites/default/files/documents/files/Hungary/Hungary-Note-September-2019.pdf last accessed on 10 April, 2021.

[119] EFC, *supra* note 5, pp. 47-48. Compliance with these ceilings can be verified by inspection of annual accounts. See Irish *et al*, *supra* note 23, p. 36.

[120] ECNL, *supra* note 19, p. 10. This is the case for example in Bosnia and Herzegovina, Czech Republic, Kosovo and Slovenia. See ICNL, The Legal Framework for Not-for-Profit Organizations in Central and Eastern Europe, available at https://www.icnl.org/resources/research/ijnl/the-legal-framework-for-not-for-profit-organizations-in-central-and-eastern-europe last accessed on 10 April, 2021.

[121] *Id,* p. 11. Czech Republic can be mentioned: generally regulated under Arts 214-418 of the Civil Code and Act No. 89/2012 of Czech Republic; in ICNL, Non Profit Law in Czech Republic, available at https://www.cof.org/content/nonprofit-law-czech-republic last accessed on 10 April, 2021.

[122] Such stipulation is, for instance, found in Lithuania under Art 11 of the Law No. IX-1969/2004 on Associations and Art 3 of the Law No. I- 1428/1996 on Public institutions; in *id*.

funds at its disposal, it will not be allowed to engage in business. Some also take in to account the frequency of the activities, by which, they require the organization to carry out the commercial activities in frequency which is deemed necessary for the support of its statutory purposes.[123] So, when the CSO is allowed to engage in business activity, it is not for indefinite period, but only to the extent it able to derive the necessary fund.

In addition to unfairly competing in the market, CSOs are also accused of soliciting funds for private gain while engaging in business activities.[124] This is the other main competing interest not taken in to account under the Proclamation. The issues discussed above such as the absence of limitation on the scale of business activities and the amount of 'related business income' subject to exemption, increase the concern that the ambiguities might be exploited and abused for private benefits.[125] The CSOs managers and administrators may be driven by personal gain to spend so much time on for-profit activities that they lose sight of the central role of providing socially valuable but privately unprofitable services. In a way, a serious conflict of interest develops between the goals of the CSO and the goals of its commercial activities. Funds raised for charitable purposes may be used as venture capital to start risky moneymaking activities and charitable funds may be used by administrators to bail out failed businesses.[126]

One of the reasons for regulation of the third sector is to control fraudulent activities, where for-profit organizations disguise themselves as non-profit entities in order to make use of their supposed non-profit status to obtain special treatment and use the resultant benefits for personal gain.[127] In this regard, the Proclamation requires all members, officers and employees of a CSO to give primacy to the Organization's interest and to take necessary precaution including avoiding conflict of interest.[128] It also provides controlling mechanisms through auditing and reporting.[129] These may help to limit the opportunities for CSOs to raise private capital, since audits focus on whether CSOs are spending appropriate amounts on

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[123]*Id*, p.12. This is the case, for instance, in Serbia. See Art 37 of Law on Associations, Official Gazette No. 51/09, 99/11 and Art 45 of Law on Endowments and Foundations, Official Gazette No. 88/10, 99/11; in ICNL, Non Profit Law in Serbia, available at https://www.cof.org/sites/default/files/Serbia-201907.pdf last accessed on 10 April, 2021.
[124]Judith Bosscher, Commercialization in Nonprofits: Tainted Value? *SPNA Review*, Vol. 5, Issue. 1, (2009).
[125]Belete, *supra* note 112, pp. 66-70.
[126]Yntiso, *supra* note 81, p. 35.
[127] Ayse Dees and Anderson B, the Process of Social Entrepreneurship: Creating Opportunities worth of Serious Pursuit, Center for the Advancement of Social Entrepreneurship, Duke University, 2002; in *id*.
[128] Proclamation, *supra* note 13, A rt. 62 (11).
[129] *Id*, Arts 71-76. These provisions contain general prescriptions, thus, the details should be made in the directive to be issued.

mission-related activities on a year-to-year basis. However, though the prohibition on the distribution of profit has been viewed as a safeguard against straying from the mission, prohibitions of unrestricted commercial engagements have been viewed as an important protective measure.[130] Moreover, permitting CSOs to engage in any business with the mere condition of 'use the proceeds to the primary purpose' cannot be a remedy to the problems emanating from the unrestricted engagement of CSOs in business activities.[131] Having said this, in Ethiopia, we need to also answer the question, to what extent the enforcement is capable enough to avoid those risks. Owing to the underdeveloped controlling capacity of the relevant organs, the problem in practice may remains intact. Hence, having the necessary substantive limitations in place from the very start and then left the other possible misuses to the enforcement organs should be taken as the better way to deal with the problems.

3.3.The Absence of Differential Treatment

'Differential treatment approach' is one of the important instruments to address the concerns raised above related with CSOs engagement in business activities; and it is commonly used across jurisdictions.[132] This helps to effectively use the laws as an instrument for furthering the objectives of CSOs without negatively affecting other competing interests.[133] To attain positive results concerning these, numerous specific factors can be taken in to account.

The Proclamation should have been following the same path. For instance, the type of the CSO and the specific purposes which the Organization established for should have been taken in to account. By type of organization, this article is referring to PBOs and non-PBO CSOs. In this regard, in most countries (despite the difference in the model of permissibility they follow), it is CSOs with public benefit status (PBOs) that are allowed to engage in business activities.[134] Non-PBO CSOs are mostly either totally barred from engaging in the activities or allowed under exceptional circumstances.[135] The Proclamation has no such differentiation,[136] hence, those serving the public at large (Charities) and those serving their own members (Associations) have granted equal opportunity to engage in business activities.

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[130]Tamara Larre, Allowing Charities to "Do More [Good]" through Carrying on Unrelated Businesses, *Canadian Journal of Nonprofit and Social Economy Research,* Vol. 7, No 1, (2016), p 36.

[131] *Id*.

[132]The experiences of various jurisdictions highlighted, here in there, in this article are indicative of this. For instance, differential treatment can be easily inferred by reading the regulatory frameworks of EU member countries, Central and Eastern European countries and others. See Hopt *et al*, *supra* note 4, pp. 86-92; EFC, *supra* note 5, pp. 9-13; Bourjaily and Lyon, *supra* note 6, pp. 47-56; and ECNL, *supra* note 19, pp. 23-24.

[133] Pajas, *supra* note 7, p. 8.

[134] Irish *et al*, *supra* note 23, p. 30.

[135]*Id*, p. VIII.

[136] Proclamation, *supra* note 13, Art. 63 (1), employs the term 'any organization', without qualification.

This is incompatible with the prevalent practices and also looks unjustified. If the government is keen to provide the privilege for both, it should at least give more space to Charities than Associations.

Differentiation can be made even among PBOs, based on their specific purposes. It is recommendable to give more space to those engaging in areas where the 'for-profit-enterprises' are unable or unwilling to take part and to those engaging in needy and socially beneficial supplies such as health and education.[137] However, this is not the case in the Proclamation. Accordingly, CSOs operating in areas where the market can fairly and sufficiently allocate the goods and services (highly competing with the commercial sector) have equal state given benefits and opportunities with those operating in neglected and needy areas. CSOs engagement in key areas such as education and health is investing in human development and these efforts can be expected to have a long-term impact in terms of improving the country's stock of human capital to sustain economic and social development.[138] Thus, apart from addressing the immediate problems facing their target groups, CSOs should be encouraged to envision such long term benefits (especially for those working in remote areas where the lack of human capital is relatively severe).[139]

Other practical factors can also be considered to decide the business engagement of CSOs on case by case basis. Empirical surveys showed that in Ethiopia CSOs are unevenly distributed where most of them concentrated in major cities, accessible locations (along road-sides) and central areas close to Addis Ababa, while the deserving remote villages and developing regions have attracted little attention.[140] The reasons mentioned for this include lack of capacity to mobilize sufficient resources; unwillingness of CSOs to bear hardships by working in remote locations; lack of policy incentives; and the difficulty in convincing donors of the feasibility of projects in inaccessible/remote locations.[141] This justifies why more treatments and incentives should be provided for those CSOs operating in remote areas and in communities who have the greatest need for the services of CSOs. Thus, in Ethiopia's context, the place of operation of CSOs should be used as a key factor for differential treatment.

[137]For instance, the World Bank recommends such approach. See Irish et al, *supra* note 23, p. II.
[138] Yntiso, *supra* note 85, p. 30.
[139] For that matter maximizing public benefit is one of the rationales for the enactment of the Proclamation. See paragraph 5 of the preamble of Proclamation.
[140]Yntiso, *supra* note 85, p. 30.
[141] *Id*.

A distinction between business activities for profit and cost sharing is also recommendable, and the requirements should be less stringent for the latter, such as exemption from business registration and license.[142] The Proclamation has nothing to say in this regard. But in the draft Regulation, it is stated that while determining the operational and administrative costs of the Organization, the benefits derived from voluntary services and a cost sharing activity should not be considered as income, unless they generate money or asset even if they are considered as income under tax laws.[143] The move seems towards the differential treatment of cost sharing. Yet, the treatment here is not sufficient since it is conditioned with 'do not generate money or asset'. It is obvious that cost sharing activities generate money or asset; the point is, it is not generated as a profit. It should be that money or asset that needs special treatment, hence, the draft needs an improvement in this regard, before its ratification.

Coming to the registration and license issue, the Commercial Registration and Licensing Proclamation requires the registration of all commercial activities; hence, cost sharing activities need to comply with the requirements.[144] For reasons of comply costs, activities run to recover costs may be abandoned, thus, better to treat them differently. However, the cost sharing activity need to be allowed for CSOs which most likely will not able to survive or be effective by providing their services for free. Financially capable CSOs should not be allowed to do the same. The forthcoming Directive should take in to account such factors too in setting the conditions for the permissibility of the cost sharing activities.

4. CSOS' MANDATE TO PARTICIPATE IN PASSIVE INVESTMENTS UNDER THE CSO LAWS OF ETHIOPIA

The regulation of passive investments is more or less similar with that of business activities discussed above. Hence, there is no need to get detail here again, except for some peculiar discussions. The Proclamation explicitly allows CSOs to acquire shares in an existing company (and derive dividend).[145] CSOs are also not prohibited to exploit other passive income sources, for instance, those recognized under the Income Tax Proclamation including rental of buildings (they may build and rent out or rent a building which contributed to them by volunteers), royalties, interest (may be earned from their bank deposits or from money

[142] Then *et al*, *supra* note 20, p. 333.
[143] Draft Regulation, *supra* note 13, Art. 18 (3).
[144] Commercial Registration and Licensing Proclamation No. 980/2016, *Federal Negarit Gazzeta*, (2016), Arts. 5 (1) and 28 (1).
[145] Proclamation, *supra* note 13, Art 64 (1).

they lend to others), income from the casual rental of asset, a gain on the disposal of immovable asset, a share, or bond.[146]

The requirements that need to be fulfilled for business activities of CSOs are by large equally applicable to their passive investments. Though its potential effect on the competing interests is not as serious as business activities, the concerns discussed under part three such as the absence of necessary restrictions on the scale of the activities and differential treatment can also be raised here. For instance, unless the level of CSOs capital participation or the number of shares they can hold is limited, they will become *de facto* owner of the commercial organizations. In addition, if there is no a threshold limit on the extent of the re-investment of the proceeds from passive investment activities, the proceeds may not be meaningfully plow back to the statutory purposes. The same goes true to the scale of their engagement in other key money generating activities such as rental of buildings. So, even in cases of passive investments, there is a need to maintain a balance between the level of participation and the primary non-profit purposes of CSOs. It should be remembered that the income CSOs derived from 'passive investments' are fully income tax exempt, whether the activities are related to their objectives or not.[147] The author is not saying that equal restrictions should be imposed on the business and passive investment activities of CSOs. More lenient approach should be applied to the latter, but considerate of the legitimate concerns.

5. NON-TRADING INCOME SOURCES OF CSOS IN ETHIOPIA

According to the Proclamation, "Any Organization shall have the right to solicit, receive and utilize funds *from any legal source* to attain its objective" (emphasis added).[148] Thus, CSOs can raise funds from non-trading sources or gratuitous transfers. No serious restrictions are imposed in this regard as the only thing the provision requires is for source to be 'legal'.[149] Under this category, CSOs may receive financial contributions from donations, inheritance, membership fees,[150] public collections etc. and in-kind contributions (the word 'fund' is

[146] ITP, *supra* note 103, Arts 13-16, 54, 56, 58 and 59.
[147] *Id*, Art. 65 (1) (m).
[148] Proclamation, *supra* note 13, Art. 63 (1) (c).
[149] Charitable committees are subject to limitations that do not apply to other forms of CSOs since they may not solicit funds without the approval of the CSO Agency for each fundraising effort. See *Id*, Art. 49 (1).
[150] *Id*, Art. 60 (2) (d) implies the right of CSOs to collect membership fees.

inclusive of both cash and in kind contributions) such valuable tangible assets like buildings, office supplies, vehicles and services for that matter.[151]

This move of the Proclamation is a big relief for local CSOs, since previously Ethiopian Charities were not allowed to raise more than 10% their annual income from foreign sources.[152] The restriction was made with a view to reduce the vulnerability of sensitive domestic issues to manipulation by imported agendas that may accompany foreign funds.[153] Although it is commendable to have local funds for local projects, it is not a viable and realistic option in the current Ethiopian context where even the government cannot function without foreign funds.[154] Meaningful resources cannot be generated from local sources due to the weak state of the economy, the lack of resolute philanthropists and the lack of a tradition of giving to secular organizations.[155] Accordingly, it is unreasonable to put a total or strict bar on foreign funding, hence, the Proclamation's stance is appropriate.[156]

However, the long-term strategy should be to encourage domestic resource generation and mobilization and to reduce or avoid heavy dependence on foreign donors. For instance, after the foreign fund restriction was made following the enactment of the CSP, many 'rights organizations' were either terminated their operations or changed their commitment to service delivery and development.[157] This shows to what extent the sector was foreign fund dependent, the restriction of which brought a devastating effect. This is indicative that local CSOs need to cultivate the culture of domestic charity giving and deepen their roots in the communities where they operate.

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[151] What about intellectual contributions such as research publications? The author sees no reason why not. They may also receive capital assets such as shares.

[152] CSP, *supra* note 11, Art. 2 (2). The restriction was applicable only if the local charities preferred to operate as 'rights organization'. 'Service delivery and development' based local charities could raise 90% of their fund from foreign sources by registered as 'Ethiopian Resident Charities' (see Arts. 2 (3) and 14 (5) of the same).

[153] Yntiso, *supra* note 85, p. 25. On the other hand, critics viewed the 10% ceiling as a strategy to silence the rights organizations by starving them of funds. See Debebe, *supra* note 12, pp.18-27.

[154] Yeshanew Sisay Alemahu, CSO Law in Ethiopia: Considering Its Constraints and Consequences, *Journal of Civil Society,* Vol. 8, No. 4, (2012), pp. 369-384.

[155] *Id.*

[156] However, it is good to note that a restriction on foreign funding is one of the main worldwide trending issues in the field of CSOs. See Julia Kreienkamp, Responding to the Global Crackdown on Civil Society, Policy Brief, Global Governance Unit, UCL, (2017). The Proclamation's complete removal of the foreign fund restriction may be questioned, in light of this trend. It even allowed a foreign CSO to operate in Ethiopia for a mere purpose of providing funds to local CSOs (Proclamation, *supra* note 13, Art. 62 (6)). So, while applauding the liberal approach the Proclamation has adopted, at the same time, we should not rule out the genuine concern that foreign funding may not be given as a 'free lunch'. Through financing, local CSOs may be used as an instrument to execute the needs of the foreign donors/agents and this meddling may even extend to domestic politics and other sensitive issues.

[157] Abiy Chelkeba, Impact Assessment of the Charities and Societies Law on the Growth and Programs of Non-Governmental Organizations: A Survey Study of Addis Ababa City Administration, LL.M Thesis, Addis Ababa University, (2011), p. 27.

Here, it is worthy to remind local CSOs that the relevance, legitimacy and accountability of CSOs, is now being highly questioned worldwide, and one of the main reasons for this is that many of them lack deep roots in the communities they operate which leads to a growing disconnect between them and their beneficiaries or the constituencies they claim to represent.[158] They have been accused of being illegitimate, out of touch, or in the sector for prestige or money, mainly, due to their failure to uphold their mandate in the face of adversity and their 'follow the money' strategy by which they accept money for programmes and initiatives that are not aligned with their core mandate.[159] Local CSOs in Ethiopia should learn from this, and work hard to deepen their existence in the community, which will eventually help them to raise significant portion of their income from domestic sources. For that matter the level of relation between the society and a CSO may vary depending on its fundraising modalities. Those which raise funds domestically from volunteers using various events may have a better chance to be known by and close to the society than others, such as those extensively engaged in business activities; the public considers the latter as commercial enterprises than non-profit entities.[160]

There are also important trending issues regarding foreign funding which local CSOs need to be aware of. For instance, foreign donors (especially, the established ones) are shifting to effective aid and favoring development/service delivery CSOs.[161] They tend to prefer those engaging in development and poverty reduction and their effectiveness in tackling these than advocacy and rights-based activities. Dwindling donor funding and shifting priorities driven by foreign policy considerations is also pose a threat to the sustainability of domestic CSOs in developing countries.[162] Geopolitical and economic shifts including the expansion of Chinese foreign direct investment in Africa and the changing focus of donor countries from aid to trade with key emerging market economies are shifting the axis of development.[163] In light of this, it is recommended that civil society in developing countries needs to shift its focus and strengthen its ability to mobilize resources from domestic constituencies and reduce excessive dependency on foreign donors.[164] From these trends, local CSOs in Ethiopia

[158]Charles VanDyck, Concept and Definition of Civil Society Sustainability, Centre for Strategic and International Studies, Washington DC, (2017), p. 2.
[159]Cooper, *supra* note 3, p. 13.
[160]Befeqadu Hailu, Inside the Controversial EFFORT; Analysis, available at http://addisstandard.com/analysis-inside-controversial-effort/, published on 16 January, 2017, last accessed, on 13 April, 2021.
[161]WEF, *supra* note 1, p. 7.
[162] *Id*, p. 15.
[163] *Id*.
[164]VanDyck, *supra* note 158, p. 5.

should learn that either to have sustainable financial source or to maintain their operational freedom, they need to work hard in cultivating the domestic culture of charity giving and widen their domestic social base within the larger section of the community.

In fact, nurturing voluntarism and the culture of charity in the society is cited as one of the reasons for the enactment of the Proclamation and promoting this, is one of the objectives as well as powers and functions of the Agency.[165] However, the Proclamation failed to indicate measures to be used to attain this objective. In this regard, the draft Regulation stipulates that commercial and investment companies are expected to fulfill their corporate social responsibility by engaging in charitable work or supporting other charitable works.[166] Though, the attempt is commendable, the prescription of the draft lacks clarity; such as whether is it mandatory, to what extent the companies are expected to contribute, and how to enforce it? So, before it gets ratified, it should add further details to address these concerns.

Apart from mandatory prescriptions, the government should also devise incentives which would strengthen the solidarity of the Ethiopian society by encouraging all citizens to make contributions for public benefit purposes. Such attempt is made under the Income Tax Proclamation, where, in determining their taxable business income, the taxpayers are allowed to a deduction for the amount of a donation they made to Ethiopian Charities and Ethiopian Societies.[167] Yet, the scope of properties qualified for the privilege (charitable tax deduction) is not inclusive of private donations, but limited to business donations (business income tax payers). This may discourage charity giving; which will reduce the number of donors and the potential income CSOs would have derived from such donations.[168] Thus, widening the coverage of the privilege is recommendable and similar incentives should be available in other areas too.

One of the new developments under the new Proclamation is the establishment of the Civil Society Fund which will be administered by the Agency.[169] The income sources of the Fund

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[165]Proclamation, *supra* note 13, preamble, paragraph 6; Arts 5 (4) and 6 (19).

[166]Draft Regulation, *supra* note 13, Art. 22 (1). See also Art. 17 (4) of the same which reads; "The Agency, after assessing procedures for communicating and implementing commercial advertisements in which individuals or commercial entities pledge to donate part of the proceeds from sale to charitable purposes, shall identify ways to promote this and such other methods of charitable giving."

[167]ITP, *supra* note 103, Art. 24 (1) (a). This provision uses the naming *"Ethiopian Charities and Ethiopian Societie*s", which is no more available under the new CSO law. We may need to understand it contextually, as it is referring to 'local CSOs'. Of course, the better way is for the Agency to issue clarifying guideline.

[168]Belete, *supra* note 112, pp. 82-84. But, please note that CSOs 'non trading income' is fully income tax exempt. See *Id*, Art. 65 (1) m.

[169]Proclamation, *supra* note 13, Art. 86 (1).

are properties of CSOs dissolved (both under the repealed and the new CSO laws; whether dissolved by the decision Agency or Court) and subsidies from the Government.[170] This fund is intended to be used to encourage volunteerism and development in the sector, and provide incentives to Organizations working with vulnerable groups.[171] If this fund is administered properly, it can serve as one source of income for local CSOs. The Agency is empowered to issue Directives on the administration of the Fund.[172] The author believes that the Directive will serve well if it is crafted in a way that allocate the fund to CSOs doing highly valuable works to the community (such as building health and educational institutions or operating in un-served areas or providing value adding services), but with limited resources. This way, we can encourage CSOs to take part in highly public benefit activities.

The Proclamation also recognizes the right of CSOs to raise money or collect property locally, through 'public collections'.[173] The term is not defined in the Proclamation, but the draft Regulation defined it as "…the process of collecting cash or other types of assets by going to public, work or residential places, or using other means, with or without pay, and after having informed the donor the purpose of the fundraising."[174] This can be made in different means such as organizing concerts, bazaars, exhibitions; putting donation boxes in offices of international organizations, hotels, and malls.

Unlike the CSP, which dedicated separate section for "public collections" including the conditions required to engage in the activity and the effect of doing otherwise,[175] the Proclamation failed to provide sufficient rules about the activity, except for few prescriptions. For instance, it stipulates that when the Organizations collect public contribution, they shall inform to the Agency.[176] The purpose of the notification, the power of the Agency and whether the notification should be made in advance are not clear.[177] The CSP was clear in this regard since it provided the time framework (including advance application) and the factors the Agency should take in to account to decide on a public collection request made by

[170] *Id*, Art. 86 (3).
[171] *Id*, Art. 86 (2).
[172] *Id*, Art. 86 (5).
[173] *Id*, Art. 64 (1).
[174] Draft Regulation, *supra* note 13, Art. 17 (1). The CSP, *supra* note 11, Art. 2 (10) had better and informative definition in this regard, which the draft Regulation better consult to, before its ratification.
[175] CSP, *supra* note 11, Arts. 98-101.
[176] Proclamation, *supra* note 13, Art. 64 (6).
[177] Draft Regulation, *supra* note 13, Art. 17 (2), which is intended to explain Art. 64 (6) of the Proclamation, also deals with the contents of the notification and not drafted in a way to address the concerns being raised here.

a CSO.[178] Thus, the draft Regulation before its final approval and the directive to be issued by the Agency should address the gaps of the Proclamation and consulting the relevant provisions of the CSP may be the first thing to do.

Though, not restricted to public collections, Art 60 (2) (g) of the Proclamation requires the internal rules of CSOs to stipulate whether or not the organization will perform fundraising activities. Does this means, a CSO cannot engage in fundraising events (including public collections) unless it in advance declared its intention to do so in its internal rules? The author believes that this is less likely. To begin with, this is found in the optional list - the mandatory elements that should to be included in the internal rules are provided under Art 60 (1) of the Proclamation. In addition, the other relevant provisions which directly deal with the issues of fund raising do not provide this as a pre-condition to perform fundraising activities.

6. CONCLUDING REMARKS

Provided they are legal and abide by the principle of non-distribution, the Proclamation has permitted CSOs to derive income from diversified sources, which, can be categorized as businesses, passive investments and gratuitous transfers. This article attempts to examine how these income sources are regulated in Ethiopia, including in light of the prevalent international practices. It has found that the Proclamation unveils important developments and attempts to play its social role through relaxing the sphere of IGAs of CSOs. The article welcomes the Proclamation's stance in allowing CSOs to engage in business activities and passive investments as their ability to generate income through activities beyond fundraising and asset administration can play an important role to ensure their sustainability via securing financial stability and independence. The limited private wealth and weak tradition of charitable giving in the country also justifies the permission.

However, the way CSOs are permitted to engage in business activities is not without concern, as the permission is not accompanied by key limitations. For instance, the Proclamation totally lifts the 'relatedness requirement'; and imposes no restriction on the scale of the business activities, the proportion of the income to be derived from the activities, and the re-investment mandate of CSOs. This approach is not considerate of other competing interests likely to be affected, most notably the commercial sector and abuse of non-profit entities for private gains. In this regard, the article highlights some important safeguarding measures

[178] CSP, *supra* note 11, Arts. 100-101.

other jurisdictions have adopted. With careful contextualization, Ethiopia can draw lessons from them in order to protect the commercial sector from unfair competition and to lessen the motive of using CSOs as a disguise for private benefits. The role of the third sector should not be blurred with the commercial and the Proclamation should be considerate of the available business income tax exemptions for CSOs.

Furthermore, the opportunity to engage in business activities is provided similarly for all CSOs. This negates the positive roles the Proclamation could have play, as an instrument to encourage CSOs to operate in high demand areas and to balance competing interests. The article argues for differential treatment that takes in to account key factors. Differentiation can be made, for instance, based on the type (being more permissive to PBOs); specific purposes (give wider opportunities for CSOs operating in critical needy and value adding areas); and place of operations (favor those working in remote/inaccessible areas). The article discussed relevant international experiences, where ample lessons can be drawn from.

CSOs are also allowed to raise income from purely gratuitous transfers such as donations, inheritances, public collections and membership fees. They can also exploit foreign funding, which the current Proclamation puts no restriction. This is good news for local CSOs since it is their principal source of revenue, where, covering their full budget from domestic sources seems impracticable, in the current situation. Albeit this, the article argues that the long-term strategy of local CSOs should be to encourage domestic resource mobilization and to reduce heavy dependence on foreign donors. Doing so will help them to maintain their operational independence and the trends also indicate that securing foreign fund is becoming a delicate situation. One a related note, the article underscore that though it is unreasonable to totally ban or put strict restriction on foreign funding, the latter's role should be carefully scrutinized to make sure it does not import agendas disruptive to sensitive domestic matters.

Suggestions are also made for the draft Regulation to be re-drafted in a way to address the concerns discussed in the article. Moreover, since the regulation and directives issued based on the CSP are lapsed,[179] there is a serious legal lacuna regarding detail prescriptions, thus, both the Council of Ministers and the Agency should act promptly.[180] They can start by consulting the repealed CSO laws and identify the prescriptions to retain, to modify or

[179]Proclamation, *supra* note 13, Art 88 (1), allowed for the previously issued Regulation and Directives to operate for a one year transition period. As this period is already lapsed they are no more authoritative.

[180]*Id*, Art 89, empowered the Council of Ministers to enact Regulation and the Civil Societies Organizations Agency to issue Directives.

overhaul. The discussions revealed that the Proclamation gets rid of important prescriptions of the previous CSO laws which would have been better to retain (at least with modifications) and in some cases made things more worrisome (the way it discarded the ‘relatedness requirement’ is one indication). A highlight is also made on various relevant experiences, where ample lessons can be drawn as a way out from the problems discussed in the article, as long as they are properly contextualized.

'Ethiopian Red-terror' Trial before the District Court of The Hague: Critical Analysis of the *'Context'* and *'Nexus'* Elements of War Crimes.

Kasaye Muluneh Aynalem*

Abstract

The main objective of this paper is to examine the existence of the 'nexus' element in the war crime conviction of Mr. E. Alemu in the 'red terror' war crime trial before the Hague district court (Hague Court). For an offence to be qualified as a war crime there must be a 'sufficient nexus' between it and an armed conflict. The nexus requirement is mainly used to distinguish war crimes from other international crimes or ordinary crimes committed on the occasion of an armed conflict. The study concludes that the Hague court employed an overly broad interpretation in determining both the context element (armed conflict) and the 'nexus' element in the 'red terror' war crime trial which resulted in diverging interpretations of the same material acts and context by the Hague Court and the Federal High Court of Ethiopia (FHC). This approach undermines legal certainty and the very purpose of the requirement of nexus.

Keywords War crime, Sufficient nexus, Armed conflict, Red-terror, Urban violence

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1. Introduction

Following the 1974 revolution[1], in the struggle for ownership and leadership of the revolution, Ethiopia experienced unprecedented political unrest, activism and violence, particularly among urban intellectuals.[2] Political unrest ultimately led to the military *Derg* regime taking power. Its revolutionary violence included summary execution, unlawful detention, enforced disappearances and torture aimed at eliminating opposition political groups in the capital and across major cities of the country, widely remembered as the 'Ethiopian Red-terror'.[3]

On 15 December 2017 the district court of The Hague in the Netherlands (hereinafter; The Hague Court) rendered a war crime verdict against Mr. E. Alemu, a former Ethiopian higher government official.[4] Alemu, who administered the province of Gojjam during the revolutionary *Derg* regime[5], faced trial before The Hague court for his involvement in the red-terror crimes committed in Gojjam during the period from 1 February 1978 up and until 31 December 1981. The Dutch public prosecutor before the international crimes chamber charged the accused for four indictments of war crimes based on the pieces of evidence retrieved from a file documented in his earlier trial in Ethiopia and victims' testimony living abroad.[6] The trial was concluded by a war crime conviction for pronouncing and imposing arbitrary detention in cruel and degrading circumstances, torture and killing of protected persons which resulted in a sentence of life imprisonment.

Since 1994, on the other hand, *Derg* former higher government officials including president M. Haile-Mariam have been prosecuted by the office of the Special Prosecutor (SPO)[7] before the

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[1] Economic and political grievances led to mass uprisings against the rule of Emperor Haile Selassie I. The uprising led to the overthrow of Ethiopia's last monarchy.

[2] J. Weibel, 'Let the Red Terror Intensify': Political Violence, Governance and Society in Urban Ethiopia, 1976-78, *International Journal of African Historical Studies* 48 (1) (2015), p.15

[3] G. Tareke, The Red-terror in Ethiopia, *Journal of Developing Societies* 24 (2) (2008), pp.183-206.

[4] District Court of The Hague, *Prosecutor v. Eshetu Alemu,* Judgment, 15 December 2017 (ECLI:NL:RBDHA:2017:14782).

[5] *Derg*, which literally means council, was established in June 1974 by representatives of various security sectors of the country before the dethroning of Emperor Haile-Selassie I. In September 1974, the council dethroned the imperial regime and established a Provisional Military Administrative Council (PMAC) and ruled the country from 1974-91.

[6] *Alemu*, *supra* note 4, para.2: Count 1: Deprivation of freedom and inhuman treatment, Count 2: Torture , Count 3: murder of 75 prisoners and Count 4: Deprivation of freedom and inhuman treatment during the period from August 1978 to December 1981.

[7] The office was established by the transitional government in 1992 immediately after the fall of the *Derg* regime with a special mandate to prosecute higher officials of the regime. *See* Proclamation No. 40/92, 1992.

Federal High Court of Ethiopia (FHC) in what is often referred to as the 'Red-Terror Trial'. M. Haile-Mariam and several high profile officials were found guilty of genocide and crimes against humanity for ordering the killing and persecution of 'political groups'.[8] Alemu, one of the co-accused in Mengistu case, was tried in absentia and found guilty of the crime of genocide against 'political groups' under the 1957 penal code of Ethiopia.[9] At the time of this conviction he was already living and working in Amsterdam, the Netherlands.

This paper focuses on the war crimes conviction of Mr. E. Alemu by The Hague Court (hereinafter; red-terror war crime trial). War crimes are 'serious violations of the laws and customs of war' under the GCs, and States have a duty to prosecute international crimes which amount to 'grave breaches' under the GCs. In order for an act to constitute a war crime, there must (1) be an armed conflict, (2) a 'sufficient nexus' or 'link' between the criminal act and the armed conflict, geographical, personal or other reasonable link, and (3) the offence must be of a serious nature.[10] Accordingly, this paper appraises the law regulating armed conflict (section 2) and applies it to the situation of revolutionary Ethiopia, examining whether there was an armed conflict during the period relevant to the indictments and the status of the groups (implicated in the case) in the conflict (Section 3); and whether the alleged war crime offences committed by the accused are linked to such armed conflict (Section 4). This section also appraises the diverging interpretations of the same act and context by the Hague court and FHC.

2. Criteria for Existence of Armed Conflict

The four Geneva Conventions (GCs) of 1949 and Additional Protocols (APs) of 1977 were basically adopted to protect victims of armed conflicts. The conventions and protocols provide detailed rules regulating means and methods of war to realize the very purpose of international humanitarian law, i.e., protection of protected persons and objects during hostilities.

[8] Federal High Court, *SPO v. Colonel Mengistu et.al.*, File No.1/87, Trial Judgment, 12 December 2006. Under Ethiopian law, the definition of genocide extends to the destruction of *'political groups'* in addition to national, ethnic, racial and religious groups. *See also* M. Tessema, Prosecution of Politicide in Ethiopia: The Red Terror Trials, T.M.A Asser Press (2018), pp.171-214.

[9] Federal High Court, *SPO v. E. Alemu*, File No.921/89, Trial Judgment, 8 May 2000.

[10] ICTY, *Prosecutor v. Blaskic*, Trial Judgment, 3 March 2000, Case No.IT-95-14-T, para.69; ICTY, *Prosecutor v. Limaj et al.,* Trial Judgment, 30 November 2005, Case No.IT-03-66-T, para.83

Disregarding these rules may amount to a war crime (grave breaches of the GCs) and entail individual criminal responsibility under international criminal law.[11]

Ascertaining the existence of an armed conflict, parties to the conflict and nature of the conflict are necessary conditions to decide on the fate of persons suspected of violating the rules of war. Even though the existence and definition of armed conflict has significant legal consequences, the GCs and ICC statute fail to provide a precise definition of what constitutes an armed conflict. The case law of the *ad hoc* criminal tribunals has contributed to defining and understanding the meaning of armed conflict. The ICTY in the *Tadic case* set out a comprehensive definition:

> An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups within a State. ... International humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[12]

Generally, only two types of armed conflict are recognized: international armed conflict (IAC), fought between two or more states as per Common Art.2 of GCs or as wars of colonial domination, alien occupation and racist regime according to Art. 1(4) of Additional Protocol (AP) I; and non-international armed conflict (NIAC), fought between a state and non-state armed groups as per Common Art.3 of the four GCs and Art.1 AP II.

Determining the existence of armed conflict as well as characterizing the type of armed conflict and its recognition is not always an easy task, particularly when the conflict is of an intra-State nature.[13] Most of the time governments, in whose territory the conflict is ongoing, are not willing to recognize the situation as 'armed conflict' for legal and political reasons even if the conflict is very intense.[14] Still, states agreed to insert a single provision (Common Art. 3) into each of the four GCs to provide minimum standards of humane treatment for persons not or no longer

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[11] Cf. The Four Geneva Conventions of 1949 Articles 50, 51, 130 and 147 respectively.
[12] ICTY, *Prosecutor v. Tadic*, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1-A, para.70
[13] Y. Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict, Cambridge University Press (2004), p.14
[14] L. Moir, The Law of Internal Armed Conflict, Cambridge University Press (2002), pp.3-21.

participating in a conflict 'not of an international character'.[15] The norm renders armed non-state actors, subject to certain conditions, parties to a conflict with a number of key duties and responsibilities. The following sub-section analyses the criteria for the existence of NIAC as per Common Art.3 of GCs.

2.1. Non-international Armed Conflict (NIAC)

There are two scenarios of NIAC based on the requirements of Common Art.3 GCs and AP II. During the period specified in the indictments Ethiopia was party to the 1949 GCs, but not to the APs. Therefore, characterization of the situation is based on the requirements of Common Art.3 GCs, relevant cases and customary international law.

Armed conflicts not of an international character are conflicts that take place in the territory of a State when there is a protracted conflict between the government and organized armed groups, or between armed groups themselves.[16] However, common article 3 does not explicitly require non-state armed groups to fulfill certain conditions to become a party to NIAC. The trial chamber in *Tadic* ruled that:

> The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.[17]

International jurisprudence emphasized on the 'intensity of the conflict' and the 'degree of organization' of the parties to the conflict as a basic criterion for the existence of a 'protracted NIAC'. In practice, the fact assessment of the protracted nature of the violence refers to the level of intensity and duration of the conflict.[18] Several indicative factors have been used in case law to determine intensity. The ICTY takes into account the following factors:

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[15] ICRC, Commentary on the First Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Cambridge University Press 2016, Art.3
[16] ICC Statute, 17 July 1998, ISBN No.92-9227-227-6, Art.8 (2) (f); *Tadic, Supra* note 12*,* para.70
[17] ICTY, *Prosecutor v. Tadic*, Trial Judgment, 7 May 1997, IT-94–1-T, para.562
[18] ICC, *Prosecutor v. Bemba Gombo*, Trial Judgement, 21 March 2016, ICC-01/05-01/08, paras.139-40

> […] the number of civilians forced to flee from the combat zones; the type of weapons used, in particular the use of heavy weapons, and other military equipment, such as tanks and other heavy vehicles; the blocking or besieging of towns and the heavy shelling of these towns; the extent of destruction and the number of casualties caused by the shelling or fighting; the quantity of troops and units deployed; existence and change of frontlines between the parties; the occupation of territory, and towns and villages; the deployment of government forces to the crisis area; closure of roads. [19]

The level of intensity may also, as stated by the ICC, be derived from objective standards such as ability to mobilize and distribute weapons, duration and strength of military operation, control over territory and consideration of the situation by international organizations, like UNSC.[20]

An armed group also required to exhibit a sufficient degree of military organization to conduct hostilities on behalf of the party to the conflict.[21] In most cases, the organizational adequacy of a group is reflected in its ability to conduct a sustained and intense military operation and capacity to negotiate. To assess whether certain armed entities exhibit the required level of organization, a series of indicative factors are employed by the *ad hoc* tribunals and the ICC, including existence of headquarters, presence of a command structure, ability to plan, coordinate and carry out sustained military operations, ability to speak with one voice and negotiate agreements with State or non-state entities and ability to implement the basic obligations of Common Art.3.[22] Once the requirements are satisfied armed non-state actors become party to the conflict and automatically assume a duty to comply with the rules stated under common Art.3 GCs. International custom and jurisprudence consider serious violations of common Art.3 and 'other serious violations of the laws and customs of war' in NIAC as a war crime.[23] Therefore, a court charged with a war crime charge in NIAC needs to examine the actual situation in line with the requirements of threshold of 'intensity' and 'organization'.

Under IHL, not every act of violence amounts to an armed conflict. In order to claim the existence of an armed conflict, particularly NIAC, during a certain period of time, examination

[19] ICTY, *Prosecutor v. Boskoski & Tarculovski,* Trial Judgment, 10 July 2008, IT-04-82-T, para.177
[20] ICC, *Prosecutor v. Thomas Lubanga*, Trial Judgment, 14 March 2012, ICC-01/04-01/06-2842, para.538
[21] ICC Statute, *supra* note 16, Art. 8 (2) (f)
[22] *See Limaj et al*, *supra* note 10, paras.85-90; *Lubanga*, *supra* note 20, para.537
[23] *Tadic, supra* note 12, para.98

of the specific circumstances of the case like the nature, scope and purpose of the conflict is required. Since no state other than Ethiopia is mentioned in the case under investigation, the focus if discussion is limited to a NIAC. The following section will make use of these indicative factors to examine whether the violence in Ethiopia satisfied the requirements of 'intensity' and 'organization'.

3. The Situation in Ethiopia during the Period Relevant to the Indictments

3.1. Overview of the situation*: 'Secessionists'* and *'Anti-revolutionists'*

Several political groups opposing the military *Derg* government, notably the EPLF[24], TPLF[25], OLF[26], EDU[27] and EPRP/MESION[28], emerged in Ethiopia in the 1970s. From the outset, the ethno-nationalist organizations (EPLF, TPLF & OLF) used force to achieve secession/independence of the people they represent.[29] EDU and EPRP, on the other side, were civilian political organizations opposing the military government and sought for the establishment of a civilian government. There was a clear difference among the opposition groups in terms of organizational structure and the political goal they sought to achieve.[30] Relatively, EPLF and TPLF were well organized in leadership and militarily and determined to achieve their respective goals militarily.[31] EPRP and EDU, on the other hand, due to

[24] EPLF (Eritrean People's Liberation Front) was established in 1977 by splinter groups from ELF (Eritrean Liberation Front) emerged in 1960. EPLF fought the *Derg* government and secured Eritrea's independence in 1991.
[25] TPLF (Tigray people's Liberation Front) is founded in 1975 that fought the *Derg* from the provinces of Tigray & Gondar for liberation of Tigray people, achieved a military victory in 1991. Later the idea of secession was replaced by self-determination.
[26] OLF (Oromo Liberation Front) was established in the 1970s and struggled for the independence of Oromia.
[27] EDU (Ethiopian Democratic Union) was not a regional independence movement but a movement which grew out of the monarchial regime ousted by the revolution in 1974.
[28] EPRP (Ethiopian People Revolutionary Party) and MESION (all Ethiopian Socialist Movement) were the two most prominent civilian political organizations of the early revolutionary era in urban Ethiopia, founded by students before the 1974 revolution. Initially they were united in their opposition to military rule and their demands for the establishment of 'provisional people's government'. Later, mainly triggered by the various reforms taken by the *Derg* government in its early period of power, MESION suspended its political opposition and allied itself with the military government. This stirred tension and violent confrontation between the two opposition groups on the one hand and between EPRP and the *Derg* government on the other hand.
[29] G. Tareke, The Ethiopian Revolution: War in the Horn of Africa, Yale University Press (2009), pp.59-65, 84-9
[30] *Id.*, pp.65-75, 86-8, 98-110
[31] R. Reid, Frontiers of Violence in North East Africa: Genealogies of Violence since 1800, Oxford University Press (2011), pp. 190-208.

organizational problems and division among their leadership, failed to achieve their goal of a revolutionary change in Ethiopia. They were later quashed by the *Derg's* brutal measure due to their violent opposition and driven from their rural hideout by TPLF fighters for reasons of political disagreement.[32] Although all political forces opposed the *Derg* regime, they were irreconcilable political groups in their approach toward the regime. Thus, the military government branded EPRP & EDU as 'anti-revolutionists'; whereas OLF, EPLF and TPLF as 'secessionists'.

Since 1976, EPRP strongly defied the legitimacy of the revolutionary military government in underground using the influential newspaper *Democracia*.[33] They demanded for the immediate removal of the *Derg* and the establishment of a 'provisional people's government'. The *Derg* considered the demand a heavy challenge in its effort to institutionalize military rule, denouncing EPRP as 'anarchist' and 'anti-revolutionist'.[34] Frustrated by the governments' uncompromising stance, EPRPs' opposition changed to a strategy of 'urban violence' and terror aimed at assassination of government officials and allies.[35] In 1977 the *Derg*, under M. Haile-Mariam's chairmanship, prepared to violently liquidate oppositions which marked a decisive turning point for the Ethiopian 'red-terror'.[36] Haile-Mariam, in his public statement, vowed that 'only those who are opposed to imperialism, feudalism and bureaucratic capitalism and who are genuine revolutionaries and patriots will have a place in socialist Ethiopia'.[37] According to observers, EPRPs' stance on 'people's government' and 'urban violence' constituted the final rapture and set the stage for the 'red-terror'.[38] The violence continued and intensified from both EPRP and the *Derg*. In response to 'urban violence' by EPRP, the *Derg* across the country stared to take the so called 'revolutionary measures'[39] against 'anti-revolutionaries'. For instance, the comprehensive house-to-house 'search campaign' of March 1977 in the capital and provincial

[32] *Ibid*; Tareke, *supra* note 29, pp.85-9
[33] M. Chege, The Revolution Betrayed: Ethiopia, 1974-9, *Journal of Modern African Studies* 17 (3) (1979), p.369
[34] J. Wiebel, The Ethiopian Red Terror, in Oxford research encyclopedia of African history, Oxford University Press (2017), p.18
[35] T. Haile-Mariam, A history of Nationalism in Ethiopia: 1941-2010, PhD Thesis on file at AAU (2013), p.217
[36] G. Tareke, The History of the Ethiopian Revolution and the Red Terror, in A. Mahoney (ed.), Documenting the Red Terror: Bearing Witness to Ethiopia's Lost Generation, Ottawa/ERTDRC North America Inc. (2012), pp.41-57.
[37] Weibel, *supra* note 34, p.18
[38] B. Zewde, The History of the Red Terror: Contexts and Consequences, in K. Tronvoll, C. Schaefer and G. Aneme (eds.), The Ethiopian Red Terror Trials: Transitional Justice Challenged, Boydell & Brewer (2009), pp.17-32.
[39] The 'revolutionary measure' literarily means summary execution of anti-revolutionist with a higher rank and suspected of a serious crime. Others, with lower rank, were subjected to arbitrary detention, torture and inhuman treatment based on the level of their participation in 'urban violence'. *See* Wiebel, *supra* note 2, p.19

cities took the lives of several prominent EPRP members.[40] The campaign targeted at hidden weapons, opposition activism and propaganda materials. At *kebele* label, 'revolution defense squads' were also established and charged to extend the 'revolutionary measures' to household level.[41] There was also a 'mass confession' and 'self-denunciation' strategy by the regime against alleged EPRP members in the government apparatus in order to break them and repress their counter-revolutionary activities by presumption of guilt.[42] Almost all urban life was affected by the period's violence which is labeled as a period of 'sustained state sponsored terror' characterized by a grave violation of human rights.[43]

3.2. Reflections on the *'Intensity'* and *'Organization'* Test

In the red-terror war crime trial, the court heavily relied on the jurisprudence of the *ad hoc* International Criminal Tribunals (ICTY, ICTR) and ICC to flesh out the requirement of what constitutes a war crime of a non-international character taking place in the territory of one country, namely a high level of organization of the parties involved in the conflict as well a high level of intensity during the carrying out of hostilities. The court was of the view that both requirements were met in Ethiopia and decided, in its judgment, that the alleged criminal acts of the accused were closely related to armed conflict.[44] The court provided three justifications for this ruling: there was a '*protracted NIAC'* between government forces and EPLF, TPLF, OLF, EDU and EPRP during the period relevant to the indictments; EPRP was '*sufficiently organized'* and involved in the conflict; and there was '*mutual cooperation'* between EPRP and other armed groups that fought the *Derg* regime. The court identified members or sympathizers of EPRP as victims. Other groups like MESION and EDU, though they too were heavily affected by the violence, were not acknowledged as victims. Given the involvement of several actors in the conflict during the specified period, the status of EPRP vis-a-vis other armed groups must be assessed based on factual circumstances and indicative factors of 'intensity' and 'organization'.

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[40] *Ibid.*
[41] 'Revolution defense squads' were civilians recruited from among various sectors, charged with carrying out police duties at *kebele* (smallest administrative unit). *See* Wiebel, *supra* note 2, p.20
[42] Weibel, *supra* note 34, p.20.
[43] G. Aneme, Apology and Trial: The Case of the Red Terror Trial in Ethiopia, *African Human Rights Law Journal* 6 (1) (2006), pp.66-7.
[44] Alemu, *supra* note 4, paras.7 & 14

I. 'Secessionists' – EPLF, TPLF, and OLF

Starting from the late 1970s the *Derg* government was involved in separate armed skirmishes with several secessionists forces. Resistance to central authority, in the form of wars of liberation, grew wider and intensified on various fronts.[45] Although fighting separately, the secessionists had joint purposes and fought within the context of sufficient intensity and level of organization, becoming victorious in 1991. Particularly EPLF and TPLF engaged in full-fledged conventional armed conflict with government forces. They controlled the majority of the territory of the respective provinces, mobilized resources, blocked or besieged towns and had large numbers of military personnel and logistics[46]. The *Derg's* response in areas occupied by the liberation fronts was uncompromising. As a result, a significant number of refugees were forced to flee the fighting provinces. Therefore, arguably, there was 'protracted armed violence' with the required intensity for the purposes of common article 3 NIAC between government forces and secessionists.

During the period relevant to the indictments, EPLF, TPLF & OLF had command leaders, consultative bodies, political programs and command-units to plan and conduct a sustained military operation in an organized manner.[47] The government had deployed a large number of troops in the provinces of Eritrea and Tigray in an effort to abate the threat of EPLF and TPLF insurgents.[48] There was also a special government force in Asmara (Eritrea), trained and equipped for counter insurgency operations.[49] For instance, among several operations aimed to eliminate EPLF and TPLF insurgents, '*Operation Red Star'* (1981) was settled in favor of the secessionists and the government suffered heavy causalities.[50] EPLF also reported significant numbers of casualties and prisoners. This indicates that the 'secessionist' among opposition groups reached the level of organization required to a NIAC.

II. 'Anti-revolutionists' - EPRP

[45] Reid, *supra* note 31, pp.183-88.
[46] *Id.,* pp.192-99; Tareke, *supra* note 29, pp.63-75, 91-8
[47] Tareke, *supra* note 29, pp.177-81.
[48] *Id.*, p.46
[49] *Id.*, p.118
[50] *Id.*, pp.178-80, 218-9, 225-39

EPRP initiated a campaign of 'urban violence' and terror in September 1976, involving bombings of any symbols of the government and assassinations of public officials and supporters (mainly MESON) in the capital and provincial cities.[51] The campaign was labeled 'white-terror'. During the ensuing government-orchestrated 'red-terror' campaign 'revolution defense squads' systematically chased, arrested and killed suspected EPRP members and sympathizers in several cities including Debre-Markos where the alleged crimes were committed. The question is whether violent opposition and its forceful suppression by the government satisfy the requirements of 'intensity' and 'organization' to make EPRP a party to the conflict.

The Hague court concluded that there was 'a protracted and intensive armed violence between *Derg* and EPRP'.[52] The courts' assessment relied on acts of violence and terror by 'urban armed wings' (in the words of the court) against government officials and supporters. However, the requirement of intensity demands 'protracted' violence that goes beyond sporadic acts of violence or terror as a relevant factor.[53] Considering the involvement of several actors, the court should have examined the activities of EPRP separately and in line with the various indicative factors used to ascertain threshold of intensity; particularly EPRP's ability to plan and carryout military operations for a prolonged period of time, places of military confrontations or front lines, duration of the conflict, existence of command structure and units, the type of weapons they used, number of causalities and destructions caused by the fighting. Of course there were insurrections and attacks mainly in towns, but were indiscriminate, short-lived, sudden, unorganized and carried out clandestinely. The killing squads' strategy of 'urban violence' underscores the group's inability to conduct sustained military operations and points instead to criminal acts. The violence falls short of the requirements of protracted violence and thus be treated as instances of internal disturbance and terror. The Hague courts' assessment of facts and conclusion that the violence between *Derg* and EPRP/EPRA fulfilled the requirements of threshold of intensity for common art.3 NIAC is therefore inaccurate.

The Hague court also considered the existence of cooperation between EPRP and other armed group against *Derg* as a fulfilling factor for the organizational and intensity requirement. The court concluded that 'there was a more than incidental cooperation between EPLF on one side

[51] Haile-Mariam, *supra* note 35, p.217
[52] Alemu, *supra* note 4, para.7.5
[53] ICC, *Prosecutor v. Bemba Gombo*, Trial Judgment, 21 March 2016, ICC-01/05-01/08, paras.139-40

and EPRP on the other side'.[54] The ruling was entirely based on the material assistance given by EPLF to other groups including EPRP. A party claiming belligerent status must demonstrate sufficient organization that enables them to carry out sustained and concerted military operations. To claim a more than incidental cooperation and belligerency status, the groups should demonstrate a common plan or goal, common responsible command, a clear relationship of dependence and allegiance between them. Material assistance is not determinative for the existence of more that incidental military cooperation. The court didn't establish the existence of indicative factors beyond reasonable doubt. Therefore, the cooperation among the groups was incidental and temporary. Further, the mere fact that all oposition groups cooperated against the same enemy (*Derg*) doesn't automatically assure any one of these groups (EPRP in this case) fulfilling the 'organizational' test. The level of organization of the group and its ability to engage in military activities must be assed in line with indicative factors separately. In the absence of a certain degree of military organization, it is very unlikely to engage in an intensive military confrontation with a state force. EPRP, emasculated due to mass detention and assassination campaigns, became unable to conduct political activities, let alone military operations. Unlike the secessionist fronts, there is no account of EPRP's military chain of command and hierarchy, ability to procure and distribute weapons and involvement in an intensive coordinated military confrontation with government forces. The party didn't possess the degree of organization required for NIAC under Article 8(2) (f) of the ICC Statute and case law.

Therefore, during the red terror trial, the existence of armed conflict, distinct from unorganized and short-lived insurrections, was not established beyond reasonable doubt with respect to EPRP/EPRA.

4. Probing the 'Nexus' Element in the 'Red-Terror' War Crime Trial.

4.1. General Remarks

[54] Alemu, *supra* note 4, para. 7.5.2.

Under international law States have a duty to prosecute international crimes which amount to 'grave breaches' under the GCs.[55] War crimes are 'serious violations of the laws and customs of war' under the four GCs.[56] There is no similar treaty recognition of 'grave breaches' in Common Art.3 NIACs. International custom and jurisprudence, however, consider serious violations of that norm and 'other serious violations of the laws and customs of war' in NIAC as a war crime.[57] Later, serious violation of common art.3 and 'other serious violations of the laws and customs of war' in NIAC are incorporated in the Rome statute.[58] Accordingly, in order to constitute war crimes either under the GCs or international custom; first, there must be an armed conflict; second, there must be a 'sufficient nexus' between criminal acts and the armed conflict, such as a geographical, personal or other reasonable link; and third, the offence must be of a serious nature.[59] Whereas the existence of armed conflict prompts the application of IHL; the nexus requirement is used to differentiate war crimes from other international crimes[60] and ordinary crimes not committed in connection with the armed conflict[61]. This means not every serious crime committed during armed conflict can be regarded as a violation of IHL. Such offences may amount to crime against humanity or genocide depending on the context and intention of the perpetrators.[62] During a war crime trial, ascertaining the existence of an armed conflict (context element) and the relationship between criminal act and conflict (nexus element) is thus the court's prime concern.

Mr. Alemu had been a senior official in the Derg with responsibility for the province of Gojjam between the period 1 February 1978 and 31 December 1981. He was accused of war crimes before The Hague court for crimes of murder of civilians, torture and inhuman treatment and arbitrary deprivation of freedom of prisoners alleged to be members of EPRP at Debre-Markos prison center in his time as governor of the province.[63] As discussed above, a series of protracted

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[55] Cf. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31, Art.49

[56] *Id*., Art.50.

[57] Tadic*, supra* note 12, para.98

[58] ICC Statute, *supra* note 16, Art.8 (2) (c) (e)

[59] ICC, *Prosecutor v. Katanga and Chuhi*, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07, paras.378-84

[60] H. Wilt, War Crimes and the Requirement of a Nexus with an Armed conflict, *Journal of International Criminal Justice* 10 (5) (2012), p.1116.

[61] ICTY, *Prosecutor v. Kunarac et al.*, Appeals Judgment, 12 June 2002, IT-96-23 & IT-96-23/1-A, para.58

[62] H. Wilt, *supra* note 60, p.1116.

[63] Alemu, *supra* note 4, para.2

NIACs occurred mainly in Ethiopia's northern part from 1978 onwards between secessionists and the *Derg*. This happened at the time, but not in the area of Debre-Markos where the alleged crimes were committed by the accused. So, the issue is whether the underlying crimes with which the accused charged were closely related to the armed conflict.

A sufficient nexus exists when the prohibited conduct is committed during armed conflict and at the place of combat between the parties to the conflict such as 'in the course of fighting or the take-over of a town during an armed conflict'.[64] War crimes may also be committed in an area remote from the actual hostilities or where no fighting is taking place provided that the criminal act has a reasonable connection to the armed conflict and is committed in furtherance of the purposes of the conflict.[65] The ICC also expressly requires that the criminal act must be committed 'in the context of and was associated with the armed conflict'.[66] If such link is lacking, the violation does not constitute a war crime.

For the purpose of criminal prosecution, emphasizing on the relevance of the nexus requirement is not adequate without a means to prove its existence beyond reasonable doubt. The ICTY provided an objective criterion to determine the existence of 'sufficient nexus', holding in the *Kunarac* case that:

> In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, inter alia, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrators official duties[67].

While determining the nexus requirement, the conclusion that the victim and the perpetrator should have a certain status under IHL may be helpful but not a determinative factor. First, combatant or civilian status doesn't determine the existence of 'sufficient nexus' unless a 'functional relationship' between the respective criminal acts and the armed conflict is

[64] ICTY, *Prosecutor v. Delalic et al.,* Trial Judgment, 16 Nov.1998, No.IT-96-21-T, para.193.
[65] ICTY, *Prosecutor v. Kunarac et al.*, Trial Judgment, 22 February 2001, IT-96-23-T&IT-96-23/1-T, para.568
[66] Katanga and Chui, *supra* note 59, para.379
[67] Kunarac *et al*, *supra* note 61, para.59.

established[68]; second, war crimes can be committed by civilians too, given the required nexus[69]; and third, perpetrators' conduct, regardless of his/her status, must 'contribute for the ultimate goal of a military campaign'. In this vein, Ambos and Cassese criticized the *status criterion* as being 'insufficient' to hold the perpetrator responsible for war crimes by itself.[70] Entirely relying on the status criteria developed in the *Kunarac* case may result in unwanted outcomes. For instance, a criminal act committed in the occasion of armed conflict for personal reasons or purposes unrelated to the conflict may easily qualify as a war crime. It is too unreasonable to choose a factor among others, such as *status criterion*, that simply fit to one's own conception of war crime. This approach undermines the delimitating function of the nexus requirement and lead to a divergent conclusion of the same fact and context.[71] Therefore, for a court entertaining a war crime case, it is essential to evaluate the alleged offences against all other indicative factors and factual situations of the case at hand. In particular the political situation of the country during the period, motive of perpetrators and context in which the crimes were committed.

4.2. Reflections on the Court's analysis of the 'Nexus' Element in the 'Red-terror' War Crime Trial

The Hague Court, while determining the existence of 'sufficient nexus' in the Red Terror war crime trial, entirely relied on the *status criterion* without considering other relevant factors, such as the requirements of a "functional relationship" between the conduct and the armed conflict and the act(s) in question being committed "under the guise of the armed conflict".[72] This neglects the circumstances of the crimes committed.

The Red Terror crimes took place in the province of Gojjam, not occupied by secessionists and far from the actual hostilities. But could the acts still have been sufficiently related to the NIAC? That would be the case if the acts were committed in furtherance of or under the guise of the armed conflict. It is the criminal acts, not the criminal, that need to be linked to the purposes and objective of the armed conflict. The main purpose of the government's campaign during the period relevant to the indictment was to destroy the secessionists in the north militarily; whereas

[68] K. Ambos, Treatise on International Criminal Law: The Crimes and Sentencing (Vol. II), Oxford University Press (2014), p.142

[69] ICTR, *Prosecutor v. Akayesu*, Trial Judgment, 2 Sep.1998, No.ICTR-96-4-T, para.633

[70] Ambos, *supra* note 68, p.140; A. Cassese, The Nexus Requirement for War Crimes, *Journal of International Criminal Justice* 10 (5) (2012), p.1397.

[71] Wilt, *supra* note 60, pp.1126-28.

[72] Kunarac *et al.*, *supra* note 65, para.568.

Alemu's criminal acts in Debre-Markos were part of a nationwide government measure to suppress EPRP's 'White Terror' using 'revolutionary defence guards'. *Derg* approached EPRP differently from the secessionists. They were officially declared 'enemies of the revolution', not enemies of the state. As such, there was no involvement of the military in the liquidation campaign. The motive and purpose of the Red Terror crimes was a systematic repression of urban political opposition and activism, not in pursuit of achieving any military goal. Instead, though successful in eliminating EPRP, it intensified the war with secessionist and lead to the collapse of the regime.[73] Therefore, the criminal acts of the accused had no relevant connection with the circumstances which established the existence of armed conflict and didn't contribute to attain the ultimate goal of the military campaign at the time. In this regard, the Hague Court didn't profoundly examine the existence of a functional relationship between the criminal acts of the accused and the armed conflict as well as its overall contribution to military goals. By doing so, the court deviated from the practices of the *ad hoc* criminal tribunals and ICC.

The accused, during his time as a governor, though a member of the *Derg* Council, never participated in and was not part of the military operations established to fight the secessionists in the north or anywhere else. This fact cast a reasonable doubt on the existence of 'sufficient nexus' and the perpetrator's status as a combatant.[74] For the existence of 'sufficient nexus', there must be concrete evidence in order to show that how and in what capacity the accused was involved in the war effort and how his criminal acts were linked to the conflict. As Wilt has demonstrated, in order to establish a 'sufficient nexus' between the criminal acts and the armed conflict, "the accused must be part of, or be closely related to, the military power apparatus that has been established to fight an international or internal enemy" and "have access, and be able, to employ the methods and means of warfare"[75]. Nonetheless, The Hague Court labeled the accused as a 'combatant' without ascertaining his involvement in the conflict in any capacity and concluded his criminal acts were closely related to the armed conflict.[76] Contrary to findings of The Hague Court, the Federal High Court of Ethiopia retreated to conclude that the Red Terror crimes were committed in defence of the State and in the context of the armed conflict.[77] The

[73] J. Wiebel, *supra* note 34, p.16.
[74] Ambos, *supra* note 68, pp.143-4.
[75] Wilt, *supra* note 60, p.1127
[76] Alemu, *supra* note 4, para.14.
[77] *Colonel Mengistu et al., supra* note 8, p. 9. The defendants claimed that the Red Terror crimes were legitimate actions committed in defense of the sovereignty of the State.

court rejected the claim of 'defence of the State' as being disproportionate and found them guilty of the crime of genocide against political groups. In fact, the accusations before the Federal High Court of Ethiopia were different though the underlying offences are quite similar with the indictments before the District Court of The Hague. However, the absence of war crime accusations in the 'Red Terror trials' doesn't necessarily mean the Red Terror crimes had no relevant relation with the armed conflict. Nonetheless, the accused's mere membership to the *Derg* Council, without any military involvement, does not suffice to establish that his criminal acts were committed in the context of the armed conflict. This overbroad interpretation of the '*status criteria'* by the District Court, while determining the nexus, leads to diverging findings of the same material element and context with the Federal High Court of Ethiopia.

Lastly, unlike other international crimes, the commission of war crimes is entirely shaped by or dependent upon the environment of the armed conflict.[78] A sufficient nexus may exist when the situation of armed conflict is exploited by the perpetrator or his ability to commit the crimes is influenced by a situation created by the conflict.[79] However, in the case at hand, the respective crimes could have also been committed in the absence of armed conflict in the same way. The Red Terror campaign was started earlier than the counterinsurgency warfare in the north. In 1976, the 'revolutionary defence squad' had already began the campaign of eliminating 'anti-revolutionaries'. For instance, in 1976, hundreds of young EPRP members, participated or planning to participate in a May-day demonstration were arrested and executed.[80] The victims were either gunned down during peaceful demonstrations or tortured to death in prison camps in the capital and provincial cities including Debre-Markos. In this light, the District Court should have treasured the context in which the crimes were committed by considering the fact that the armed conflict with the secessionists followed and overlapped the Red Terror carnage. Further, though might have its own impact, the armed conflicts in the north didn't create any legal vacuum for the commission of the alleged crimes. In fact, on the part of the government, there was unwillingness, not inability, to protect citizens from wanton abuse of human rights. The capacity to ensure the life and bodily integrity of its citizens was not diminished as a result of the armed conflict. Therefore, the mass detentions, torture and execution measures in Debre-Markos were not occasioned or influenced by the armed conflict. The crimes in question were committed

[78] Kunarac *et al*., *supra* note 61, para. 58.
[79] Katanga and Chui, *supra* note 59, para. 380
[80] Zewde, *supra* note 38, p. 28.

systematically as a persecution policy through the *Derg* governments' sophisticated security apparatus which amounts to a serious violation of human rights, but not a war crime.

5. Conclusion

During the period relevant to the indictments, a prolonged NIAC existed between regime forces and 'secessionists'. However, contrary to the findings of The Hague Court, EPRP did not fulfil the minimum degrees of 'intensity of violence' and 'organization' required for a Common Article 3 NIAC. The criminal acts committed by the accused against members of EPRP (victims) had no relation to the armed conflict and thus didn't satisfy the existence of 'sufficient nexus' required in war crime. The alleged crimes were committed not in the context of and in association with, but merely *during* an armed conflict between the *Derg* government and the secessionists. The mere fact that the horrendous crimes were committed by a government official during the occasions of an armed conflict does not render them war crimes.
The alleged offences committed by the accused took place in the context of the infamous Red Terror campaign to counter the white-terror aimed at assassination of government officials and supporters. The revolutionary measures taken by the regime across provincial cities clearly show that the arbitrary arrest, torture and summarily execution of the victims were conducted as a persecutory policy and in a well-organized manner to eliminate political contestants. The measures were not simply carried out by an unaccountable local actor, but rather institutionally recognized and centrally authorized through the *Dergs'* sophisticated security apparatus. The patterns of violence and the reluctance of the state to secure the life and bodily integrity of its own citizen amounts to a serious violation of human rights and thus best qualify as either a crime against humanity or genocide as depicted by the FHC.

Basically, the existence of nexus between armed conflict and conduct is used to distinguish war crime from other international crimes committed during armed conflict, but unrelated to the conflict. Prosecutions dealing with war crimes, thus, must prove the existence of the nexus element beyond reasonable doubt on the basis of determinative factors developed by case law. In light of the requirements introduced by the *Kunarac* appeals judgement, The Hague Court's reliance on the *status criterion* alone resulted in an overly broad interpretation of the nexus

element in the Red Terror war crime trial. The mere fact that the victims are protected persons and the perpetrator is a combatant doesn’t suffice to claim the existence of sufficient link. In addition to *status criteria*, analysis of other indicative factors is essential to establish a substantial ground to believe that the offences committed took place in the context of and were associated with the protracted armed conflict in Ethiopia. The Hague Court didn’t demonstrate a sufficient link or nexus between the alleged offences and the armed conflict in order to justify the labelling of the conduct as war crime beyond reasonable doubt.

While the approach taken by the ICTY in the *Kunarac* judgement leaves room for different outcomes, a fundamentally divergent interpretation of the same fact and context, as exemplified by The Hague Court and Federal High court, is undesirable and affects the principle of legal certainty in criminal law. The divergent interpretation of the same criminal act and context impends the uniformity of war crime jurisprudence on the one hand and undermines the very purpose of the requirement of nexus in war crime prosecution, i.e., delimiting war crime from other international crimes and/or ordinary crimes on the other hand. To ensure a proper distinction between war crimes from other international crimes the District Court should have dealt the nexus requirement in concrete terms and employed a more restrictive approach – it should certainly do so in comparable cases in the future.

The Constitutionality of Election Postponement in Ethiopia amidst COVID-19 Pandemic

Marew Abebe Salemot* Mequanent Dube Getu**

Abstract

Election postponement in Ethiopia, due to the COVID-19 pandemic, has raised critical constitutional questions that have never been thought of before in the country's constitutional law jurisprudence. This was because the state of emergency measure in Ethiopia, to contain the spread of COVID-19, was in conflict with constitutional deadlines for elections. The constitutional lacuna was due to the absence of a provision regulating election postponement. In response to this constitutional dilemma, the four possible 'options': dissolving the parliament, declaring a state of emergency, constitutional interpretation, and amendment of the Constitution were suggested. This paper investigates the constitutionality of each of the four alternatives. Given the risks of unconstitutionality in the first three options mentioned above, the constitutionally correct approach, although not ideal during a state of emergency, was to amend the Constitution. But the House of Federation, the Ethiopian Upper House entrusted to interpret the Federal Republic of Ethiopia Constitution, decided and postponed the election indefinitely. Accordingly, the constitutional interpretation option to postpone elections was an unconstitutional alternative. The research employed qualitative research methods and the documents included, among others, the Constitution, the regional and international legal frameworks, and the decisions of the House of Federation were considered.

Key Words: Constitutional Interpretation, Covid-19, Election deferral, Ethiopia, Second Chamber

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Introduction

The Coronavirus (COVID-19) pandemic, which broke out in China in late 2019, forced most states to impose either partial or complete lockdown. Some others have declared a state of emergency to curb the spread of the pandemic.[1] To certain states, the declaration of state of emergency during the coronavirus times[2] is in contemporaneous with the election period. Such state of emergency has placed unprecedented pressure on states as to whether to hold or postpone scheduled elections, resulting in controversies in either case[3]. Only 36 states and territories have decided to hold national or subnational elections as originally planned despite concerns related to COVID-19. At least 70 countries and territories across the globe have decided to postpone national and subnational elections due to COVID-19.[4]

While some states have constitutional provisions or legal frameworks to deal with election postponements in certain circumstances, such as political crises, the death of elected officials or natural disasters, some others have neither constitutional provisions nor any legal frameworks to do so[5].

Following the report of the first case of COVID-19 in Ethiopia on 13 March 2020, the government restricted public movements and closed offices and schools.[6] On March 31, the National Electoral Board of Ethiopia submitted a proposal to the House of Peoples

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[1]Emergency Measures and Covid-19: Guidance Organization for Higher Commission for Human Rights (2020), Https://www.Ohchr.Org/Documents/Events/Emergencymeasure _COVID19.Pdf.
[State of Emergency], In a general sense, involves "Governmental action taken during an extraordinary national crisis that usually entails broad restrictions on human rights in order to resolve the Crisis."

[2]At Least 70 countries and territories across the globe have decided to postpone national and subnational elections due to COVID-19.

[3] Antonio S, *Managing Elections Under The COVID-19 Pandemic: The Republic Of Korea's Crucial Test*, International Institute For Democracy And Electoral Assistance(IDEA), Technical Paper, 1-8.(2020), Accessed at date DOI: Https://Doi.Org/10.31752/Idea.15.

[4]Global Overview Of COVID-19 Impacts on Elections (2020), Https://Www.Idea.Int/News-Media/Multimedia-Reports/Global-Overview-Covid-19-Impact-Elections. Accessed on August 2020. International IDEA's Global Overview Of COVID-19: Impact On Elections lists the countries that conducted elections under COVID-19 as of March 2020, Among which: Australia (Local Elections In Queensland); Dominican Republic (Municipal Elections); France (Local Elections); Germany (Local Elections In Bavaria); Guyana (General Elections); Israel (General Elections); Mali (General Elections); Switzerland (Local Elections In Lucerne) And Vanuatu (General Elections).

[5]Sead, A. and Nicholas Matatu, *Timing and Sequencing of Transitional Elections* International Institute for Democracy and Electoral Assistance (IDEA), Policy Paper No. 18,(2018), 1-61. DOI: https://Doi.Org/10.31752/Idea.

[6] Zemelak, A, *Federalism and the COVID-19 Crisis: Perspective from Ethiopia*, Forum of Federation, (2020). Https://Www.Researchgate.Net/Publication/341205760_Federalism_And_The_COVID-19_Crisis the_Perspective_From_Ethiopia/Link/5eb3f35745851523bd49b6c1/Download

Representatives (HPR)–which was approved on 30 April 2020–to postpone the sixth national election, which was scheduled to be held in August 2020, for an unspecified time.[7] A week after the *de facto* lockdown, a formal state of emergency was declared all over the country for five months on 8 April 2020[8] and had effectively postponed the election schedule. But the postponement of elections in Ethiopia due to the COVID-19 pandemic has raised a critical constitutional question that has never been really thought before not only in the country's constitutional law jurisprudence but also it had not been discussed in academic publications either.

This was because the state of emergency measure in Ethiopia, due to COVID-19, was in conflict with constitutional deadlines for elections. The constitutional lacuna was due to the absence of a provision regulating election postponement. Although any legal measures to postpone election schedule and pass constitutional deadlock was far from simple, the parliament, on 29 April 2020, suggested the following options to the constitutional dilemma: dissolving the parliament, declaring state of emergency, amendment of the Constitution and constitutional interpretation. Despite objections from some 25 members of the very parliament mainly from Tigray people's Liberation Front (TPLF)[9],constitutional interpretation was endorsed and the issue was referred to the Council of Constitutional Inquiry (CCI).[10] The CCI has a legal advisory role to the House of Federation (HoF).

On 11 June 2020, the HoF fully adopted the recommendations made by the CCI over the constitutional matters referred to it for interpretation by the parliament. Finally, the CCI recommended the deferred general elections to be postponed indefinitely until COVID-19

[7]International Foundations For Electoral Systems: Elections Postponed Due To COVID-19 - As Of August 20, 2020, 1–8. Http//Ohfgljdgelakfkefopgklcohadegdpjf/Https://Www.Ifes.Org/Sites/Default/Files/Elections_Postponed_Due_To_Covid-19.Pdf.

[8] Proclamation 3/2020: A State of Emergency Proclamation Enacted to Counter and Control the Spread of COVID-19 and Mitigate its Impact, (2020), 1–4.

[9] Later TPLF, a party that administers one of the 10 th regions of Ethiopia, has attacked the northern command and entered the full scale war with the federal government over the disagreement of the election postponement as an immediate factor and the former had held its own regional elections.

[10]The Council of Constitutional Inquiry Is Established by Virtue of Art.82 of the Constitution of the Federal Democratic Republic of Ethiopia and by Proclamation No. 798/2013 to conduct constitutional inquiries and present its findings to the House of the Federation which is empowered to interpret the Constitution.

pandemic no longer poses a risk to public health confirmed by the very parliament which has direct vested interest in the outcome.[11]

The verdict of the HoF to postpone the election indefinitely, however, raised concerns whether the decision regards the premise of the FDRE Constitution. This research evaluates whether constitutional interpretation did adhere to the premises of the FDRE Constitution. The research also investigates the constitutionality of each of the four alternatives.

The research employed qualitative research methods and the documents included, among others, the Constitution, the regional and international legal frameworks and the decisions of the House of Federation were considered.

The research has four parts. The first part discussed how some states' constitutional provisions or/and legal rules entertain election postponements during emergency situations. The second part examined the constitutionality of election postponement in Ethiopia. The third part examined whether the four options–dissolving the parliament, declaring state of emergency, amendment of the FDRE Constitution and constitutional interpretation–adhere to the Constitution or are they (un)constitutional. The conclusion and the way forward are presented at the end of the work.

1. Elections during Emergencies: Experiences of Constitutional Provisions of Some States

Although deadlines for holding elections are often entrenched in a country's legal or constitutional framework, international law allows for the derogation of some rights – including the right to vote and stand for election – in emergency situations with stringent rules to prevent abuse.[12] Some countries have either constitutional provisions or/and legal rules to entertain election postponements due to emergency situations. During a state of emergency, the Indian Constitution for example, allows parliament's term of office to be extended by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months

[11] The Ethiopian House of Federation convenes for the second year of its 5th parliamentary term on June 11,2020.http://www.hofethiopia.gov.et/web/guest/decisions-documents/ /document/preview/29608/21536 The CCI's recommended the deferred general elections to be held within nine to 12 months after the Ethiopian Ministry of Health, the Ethiopian Public Health Institute and the science community assure that the pandemic no longer poses a risk to public health and the Parliament approves their suggestion.

[12] Katherine, E, *Legal Considerations When Delaying or Adapting Elections*, International Foundation for Electoral Systems. (2020) https://www.ifes.org/sites/default/files/ifes_covid19_briefing_series_legal_considerations_whe_delaying_or_adapting_elections_june_2020.pdf, Accessed 14 January 2021.

after the Proclamation has ceased to operate.[13] The Bangladesh constitution, if the Republic is engaged in war, also allows the term of office of the parliament, without holding elections, to be extended for not more than one year but it shall not be extended beyond six months after the termination of the war.[14] In case of serious crisis, the Cameroon Constitution allows election postponement and asserts that the election of a new Assembly shall take place not less than forty days and not more than one hundred and twenty days following the expiry of the extension or abridgement period.[15] The Constitution of Estonia also prohibits the election of members' of the new parliament during a state of emergency nor shall authority of the existing one be terminated, and elections must be held within three months after the end of the war or emergency.[16] Whereas the Constitution in Myanmar explicitly provides that after the expiry of the incumbent term, the President and the Vice-Presidents shall continue their duties until the time the new President is duly elected but no similar provision exists for members of parliament.[17] According to the legislation of Armenia, no referendum can take place during the period of the state of emergency as a result a constitutional referendum scheduled for April 5/2020 had been postponed in Armenia as the country declared a state of emergency to deal with the Coronavirus pandemic.[18]

Thus, states having constitutional provisions or legal frameworks to entertain election postponement, can easily pass emergency situations which would otherwise have paved the way for constitutional lacuna and conflicts among competing groups.

Any election is by nature a rules-based exercise, and changing the rules too close to the game, or without regard to flow-on effects, can be damaging and illegitimate.[19] It is inescapable in some

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[13] *IDEA, Voting From Abroad:* The International IDEA Handbook,(2020), <Https://www.Idea.Int/Publications/Catalogue/Votingabroad-International-Idea-Handbook>, Accessed 17 July2020.

[14] The Constitution of the People's Republic of Bangladesh,Art.72(3) https://www.refworld.org/pdfid/3ae6b5684.pdf.

[15] Malah, A, *Constitutional Protection in Cameron: Critique of the Amendment Mechanism*, MA Thesis, Central European University, 21(2009).

[16] The 1992 Estonia Constitution, Art.131[Authority During State of Emergency]: (1) During a state of emergency or a state of war there shall be no elections for the Parliament, the President of the Republic or representative bodies of local government, nor can their authority be terminated. (2) The authority of the Parliament, the President of the Republic, and representative bodies of local government shall be extended if they should end during a state of emergency or state of war, or within three months of the end of a state of emergency or state of war. In these cases, new elections shall be declared within three months of the end of a state of emergency or a state of war. http://www.concourt.am/armenian/legal_resources/world_constitutions/constit/estonia/estoni-e.htm

[17] The 2008 Constitution of Myanmar, Art. 61(b) http://extwprlegs1.fao.org/docs/pdf/mya132824.pdf

[18] Constitutional Referendum Postponed as Armenia Declares State of Emergency, Asbarez Staff, 2020. http://asbarez.com/193019/constitutional-referendum-postponed-as-armenia-declares-state-of-emergency/

[19] Supra note 12.

contexts that decisions to postpone or modify election periods and modalities will become politicized and heavily contested. This is even true in democratic states let alone in a country like Ethiopia which suffers from a democratic deficit and has many polarized interests.

The responsibility for making these difficult legal and operational decisions regarding the postponement or modification of elections varies between countries and can become fraught with problems, especially where the legal basis for postponement is not clear cut.

The Venice Commission's Code of Good Practice in Electoral Matters affirms that "stability of the law is crucial to credibility of the electoral process" and recommends no legal changes in the year prior to an election.[20] The International Foundation for Electoral Systems (IFES), in its Guidelines and Recommendations for Electoral Activities during the COVID-19 Pandemic, has noted the following legal elements to be considered in relation to election postponements and modifications[21]:

- Source of authority for setting or moving election dates
- Legal or constitutionally mandated deadlines for transfers of power
- Provisions for continuity of power beyond the end of a term, or for caretaker governments
- Legal or constitutional authority for temporary derogation of rights or postponement of elections in emergency situations
- Laws or regulations enabling flexibility or modification of methods or modes of carrying out election processes
- Set timelines in the legal framework for key electoral processes such as voter registration, candidate registration and campaigning
- Statutory authority for Election Management Bodies(EMB) to develop regulations and procedures

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[20] Guidelines and Explanatory Report of the European Commission for Democracy Through Law (Venice Commission), No. 190/2002, Code of Good Practice in Electoral Matters (October 30, 2002).

Accordingly, one way of avoiding manipulation is to define in the Constitution or in a text higher in status than ordinary law the elements that are most exposed (the electoral system itself, the membership of electoral commissions, constituencies or rules on drawing constituency boundaries). Another, more flexible, solution would be to stipulate in the Constitution that, if the electoral law is amended, the old system will apply to the next election – at least if it takes place within the coming year – and the new one will take effect after that.

[21] Supra note 12 https://www.ifes.org/sites/default/files/ifes_covid19_briefing_series_legal_considerations_when_delaying_or_adapting_elections_june_2020.pdf.

- Provisions in the legal or regulatory framework requiring certain forms of accessibility, inclusion or consultation

When states, in the interest of public health, are unable to hold elections which touch upon citizens' fundamental rights and are crucial to facilitating peaceful and democratic transfers of power, they are obliged to exhaust different legal means to postpone elections and/ or create platforms for inclusive participation of all political parties.[22]

2. The Constitutionality of Election Postponement in Ethiopia

Coming to Ethiopia, the FDRE Constitution stipulates that the members of the HPR, the Lower House, to be elected by the people for a term of five years on the basis of universal suffrage and by direct, free and fair elections held by secret ballot.[23] The FDRE Constitution also obliges elections for new members of the parliament to be concluded one month prior to the expiry of the House's term.[24]

Except stating as there will be a regular national election to be held for every five years, the FDRE Constitution doesn't have any provision to entertain election postponement.[25] The Constitution, the supreme law of the land, imposes a duty to *inter alia* all organs of state, political organizations as well as their officials to ensure observance of the Constitution and to obey it.[26] The Constitution also prohibits assuming state power in any manner other than that provided under the Constitution.[27]

If there is a *force majeure* to extend the election in an extra constitutional manner, it should be decided by an independent organ that has the consent of all competing political forces or with inclusive participation of all political parties.[28] The government, when it comes to elections, is one of the actors, not the sole decision maker. One can also argue that the absence of

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[22] Kotanidis et al, *States of emergency in response to the coronavirus crisis: Situation in certain Member States*, EPRS, (2020).

[23] The Constitution of the Federal Democratic Republic of Ethiopia, 1995, Proc. No. 1, Neg. Gaz. Year 1st, No. 1, Art.54.

[24] FDRE Constitution , Art. 58.

[25] FDRE Constitution, Art. 54.

[26] FDRE Constitution, Art. 9; The Constitution obliges any official, institutions and practices to observe the premises of its provisions as follows: the Constitution is the supreme law of the land, any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect. All citizens, organs of state, political organizations, other associations as well as their officials have the duty to ensure observance of the constitution and to obey it. It is prohibited to assume state power in any manner other than that provided under the Constitution.

[27] FDRE Constitution, Art. 9.

[28] Supra note 3

constitutional provisions to postpone the election schedule was made intentionally by the architects of the Constitution. This is because the Constitution was drafted after long years of civil wars and it aimed to prohibit any incumbent government from extending its term limit under the guise of an election postponement provision. The state of emergency, due to the pandemic, came at a precarious time for Ethiopia's short-lived (democratic) transition in which the country was already struggling to meet the expectations of its population. The postponement of the election in Ethiopia created a constitutional crisis and unfolded in a legal vacuum. Thus, the decision of the HoF to postpone the election was not constitutional as any law or a decision of an organ of state or a public official which contravenes the Constitution shall be of no effect.

3. Attempting to Validate Election Postponement in Ethiopia: the Four 'Options' and their (un)constitutionality

This section evaluates whether the four options–dissolving the parliament, declaring state of emergency, amendment of the FDRE Constitution and constitutional interpretation–adhere to the Constitution or are they unconstitutional. It also investigates the constitutionality of opting for a constitutional interpretation to solve the constitutional controversy.

3.1. Dissolving of the Parliament

Dissolution is the power to dismiss a parliament or other legislative assembly such that the members of the assembly cease to hold office and new elections are required.[29] Dissolution may be required due to one or more of the following factors: as a means of enforcing party discipline and strengthening the executive, as a catalyst for government formation processes, as a way of breaking inter-institutional deadlock, as a way of reinforcing a government's popular mandate, to win a mandate following a change of government, as a way of testing public opinion on major issues and /or as a way of choosing the timing of elections.[30]

Dissolution of the parliament was one of the four suggested options by the government to get out of the legal conundrum. The FDRE Constitution under Article 60 allows the dissolution of the House. The specific constitutionally anticipated grounds to dissolve the House is in order [to hold new elections] if the Council of Ministers lose its majority in the House or if the political

[29] International Institute for Democracy and Electoral Assistance(IDEA), 2016. https://www.idea.int/sites/default/files/publications/dissolution-of-parliament-primer.pdf, Accessed 25July2021.
[30]Ibid

parties cannot agree to the continuation of the previous coalition or to form a new majority coalition.

The FDRE Constitution pursuant to Article 60 (1) and (2) allows the dissolution of the House under the following stringent condition.[31]

First, 'the dissolution of the House is to be made before the expiry of its term.' The assumption of the dissolution of parliament shall be concluded before the five-year term limit expires. Given five months were left for the term of the parliament's legal termination, the dissolution of the House could not be legally substantiated. Had the attempt to dissolve the parliament been made earlier before the date of the expiry, it would have been constitutional. Otherwise, the term of the parliament should have not been close to its termination.

Second, 'elections shall be organized within six months after the dissolution of the House.' But the debate–since early April 2020–was how to legally postpone the National Elections which were scheduled for August 2020; not to hold an interim election within the House's term of office. Hence, Article 60 cannot be invoked to ascertain term extension, and dissolution of the parliament cannot be justified to extend the term limit of the ruling government beyond the constitution's allotment period. Unless understood as such, it means that an incumbent can always extend its term by at least six additional months by deliberately dissolving parliament just before its term expires.

Third, 'the dissolution of the House by the Prime Minister requires the consent of the members of the parliament (MPs)'. Getting majority support from the MPs could not be difficult as the House was held only by the same political party, the then Ethiopian People's Revolutionary Democratic Front (EPRDF), rebranded as Prosperity Party.[32]

Fourth, 'the loss of the Council of Ministers to have a majority in the House and cannot agree to the continuation of the previous coalition.' This point doesn't need further explanation as the concern was not to sustain or form a coalition government but looking for any possible legal options to justify election postponement in the absence of clear constitutional provisions. Thus,

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[31] FDRE Constitution, Art. 60

[32] Analysis: Deferred Election, State Of Emergency and Covid19 – How Can Ethiopia avoid an Impending Constitutional Crisis?(2020) Addis standard /April 10, 2020 /

there are not sufficient constitutional grounds to dissolve the parliament and form a new government thereafter.

Even if a new government were to be established, following the dissolution of the House, it shall continue as a caretaker government that does nothing beyond conducting the day to day affairs of government and organizing new elections.[33] Ethiopia, due to COVID-19, was under a state of emergency and the logic of a caretaker government with limited powers was inconsistent with the logic of emergencies, which necessitated the government with full, even exceptional powers during and in the immediate aftermath of the emergency.[34]

Establishing a caretaker government was not only unconstitutional to Ethiopia but also practically was not the right decision while the country has faced internal political cleavage and external challenges, too.[35] Of course, when proposing 'dissolution of the House' as one of the alternatives to pass the deadlock, the government expressed its concern not to have a weak government that cannot enact new proclamations, regulations or decrees, nor may it repeal or amend any existing law.[36] Generally, the FDRE Constitution under Article 60 (1) and (2) allows dissolution of parliament to handle the power vacuum created in the ruling government only within its five years term of office; not to extend the next regular elections. Had dissolution of the parliament been opted as the legal solution to postpone national elections it would have been unconstitutional.

3.2. State of Emergency used as a Ground to Postpone Election in Ethiopia

The Council of Ministers of the Federal Government has the power to declare a state of emergency, should an external invasion, a breakdown of law and order which endangers the constitutional order and which cannot be controlled by the regular law enforcement agencies and personnel, a natural disaster, or an epidemic occur.[37] This part examines whether the above-

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[33] FDRE Constitution, Art. 60(5).

[34] Yonata Tesfaye and etal, Commentary: Making Sense of Ethiopia's Constitutional Moment,2020, https://addisstandard.com/commentary-making-sense-of-ethiopias-constitutional-moment/, Addis Standard, Accessed on 05 July2021.

[35] Ibid

[36] Bantayehu Demlie, Analysis: Deferred Election, State of Emergency and #Covid19 – How Can Ethiopia Avoid An Impending Constitutional Crisis?, Addis Standard, https://addisstandard.com/analysis-deferred-election-state-of-emergency-and-covid19-how-can-ethiopia-avoid-an-impending-constitutional-crisis/, Accessed On 05 July2021.

[37] FDRE Constitution, Art. 93

mentioned grounds–conditions used to declare a state of emergency in Ethiopia–can also be used to justify postponing elections as the government sought it.

From these circumstances, the occurrence of a pandemic can be used as the justification to impose a state of emergency which was already declared on 8th of April 2020 due to COVID-19 until the end of August 2020. The parliament can extend by a two-thirds majority vote to renew every four months successively.[38] If the state of emergency had been renewed for another four months i.e., until the end of December 2020, still the time would not have been sufficient to handle the election. Of course, the FDRE Constitution neither puts a maximum limit on the number of renewals of an emergency decree nor mentions circumstances to extend. And there is no constitutional provision that allows a declaration of state of emergency simply to freeze the term of the House from counting. Here the 'state of emergency' was also anticipated by the government to justify election postponement as well. But election postponement is not one of the grounds, under the FDRE Constitution or the electoral law, to declare a state of emergency and can't be used to extend the term of the parliament beyond allotted time. There should be any legitimate and constitutionally accepted cause (other than election postponement) to the result (i.e., to declaring state of emergency).

The FDRE Constitution also allows declaring state of emergency due to 'a breakdown of law and order which endangers the constitutional order and which cannot be controlled by the regular law enforcement agencies and personnel'. The constitutional crisis that has loomed after September 2020 was not due to any other external forces i.e., riots and invasions that require a state of emergency but emanates either from the very Constitution itself– the constitutional failure to legitimize election postponement.

Partly, the absence of any single constitutional provision or any legal framework that addresses explicitly or even impliedly election postponement endangers the constitutional order. Therefore, the constitutional lacuna–due to the absence of provisions to handle election postponement–cannot be mitigated by declaring a state of emergency. If it is assumed that declaring a state of emergency is the possible way out, it is impossible to hold an election while the very right to

[38]FDRE Constitution, Art. 93(3) A state of emergency decreed by the Council of Ministers, if approved by the House of Peoples' Representatives, can remain in effect for up to six months. the House of Peoples' Representatives may, by a two-thirds majority vote, allow the state of emergency proclamation to be renewed every four months successively.

movement and assembly, among others, are limited during such extraordinary times.[39] Letting the country to stay in a prolonged state of emergency has also its own far reaching consequences in limiting fundamental human rights and freedoms. Thus, declaring a state of emergency, even with sufficient reasons, cannot create a conducive environment to handle elections except extending the term of office of the incumbent government whose term limit is expired.

The last, but not least, ground to declaring a state of emergency under the FDRE Constitution is the 'external invasion' and is not worth mentioning here as there is not any such threat to the country. A state, even fighting at war, may hold elections and Ethiopia did not postpone the 2000 national elections while it was at full scale war with its neighboring Eritrea between 1998 and 2000.

The FDRE Constitution, while listing grounds to declare a state of emergency, does not say anything about election postponement if the election schedule occurs amidst such an extraordinary situation.[40] Some argue, citing Article 38 cum 93, that election can be postponed because the FDRE Constitution does not list the right to vote and be elected as non derogable rights during a state of emergency. If an election is not conducted, there will not be a government as per Article 54 cum 93. Ethiopia, given its internal political polarizations and external challenges, should not be left without a government unless the new elected government replaces the outgoing one. But some others still argue that because self-determination is one of the non-derogable rights under the FDRE constitution[41] even during a state of emergency, holding elections, one of the basic manifestations of self-determination, cannot be postponed.

Had the Constitution anticipated emergency situations during election periods that could potentially prevent the holding elections as per the scheduled timeline the Constitution would

[39] FDRE Constitution, Art. 93. The exclusive listing of non-derogable rights during state of emergency under the FDRE Constitution are: art 1 which describes the nomenclature of the state 'the Federal Democratic Republic of Ethiopia'; article 18 which prohibits inhumane treatment; article 25 which guarantees equality of everyone before the law and equal protection of the law and articles 39(1 and 2) which guarantee every nation, nationality and people in Ethiopia to have an unconditional right to self-determination, including the right to secession.

[40] FDRE Constitution, Art. 93.

[41] FDRE Constitution, Art. 93 (4)(C): In the exercise of its emergency powers the Council of Ministers cannot, however, suspend or limit the rights provided for in Art.1, 18, 25, and sub- Art.1 and 2 of Art.39 of this Constitution. The exclusive listing of non-derogable rights during state of emergency under the FDRE Constitution are: art 1 which describes the nomenclature of the state 'the Federal Democratic Republic of Ethiopia'; Art.18 which prohibits inhumane treatment; Art.25 which guarantees equality of everyone before the law and equal protection of the law and Art.39(1 and 2) which guarantee every Nation, Nationality and People in Ethiopia to have an unconditional right to self-determination, including the right to secession.

not have such limitations responsible for the current legal crisis. Unfortunately, in Ethiopia, there are neither constitutional provision(s) that anticipate grounds to extend elections nor any proclaimed legal frameworks that govern election delaying or rescheduling during an emergency situation.

Generally, unlike some countries' constitutions, that foresee impending circumstances during a state of emergency that delay from holding elections or put exclusive provision to entertain election postponement, the FDRE Constitution does not have any such single provision to justify election postponement. In the absence of any constitutional provisions and legal frameworks, declaring a state of emergency merely to justify election postponement and extend the term limit of the expired parliament is duly unconstitutional. Thus, declaring a state of emergency, to handle the constitutional crisis, is doubling the problem and half the solution and it is not looking for solutions for problems but problems for solutions.

3.3. Constitutional Amendment

A constitution, a supreme law of a country, needs to be amended over time to adjust provisions that are inadequate. Motivations for changing the written text of a constitution differ. Some amendments are made for the public interest, for example: (i) to adjust the constitution to the environment within which the political system operates (including economics, technology, international relations, demographics, changes in the values of the population etc.); (ii) to correct provisions that have proved inadequate over time and (iii) to further improve constitutional rights or to strengthen democratic institutions.[42]

Constitutional amendment was one of the four possible ‘options’ suggested by the Ethiopian government to legalize election postponement following the broke out of COVID-19 in the country. The general procedure of constitutional amendment mechanism of the FDRE Constitution is clearly stipulated under Art 104 and 105 of the Constitution. While the former sets *initiative* procedures for any proposal for constitutional amendment, the latter puts forth a *ratification* process. As per Article 104, there are no unamendable provisions under the FDRE Constitution.

[42] The International Institute for Democracy and Electoral Assistance (International IDEA), Constitutional Amendment Procedures (2014), 1-17.

As Ethiopia is a federal state, its constitutional amendment mechanism (initiation and approval) requires the participation of both the federal and the regional governments.[43] Regarding the initiation of constitutional amendment, it can be started by either the federal or regional governments. If the amendment proposal is initiated at the federal level, the proposal should be supported by a two thirds majority vote in the HPR, or by a two thirds majority vote in the HoF; or if the amendment is initiated at the regional level, it requires one-third of the State Councils (i.e. three out of the then[44] nine) of the member states of the Federation to approve the proposal by majority vote.

Compared with initiation of amendments, ratifications of proposed amendments require more rigid requirements and restrictions. Based on the rigidity of criteria to ratify, there are two kinds of provisions. The first kinds of provisions are the ones that are given special protection with relatively rigid ratification requirements. They include all rights and freedoms specified under chapter three of the FDRE Constitution, the provision that provides for the initiation of amendment[45] and the amending provision itself.[46] The ratification of these provisions requires the endorsement of all State Councils by a majority vote and by the two Houses' two- thirds majority vote at the federal level in a separate session.

The second category includes other provisions of the Constitution that require relatively less rigid procedure to approve and can be ratified with the approval of the two Houses' two-thirds majority vote in a joint session and by the majority vote of the two-thirds of the Councils of the member States of the Federation.[47] Although the FDRE Constitution stipulates the need for popular discussion during the initiation of amendments, it does not require popular approval for ratification.[48] It is furthermore not clearly stipulated whether "popular discussion" refers to referendum or any other form of participation and the amending clauses do not mention constitutional amendments to be published in the *Negarit Gazeta*.

[43] FDRE Constitution, Art. 104 and 105.
[44] The Ethiopian Federation initially had nine regional governments until the Sidama regional state formally joined the Federation in July 2020 as the tenth member.
[45] FDRE Constitution, Art. 104.
[46] FDRE Constitution, Art.105.
[47] FDRE Constitution, Art. 105(2).
[48] FDRE Constitution, Art.104.

There have not been any formal experiences of constitutional amendment in Ethiopia. The ruling party, the architect of the Constitution and basically still in power although in a different form, has resisted any amendment proposal especially from opposition parties.[49] It was not only rejecting the amendment proposals but also blaming the opposition themselves and their initiatives altogether as if it was a move to undermine the constitutional order of the country. But, the government did amend two provisions[50]- the concurrency of taxation power and national census. The first amended constitutional provision is Article 98 in 1997. Accordingly, the concurrency of taxation power between the federal and regional governments amended into revenue sharing, which gives more power to the federal government to levy, collect and administer specific taxes while regional governments share the collected money based on the criteria set by the HoF.

In 2005 when the national census–supposed to be held every ten years as per Article 103 (5) of the Constitution without any exception–was in conflict with the national election, the parliament amended Article 103(5) of the Constitution. And later the parliament amended as 'the ten years schedule can be extended due to *a force majeure* approved by the joint session of the two Houses.[51] The fact that the FDRE Constitution obliges laws approved by HPR to be proclaimed in the *Negarit Gazeta*, none of the amended constitutional provisions were published nor included into the Constitution.[52] The above constitutional provisions, thus, were amended without a formal constitutional amendment procedure but with the decision of the executive and/or the House.

Following the broke out of COVID-19 that hindered the conduct of elections, the Ethiopian government proposed, among other things, to amend the FDRE Constitution to postpone elections during emergency situations. Although amendment of the Constitution was alluded by many legal experts as a legally indisputable remedy[53], there is still unanswered question to be addressed including:

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[49] Zelalem Eshetu, Unconstitutional Constitutional Amendments in Ethiopia, Haramaya Law Review/ Vol 4(1), 2015, Acceded date, https://www.ajol.info/index.php/hlr/article/view/148618
FDRE Constitution Article 71(2).
[50] FDRE Constitution, Art. 98 And 103.
[51] Supra note 49.
[52] FDRE Constitution Article 71(2).
[53] Supra note 36.

1. Is it feasible and legitimate amending the Constitution during a state of emergency?
2. Which constitutional provisions have to be amended to fill the current legal vacuum concerning parliamentary term of office?

Concerning amending constitutional provisions *vis-a-vis* the state of emergency, some constitutions put constitutional amendment restrictions during state of emergency (e.g. Cambodia, and Estonia).[54] This is with the intention to avert any amendments from being taken place under emergency circumstances when those incumbent governments may abuse public fear to seize additional power. The African Charter on Democracy, Elections and Governance,[55] to which Ethiopia is a party, obliges States Parties to ensure that the process of amendment or revision of their constitution reposes on national consensus, obtained if need be, through referendum.[56]

The FDRE Constitution does not prohibit amending its provisions during emergency situations. Amidst COVID 19 pandemic, the Ethiopian parliament was prompted to amend the Constitution to fill the constitutional lacuna created by the absence of explicit constitutional provisions that indisputably govern election postponement. Since amending the Constitution in order to add or modify clauses needs to be conducted in a normal situation, its feasibility was far from attainable, given Ethiopia was under state of emergency to contain the spread of COVID 19. The FDRE Constitution requires, among other things, public discussion for constitutional amendments[57] and such participation is difficult during a state of emergency period that limits, among other things, public gathering and movements. Though the Tigray Regional State duly rejected all proposals suggested by the government including amending the Constitution, getting approval from the six regional governments out of the then nine members of the federation is a sufficient condition in addition to the two Houses to amend the FDRE Constitution. To protect the spirit of the Constitution from short-sighted or partisan amendments, legal scholars

[54]The International Institute for Democracy and Electoral Assistance (International IDEA), Constitutional Amendment Procedures (2014), 1-17.
[55] African Union, African Charter on Democracy, Elections and Governance, 30 January 2007, available at: https://www.refworld.org/docid/493fe2332.html [accessed 24 August 2020].
[56] African Charter on Democracy, Elections and Governance, Article 10.
[57] FDRE Constitution, Art.104: Any proposal for constitutional amendment, if supported by two-thirds majority vote in the House of Peoples' Representatives, or by a two-thirds majority vote in the House of the Federation or when one-third of the State Councils of the member states of the federation, by a majority vote in each council have supported it, shall be submitted for [discussion and decision to the general public] and to those whom the amendment of the Constitution concerns.

recommended the Ethiopian government to refrain from amending the Constitution during the state of emergency while public engagement was limited.[58] The amendment decision would have been considered as a unilateral decision provided that the parliament is of a single party government elected in an undemocratic manner. Had the constitutional amendment happened last May 2020 in Ethiopia during a state of emergency it would have been considered as a move to extend the term limit of a single party that dominated the parliament. This is because under the guises of constitutional amendment, some governments and presidents extended or even abolished their term limit to stay in power indefinitely. Such extension of the term limit of presidents and parliaments under the guise of amendments was practiced in Tunisia 2002, Chad in 2006, Uganda in 2005, Azerbaijan in 2009, Venezuela in 2009, Hungary in 2010), Yemen in 2011 and Burundi (2015) and Russia in 2008 and 2020 and tried and succeeded in circumventing term restrictions by abolishing relevant provisions through constitutional amendments.[59] Otherwise, there would have been constitutional provision in Ethiopia (like South Korea) that had prohibited any constitutional amendments from being applied to incumbent governments.

One of the second questions would have been identifying the specific constitutional provisions to be amended had the government resorted to constitutional amendment. These provisions would have included 'the duration of the Houses', 'the right to vote and to be elected' and 'state of emergency'. This part discusses these provisions that could have potentially been proposed for amendment.

Obviously, Article 54 cum 58 of the Constitution, which limits the term of the members of the HPR to five years without exception, would have been amended. The amended version would have considered conditions during a state of emergency that prevent the term of a parliament from expiring and that allow it to be extended until the exigencies end. Article 93 of the

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[58] Supra note 48.

[59] Davide, E., et etal, From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons From Honduras, Global Constitutionalism, Cambridge University Press,8:1,(2019, P 40-70. See Also S Choudhry, 'Transnational Constitutionalism and a Limited Doctrine Of Unconstitutional Constitutional Amendment: A Reply to Rosalind Dixon And David Landau' (2017) 15(3) International Journal Of Constitutional Law 826, 828 ('Proposals to relax or remove Presidential term limits are the most Visible and Common example of Constitutional Amendments in the Service of Democratic Backsliding, having generated Constitutional Conflict in recent years across Sub- Saharan Africa (Burkina Faso, Burundi, Cameroon, Chad, Congo Brazaville, Democratic Republic Of Congo, Gabon, Guinea, Malawi, Namibia, Niger, Nigeria, Rwanda, Senegal, Togo, Uganda, And Zambia) And Latin America (Colombia, Ecuador, Honduras, Nicaragua, And Venezuela).')

Constitution that empowers the government to declare the state of emergency should also prohibit the election of members' of the new parliament during state of emergency nor shall the authority of the existing one be terminated, and must state as elections to be held [within the possible shortest time frame] after the end of the emergency situations. Article 38 of the Constitution which guarantees every Ethiopian national to have the right to vote and to be elected at a periodic interval (every five years) would have also been one of the amended provisions and put certain sudden conditions that hamper from holding regular elections.

3.4.Constitutional Interpretation

The Ethiopian parliament claimed and proposed that the only possible solution, to the constitutional crisis concerning election postponement, should be exhausted within the perimeter of the Constitution as opposed to extra constitutional means. And the parliament had finally endorsed constitutional interpretation, among the four[60] recommended 'options', as the least complex decision to exit the constitutional quandary. The FDRE Constitution affirms that the fundamental rights and freedoms (including voting and being elected) shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia.[61] In our case the task of doing interpretation of the Constitution mandates any organ not to intrude on the constitutional right to vote and be elected. The FDRE Constitution–concerning the 'application and interpretation' of the constitution–obliges the interpreter to have the responsibility and duty to respect and enforce constitutional provisions and premises while giving interpretation.[62]

The incumbent's decision of requiring constitutional interpretation concerning election postponement, given the constitutional provisions that fixes the term of the office of any elected parliament to be five years[63], heated up legal debates on, among others, the following issues:

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[60] These four options were put forward by the administration dissolving the parliament, declaring a state of emergency, amendment of the FDRE Constitution and constitutional interpretation.

[61] FDRE Constitution, Art.13.

[62] FDRE Constitution, Art. 13; Under the scope of application and interpretation, the Constitution obliges all Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce constitutional provisions.

[63] FDRE Constitution, Art.58 and 54.

1. Do the constitutional provisions, governing the period of conducting election and the term of the two Houses as well as the Executive branch, merit constitutional interpretation?
2. Were the specific constitutional provisions tabled for interpretation sufficient and duly selected?

The first question regarding constitutional interpretation, in the specific case of election deferral, starts from questioning the necessity of the very act of interpreting the FDRE Constitution. This is due to the Constitution having explicit provisions that govern election schedules– determining the term of office of the parliament for five years.[64]

The FDRE Constitution also, while prescribing the meetings of the House and the duration of its term, duly sets the term of the parliament at [five] years and reiterates that [elections] for a new House shall be concluded one month prior to the expiry of the House's term.[65] The debate is about 'what is not clear about *five years'* that needs interpretation. Of course, the FDRE Constitution–while determining the term of office of the parliament–neither prohibits nor allows term extension. And some claimed that the FDRE Constitution is rather silent concerning term extension.

The FDRE Constitution asserts its supremacy and denies effect to any law, customary practice or a decision of any organ of the state or a public official that violates it.[66] As an expression of its supremacy, all citizens, organs of state, political organizations and other associations, as well as their officials, are required to ensure the observance of the Constitution and to obey it. Most importantly, the FDRE Constitution serves as the only source of government power. It is, therefore, prohibited to assume power through any means other than, or contradictory to, the manner prescribed in the Constitution itself.

The second debate, regarding constitutional interpretation, was regarding the selected constitutional provisions tabled for interpretation. It is believed that a holistic understanding of a constitution and a robust interpretation by the responsible body is a necessary means of guaranteeing constitutionalism and making an indisputable and consistent reform [of a

[64] FDRE Constitution, Art. 54.
[65] FDRE Constitution, Art. 58.
[66] FDRE Constitution, Art. 9.

constitution] in line with the ever changing conditions of life. However, the Ethiopian ruling Prosperity Party, the only party in the parliament, listed only three constitutional provisions (Article 54, 58 and 93 which, state about the election of members of the parliament, the duration of the term of the members of parliament and the declaration of the state of emergency respectively) to be interpreted and forwarded to the HoF.[67] Although identifying specific constitutional provisions to be interpreted requires careful selection by the interpreter, the parliament decided this in a hurry on 5 May 2020, less than five days after [the parliament] announced the four possible 'options'.

Since the guidance as to the meaning of a particular word or phrase may be found in other words and phrases in the same provision or in other provisions of a constitution, constitutional interpretation requires provisions to be construed as a whole. Owing to this, the parliament's prejudgment of ordering only [three] constitutional provisions to be interpreted while there are other potentially relevant provisions raises concerns as to the holistic interpretation of the Constitution. The provisions the government wanted to be interpreted should not be read by excluding other pertinent provisions. This is because depending on a single or two or even three provisions may lead to a hasty generalization.

The interpretation did not even consider Article 9 of the FDRE Constitution that prohibits assuming state power 'in any manner' other than provided by the Constitution.[68]
The crux of the debate following the global pandemic–whether periodic elections to be maintained or postponed– necessitates consideration of not only nation legal frameworks but also ratified international legal norms. The importance of periodicity of elections is enunciated under the African Charter on Democracy, Elections and Governance[69] and the International Covenant on Civil and Political Rights (ICCPR)[70], to which Ethiopia is a party, and which by virtue of Article 13(2) of the Constitution form part of the human rights chapter of the Constitution. But, the interpretation decision as far as it considers merely Article 54, 58 and 93 excludes Article 13

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[67] It does not mean that these are not the right provisions for interpretation.

[68] FDRE Constitution, Art. 9(3).
[69] African Charter on Democracy, Elections and Governance (ACDEG, Art. 2(3) And 3(4).
[70] International Covenant on Civil and Political Rights, Art. 25(B).

of the FDRE Constitution that requires the bill of rights to be interpreted in a manner conforming to the international instruments adopted by Ethiopia, which [require periodic] election.[71]

It was also a unilateral decision by the parliament, being the judge on its own fate, without even consulting competing political parties, the primary actors in the election process. Of course, some members of parliament did not accept the very necessity of constitutional interpretation, citing Article 54 and 58 of the Constitution which have unequivocal provisions governing elections schedule without any exception. Still, Article 45 of the Constitution should not have been left from being referred during the interpretation, since it requires the establishment of only a 'parliamentary' form of government in Ethiopia, in response to the opposition parties' call for any form of government (Transition Government, Caretaker Government, Consultative Government, Elite Led Government…) different from what the constitution prescribes. And any attempt to establish such a government would have been, of course, understood as contradicting the constitutional provisions.

Generally, a constitutional interpretation is not like an ordinary judicial exercise and hence, the constitutional interpreter need not to limit itself to what has been raised or asked by the petitioners only. Once the question is raised, the interpreter–unlike the ordinary courts–has the relative liberty to address related matters. The very purpose of constitutional interpretation is to maintain the supremacy of the constitution. And hence, a constitutional interpreter in the course of interpreting the constitution can see other related provisions, the preamble and other parts of the constitution.

3.4.1. Prohibition of Abstract Review and Interpretation Ground under the FDRE Constitution

Due to the fact that the perilous situation created by COVID-19 worsened the seemingly looming constitutional crisis in Ethiopia, the incumbent government desperately looked for leeway to postpone the sixth national election under the guise of constitutional interpretation. However, the constitutional interpretation option was, rather, unconstitutional in itself for two simple constitutional reasons: the absence of interpretation ground (disputed issue) and the prohibition of abstract review.

Interpretation Ground: In general, legal interpretation including the constitution takes place where there are justifiable grounds such as – *vagueness*, *silence* and *contradiction* (Randall,

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[71] FDRE Constitution, Art. 13(2).

1994*)*. Hence, the main inquiry should be whether the provisions under question – Articles 54 (1), 58 (3) and 93 – show any of these three grounds.

A. Vagueness – When a given word or phrase in the law/constitution is unclear or vague, it calls for interpretation by the institution formally bestowed with the power to do so (Guyora, 2019). Article 54 (1) and 58 (3) explicitly state and limit the term of the HPR to five years without exception and Article 93 unambiguously lists grounds, other than election postponement, for declaration of state of emergency–"…external invasion, a breakdown of law and order which endangers the Constitutional order and which cannot be controlled by the regular law enforcement agencies and personnel, a natural disaster, or an epidemic". In the current case, there is no vague constitutional provision which warrants constitutional interpretation by the HoF.

B. Contradiction – The second ground that brings constitutional interpretation to the fore is when two constitutional provisions are apparently contrary to each other at least textually. [72]Again, in the case at hand, there are no seemingly contradictory provisions.

C. Silence – This ground calls for interpretation of the matter(s) on which the Constitution kept silent or left it unregulated. Now the question is, whether the Constitution is silent on the extension of term limits? The answer is emphatically no. Because, the Constitution has spoken in loud and clear volume when it comes to prohibition of extension of term limits. Article 9(3) clearly rules out the assumption or continuation of power other than by means and procedures laid down under the constitution. And an election is the only constitutional avenue to assume power which the FDRE Constitution stipulates as there will be regular elections for every five years.[73] Declaring a state of emergency as per Article 93 (1)(a) also cannot be used to extend the tenure of the parliament beyond five years as specified under Article 54 (1). Therefore, there are no justifiable constitutional interpretation grounds in this case that merit constitutional interpretation. This sounds as there are no justifiable constitutional interpretation grounds in this case that would deem constitutional interpretation.

[72] FDRE Constitution (Art.84 (2)).
[73] FDRE Constitution, Art.54.

3.4.2. The Prohibition of Abstract Review under the FDRE Constitution

In this regard, constitutional interpretation can be roughly bifurcated into two.[74] These are abstract review and concrete review procedures. While the former refers to seeking interpretation for the matter which has not been contested, the latter applies to case(s) where constitutional dispute arises between litigant parties. Broadly speaking, in Ethiopia, abstract review or advisory opinion mode of interpretation has not been permissible.[75] Evidence for this is Article 37. The FDRE Constitution states unequivocally that it is only justiciable (not abstract issues) matter that can be brought to adjudicatory institutions in Ethiopia. The relevant constitutional provisions (read Articles 62 cum 83) which define power of constitutional interpretation also make it abundantly clear that the interpretational power of HoF is limited only to constitutional disputes (that's concrete review). Besides, the existing president in Ethiopia makes no space or possibilities for abstract reviews (an example for this include: *Dr. Negaso's case* – his claim against the proclamation that prohibits benefits to retired or resigned President if s/he joins an opposition political party and also, *the Oromia regional state's* request for interpretation of the 'special interest on Addis Ababa' under the constitution).[76] The Proclamation No 798/2013 regulating the CCI has also no provision authorizing the CCI to issue a consultative or advisory opinion.

The fact that the HoF and CCI don't have consultancy or advisory service, the very request of the HPR for [constitutional guidance] on the postponement of the national election and subsequent matters is not supported by the Constitution or any relevant proclamations.[77] Hence, based on the preceding legal analysis one can soundly conclude that the constitutional interpretation option apparently preferred by the parliament is an unconstitutional alternative.

Conclusion

From the suggested four possible solutions–dissolving the parliament, declaring state of emergency and constitutional interpretation–were unconstitutional options to postpone elections in Ethiopia as per its Constitution. Given the risks of unconstitutionality in the three options mentioned above, the constitutionally correct approach, although not ideal during a state of

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[74] Choudhry, S, T*ransnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment,* International Journal of Constitutional Law, 15(3), pp. 23- 34(2017).

[75] FDRE Constitution, Art.37.

[76] Solomon Dersso, *Constitutional Based National Dialogue the best way to avert a Constitutional Crisis Triggered by Deferred Election*, Addis Standard, Op-Eds, 2020.

[77] FDRE Constitution, Art. 37(1), 62(1), 83(1), 84(1 and 2) and Proclamation No 798/2013.

emergency, was to amend the Constitution. Thus, the postponement of the scheduled election under the patronage of constitutional interpretation was unconstitutional and made the decision of the HoF as a constitutional interpretation by name and a political decision in practice. The constitutionality of election postponement in Ethiopia, in the absence of clear constitutional provision,was not duly legalised.

The Way Forwarding

The CCI relied on fallacious reasoning on crucial issues. The reasoning is absurd, fallacious, self-serving and deeply flawed that it amounts to the CCI basically saying that "the Constitution must be interpreted this way because I said so!" The CCI has rewritten the Constitution under the guise of interpretation. The destabilizing effect of a failure to successfully tackle the current crisis can only contribute to further deterioration in an already fragile transition in Ethiopia. To amicably manage an impending constitutional and political crisis the discussion between the government and opposition parties within the constitutional framework would have been vital.

Thus, in the absence of a constitutional remedy, the political dialogue and consensus building remains the only real avenue for resolution of the crisis. Given the internal political polarizations and external challenges, a short period of government led transition, with its limitations, would have been one of the least evil options until the next election to be held after the pandemic over.

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Dealing with the Legacies of Repressive Past: Transitional Justice in 'Transitional' Ethiopia

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Setting the Context

In the recent past, lengthy conflicts that wreaked havoc and caused incalculable human causalities in several African countries came to an end. Likewise, deeply entrenched undemocratic and repressive modes of the rule have given way to relatively democratic civilian governments. Regrettably, the African continent is still saddled with conflicts and atrocities, and authoritarian regimes are the rule rather than the exception. In many countries such as the youngest Africa nation, South Sudan; Somalia, the Democratic Republic of Congo, and Ethiopia horrific conflicts are causing an incalculable number of human casualties.

Most often, the displaced authoritarian regime and the conflict are characterized by gross human rights violations, tattered social fabric, social discontent, and societies divided along different lines. Hence, following a transition from an authoritarian regime to a relatively democratic one or from conflict to stability, the newly installed government is often faced with the herculean tasks and formidable challenges of how to confront the repressive past to build the future yet without upsetting the fledgling democracy and fragile peace.

Numerous countries across the globe were confronted with this formidable challenge and many others particularly in Africa are still grappling with this arduous task. It has become a burgeoning practice that addressing past gross human rights violations by charting appropriate transitional justice mechanisms is necessary in order to, *inter alia*, re-humanize the victims, replace impunity with accountability and restore rule of law, and to promote reconciliation by uncovering the comprehensive truth. However, as a transition is an extraordinary and chaotic period that requires *sui generis* mechanisms, the questions of how to address and effectively come to terms with the evils of the past is a complex and daunting one yet necessary.

In the recent past, Ethiopia has also experienced a series of regime changes and faced the challenges of confronting the legacies of past gross human rights violations. The newly installed governments have put in place different mechanisms, albeit incomplete and inadequate, as a means to come to terms with alleged violations of predecessor regimes. Nonetheless, Ethiopia's history is still rife with unsettled and unprocessed egregious human rights violations and historical grievances. Since April 2018, Ethiopia is again in the transitional process and grappling with transitional justice issues that often arise during such a 'transitional period'. Thus, this article takes stock of the transitional justice mechanism/s

that Ethiopian put in place or should have put in place with special emphasis on prosecution and the Ethiopian Reconciliation Commission

The article is divided into four parts to address major issues surrounding Ethiopia's attempt to come to terms with the legacies of widespread and systematic human rights violations of the past. The first part briefly introduces readers to the general notion of transitional justice and mechanisms. The part that follows dwells on transitional justice in Ethiopia. To do so, this part takes stock of the major transitional justice mechanisms that the post-*Derg* regime and the incumbent Abiy government have put in place to deal with the repressive past *in seriatim*. The third part briefly deals with the interface between the mechanisms put in place and on how to address their symbiosis. The last part of the article puts forth lessons that can be drawn for the current transitional process and plausible means which help rectify the blind spots of the ongoing transitional justice mechanisms and thereby restore the mechanisms.

I. General Account of Transitional Justice

After a transition,[1] be it from a dictatorial regime or disastrous civil war, the embryonic democracy and newly installed government or regime is often faced with the complex challenges of: what to do to atrocious and repressive past. Transition is an extraordinary period that requires *sui generis* mechanisms, as the conventional approaches and conception of justice associated with ordinary period are ill suited for such context of extraordinary condition and political flux. During this period '[l]aw is caught between the past and the future, between backward-looking and forward-looking, between retrospective and prospective, between the individual and the collective.'[2]

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1 As aptly observed by O'Donnel and Schmitter: Transition in this sense implies 'an interval between one political regime and another. Transitions are delimited, on the one side, by the launching of the process of dissolution of an authoritarian regime and, on the other, by the installation of some form of democracy, the return of some form of authoritarian rule, or the emergence of a revolutionary alternative. The typical sign that the transition has begun comes when these authoritarian incumbents, for whatever reason, begin to modify their own rules in the direction of providing more secure guarantees for the rights of individuals and groups.' See O'Donnell G, and Schmitter Ph (eds.) *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (1986), p. 6. See also the AU Transitional Justice Policy (2019), p. 4. Available at https://au.int/en/documents/20190425/transitional-justice-policy last accessed June 2020; and Teitel RG *Transitional Justice* (2000), pp. 5-6.

2 Teitel (2000), p. 6.

Transitional justice[3] is a notion associated with such context and helps to tackle the thorny issues and dilemmas intrinsic to transition. Put differently, transitional justice is a field that studies how societies emerging from authoritarian rule or protracted war can deal with the legacies of repressive past. Teitel defines the concept as 'conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes'.[4] For the UN, transitional justice 'comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.'[5]

Albeit it is daunting to define a slippery notion like transitional justice due to its multidimensional and multidisciplinary nature as well contextual feature, it is possible to dissect the main issues or questions that it seeks to address. Succinctly, transitional justice deals with the following major dilemmas, questions and formidable challenges that transitioning states/societies face: What to do to a repressive past? Is settling past accounts necessary? Is dealing with the legacies of repressive past an option to displace without risk? Can confronting repressive past run the risk of awakening the ghost of the past? Or is it inescapable yet daunting task for a newly installed government or regime to face to fast the atrocious (and/or contested) past? What are the available choices and mechanisms to confront past gross human rights violations?

Admittedly, these are complex questions, as some call them 'immensely difficult' dilemmas,[6] for which there are no off-the-shelf and conclusive answers. However, turning a blind eye to a repressive past and trying to 'brush the past under the rug' in order to avoid grappling with

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3 There is no consensus on the labelling or nomenclature of this subject either. Many refer to it differently. The labels or descriptive phrases range from 'Post-conflict justice', 'post-transition justice', 'post authoritarian (or totalitarian) justice', 'retributive justice' to 'justice after transition'. The author of this paper prefers to use 'transitional justice' as this is relatively less misnomers and descriptive of the subject matter.

4 Teitel RG 'Transitional Justice Genealogy' (2003) *Harv. Hum. Rts. J.* 16, p. 69. See also, Kritz NJ *Transitional Justice: How Emerging Democracy Reckon With Former Regimes* (1995). Cf Roht-Arriaza N 'The New Landscape of Transitional Justice' in Roht Arriaz N, Mariezcurrena J (eds) *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice (*2006), pp. 1-2.

5 Report of the UN Secretary-General 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (2004), p. 4. See also the AU Transitional Justice Policy (2019), p. 4. AU in its transitional justice policy succinctly recognizes transitional justice as one of the crucial ideals for 'drive towards the Africa-We-Want'. See AU Transitional Justice Policy (2019), p. iv.

6 O'Donnell and Schmitter (1986), p. 30.

the complex and difficult challenges of confronting past gross human rights violations, cannot lead to the much needed 'healing of wounds', reconciliation and democratization process.[7]

There is a growing consensus that ignoring past gross human rights violations and attempting to close the chapter of an oppressive past by saying let bygones be bygones is not anymore a viable option to start a journey on the road to a democratic future.[8] In other words, confronting the violent conflict, repressions and other mass atrocities of the past is necessary, in fact it is the 'least worst strategy' compared to ignoring the past which is 'the worst of all bad solutions'.[9] Because unaddressed atrocities and a sense of injustice would not only haunt a nation but also remain as embers that could ignite similar conflicts in the future. It is undeniable that in some transitions, sequencing mechanisms and prioritization peace over justice is necessary so as not to provoke the ire of the defunct but powerful wrongdoers who might have the potential to destabilize the fragile democracy and foment violence.[10]

The question then is what choices are available to the newly installed government to reckon with the legacies of repressive past? Also, which or which combination of the mechanisms should be charted as a means to look back at the past and forward to the future? The following subsections shed light first on the models of transition followed by the major transitional mechanisms that help confront a repressive past.

i. Models of Transition

Based on the foregoing discussion, transitional justice is a notion associated with periods of (political) transition. Hence, it is judicious to briefly highlight the main models that bring

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7 As Lutz argues 'unmet transitional justice goals will cast a long shadow across the political landscape that will not go away until they are realized.' See Lutz, E 'Transitional Justice: Lessons Learned and the Road Ahead' in Roht Arriaz and Mariezcurrena (eds) (2006), p. 327.

8 See Kritz (1995); Roht-Arriaza (2006), pp. 3-14 in Roht Arriaz and Mariezcurrena (eds) (2006).

9 O'Donnel and Schmitter stated that: 'By refusing to confront and to purge itself of its worst fears and resentments, such a society would be burying not just its past but the very ethical values it needs to make its future livable. Thus, we would argue that, despite the enormous risks it poses, the "least worst" strategy in such extreme cases is to muster the political and personal courage to impose judgment upon those accused of gross violations of human rights under the previous regime.' See, O'Donnell and Schmitter (eds.) (1986), p. 30.

10 AU Transitional Justice Framework (2015), pp. 13-14; Stan and Nedelsky (2013), pp. 58-59.

about transition, change of regime or government or end of war. Huntington makes tripartite classifications of transition, namely replacement, transplacement and transformation.[11]

Replacement, as the designation indicates, is a model of transition in which the change of regime resulted from complete defeat or collapse of the old regime and then ultimately replaced by the opposition group. This type of transition often occur through a protracted revolutionary struggle or civil war which consequently results the opposition gaining strength and the government losing strength until the government collapses or is overthrown.[12] Unlike in other types of transition, in the case of replacement the oppositions are the ones who take the lead to bring about change or transition. The prototypical cases of this transition include Rwanda's 1994 transition and Ethiopia's transition from *Derg* to Ethiopia's People Revolutionary Democratic Front (EPRDF). In such cases of transition, the level of criminal accountability for past gross violations is substantial as the defunct officials are often powerless hence could not cause serious threat to the peace and stability of a country.

Transformation on the other is a type of transition in which 'those in power in the authoritarian regime take the lead and play the decisive role in ending that regime and changing it into a democratic system.'[13] Of course, it is not to say that the opposition and /or citizens in general do not have any role in the realization of such transition. Instead, in such model of transition, the incumbent government is stronger than the opposition. Thus, such changes are regime initiated reforms. In contrast, in the case of transplacement, the transition is a result of the joint action of both the government, on the one hand, and the oppositions and citizens, on the other. In transplacement, unlike in the cases of replacement and transformation, 'the eyeball-to eyeball confrontation in the central square of the capital between massed protesters and serried ranks of police revealed each side's strengths and weaknesses.'[14] In such case, there is often a stalemate and is hard to foretell a definitive winner. To use the words of Huntington, 'the political process leading to transplacement was thus often marked by a seesawing back and forth of strikes, protests, and demonstrations, on

[11] For the various cases of these transitions, see, Sriram, CL *Confronting Past Human Rights Violations: Justice vs. Peace in Times of Transition* (2004), pp. 40 *et seq*. For more discussion on other models of transition see also, Share, D 'Transactions to Democracy and Transition through Transaction', *Comparative Political Studies*, 19/4 (1987), pp. 525–548. On the models of transition, phases and paces of transition, see generally, O'Dnnell and Schmitter (1986).

[12] Huntington S *The Third Wave: Democratization in the Late Twentieth Century* (1991), p. 142.

[13] Huntington (1991), p. 124.

[14] Ibid, p. 154.

the one hand, and repression, jailings, police violence, states of siege, and martial law, on the other.'[15] Due to this, the regime would be forced to concede change—liberalization of the political space and democratization process. In the case of transition that resulted from transplacement, the level of criminal accountability is slightly higher than transformation where accountability is minimal as in the latter case the reformers tend to be protective of the erstwhile officials.

To conclude, the nature of transition is one of the various factors that may inform the type, timing and sequencing as well as postponing of some of the transitional justice measures, especially prosecution in case of negotiated transition (or transplacement). However, whatever nature a given transition takes, it does not warrant an attempt to move forward without reckoning with the past egregious human rights violations. The newly installed government has to confront the repressive past by using appropriate transitional justice mechanisms. The question then boils down to what are the transitional justice mechanisms that are available to confront the repressive past.

ii. General Overview of Transitional Justice Mechanisms

This part briefly dwells on the various transitional justice mechanisms with special emphasis on criminal accountability and truth commission. Transitional justice mechanisms include wide-array of measures that help to come to terms with the legacies of past widespread and /or systematic (state sponsored) human rights violations. As defined in the UN Policy Framework, transitional justice mechanisms are 'both judicial and non-judicial mechanisms with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.'[16] The possible road map that transitioning states chart to confront past gross human rights violations can also be broadly defined to include anything that they adopt to come to

[15] Ibid, p. 153.

[16] Report of the UN Secretary-General, p. 4.

terms with legacies of past violations and abuses.[17] The above definition of the UN narrowly defines, rightly so, the universe of transitional justice mechanisms.[18]

Accordingly, the most prominent transitional justice mechanisms include criminal prosecution (or accountability), truth commission, conditional amnesty, vetting, reparation, and memorialization. Although each of these mechanisms have their respective purposes, the general shared goals of the mechanisms range from establishing accountability, truth seeking, establishing authoritative historical record, acknowledgement of the violations, promoting healing of wounds and reconciliation, and preventing recurrence of similar violations.[19]

It bears mentioning that from the diverse ranges of transitional justice mechanisms, there is 'no-one-size-fits-all' mechanism or miracle solutions for the question of how to deal with the past.[20] Besides, one mechanism is neither a substitute for the other nor sufficient by itself to address past wrongs. In other words, the wide-array of transitional justice mechanisms should be viewed as adjunct and mutually reinforcing than as dichotomous and mutually exclusive.[21]

Based on factors, such as, the nature of the transition, the scale and intensity of past gross human rights violations, and resource, it is necessary to tailor the transitional justice mechanisms to prevailing context and situation of a transitioning state. Also, use of comprehensive transitional justice mechanisms is desirable where broader outcomes are desired.

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17 'At its broadest, it involves anything that a society devises to deal with a legacy of conflict and/or widespread human rights violations, from changes in criminal codes to those in high school textbooks, from creation of memorials, museums and days of mourning, to police and court reform, to tackling the distributional inequities that underlie conflict.' See Roht-Arriaza in Roht Arriaz and Mariezcurrena (eds), p. 2

18 As noted by Roht Arriaza 'broadening the scope of what we mean by transitional justice to encompass the building of a just as well as peaceful society may make the effort so broad as to become meaningless.' Roht-Arriaz in Roht Arriaz and Mariezcurrena (eds) , p. 2.

19 AU Transitional Justice Policy (2019), p. 6, paras, 35 and 36.

20 Ibid.

21 Ibid, p. 7, para, 38. See also, The Report of the UN Secretary-General (2004), p. 9; Hayner, PB *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* 2 ed. (2011), pp. 8, 26. While commenting on the Sierra Leone experience, Schabas aptly noted that: 'The Sierra Leone experience may help us understand that post-conflict justice requires a complex mix of complementary therapies, rather than a unique choice of one approach from a list of essentially incompatible alternatives.' See Schabas, WA 'The Sierra Leone Truth and Reconciliation Commission' in Roht Arriaz and Mariezcurrena (2006), pp. 21-22.

Besides, it is worth mentioning that for the transitional justice process and mechanisms in general to be effective and successful, among other factors, there should be meaningful participation of different stakeholders starting from the decision to initiate transitional justice process to designing, opting for and implementing a specific or all ranges of transitional justice mechanisms. Also, whatever combination is charted must be in implemented in compliance and conformity with international legal norms and obligations.[22]

a. Criminal Prosecution as a Transitional Justice Mechanism

Prosecution as a criminal accountability mechanism is judicial measures which traditionally represent justice only whereas the others transitional justice mechanisms are non-judicial mechanisms which represent peace. To reiterate, the periods that precedes a transition from authoritarian regime to democracy or conflict to stability is often characterized with egregious human rights violations in the forms of extra judicial killings, torture, enforced disappearance, arbitrary arrest, abuse of power, corruption and many others. Simply put, during these periods, impunity and rule by iron fist were the order of the day which enabled state sponsored crimes. Thus, following transition, among other things, replacing impunity with accountability and re-establishing rule of law through the instrumentality of criminal prosecution is not only necessary but also a duty of transitioning states.

A case for adopting criminal prosecution as a transitional justice mechanism transcends the conventional theories of punishment—it advances other purposes peculiar to period of political change. Transitional criminal prosecution is 'generally justified by forward-looking consequentialist purposes relating to the establishment of the rule of law and to the consolidation of democracy.'[23] In simple terms, transitional criminal prosecution aims to replace impunity for rationalized state sponsored violence with accountability and thereby reinforce normative change and reconstruct rule of law.

Moreover, in most cases, the gross human rights violations perpetrated under the authoritarian rule or during conflict fulfill the necessary elements of crimes under international law such as genocide, crimes against humanity and /or war crimes for which states have a duty to investigate and prosecute alleged perpetrators or extradite.[24] Thus, in

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22 United Nations Approach to Transitional Justice Processes and Mechanisms (2010), p. 2.

23 Teitel (2000), p. 30.

24 Scholars have suggested that there are at least 70 treaties that impose obligation to prosecute or extradite on states. The major multilateral treaties that impose *aut*

such cases, transitioning states have a duty to chart criminal prosecution as a means to reckon with such core crimes, at least for those who bear greatest responsibility.[25]

Admittedly, in some transitional contexts, adopting criminal prosecution as a means to deal with the crimes of defunct officials might threaten the fragile peace and foment violence. In such cases, relentless pursuit for prosecution can only exacerbate the already fragile peace and be an obstacle for the transition, hence postponing, not abandoning altogether, criminal prosecution is necessary.[26]

Transitional criminal prosecution can be carried out before courts of territorial state, third state (at least on the basis of universal jurisdiction), international courts, internationalized and/or hybrid courts.[27] The prosecutions can be carried out on the basis of domestic law or other applicable laws.

It is worth to note that criminal accountability alone cannot help to adequately deal with repressive past and come to terms with the evils of past. In other words, 'a piecemeal approach to the rule of law and transitional justice will not bring satisfactory results in a war-torn or atrocity-scarred nation.'[28] Thus, depending on the context and peculiarities of the transitional state, transitional criminal accountability should be complemented with other mechanisms—where transitional justice mechanisms are required, embracing comprehensive and complementary mechanism is imperative. The reason being, criminal prosecution as a form of retributive justice is ill fitted to achieve the goals of the other restorative transitional

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dedere aut judicare obligation are Genocide Convention, Torture Convention, and Geneva Conventions. For detailed discussion on the sources of aut dedere aut judicare, see *Bassiouni MC, Wise MW Aut Dedere, Aut Judicare: The Duty to Extradite or Prosecute in International Law (1995) Martinus Nijhoff Publishers, London; Kelly, M "Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists – Passage of Aut Dedere Aut Judicare into Customary Law and Refusal to Extradite Based on the Death Penalty", 20 Arizona Journal of International and Comparative Law, 2003, pp. 491-532 Mitchell, C, Aut Dedere, Aut Judicare: The Extradite or Prosecute Clause in international Law (2009) Graduate Institute: Geneva.*

[25] However, extensive or large scale prosecution of 'all offenders for all crimes' is impractical especially when there are numerous, which is often the case in many transitional states, perpetrators of past human rights violations. Hence, it is imperative to prioritize the perpetrators and the crimes to be investigated and prosecuted on the basis of clear strategy.

[26] The cases of Argentina and Chile are classical instances of the need to sequence mechanisms.

[27] For more on this, see Marshet Tadesse Tessema *Prosecution of Politicide in Ethiopia: The Red Terror Trials* (2018), p. 138.

[28] The Report of the UN Secretary-General (2004), p. 9.

justice mechanisms. It is hardly possible to establish comprehensive historical record of past gross human rights violations by using criminal prosecutions. Thus, as the context of transitioning societies often demand, complementing criminal prosecutions by other responses to legacies of past abuse is crucial.

b. Truth Commission: Truth Seeking and Telling Mechanism

After the first the widely known Argentinean truth commission of 1983,[29] truth commissions have become one of the standard ways of coming to terms with the past gross human rights violations.[30] In Africa, Uganda in 1986 and Chad in 1991 are forerunner countries in establishing truth commissions albeit their Commissions are the least successful and popular compared to the 1995 Truth and Reconciliation Commission of South Africa.[31]

Over 40 truth commissions have been established by several countries though in different designations and for different purposes.[32] As rightly noted:

> Given the variation between these many inquiries, it is not always clear which bodies should be considered within the group for comparison. There is still no single, broadly accepted definition of what constitutes a truth commission. Thus, published lists and databases of truth commissions differ, with some researchers liberally including a broad range of inquiries, and others insisting on a more rigorous and narrow definition and thus a smaller number of commissions.[33]

From the above, it is clear that there is no uniformity in the naming of truth commissions; in consequence on the list of these bodies and on which ones should be categorized as truth commissions. In fact, Hayner and the United States Institute of Peace database of truth

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29 The Commission was referred to as: 'The National Commission on the Disappeared'.

30 Wiebelhaus-Brahm, E *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* (2010), p. 3.

31 Subsequently, several African countries such as Nigeria, Sierra Leone, Ghana, the DRC, Morocco, Liberia, Togo, Kenya and Côte d'Ivoire have established truth commissions. Recently, the Gambia and Ethiopia have established truth commissions as means to address their repressive past.

32 The commissions on the disappeared" in Argentina, Uganda, and Sri Lanka; "truth and justice commissions" in Ecuador, Haiti, Mauritius, Paraguay, and Togo; a "truth, justice, and reconciliation commission" in Kenya; a "historical clarification commission" in Guatemala; and, of course, "truth and reconciliation commissions" in South Africa, Chile, Peru, and other countries. See Hayner (2011), p. 12.

33 Hayner (2010), p. 10. Freeman also noted that: 'Despite the apparent popularity of truth commissions, their nature often remains obscure to lawmakers and laypersons alike.' See *Freeman M Truth Commissions and Procedural Fairness* (2006), p. 3.

commissions, erroneously categorized the Ethiopian Special Public Prosecution Office of 1992 as a truth commission.[34]

Be that as it may, truth commissions are defined as 'official, temporary, non-judicial fact finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years.'[35] From this it is clear that truth commissions are victim-centred bodies unlike criminal prosecution which primarily focuses on the perpetrators. Also, the subject matter jurisdiction of such truth-seeking and telling bodies is not to establish individual criminal responsibility rather to seek official, authoritative and compressive truth of what had happened.

As parameters to differentiate a truth commission from a court, administrative tribunal, human rights commissions and other similar bodies with adjudicatory power, Hayner identified the following four defining characteristics or attributes of truth commissions: 1) They focus on past, rather than ongoing, events; 2) they consider pattern, causes and consequences of conflict in general terms as opposed to specific or particular events ; 3) they are ad hoc in nature and conclude with general findings; and 4) they operate under authority be it national or international auspices.[36]

As the names of truth commissions that have been established so far vary, so do their mandates,[37] duration (life span), the time-period that they cover, and composition.[38] For instances, in terms of their nature (or composition) truth commissions can be national,[39]

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34 Hayner, PB 'Fifteen Truth Commissions-1974 to 1994: A Comparative Study' (1994) 16 *Human Rights Quarterly, pp. 634-635; and the United States Institute of Peace digital collection of truth commissions available at http://www.usip.org publications/truth-commission-digital-collection. Accessed June 2020.*

35 The Report of the UN Secretary-General (2004), p. 17.

36 *Hayner, PB Unspeakable Truth: Confronting State Terror and Atrocity (2001)*, p. 14. Cf, Hayner's revised definition in the second edition of the same book, Hayner (2011), pp. 11-12. Also for more defining attributes of truth commissions, see Freeman (2006), pp. 14-17.

37 Some truth commissions were vested with the mandates to grant amnesty, to list names of perpetrators or name names, power to order search and seizure, and / or to subpoena. See the detailed table on the mandates and other features of diverse truth commissions in Freeman (2006), p. 317. See also the United States Institute of Peace digital collection of truth commissions available at http://www.usip.org/publications/truth-commission-digital-collection. Accessed June 2020; and the Institute for Justice and Reconciliation, Truth Commissions: Comparative study available at http://www.ijr org.za/trc-database-themes.php. Accessed June 2020.

38 For more on the various features of different truth commissions see Freeman (2006), p. 27.

39 There are several national truth commissions which have been established since the first Truth Commission of Idi Amin of Uganda in 1974. See Freeman 2006, p. 317;

mixed[40] or international truth commissions;[41] the organ that establishes them also varies, in some countries the executive organ, in others the legislative established truth commissions.[42] In relation to the organ that establishes truth commission, there is no one size fits all best model. As aptly noted by Freeman '[n]one of these means of establishing a truth commission is inherently preferable to the others. In one context the executive branch may be seen as more credible than the legislative branch; in other cases, the reverse may be true.'[43]

Although dozens of truth commission have been established only few of them are (considered) effective. Several factors determine the success or failure of truth commissions, 'some of which are determined by the body that establishes the truth commission or by the truth commission itself; other factors remain outside of a commission's control.'[44] The major factors that determine the success or failure of a truth commission include its establishment process, the scope of its mandate, legal powers, independence, period of operation, and period under investigation.

The establishment process of a truth commission should not be a top-down, nor should it be an outcome of external imposition, rather it has to be the result of decision of the concerned nation itself which need to talk into account the views of victims and the society at large. Truth commission is 'best formed through consultative processes that incorporate public views on their mandates and on commissioner selection.'[45] The establishment of a truth commission and selection of its commissioners which is preceded by public consultation and consultative selection process would not only help to ensure the credibility, legitimacy and the acceptance of its findings but also determines its effectiveness.

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the United States Institute of Peace digital collection of truth commissions available at http://www.usip.org/publications/truth-commission-digital-collection. Accessed 16 June 2016; and Institute for Justice and Reconciliation, Truth Commissions: Comparative study available at http://www.ijr.org.za/trc-database-themes.php. Accessed June 2020 The most prominent prototypes of national truth commissions are the Truth and Reconciliation Commission of South Africa; the National Commission on the Disappeared of Argentina, and the National Commission for Truth and Reconciliation, see Hayner 2011, pp. 28 *et seq.*

[40] Guatemalan Historical Clarification Commission is the archetype of mixed truth commission, see Tomuschat 2001, pp. 233-258, Hayner 2002, pp. 45-49

[41] For example Commission on the Truth for El Salvador, see Buergenthal 1994, p. 497.

[42] Freeman 2006, p. 27.

[43] Freeman (2006), p. 27.

[44] AU Transitional Justice Framework (2015), p. 14.

[45] Report of the UN Secretary-General (2004), p. 17

The other important factor that contributes to the effectiveness of a truth commission is the scope and clarity of its mandates.[46] The enabling law of a truth commission should clearly define the types of gross human rights violations that fall under the subject matter jurisdiction of a commission. Conducting public consultation would play a significant role to determine the needs and priority of victims on what should be investigated and uncovered by a truth commission. Simply, '[a] mandate too broad in scope may overwhelm a truth commission; an overly limited or unrepresentative mandate may undermine the commission's legitimacy and fail to respond to the needs of victims and their relatives.'[47] Also, in view of the indivisibility nature of human rights, socio-economic violations should not be excluded from the mandates of truth commission.

Truth commission should be equipped with all the necessary powers that enable it to effectively carry its mandates. These include the powers to search premises and seize evidence, access to archives, subpoena, grant (or recommend) conditional amnesty, name perpetrators, grant/recommend reparation and recommend reforms. The enabling law of a truth commission should also state the consequences of failure to coordinate with, or obstructing the works of a commission. The establishing law should also provide for not only ways to implement the recommendations of a commission but also follow-up mechanisms that ensure full implementation of recommendations. In addition to these factors, meaningful independence, sufficient support from civil societies (as well as other partners), enabling political context and host of other factors determine the effectiveness of a truth commission.

Although the goals of most truth commissions and factors that determine their effectiveness are similar, there is no 'one-size-fits all' truth commission model. As stated in the UN Rule of Law tools for Post-Conflict states

> it should be expected that every truth commission will be unique, responding to the national context and special opportunities present. While many technical and operational best practices from other commissions' experiences may usefully be

[46] Mandates also referred to as 'charters' or 'terms of reference', see Freeman, (2006), p. 27.

[47] AU Transitional Justice Framework (2015), p. 15. For more on this and other necessary benchmarks for the success of a given truth commission, see AU Transitional justice Policy (2019), p. 53.

> incorporated, no one set truth commission model should be imported from elsewhere.[48]

Even though transitioning states are not expected to invent 'new truth commission' out of nothing, in establishing a truth commission each state needs to adapt commission that fits its prevailing situation, context, national needs and political climate.

In summary of this part of the article, it is a trite that each transitioning society has its own peculiar contexts, needs, opportunities and challenges. In fact, 'there is little that unites any single transitional context to another; the differences are greater than the similarities'.[49] But one factor that makes most transition societies similar, if not unites them, is the legacy of widespread and systematic human rights violations albeit they may differ on the type, scale and extent of the violations.

So many transitioning societies and government are confronted with the daunting task of how to come to terms with their past in order to clear their way for the future. Of course, transitional justice issues are not the only challenging agenda on the plate of transitioning societies. Transitioning societies face host of other equally challenging non-transitional justice societal and political matters such as security issues, invigorating the shattered economy, providing basic services, and /or resettling displaced persons. Balancing those challenging demands and properly addressing the repressive past by charting appropriate transitional justice measures is herculean but necessary. Thus, transitioning states need to confront the legacies of their repressive past by adopting holistic, not piecemeal, and complementary transitional justice mechanisms. Moreover, the synergy of the various transitional justice mechanisms should be properly regulated.

II. Transitional Justice in Ethiopia: Criminal Prosecution and the Reconciliation Commission in Focus

In recent past, Ethiopia has seen different forms of transitions which include from imperial regime to *Derg in 1974,* from *Derg* to EPRDF in 1991 and most recently, in 2018, from EPRDF to Prosperity Party (PP). Ethiopia and Ethiopians missed the opportunities to come to terms with their repressive past and thereby democratize the country not once but at least twice. Arguably, the most apposite time to kick-start the onset of democracy in Ethiopia was

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48 Report of the UN Secretary-General (2004), p. 4.
49 Freeman (2006), p. 5.

the post-Derg transition. After a little less than three decades, Ethiopia and Ethiopians are again on a transitional path which is undoubtedly an opportune time like no other to set the democratization process of the country on the right path. I only hope, of course not hope against hope, that this window of opportunity will not be squandered and go to waste as another addition to the list of missed opportunities in the democratization process of Ethiopia.

One of the factors that positively contribute to a democratization process of transitioning state like Ethiopia is the use of comprehensive and integrated transitional justice mechanisms. With the view to draw lessons for the on-going transitional process, this part first briefly examines the transitional justice mechanisms (mainly criminal prosecution) that were put in place as a means to come to terms with the 17 years legacy of *Derg* regime. Then, this part takes stock of the transitional justice mechanisms namely criminal prosecution and truth commission that the Ethiopian government charted following the country's transition from EPRDF-led government to PP.

i. Post-*Derg* Transitional Justice Mechanism: Reckoning with *Derg* Crimes

Following the replacement of the imperial regime by the totalitarian regime of Mengistu, no official criminal accountability mechanism was charted for addressing crimes of the defunct regime. Instead, instant justice or mass of summary executions followed. In fact, until 1991, almost all successor regimes in Ethiopia settled their scores with their predecessor officials by resorting to summary justice.

After the complete military defeat of *Derg* in 1991, the Transitional Government of Ethiopia adopted criminal accountability as the main transitional justice mechanism to reckon with the repressive past of the *Derg* regime. The Special Public Prosecutor's Office (SPPO) was established in 1992 to investigate and prosecute *Derg* crimes.[50] No special court was established albeit necessary; instead the cases were entertained before the newly established ordinary courts.

The Transitional Government resorted to massive criminal prosecutions as an accountability mechanism. Other promising transitional justice mechanisms such as a Truth and

[50] Proclamation 22 of 1992. For more on the SPPO, see Marshet (2018), pp. 148 *et seq*; *Vaughan S 'The Role of the Special Prosecutor's Office' in: Tronvoll K, Schaefer Ch, Aneme GA (eds) The Ethiopian Red Terror Trials: Transitional Justice Challenged (2009), pp. 51 et seq.*

Reconciliation were not brought into play. In other words, the government adopted incomplete, inadequate and narrow transitional justice mechanism.

In general, although the criminal prosecutions of *Derg* officials as a transitional mechanism left some contributions as their legacy, they suffer from the following limitations which the current prosecutions should consider with a view not to repeat them:[51] a) Selectivity: The post-*Derg* criminal prosecutions were solely against *Derg* officials. Crimes allegedly perpetrated by other civilian and armed groups were excluded from the mandate of the SPPO. This makes criminal prosecutions of *Derg* officials a prototype of victors' justice. However, this does not mean that the *Derg* officials are as such victims of the criminal accountability process and should have been spared. Rather, such narrow conception of perpetrators should have been avoided and crimes allegedly perpetrated by opponents of the *Derg* regime should have been investigated and prosecuted as well. b) Massive prosecutions of all perpetrators: Instead of large-scale prosecutions of all level of perpetrators (or all offenders and all crimes approach), the focus should have been in prosecuting only the most heinous crimes and in respect of the most responsible perpetrators. Other complementary transitional justice mechanism (example truth and reconciliation) should have been used to deal with the less serious crimes and lower level perpetrators. c) Protracted trials: The investigation and prosecution of *Derg* officials took unreasonably long time to wind up which in turn jeopardized fair trials rights of the individuals involved and the legitimacy of the whole process; d) Offenders oriented approach: In the post-Derg criminal prosecutions, there were minimal engagement and participation of victims of egregious human rights violations.

In a nutshell, the post-*Derg* transitional justice mechanism (or criminal prosecution) was incomplete, delayed, selective and inadequate. It, therefore, left several issues unaddressed and unsettled, which arguably contributed to the poor human rights record during the periods of the successor regime—EPRDF that followed. In the presence of such limitations, transitional justice mechanisms would not have salutary effects and contributions for the process of moving forward from bleak past.

ii. The Current Transitional Process and the Mechanisms Charted to Confront the Repressive Past

[51] For detailed discussion on the pitfalls of Red Terror trials, see Marshet (2018), pp. 240 *et seq*; *Tronvoll K, Schaefer Ch, Aneme GA (eds) The Ethiopian Red Terror Trials: Transitional Justice Challenged (2009).*

Currently, Ethiopia is in transitional process, although the nature of this transition is not as clear as Ethiopia's transition from *Derg* to EPRDF. The nature of Ethiopia's transition, from Prime Minister Haile-Mariam Desalegn's EPRDF to Prime Minister Abiy Ahmed's EPRDF/PP is what Huntington refers to as transplacement.[52] The waves of anti-government protests and resistances in Oromia and Amhara Regional States and in other parts of the country; which resulted in the deterioration of the power of the governing coalition, forced the latter to concede change and start the democratization process. As a result, the ruling coalition was forced to make changes of the top leadership by replacing the staunch standpatter. Hence, the type of Ethiopia's current transition is transplacement, not transformation, which is a result of a combined action of the reformist within the EPRDF and anti-government protests.

Admittedly, the line between transformation and transplacement as types of transition is fuzzy, hence for some the type of Ethiopia's current transition can be transformation or reform. Whatever type of transition it may take, Ethiopia is in transition and transitional process.

Since April 2018 Prime Minister Abiy and his administration have adopted several transitional justice mechanisms which range from Official Apology, Amnesty,[53] establishment of the Ethiopian Reconciliation Commission (ERC), criminal prosecutions to legal[54] and institutional reforms as mechanisms to come to terms with the past.[55] The part that follows briefly highlights and analyzes some of the blind spots of the ongoing criminal prosecutions as well as the establishment process of the Reconciliation Commission and its enabling law in seriatim.

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[52] *Supra*, p. 7.

[53] The law-making organ passed Amnesty law on 28 June 2018, which applies for individuals suspected of, charged with, convicted, or sentenced for political crimes such as treason and acts of terrorism. See Proclamation 1098 of 2018.

[54] The Federal Attorney General of Ethiopia established the Legal and Justice Affairs Advisory Council (LJAAC) in 2018. LJAAC is mandated to assist and advice the government to make the much-needed legal and institutional reforms of the system that enabled past gross human rights violations. As a result of the fruitful works of LJAAC and its diverse working groups, several laws which enabled the perpetration of gross human rights violations have been abrogated and replaced by relatively progressive laws. For more on this, see Muradu Abdo 'Ethiopia's Ongoing Criminal Justice Reform: Modus Operandi, Methodology and Observations' *Mizan Law Review* Vol 14, pp. 341-356.

[55] To the best of this author's knowledge, although some institutional reforms like that of the Human Rights Commission and the National Electoral Board have been progressing fairly well, the same cannot be said for the security and judicial sectors.

a. Criminal Prosecutions

There are several on-going criminal prosecutions at the Federal and Regional levels against some suspects of past gross human rights violations and /or corruption crimes.[56] Neither special court, nor special prosecution office has been established; instead, the investigation and prosecutions of the suspects are carried out by the existing justice machinery, without undergoing meaningful revamp.

One of the challenges in using criminal prosecutions as transitional justice mechanism is lack of independent and impartial justice machinery in the wake of transition from authoritarian rule. In a situation where the transitional state inherited a judiciary and other justice sectors which were used as instruments of repression or were at least complicit in the perpetration of past gross human rights violations, adequate and proper institutional reform should precede criminal prosecutions. Or else, it is advisable to bypass existing justice machinery and carry out criminal prosecutions before specially constituted court.

In Ethiopia's current transition, the justice sectors particularly the judiciary is yet to undergo meaningful, adequate and proper reform including vetting process of judges. In fact, it takes time to make such meaningful reform in the criminal justice system, or in any other sector for that matter. Thus, the Ethiopian government should have established special court to investigate and prosecute those who bear greatest responsibility for perpetration of past gross human rights violations. Had Ethiopia's government established such special court it would help to lessen issues of partiality and selectivity that arise in relation to the ongoing trials. Henceforward, to restore the credibility of the process and to minimize plausible danger of partisan justice, selectivity and issues of legitimacy in relation to the on-going criminal prosecutions, it is desirable to at least fast track the reform process of the judiciary.

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[56] These include cases against some of the former officials, intelligence officers, and prison officials. To mention few, cases against *Getachew Assefa* et al (26 former National Intelligence and Security Service officials, 4 *in absentia, are charged with various crimes);* Commander Alemayehu et al (9 accused from federal and Addis Abeba Police); Abdi Muhamud Omer et al (Cr. File No. 231812, some 43 accused charged for various crimes). Also, former prison officials (nine accused from Makelawi and eight accused from Qilinto) are charged with various crimes. The case against Bereket Simon and Tadesse Tenkeshu before Amhara Regional Supreme Court; and the case against the former higher officials of Metals and Engineering Corporation are also among the high profile cases for past crimes. Some of these cases have reached or about to reach their logical conclusion. Also, it is worth to mention that the Federal Attorney General has recently dropped charges against some 63 individuals including from some of the aforementioned cases.

Due to the scale of past violations and large number of perpetrators involved, it is hardly possible to investigate all the crimes perpetrated by all the offenders. Even if it was possible to do so, conducting massive criminal accountability is not a viable option for successful transitional process. Thus, it is necessary to adopt prosecutorial strategy to clearly address the criteria or basis to select and prioritize the crimes and /or offenders to be investigated and prosecuted. Accordingly, criminal accountability should focus on gross human rights violations (or serious crimes or crimes under international law) perpetrated by (former) high ranking and middle level officials.

In relation to some of the on-going criminal prosecutions, one can discern that albeit most of the conducts for which the individuals are charged with squarely meet the contextual elements of crimes against humanity (and torture); the charge is for less serious crimes such as abuse of power. What is clear from this is that akin to Ethiopia's transition from *Derg* to EPRDF, the current transition also faced the challenge of inadequate legal framework on crimes against humanity and/or torture.[57] There are two plausible options to overcome this problem:[58] First, using ordinary crimes approach to prosecute crimes against humanity: Most of the individual acts of crimes against humanity such as killing, and arbitrary arrest are criminalized under the FDRE Criminal Code. Hence, crimes against humanity can be prosecuted as these ordinary crimes, as the Ethiopian government has done albeit this is not a good approach for many reasons. The second option is using customary international law as a legal basis to prosecute crimes against humanity in same characterization and label. Crimes against humanity is one of the *jus cogens* crimes that impose *erga omnus* obligation, hence absence of domestic legal framework is not necessarily a bar against prosecuting such crimes which attained the status of customary international law. Thus states can rectify the blind spot in their domestic criminal law either by direct application of customary international law or by enacting a law on crimes against humanity that confers retroactive jurisdiction on courts to investigate and prosecute these crimes as such. Doing so would not fly against principle of legality as the law-makers are not creating new crimes rather simply conferring retroactive jurisdiction on courts.[59] Using the second approach is preferable as it enable states to invoke the various features of core crimes, not to mention the moral condemnation associated with

[57] The Ethiopian law criminalized torture in a narrow sense. *Cf* Art. 424 of the Criminal Code with Art. 1 Convention against Torture and Art. 8 (2) (f) of Rome Statute. For more on the status of crimes against humanity in Ethiopia, see Marshet (2018), pp. 103 et seq.

[58] For general discussion on the plausible approaches, see Marshet (2018), p. 106.

[59] Art. 15 (2) ICCPR.

such core crimes. However, most states are reluctant to use customary international law as a legal basis to prosecute core crimes; the same is true in Ethiopia. Thus, it is advisable to repair this blind spot in Ethiopia's criminal law by enacting a law that adequately and comprehensively criminalizes crimes against humanity as such.

b. The Restorative Justice Route: The Ethiopian Reconciliation Commission

Ethiopia's government established a national 'Reconciliation Commission' which became effective on 25 December 2018.[60] The Reconciliation Commission is the first of its kind in Ethiopia, hence a new restorative justice path for the country. It has been over two years since the Commission was established, but it has not yet started its core functions such as statement taking and hearing rather still grappling with other works.

Although such body is one of the much-need and a long overdue mechanisms for Ethiopia to move forward from its bleak past, for it to be effective, the major factors that determine the success of truth commissions in general have to be present. These include the establishment process, scope of the mandate, composition, temporal jurisdiction, period of operation and political context.[61]

1) Establishment Process: Defective

As discussed in preceding part of this article,[62] the establishment process of truth commissions in general should be preceded by public consultation. The establishment of the Ethiopian Reconciliation commission (ERC) was rushed, if not done meteorically. To the best knowledge of the author of this paper, no proper public consultation and dialogue was conducted prior to the establishment of the Commission. Although this birth defect is not a serious irredeemable problem, had public consultation been conducted that not only would have increased the legitimacy and credibility of the Commission but also would have helped the lawmakers to have a clear picture on the needs of victims and types of violations that need priority and focus. To mitigate the impact of this defective establishment process, the Commission should design a clear strategy that helps to actively engage different stakeholders specially the victims of past gross human rights violations and civil societies.

2) Composition of the Commission: Commissioners

60 Reconciliation Commission Establishment Proclamation 1102 of 2018.
61 *Supra*, p. 14.
62 *Supra*, p. 15.

As highlighted somewhere in this article, for a truth commission to be effective, one of the determining factors is its composition. Truth commission should be composed of recognized, competent and independent personalities from all relevant social groups and sectors. In other words truth commission, other institutions as well for that matter, is as good as its commissioners. The selection of the members should be in a consultative and representative process. Therefore, prior to the appointment of members of a truth commission, public consultation in the selection process should be conducted.

On this matter, the Ethiopian law states that the Chairperson, vice Chairperson and other members of the Commission shall be appointed by the House of Peoples Representatives upon the recommendation of the Prime Minister.[63] The law says nothing concerning the direct participation of the public and other stakeholders in the appointment of the commissioners. This adversely affects the legitimacy and credibility of the process and consequently works of the Commission. Therefore, it is submitted that prior to making recommendation of the commissioners to the law-making organ, the law should have imposed obligation on the Prime Minister to conduct public consultative selection process before choosing the commissioners. The reason being, the consultative process would make the victims and other members of civil societies to feel local ownership of the mechanism and thereby boost the credibility of the resulting outcome.

Moreover, unlike the experience of countries like South Africa,[64] and Sierra Leone,[65] the Ethiopian law does not determine the number of commissioners.[66] Rather, it empowers the government to determine the number of the members of the Commission.[67] In this regard, it would have been better had the Ethiopian law clearly stated the minimum and maximum number of the Commissioners; or at least the maximum number of the commissioners.

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63 Art. 4(2), Proclamation 1102 of 2018.

64 Art. 7 (1) of the Act that established the South Africa's Truth and Reconciliation Commission stated: 'The Commission shall consist of not fewer than 11 and not more than 17 commissioners, as may be determined by the President in consultation with the Cabinet.'

65 'The Commission shall consist of seven members', See Art 2 (3), the Truth and Reconciliation Commission Act 2000.

66 Art. 4, Proclamation 1102 of 2018.

67 The proclamation states that: 'Number of members of the commission shall be determined by the government'. Ibid, Art. 4(1). The definitional article of same proclamation defines government as a federal or regional government. From this wording of the law, it is not clear which specific organ of government is empowered to determine the number of commissioners.

Regardless, the law-making organ stupefyingly appointed 41, oodles by any standard,[68] Ethiopians as commissioners, His Eminence Cardinal Berhane Yesus Sourafel and Mrs Yeteneberesh Nigusse as Chairperson and Deputy Chairperson, respectively.[69] The commissioners work on part time basis as volunteers which pose a serious challenge for a herculean task like that of ERC's mandate. Thus there is a need to revisit not just the composition of the ERC but also the commissioners' modality of work.

The other serious blind spot of the enabling law of the ERC in relation to its composition is the fact that it does not provide for conditions to be appointed as commissioners.[70] The law should have provided for eligibility conditions for appointment as a commissioner and factor/s that make a person ineligible for the position.[71] The other equally important point is conditions for the removal (and/ or replacement) of the commissioners which are not addressed under the enabling law of ERC. Issues such as who has the power to remove (and /or replace) a commissioner and on what ground/s remain the lacunae of the law as well, albeit this can easily be resolved by looking at the practice.[72]

3) The Institutional Set-up of the Commission

[68] Of the truth commissions established thus far, the ERC is the one with the highest number of commissioners. To the best of this author's knowledge, there has not been any truth commission with more than 30 commissioners. Having manageable size of commissioners is advantageous for many reasons.

[69] It is not clear why the Prime Minister decided to recommend 41 individuals as commissioners of the ERC, nor is it clear why the law-makers simply endorsed what was presented to it. It seems that representation was used as a predominant criterion in selecting the commissioners, instead of meritocracy. It is unclear whether this mysterious 41 number is meant as a minimum or maximum. Some Commissioners have distanced or disassociated themselves from the ERC. Also, Commissioner Laureate Dr. Tibebe Yemane Berhane and Commissioner Sultane Hanferie Almira passed away on 20 February 2021. The Vice Commissioners, Yetneberesh Nigussie resigned from the ERC and at the time of writing she has not been replaced.

[70] The enabling law of the ERC does not regulate the nationality of the members of the Commission either. Truth commission can be national, mixed or international based on its composition. The Ethiopian law, however, is silent whether foreign national/s can be elected as commissioners or not. All the current commissioners are Ethiopian nationals.

[71] This resulted in the appointment of some controversial figures as members of the Commission.

[72] In fact, the law-making organ appointed five Commissioners namely Dr Ezera Abate Yemam, Mr Debelash Yadetie Teferra, Mrs Fatum Hatie Hafi, Garde Kulemie Mohamed Dol and Reverend Dereje Jemberu Kassa on 25 June 2020 to replace those who were not present due to different reasons. From this, it is clear that the parliament is the one who has the power to replace the commissioners for whatever reasons. But what is still not clear is the period within which the replacement should be done and how the ERC should proceed in the interim.

The ERC's founding law does not layout the institutional set up of the Commission.[73] Thus, to carry out the functions of the ERC, the commissioners structured themselves into General Assembly,[74] Executive Committee[75] and five standing committee, namely the Gross Human Rights Violations Affairs Standing Committee, Conflict Resolution Standing Committee, National Dialogue and Consensus Standing Committee, Capacity Building Standing Committee, and Public Relations and Awareness Raising Standing Committee.[76] The ERC also has Secretariat office. The Secretariat (or the office to use the wording of the law) is established by the enabling law of the ERC as separate and distinct institution with its own legal personality, albeit the office is responsible to run the day-to-day and administrative activities of the ERC.[77] Also, the Chief Executive Director (or head) of the office is appointed by the Prime Minister, not by the Commission.[78] This sort of created two institutions in one; both of them are made accountable to the Prime Minister.

4) Mandates: Subject Matter Jurisdiction

The enabling law of a truth commission should explicitly specify the types of past gross human rights violations that fall within the subject matter jurisdiction of a commission.[79]

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[73] The law clearly stated that the head office of the ERC is Addis Ababa and it may establish branch offices at the regions. See Article 10 (3) of Proclamation 1102 of 2018. The ERC shares the spacious and beautiful building adjacent to American Embassy in Addis Ababa with the Administrative Boundaries and Identity Issues Commission. The ERC decided to establish branch offices in Awassa, Asella, Diredewa, Jimma, Gambella, Nekemte, Arbaminch, Mekele, Bahirdar, Desse, Asossa and Jigjiga. The plan is to establish the branch offices within the public universities located on these cities.

[74] The General Assembly is composed of all the commissioners.

[75] This consist of 13 individuals namely the Chairperson of the ERC, Deputy Chair Person of the ERC, the chairperson and vice chairperson of each standing Committee as well as the Chief Executive Director of the Secretariat (non-voting). This Committee holds its regular meeting every two weeks. In other words, it is this set up of the ERC that operates as per Article 7 of the Proclamation.

[76] From these standing Committee, it is clear that the ERC considers conflict resolution as one of its mandate. It is uncommon for a commission like the ERC to embark on the daunting work of addressing on-going conflict.

[77] See Arts. 3(3), 4(3) and 10 of Proclamation 1102 of 2018.

[78] There is a discrepancy between the Amharic and English versions of Article 10 (1) of the Proclamation. The Amharic version states that the Head of the Office is appointed by the Prime Minister whereas the English version gives the power to the Chairperson of the ERC. For obvious reason, the Amharic version prevails. In practice as well all the three Heads that served the office are appointed by the Prime Minister. As a result, the head is also accountable to the Prime Minister. Thus far the office has had three executive directors; the first two resigned from the position one after the other.

[79] *Supra*, p. 16.

The law of ERC provides the mandates of the Commission under its Article 6. This provision reads like mishmash—the problem starts with its structure. This provision of the law provides both mandates and legal powers of the Commission. For example, while the other sub-provisions are about the mandate of the Commission, Article 6(1) (5) (6) & (7) are legal powers of the Commission. As these two matters are essentially different, they should have been regulated in distinct provisions of the law.

Be the above as it may, the Ethiopian law is not express enough as to the subject matter jurisdiction of the Commission.[80] The provision that purports to address the mandate of the ERC is neither here nor there; the preamble is relatively expressive.[81] From the reading of Article 6, it is plausible to argue that the ERC is also mandated to conduct national dialogue and resolution of on-going conflict. In fact, as can be discerned from the national dialogue and conflict resolution standing committees, this is also the position of the Commission. The law should have plainly spelt out the subject matter jurisdiction of the ERC. It is necessary to revisit the law and specifically regulate the subject matter jurisdiction of the ERC. Based on the very nature of such commission, it is inconceivable to mandate it with national dialogue function[82] and prevention of ongoing conflicts. Such a commission is a means to reckon with the past for the betterment of the present and future. It is submitted that the main mandates of the ERC should be to investigate and establish historical record of the pattern, causes, nature, extent, and consequences of past gross human rights violations in Ethiopia. The investigation should not be limited to gross-violations of civil and political rights; instead, in view of the indivisibility nature of human rights, it should also include gross violations of socio-economic rights. The law should also illustratively define the constituent elements of gross human rights violations. In relation to this, the law should also provide a guideline for the contents of the final report of the Commission on the gross human rights violations. Also, as the law is silent on the implementation of the recommendations and follow-up mechanism/s to ensure proper implementation; it is necessary to clearly address this under the law.

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80 From the five standing committees established by the ERC, it is possible to deduce that the Commission considers national dialogue and conflict resolution as matters that fall within its mandate.

81 The preamble reads that 'it is necessary to identify and ascertain the nature, Cause and dimension of the repeated gross violation of human rights …', Preamble , para 2, of Proclamation 1102 of 2018.

82 Ideally, such a commission is midwifed through national dialogue process, not the other way round. Undeniably, the ERC can play a facilitation role in a national dialogue with the view to make the ideals of confronting the past to promote reconciliation one of the agenda of such initiatives.

5) Temporal Jurisdiction: Period under Investigation

It is important to determine the time frame within which a commission should confine its operation. The enabling law of the ERC does not mention period of coverage of the works of the Commission. In other words, it does not limit the mandate of the Commission in terms of time-period from when up to which period it should investigate past gross human rights violations. The law should have clearly addressed this by first conducting public consultation as regards the period to be covered by the ERC. Therefore, in consultation with different stakeholders, the lawmakers should clearly specify the time-period that fall in the ambit of the ERC's temporal jurisdiction. The draft regulation stated the cut-off period of the ERC's temporal jurisdiction as 1974, still without proper public consultation.[83] Over and above this, even if public consultation will be conducted at a later stage, trying to solve decisive matter like this by a subsidiary law would be problematic in many ways.

6) Period of Operation: Life Span of the Commission

Truth commission is an ad hoc body by its very nature, hence, the period for which a commission operates should be determined by the law that establishes it. The law that established the ERC under Article 14 provides that the tenure of the Commission be for three years with the possibility of extension for additional time. Given the time period to be investigated is not determined by the enabling law, it is not clear how the lawmakers determined the period of operation. The other point is, it is not clear as to when this three-year period starts to run. Does it include time for preparatory work such as appointment of commissioners and staffing? Although members of the Commission were appointed on 16 May 2019, the ERC, is yet to officially start its statement taking, truth seeking and telling exercise.

7) Legal Powers

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[83] The ERC has made an attempt to address this problem by a regulation but, (fortunately) the draft regulation could not pass the first legislative process for different reasons. It is uncertain how the ERC will address the blind spots in the enabling law. In addition, in its strategic plan, the ERC, 'decided to look into the social and political conflicts and gross violations of human rights experienced across the country as of 12 September 1974. Notwithstanding the period specified herein, the Commission may, on an application by any person or groups of persons on justifiable grounds, pursue the objective set out in the Proclamation in respect of any other period preceding 1974.' See The Ethiopian Reconciliation Commission Strategic Plan 2020-2022 (2020), p. 2. It is not clear on what basis the ERC chose the stated year as a cut off for its temporal jurisdiction.

Truth commission should be vested with necessary powers that enable it to effectively carry out its mandates.[84] On the basis of Article 6 (1) (5) (6) (7) and Article 15 of the law, the ERC has the legal powers to search and seizer, and access to archives. From the reading of the Ethiopian law, the Commission has the power to order the presence of anyone; however, it is not clear whether the Commission has the power to issue summon itself. The law should have plainly entrusted this power to the ERC. Also, the law does not clearly state the consequences of failure to cooperate with or obstructing the works of the Commission.

One of the crucial legal empowers for the ERC to unravel comprehensive truth about the past is the power to trade-off amnesty for full disclosure. Some truth commissions were given the power to grant (or recommend) a conditional amnesty, i.e. depending on the nature and gravity of the crimes and the extent to which the suspects have cooperated in the discovery of the truth and the compensation of the victims.[85] Under the enabling law of the ERC, there is no mention of conditional amnesty. There is a need to trade-off amnesty for full disclosure of the details of commission of crimes. Therefore, the law should have given the power to grant conditional amnesty to the ERC and should have provided conditions such as individual application, nature and gravity of the crime, degree of participation, and full disclosure for granting amnesty.

The other issue that the law does not address is whether the Commission has the power to name names of perpetrators. The Commission should be empowered to name identified perpetrators of egregious human rights violations. Besides, the Commission should have been empowered to recommend reparation, mainly collective reparation to identified victims.

III. Integrating and Synchronizing the Mechanisms: Managing their Symbiosis and Synergy

The wide-ranges of transitional justice mechanisms are not a substitute to one another, nor mutually exclusive, instead, they are complementary. The crucial roles of criminal accountability or reparation cannot be achieved by truth commission alone and vice versa. For instance, it is only by way of criminal accountability that one can establish individual

[84] *Supra*, p. 16.

[85] The South African Truth and Reconciliation Commission was entrusted with the power to grant conditional amnesty; see Art. 19 of Promotion of National Unity and Reconciliation Act 34 of 1995. The Gambian Truth, Reconciliation and Reparation Commission was given the power to recommend granting of conditional amnesty. See Art. 19 of Truth, Reconciliation and Reparation Act 2017.

criminal responsibility—individualization of guilt. Transition from repressive past to a society based on a culture of rule of law and reconciliation requires a comprehensive or synergy of transitional justice mechanisms. Although the leadership of Prime Minister Abiy put in place relatively diverse mechanisms simultaneously, the various measures are operating disconnectedly.

Under the ERC's law, the relationship of the Commission with the finalized, ongoing and future criminal accountability for past gross human rights violations is not regulated. Can a court and the Commission share evidence? Can the Commission recommend prosecution of identified perpetrators? Can the Commission look at matters which have already been entertained before courts of law?

The law states that no one will be prosecuted on the basis of testimony he gave before the Commission.[86] However, this does not inhibit investigation and prosecution of a person on the basis of other possible evidence. In other words, since the Commission is not given the power to grant conditional amnesty, perpetrators of crimes who gave testimony before the Commission can be prosecuted if there is other evidence that serve as a proof. Thus, these and other issues as regards the relationship of the ERC and criminal accountability mechanism need to be plainly regulated.

Also, the indigenous restorative justice mechanisms in Ethiopia are not integrated in the design and implementation of the ongoing formal transitional justice mechanisms adopted by the government. The mechanisms put in place specifically the ERC should be synchronized with the indigenous restorative justice mechanisms.[87] Undoubtedly, the various indigenous dispute resolution mechanisms in Ethiopia have a lot to offer in coming to terms with past gross human rights violations. In fact, these mechanisms are considered as informal transitional justice mechanisms that play vital complementary roles to formal transitional justice mechanisms in addressing past human rights violations.

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[86] Art. 18(1), Proclamation 1102 of 2018.

[87] There are diverse indigenous dispute resolution mechanisms throughout Ethiopia, which include *Jaarsummaa*, *Songo* Serra and *Shimgilinna*; for more on these, see Pankhurst, A and Assefa (eds), G Grass-Roots Justice in Ethiopia : The Contribution of Customary Dispute Resolution (2008) Centre Français d'Études Éthiopiennes: Addis Ababa
Adebo, T and Tsadik, H(eds) *Making Peace in Ethiopia: Nine Cases of Traditional Mechanisms for Conflict Resolution* (2016) Peace and Development Centre: Addis Ababa.

There are diverse indigenous restorative justice mechanisms throughout Ethiopia. These mechanisms offer several useful and positive contributions in truth seeking, healing of wounds, promoting reconciliation and redressing past gross human rights violations. However, they are not synchronized with the various transitional justice mechanisms, particularly the Reconciliation Commission, charted by the government. It is necessary to utilize the useful roles of these mechanisms in truth finding and reconciliation process. Admittedly, it is necessary to first conduct a balanced assessment of these mechanisms in order to identify their potentials, specific roles and compatibility with international standards.

IV. The Way Forward: Restoring the Mechanisms

Although the nature of Ethiopia's current transition is not as clear as Ethiopia's transition from *Derg* to EPRDF, since April 2018, Ethiopia is again on transitional process. To set the democratization process on the right path, the current government should not repeat the incompleteness, selectivity and inadequacy of Ethiopia's transition from *Derg* to EPRDF. The government should build a bridge that would help the country to quickly move forward from its bleak past by charting comprehensive and integrated transitional justice mechanism that help to uncover the truth and bring closure, ensure justice and unify all Ethiopians. Based on the foregoing discussions the author puts forward the following: First, it is commendable that the current leadership took the initiative to adopt broader transitional justice mechanisms including the establishment of the ERC. Nonetheless, these mechanisms should not operate disjointedly. There is a need for a clear strategy that should integrate these mechanisms and regulates the symbiosis as well as possible tension of the mechanisms that are put in place; secondly, it is necessary to adopt prosecutorial strategy to clearly address the criteria or basis to select and prioritize the crimes and /or offenders to be investigated and prosecuted for past gross human rights violations. Accordingly, criminal accountability should focus on serious crimes perpetrated by former high ranking officials. To carry out the accountability process in compliance with international standards and norms, fast-tracking the much-needed meaningful reform of the judicial sector is pivotal. Also, just like the Red Terror Trials, (some of) the on-going criminal prosecutions for the past gross human rights violations have faced challenges of inadequate legal framework that criminalizes crimes against humanity under Ethiopian law. This forced the prosecutorial organ to resort to ordinary crimes approach as opposed to crime under international law—crimes against humanity. Thus, it is necessary to repair this defect in the Ethiopia's criminal law by way of criminalizing crimes

against humanity in the same label and characterization as under international criminal law; thirdly, it is necessary to restore the ERC by rectifying the serious defects in its enabling law. Some of the serious flaws in the enabling law such as issues of period under investigation, its subject matter jurisdiction and types of past gross human rights violations, power to grant conditional amnesty and power to recommend reparation need to be addressed by way of (at least) amending the law, not by subsidiary laws. Ideally, the ERC's composition and serious blind spots of the founding law be addressed by way of reestablishment, as the problems are too many to be revitalized by way of amendment. In addition, for the ERC to have salutary effects, it must be used in combination to other transitional justice mechanisms. In more specific terms, criminal accountability for the upper echelon and the most responsible perpetrators of past gross human rights violations should be carried out; and conditional amnesty as a trade-off to full-disclosure of past egregious human rights violations by middle and low-level perpetrators need to be recognized. Also, identifying the indigenous restorative justice mechanisms in Ethiopia which offer useful and positive contributions for promoting reconciliation and integrating them within the ERC is imperative.

Finally, to ensure full implementation of the recommendations of the Commission and maximum dissemination of the report/s, it is necessary to device implementation and follow-up mechanisms as well as comprehensive dissemination strategies.

The Practicability of Farming Product Secured Credit in Ethiopia: Some Insights

Tajebe Getaneh Enyew*

Abstract

Many countries in the world reform their secured transactions law on movable property to unlock access to credit to their society. Recently, Ethiopia also reforms its movable property security right law by proclaiming a comprehensive Movable Property Security Rights Proclamation. This Proclamation provides an extensive list of movable properties that a debtor can grant to secure his obligation. Farming product is one category of movable property that the proclamation allows a debtor to use as collateral to secure the creditor's right. However, though the proclamation explicitly entitles debtors to grant their farming products as collateral, it is very doubtful whether it is going to be practicable. The purpose of this paper is, therefore, to assess the practicability of farming products secured credit in Ethiopia. In addressing this issue, the author adopts a qualitative research approach and typically doctrinal research type. The author uses data collected from legislation and pieces of literature through document analysis. After evaluating the issue from different perspectives, the author concludes that a secured credit backed by a farming product will face problems to be practiced as much as the proclamation intends. The author identifies three critical problems that hinder to practice of farming product secured credit fully in Ethiopia. Firstly, it is difficult to perfect the interests of lenders in farming product collaterals since farming products are not suitable to be described in a manner that reasonably allows their identification in the collateral registry. This will discourage lenders to receive the farming product as collateral. Secondly, it does not protect buyers of farming products in the ordinary course of the seller's business from competition from secured creditors since the proclamation gives an exclusive priority right to the latter. This destructs the marketability of farming products and thereby discourages debtors to use their farming products as collateral. Thirdly, as farming products are exposed to risks or natural catastrophes and, most farmers cannot afford to buy an insurance policy for collateralized properties, lenders may not be interested to enter into a secured transaction using a farming product.

Keywords: - Collateral, Farming Products, Practicability, Secured Creditor, Security interest,

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Introduction

Intending to facilitate the transaction, many nations in the world reformed their secured transaction law.[1] Widening of the lists of properties that debtors can grant as collateral takes the primacy, among others, that reforms brought in many jurisdictions.[2] Likewise, the Ethiopian government reformed the country's movable property security right law in August 2019 aiming to ease getting finance in the country.[3] Before the reform, secured transaction rules of the country were scattered in different proclamations including the Civil Code and Commercial Code.[4] Now, the legislature proclaims a comprehensive Movable Property Security Rights Proclamation that applies to security rights created in movable property. This Proclamation comes up with an extensive list of movable properties over which a security right can be created.[5] Among these lists, the farming product is one. The proclamation explicitly lists farming products as movable property that a debtor can use as collateral to secure his debt. According to this proclamation, a farmer can grant as collateral farming products including but not limited to;

> *[C]rops grown, growing or to be grown, forest, timber, and other wood products, livestock, born or unborn, bees and poultry, and the produce and progeny thereof, supplies used in the farming operation, or products of livestock in their unmanufactured states are some of the farming products listed as a movable property subject to security right.*[6]

Allowing farmers to use farming products as collateral is a crucial means of boosting the accessibility of finance for farmers in the country. It becomes very important given that the majority of the population in Ethiopia engages in the agricultural sector.[7] It is, however, questionable whether secured credit backed by farming products would be pragmatic.

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[1] European countries especially central and eastern countries and African countries such as Malawi, Nigeria, Sierra Leon, and Liberia are among the countries that have reformed their secured transaction law lately. (Asress Adimi Gikay, 'Rethinking Ethiopian Secured Transactions Law through Comparative Perspective: Lessons from the Uniform Commercial Code of the US', 1 Mizan Law Review 11, 154 (2017).

[2] Xuan-Thao Nguyen & Bich T. Nguyen, 'Transplanting Secured Transactions Law: Trapped in the Civil Code for Emerging Economy Countries', 1 North Carolina Journal Of International Law And Commercial Regulation 40, 11 (2014).

[3] Movable property security rights proclamation, (2019), Fed. Neg. Gaz., Proc. No. 1147, 25th year, No. 76.

[4] Commercial Code of the Empire of Ethiopia, (1966), *Negarit Gazzeta* (Extraordinary issue), Proc. No. 166, 19th year, No. 3, art 947-958 & 171-193, and Civil Code of the Empire of Ethiopia, 1960, *Neg. Gaz. (* Extraordinary issue), Proc. No. 165, 19th year, No. 2, art 2825-2874 & 3041-3130.

[5] Movable property Security Rights Proclamation, supra note 3, art 2/27.

[6] *Ibid*. Art. 2/16.

[7] Obse M. Eshetu, *Determinants of credit constraints in Ethiopia*, Master's Thesis in Economics, Norges Arktiste University, (2015), at. 1

Particularly, it is doubtful whether the interest of the lender would be secured when the collateral is a farming product. This concern becomes worrisome when we think of the difficulties in describing farming products during the perfection of the security interest, the impact of the absolute priority right of a secured creditor in the farming product collateral on the marketability of the farming products, and the catastrophes associated with farming products. Hence, this paper aims at examining the practicability of farming product secured credit in light of these concerns.

The paper has two major parts. The first part deals with the general conceptual understanding of secured transactions. In this part, the author attempts to elaborate the definition of a secured transaction as well as the five stages of secured transaction namely the creation, attachment, perfection of security interest, priority among creditors, and enforcement of security rights. This helps to give some insight on the concept of secured transactions in general and to have a benchmark to evaluate the feasibility of farming product secured credit in Ethiopia. The second part analyzes the practicability of farming product secured credit in Ethiopia by considering some critical issues involved therein.

1. The Conceptual Underpinning of Secured Transaction

Normally, when a lender gives a loan to a borrower, it is with the expectation that the latter will pay it back. However, this may not be always the case as the borrower may sometimes default. To avoid the risks of defaults of the borrower, many lenders prefer to give a loan through a secured transaction/credit system. The term secured transaction lacks a single accepted definition.[8] Literally, a transaction is considered as a secured transaction when "a property is provided by the borrower (the debtor) under the terms of a loan to the lender (the secured creditor) to secure future repayments, with the lender being able to foreclose on the collateral if the borrower defaults on payment."[9] From this, it can be inferred that a secured credit enables the creditor to have a claim over specific property of the debtor or third party granted as collateral provided the debtor defaults. When the transaction is secured, a security interest is created in the

[8]Iyare Otabor-Olubor, *A Critical Appraisal of Secured Transactions over Personal Property in Nigeria: Legal Problems and a Proposal for Reform,* Ph.D. dissertation, Nottingham Trent University, (2017), P. 3
[9]*Ibid.*

asset of the debtor in favor of the creditor until the settlement of the debt.[10] The secured transaction enables the lender to acquire a priority right in the collateralized asset of the debtor.[11] It helps the lender to have a right that overrides other competing creditors' rights[12] and entitles him to foreclose, sell without judicial help, the collateral to satisfy his interest. Besides, it also unravels a chance for borrowers to get funds easily by securing the lender's interest.[13]

2. The Agricultural Sector and Access to Credit in Ethiopia

As different pieces of literature reiterated, the agricultural sector is the backbone of the Ethiopian economy. It contributes 46.7% to the country's Gross Domestic Product (GDP), employs 85 % of the labor force and 90% of the export products come from this sector.[14] Because of these contributions of the sector, Ethiopia needs to work to flourish the agricultural sector. One of the determinants for the development of the agricultural sector is the availability of finance. In practice, however, the agricultural sector has been faced inaccessibility of credit from financial institutions due to lack of physical asset collateral and other risks.[15] Most lenders have preferred to accept immovable property collaterals such as buildings and houses located in the urban areas or some special movables property collaterals such as vehicles.[16] Their inclination to lend through farming product collateral is very low. Though the law did not prohibit accepting farming products, for practical reason, lender hesitates to lend by receiving animals, forestry, and other agricultural products. As a result, farmers have not been able to get funds from lenders

[10]Otabor-Olubor, Supra note 8, at 3.
[11] Thomas H. Jacksonm & Anthony T. Kronman, 'Secured Financing and Priority among Creditors', 6 Yale Law Journal 88, 1143 (1979).
[12] Ibid. 1144.
[13]Ronald J. Mann, 'Explaining the Pattern of Secured Credit', 3 Harvard Law Review 110, 638-639 (1997).
[14]Doreen Auma and Philip Ahen Mensah, *Determinants of Credit Access and Demand Among Small-Holder Farmers in Tigray Region, Ethiopia*, Norwegian University of Life Sciences School of Economics and Business, Master's Thesis, (2014), p. 10
[15] Atkilt Admasu and Issac Paul, Assessment on the Mechanisms and Challenges of Small Scale Agricultural Credit from Commercial Banks in Ethiopia: The Case of Ada'a Liben Woreda Ethiopia, Journal of Sustainable Development in Africa, (2010), Vol.12, No.3, P. 305
[16]New Business Ethiopia, 'Ethiopia's smallholder farmers to use cattle as collateral',https://newbusinessethiopia.com/finance/ethiopias-smallholder-farmers-to-use-cattle-as-collateral/> last accessed on December 11, 2019

since they do not have immovable and special movable properties. Even farmers were not able to grant their land as collateral for their obligation since they lack ownership right on the land.[17]

Importantly, the present proclamation explicitly rectifies such challenges of farmers, at least theoretically, due to two reasons. On the one hand, this Proclamation explicitly allows farmers or other persons to use farming products as collateral to secure their obligation. They can get credit by granting their farming products including "crops[18] grown, growing or to be grown, forest, timber, and other wood products, livestock, born or unborn, bees and poultry, and the produce and progeny thereof, supplies used in the farming operation, or products of livestock in their unmanufactured states" as collateral.[19] On the other hand, this Proclamation imposes a mandatory obligation on commercial banks and microfinance institutions to accept farming products collaterals. The National Bank of Ethiopia (NBE) in its directive on the Operationalization of Collateral Registry mandatorily requires banks to allocate at least 5% of their credit disbursement of the year to persons engaged in the agricultural sector by receiving movable property as collaterals, which includes farming products.[20] These reforms in the new movable property security rights law will unravel financial access to farmers since it allows them to grant their farming products as collateral.

3. The Major Steps and Features of Secured Transaction under the New Proclamation

Commonly, a secured transaction process has five stages.[21] These are (1) creation of a security interest, (2) attachment of the interest, (3) perfection of the interest, (4) priority from other competitor creditors, and (5) enforcement of the security right by the creditor.[22] In fact, not every

[17] International Maize and Wheat Improvement Center, Financial Products For Farmers And Service Providers Report Ethiopia, (2015), p. 11

[18] Crop means a plant planted cultivated for either profit-making or personal consumption. Crops can be categorized into six groups: "food crops, for human consumption (e.g., wheat potatoes); feed crops, for livestock consumption (e.g., oats, alfalfa); fiber crops, for cordage and textiles (e.g., cotton, hemp); oil crops, for consumption or industrial uses (e.g., cottonseed, corn); ornamental crops, for landscape gardening (e.g., dogwood, azalea); and industrial and secondary crops, for various personal and industrial uses (e.g., rubber, tobacco)" (<https://www.britannica.com/topic/crop-agriculture>last accessed on 11 December 2019).

[19] Movable property Security Rights Proclamation, supra note 3, Art. 2/16.

[20] National Bank of Ethiopia, Operationalization of Collateral Registry, Directive No. MCR/01/2020, Art. 19.1.

[21] Ali Khan, 'Secured Transaction Final review 2012', (3 December 2012) <https://www.youtube.com/watch?v=-Tk-eO13blk&t=320s> last accessed on 12 December 2019.

[22] Ibid.

secured transaction goes through all these steps. In most cases, the secured transaction passes only the first three consecutive stages since they are essential steps to secure and perfect the interests of the creditor in collateral. The last two stages exist only when there are more than one competing creditors and there is a default of the debtor to perform his obligation respectively. A further discussion is given below about each stage of a secured transaction in reference to the new Proclamation.

1.1.Creation of Security Interest

The term security interest is used interchangeably with security rights in different pieces of literature. The author of this paper also uses them interchangeably. The term security right is defined by the United Nations Commission on International Trade Law (UNCITRAL) as "a property right in a personal property, created by agreement which secures payment or performance of an obligation, regardless of whether the transacting parties had delineated it as a security right."[23] The Ethiopian secured transaction law also provides a similar definition. It is defined as "a property right in a movable property that is created by an agreement to secure payment or other performance of an obligation, regardless of whether parties have denominated it as a security right, the status of the grantor or secured creditor, or the nature of the secured the obligation".[24] From these two definitions, it can be understood that a security right is a right created in movable property in favor of a creditor through the conclusion of a valid security agreement between a creditor and a debtor. Here, a security agreement means a contractual agreement that the debtor agrees with a creditor to grant his property as a security to secure the re-payment of the loan that he took or the performance of his obligation.[25]

Security agreements, like other types of contractual agreements, shall fulfill the validity requirements provided by the general contract law.[26] However, there are special validity requirements for a security agreement provided by the Ethiopian movable security rights proclamation. The proclamation provides four special validity requirements for the validity of a

[23]Otabor-Olubor, supra note 8, at 3.
[24] Movable property Security Rights Proclamation, supra note 3, Art. 2/44.
[25]Marek Dubovec & Cyprian Kambili, *A Guide to the Personal Property Security Act: The Case of Malawi, Pretoria* University Law Press, 52 (2015).
[26] Civil Code of the Empire of Ethiopia, supra note 4, Art. 1678 ff.

security agreement. First, the agreement shall be made in writing; and the grantor shall sign it.[27] Security agreement cannot be made orally. Making security agreements in writing is important for evidentiary purposes. The grantor of the collateral must also sign the agreement. Nevertheless, the signature of a secured creditor is irrelevant to the validity of the agreement. Second, the agreement shall contain the description of the secured obligation.[28] The agreement should specify clearly the obligation of the debtor secured by the collateral. As it is provided in the proclamation, the obligation that can be secured by collateral is an unlimited one. It could be one or more than one of any type, present or future, determinable or determined, conditional or unconditional, fixed or fluctuating.[29] The obligation of the debtor may be to return the loan that he took, or it may be the performance of any other obligation. In any case, such obligation should be described in the security agreement in a way that it can be reasonably identified.[30]

Third, the agreement shall include a clear description of the collateral granted to secure the interests of the creditor.[31] As mentioned above, a debtor is expected to grant a property as collateral to secure the rights of the creditor. The property that is given as collateral shall be described succinctly. The difficulty is, then, what kind of description is said to be 'reasonable' to identify the collateral. This issue may vary depending on the nature of the property to be granted as collateral. Therefore, whatever the nature of the collateral is, the law requires it to be identified in the agreement by using their specific listings, category, type of collateral, or quantity.[32]

A closer reading of the proclamation shows that collaterals could be corporeal and incorporeal. Corporeal includes any tangible goods including money, negotiable instruments (promissory note, bills of exchange, and others other than a cheque[33]), negotiable documents (bills of lading, warehouse receipt, seaway bill, and other), and certificated securities (share/stock, bond,

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[27] Movable property Security Rights Proclamation, supra note 3, Art. 4/5.
[28] *Ibid*. Art. 4/5 (b).
[29] *Ibid*. Art. 5.
[30] *Ibid*. Art. 6/1.
[31] *Ibid*. Art. 4/5 (c).
[32] *Ibid*. Art. 6/1.
[33] The nature of a cheque is payable on demand or at sight i.e. the holder can claim payment from the drawee as soon as he receives the instrument without waiting any further periods. Because of this nature, a cheque cannot be used as a pledge or security to secure the interests of secured creditors. (ገዙ አየለ መንግስቱ, የኢትዮጲያ የባንክ እና የሚተላለፉ የንግድ ሰነዶች ሕግ, 162 (2009)).

debenture, and treasury bills).[34] An incorporeal asset, on the other hand, includes properties other than those falls under the category of corporeal assets including receivables[35], deposit account[36] , and intellectual property rights.[37] These properties may be existing or to be acquired in the future. For example, a debtor may grant his existing vehicle or his vehicle that he plans to buy after two months.

Fourth, the agreement shall also include the description of parties involved in the contractual agreement in a way that a secured creditor and the grantor can be easily identified. The agreement shall identify who is the grantor, the debtor, and who is the creditor.[38] Overall, upon the conclusion of a valid security agreement, there is a creation of security interest in favor of the creditor and, then, the first stage of the secured transaction is done.

1.2. Attachment of Security Interest

The mere conclusion of a secured transaction may not give a creditor a security right in the collateral property.[39] The creditor's right remains to be contractual unless his interest is attached.[40] Before attachment, the secured creditor's claim is limited to the breach of the contractual agreement and does not have any claim in specific collateral or asset of the debtor.[41] The creditor acquires enforceable interest to be claimed against the collateral only if there is an attachment of the interest.[42] A security interest is considered as attached provided, first, there is a conclusion of a valid security agreement.[43] As mentioned before, the conclusion of a security agreement is the basis for any secured transaction.[44] Therefore, there shall be a valid security agreement to attach a security interest. Second, the debtor is an owner of the collateral or has a

[34]Movable property Security Rights Proclamation, supra note 3, Art. 10.
[35]Receivable refers to “a right to payment of monetary obligation, excluding a right to payment evidenced by a negotiable instrument, a right to payment of funds credited to a deposited account and a right to payment under security.” (*Ibid.* Art. 2/37).
[36]A deposit account refers to "an account maintained by a financial institution authorized to receive a deposit from the public" (*Ibid*, Art. 2/13).
[37]*Ibid.* Art. 2/22.
[38]*Ibid.* Art. 4/5 (a).
[39]Dubovec & Kambili, supra note 25, at 53.
[40]*Ibid.*
[41]*Ibid*.
[42]*Ibid.*
[43]Movable property Security Rights Proclamation, supra note 3, Art. 4/1.
[44]Supra, p. 6, Section 1.1, Para. 1.

right to encumber it.[45] This is because the creditor will not able to exercise his right through foreclosure or re-possession unless the debtor is an owner or has a right to transfer to third parties. Third, the debtor received some value (loan) from the creditor.[46] There is no security interest unless the debtor receives some gain or benefit from the creditor i.e. the security right is not enforceable until the creditor gave the debtor some value, be it a loan or else.

Thus, if all of these requirements of attachment are fulfilled, the security interest becomes enforceable. The creditor acquires an enforceable security right in collateral that can be exercised upon the default of the debtor.

1.3. The Perfection of Security Interest

The creation and attachment of security interest may not necessarily mean that the secured creditor is certain to enforce his right in the collateral upon the debtor's default. Rather, the secured creditor needs to proceed with further steps to perfect his right. Perfection of a security interest is the "process of putting the entire world on notice that the secured party claims a security interest in the debtor's collateral".[47] It is a means of making the security interest enforceable against third parties who have a competing claim in the same collateral.[48] The perfection of security interest protects the interests of secured creditors by excluding third parties, such as buyers and other creditors, from having a claim in the collateral. A secured creditor, to perfect his right, is required to put the world in a notice by different methods so that other potential creditors refrain from receiving such collaterals as security.[49] The methods of perfecting security interests vary depending on the nature of the property granted as collateral. In any case, there are four major methods of perfection of security interest recognized in different jurisdictions.[50]These are perfection through registration, possession, control, and automatic methods.[51] All of these methods of perfection are also incorporated under the Ethiopian Movable Property Security Rights Proclamation.

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[45]Movable property Security Rights Proclamation, supra note 3, Art. 4/1.
[46]*Ibid.* Art. 4/1.
[47]Jason Gordon, 'Perfection of a Security Interest', <https://thebusinessprofessor.com//lesson/perfection-of-a-security-interest/> accessed on April 28/2021.
[48]*Ibid.*
[49]Dubovec & Kambili, supra note 25, at 65.
[50]*Ibid*. p. 66-67.
[51]*Ibid*.

1.3.1. Perfection by Registration

Collaterals, especially tangible assets, are preferred to be perfected through filing before the concerned authority.[52] Registration of security interest enables other potential creditors to verify the existence of prior established security interest in the collateral that the debtor agrees to grant as security.[53] Potential creditors can assure this by searching the borrower's name from the records of the concerned authority.[54] The Ethiopian law also provides that the perfection of tangible assets must be through filing a notice in the collateral registry.[55] Of course, there is no collateral registry in Ethiopia so far. Though the proclamation requires that the collateral registry office to be established by the regulation, so far, there is no such office in the country.[56] However, when there is a collateral registry, it will have the purpose of receiving, storing, and making information to the society.[57] Perfection through registration is made by registering the name of the debtor[58], secured creditor,[59] and collateral[60] using their identification such as a serial number. Thus, other creditors can access the fact by using either of such elements of registration. Even our law adopts an online filing system, which is, of course, very absurd to practice in the current reality of the country.[61]

1.3.2. Perfection by Possession

The nature of some collateral requires the perfection of the security interest in such properties to be made by possession.[62] Collaterals such as promissory notes, a security certificate, or a warehouse receipt into its custody should be perfected through possession.[63] The Ethiopian Movable Security Right Proclamation also provides that collaterals such as money, negotiable instruments, negotiable documents, and certificated securities are categories of collaterals to be

[52]*Ibid.*, at 68.
[53]*Ibid.*
[54]Steve, Weise & Stephen, L. Sepinuck, 'Personal Property Secured Transactions', 4 the Business Lawyer 68, 1268 (2013).
[55]Movable property Security Rights Proclamation, supra note 3, Art. 13/1.
[56]*Ibid.* Art. 20.
[57]*Ibid*. Art. 21.
[58]*Ibid*. Art. 28.
[59]*Ibid*. Art. 29.
[60]*Ibid*. Art. 30.
[61]*Ibid*. Art. 24 ff.
[62]Dubovec & Kambili, supra note 25, at 72.
[63]*Ibid*.

perfected through possession.[64] The nature of these collaterals requires the creditor to possess the property itself so that he can exclude third parties from having a right in the collateral. In fact, possession may be used to perfect even security interests in tangible assets as an alternative to registration.[65]

1.3.3. Perfection by Control

Likewise, the nature of some other properties requires to be perfected by control. If the lender controls the collateral, it means that he can exercise his right on the default of the debtor without the permission of the latter.[66] According to the Ethiopian Movable Property Security Rights Proclamation, payment of funds credited to a deposit account and electronic securities can be perfected through control.[67] Deposit accounts could be controlled through three mechanisms. First, it can be controlled through the conclusion of a tri-party control agreement.[68] The secured creditor controls the account by reaching an agreement with the grantor and financial institution that the financial institution should follow the orders of the creditor for any transaction. "Third-party creditors that do not maintain bank accounts could effectively control a deposit account of the debtor by requiring a bank to establish a specific collateral bank account to which all proceeds shall be deposited and the withdrawals controlled by that secured party."[69] In such a case, the account is under the control of the creditor as every activity in that account is upon the creditor's instruction. Second, it can be also controlled through the creation of security interests in favor of financial institutions. If the security interest is created in favor of the financial institution, which maintains the account, that financial institution can easily control the deposit and withdrawal of money from that account.[70] Third, it can be also controlled when the secured creditor becomes the deposit account holder.[71] When the secured creditor is the account holder, he is the only person that can withdraw cash from his account. That means he is controlling his interest.

[64]Movable property Security Rights Proclamation, supra note 3, Art. 13/2. Possession could be either actual possession or constructive possession (*Ibid*. Art. 2/35).
[65]Dubovec & Kambili, supra note 25, at 72.
[66]Otabor-Olubor, supra note 8, at 160.
[67]Movable property Security Rights Proclamation, supra note 3, Art. 13/3.
[68]*Ibid*. Art. 17/2.
[69]Dubovec & Kambili, supra note 25, at 74.
[70]Movable property Security Rights Proclamation, supra note 3, Art. 17/1.
[71]*Ibid*. Art. 17/3.

Concerning electronic securities, it can be controlled in two ways. First, it can be controlled by entering into an agreement with the grantor and issuer that the issuer must follow the instruction given by the secured creditor for whatever transaction in the electronic securities.[72] Second, it can be also controlled by entering or noting the secured creditor's name or his right in the book maintained for recording the name of the security holder.[73]

1.3.4. Automatic Perfection

Automatic perfection refers to when the interest of the creditor has perfected without any further requirements i.e. perfection of security interest by the mere fact of the creation of security interest. Rights in proceeds and acquisition security rights are prominent examples of security interests that can be perfected automatically.[74] As it is stated under Ethiopian Movable Property Security Right Proclamation, a security right in an asset automatically extends to its proceeds.[75] A secured creditor who has a security interest in an asset will automatically have a security interest in the proceeds derived from that asset without additional perfection requirements. A proceed, here, refers to "whatever received from the collateral including from selling, licensing, insurance, fruits, claims arising from defects, damage or lose of the collateral and also proceeds of proceed."[76]

Similarly, if the interest of a person is secured by acquisition security right, his security interest will be perfected automatically. A right is said to be an acquisition right when "a security right in a corporeal asset or intellectual property, which secures the obligation to pay any unpaid portion of the purchase price of the asset or other credit extended to enable the grantor to acquire right in the asset to the extent the credit is used for that purpose."[77] This means when the creditor and borrower conclude a purchase-money agreement i.e. the loan is said to be a purchase price for the asset that the borrower plans to buy, an acquisition security right is created in favor of the lender. Through automatic perfection, the lender of money in the form of a purchase-price agreement will acquire a super-priority right even against interests perfected before such an

[72]*Ibid*. Art. 19/2.
[73]*Ibid*. Art. 19/1.
[74]Dubovec & Kambili, supra note 25, at 66 & 78
[75]Movable property Security Rights Proclamation, supra note 3, Art. 7/1.
[76]*Ibid*. Art. 2/36
[77]*Ibid.* Art. 2/2.

agreement.[78] In fact, to acquire this right, a creditor needs to meet some procedures provided by the proclamation.[79]

1.4.Priority among Creditors of Security Right

It is obvious that a secured creditor has a priority right in the collateral against unsecured creditors of the same debtor.[80] In some cases, however, a difficulty may arise to establish the order of creditors' interest when two or more creditors have a claim in the same asset of the same debtor.[81] This problem becomes worse when the debtor's asset is insufficient to pay the claims of all creditors. To address such a problem, most secured transaction legislations set priority rules to determine the rank of creditors.[82] Once a secured creditor gets priority right in the collateral, he can be paid fully before other subordinate creditors.[83]

The Ethiopian Movable Security Rights Proclamation also came up with detailed rules of priority among competing creditors of a debtor in the same collateral. Of course, the priority rules incorporated in the proclamation may differ depending on the type of the collateral and the aligned methods of perfecting the security right. In principle, when collateral is a tangible asset the ranks of the creditors are determined based on the time of registration in a collateral registry office.[84] The competition in the same corporeal asset needs to be settled based on the maxim "*[t]he first in time, the first in right*". (*Emphasis added*).[85] The proclamation, however, provides special means of determination of the rank of creditors when the collateral is intangible property. As regards deposit account and electronic securities, the one who is the holder of such property will have an overriding right.[86] Should the property is money, negotiable instruments, negotiable documents, or certificated securities, the person who has possession of such properties will be the winner in the competition of creditors. To know the detailed rules in the proclamation in respect to establishing the ranks for competing creditors, see the summary given below.

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[78]*Ibid*. Art.56.
[79]To know detail procedural requirements to get super-priority interest over acquisition security rights see Movable property Security Rights Proclamation, supra note 3, Art. 56.
[80] Jacksonm & Kronman, supra note 11, at 1161.
[81]*Ibid*. at 1162
[82]Dubovec & Kambili, supra note 25, at 83
[83]Douglas G. Baird, 'Priority Matters: Absolute Priority, Relative Priority and the Costs Of Bankruptcy', 165 University Of Pennsylvania Law Review4, 785 (2017), at. 786
[84]Movable property Security Rights Proclamation, supra note 3, Art.13/1 & art. 46/1.
[85]Jacksonm & Kronman, supra note 11, at 1161.
[86] Movable property Security Rights Proclamation, supra note 3, Art. 62/1 & 65/2.

Table 1. Summary of the Priority Rules of the Ethiopian Movable Property Security Rights Proclamation

Competing Creditors	Collateral Type	Overriding Creditor
Secured creditor Vs. Unsecured creditor	Any collateral type	Secured creditor (art. 45/1).
A creditor with perfected security interest Vs. A creditor with unperfected security interest	,,	A creditor with perfected security interest (art. 13).
A creditor with perfected security interest Vs. A creditor with perfected security interest	,,	A creditor that registers the interest first, possesses or controls the collateral depending on the type of the collateral (art. 13 & 46).
Secured creditor Vs. Buyer, licensee, or lease of the collateral	,,	Secured creditor unless the secured creditor authorizes the sale or transfer of the asset free of security right or the transaction is made in the ordinary business course of the seller and the transferee doesn't know that the transfer violates creditor's right (art.54).
A creditor whose interest is secured by collateral before commingling with other good Vs. A Creditor whose interest is secured by collateral after commingling with other good	Tangible properties	A creditor whose interest is secured with collateral before commingling with other good (art. 52/1).
A creditor whose interest is secured by collateral before commingling with other good Vs. A creditor whose interest is secured by collateral before commingling with other good	,,	All creditors are entitled to proportionate to the value of their respective collaterals before commingling (art. 52/2).
A creditor whose interest is secured by acquisition security right Vs. A creditor whose interest is secured by non-acquisition security right	IP rights Equipment Consumer goods	Acquisition creditor provided he is in possession of the collateral (art. 56/1(a)) or registered within seven days from the date of acquisition (56/1(b).

	Inventory	A creditor in possession of the collateral (art.56/2(a), or registered the interest before the grantor obtains possession of the property and gives notice of the existence of acquisition right for the no-acquisition creditor (56/2 (b & c)).
A creditor whose interest is secured by acquisition right Vs. A creditor whose interest is secured by acquisition right	All types of collateral	An acquisition creditor who is first in registering the interest, possesses or controls the collateral unless the acquisition right holder is the seller, lessor or licensor (art. 57).
Secured creditor Vs. Transferee	Negotiable instrument	Transferee provided he is a holder in due course and took the possession with value without the knowledge that the sale violates the creditor's right (art. 61/2).
A creditor whose security right is secured by registration Vs. A creditor whose security right is secured by possession	Negotiable instruments	A creditor whose security right is secured by possession (art. 61/1).
A creditor with unperfected security interest Vs. A creditor with unperfected security interest	Any type of property	The proclamation is silent. Hence, it is open for argument whether the rights of competing creditors' rights should be ranked based on the date of registration of the interest, or proportionately to their right.
A creditor whose security right is perfected through becoming an account holder Vs. A creditor whose securest right is perfected through other methods	Deposit account	A creditor whose security right is perfected through becoming an account holder (art. 62/1).
Financial institution creditor with perfected security right Vs. Non-financial institution creditor with perfected right	Deposit account	Financial institution creditor with perfected security right unless the non-financial creditor is an account holder (art. 62/2).
A creditor whose security right is perfected by control agreement Vs. A creditor whose right is perfected by other methods	Deposit account	A creditor whose security right is perfected by a control agreement the creditor is a financial institution or an account holder (art. 62/3).
A creditor whose security right is perfected by concluding control agreement Vs. A creditor whose right is perfected by concluding control agreement	Deposit account	The first in concluding the control agreement prevails (art. 62/4).
Financial institution's set off right Vs. Secured creditor right	Deposit account	Financial institution's set off right unless the secured creditor is the

		account holder (art. 62/5).
Transferee Vs. Secured creditor	Deposit account	Transferee unless he knows the transfer violates the rights of the secured creditor (art. 62/6).
Transferee Vs. Secured creditor	Money	Transferee unless he knows the transfer violates the rights of the secured party (art. 63).
A creditor whose security right is perfected by possession of negotiable document Vs. A creditor whose right is secured by other methods	Negotiable document	A creditor whose right is perfected by possession of the negotiable document (art. 64/1).
A Transferee who possesses the document Vs. A secured creditors	Negotiable document	Transferee unless he knows the transfer violates the rights of the secured party (art. 64/2).
A creditor whose interest is perfected by possession Vs. A creditor whose interest is perfected by registration	Certificated Securities	A creditor whose interest is perfected by possession prevails (art. 65/1).
A creditor whose security interest is perfected by notation/registration the name of the secured creditor in the record book Vs. A creditor whose interest is secured by other methods	Electronic security	A creditor whose interest is perfected by notation/registration the name of the secured creditor in the record book prevails (art. 65/2).
A creditor whose security interest is perfected by the conclusion of control agreement Vs. A creditor whose interest is secured by registration	Electronic security	A creditor whose interest is perfected by a control agreement (art. 65/3).
A creditor whose security interest is perfected by concluding control agreement Vs. A creditor whose security interest is perfected by concluding control agreement	Electronic security	The first in concluding the control agreement prevails (art. 65/4).
A transferee who possesses the security Vs. secured creditors	Electronic security and Certificated Securities	Transferee unless he knows the transfer violates the rights of the secured party (art. 65/5).

1.5.Enforcement of Security Rights

Though the debtor has a contractual obligation to pay back the loan, he may fail to do so due to different reasons and, then, it can be said that there is a default of the debtor. If there is a default, the secured creditor has an option to receive his money through "recours[ing] to the collateral of the debtor."[87] Under the Ethiopian Movable Property Security Rights Proclamation, a secured

[87]Dubovec & Kambili, supra note 25, at 83.

creditor has three major alternatives of enforcement provided there is a default of the debtor. These are enforcement through the foreclosure system[88], repossession[89] and judicial help[90]. Though the proclamation does not use the term 'foreclosure' exactly, it entitles the secured creditor to sell or otherwise dispose of the collateral without demanding the judgment of a court.[91] The secured creditor, however, needs to give a ten days' notice to the grantor or any other person who possesses or has a right in the property.[92] He shall notify the debtor of his intention of disposition. By doing so, the secured creditor may sell the property through public auction following the rule of public auction under the civil procedure code of Ethiopia.[93] Enforcing the right through foreclosure helps to avoid the prolonged court process.[94]

Execution of security rights through self-help/repossession means taking possession of the thing and using it for personal purposes without court proceedings. As it is given under the proclamation, the secured creditor can enforce his right through possession provided there is either (1) agreement to repossess in the security agreement[95] or (2) the grantor or any other person who possesses the property does not object in the attempt of repossession by the secured creditor.[96]The other alternative to the enforcement of security rights is through court proceedings. This is calming payment from the defaulting debtor through a judicial process. A secured creditor can claim his right by instituting court action against the debtor. This alternative is, in fact, tiresome and costly since it takes an extended period. Consequently, it is not recommended unless the other alternatives are absent or failed to solve the dispute.

[88]Movable property Security Rights Proclamation, supra note 3, Art. 82 & 83.
[89]*Ibid*. Art. 81.
[90]*Ibid*. Art. 77.
[91]*Ibid.* Art. 82.
[92]*Ibid*. Art. 83/1.
[93]*Ibid*. Art. 82 (3 &4).
[94]Tihitina Ayalew, *Legal Problems in Realizing Non-Performing Loans of Banks in Ethiopia*, Addis Ababa University school of law, LLM thesis, (2009), at 54
[95]Movable property Security Rights Proclamation, supra note 3, Art. 81/1(a).
[96]*Ibid.* Art. 81 1 (b).

2. Problems for Using Farm Products as a Collateral under the Proclamation

2.1. Description of Farming Product in Perfecting Security Interest

As discussed in the first part of this paper, a secured creditor needs to perfect his security interest to have perfect security rights.[97] Otherwise, his security right will be subordinate to the security right of another third-party creditor who has a security interest in the same collateral and debtor. As well, a creditor whose security interest is secured by farming products shall perfect his interest. As farming products are tangible properties, the lender has two alternative methods of perfection. It can be done either through possession of the collateral or registration of the interest in the collateral registry. However, perfecting security interest in farming products through possession, in most cases, is problematic. This is because, on the one hand, if the lender possesses the collateralized farming product, it will result in the dispossession of the borrower. Dispossession, in turn, inhibits him from using the collateral, which may discourage borrowers to use their farming products as collateral. Of course, farming products kept in a warehouse can be perfected through possessing the warehouse receipt without which the borrower cannot sell such warehoused goods. In such a case, it is straightforward to perfect interests in farming products stored in a warehouse. On the other hand, the nature of some farming products does not permit perfection through possession. It is impossible, for example, to possess crops growing or to be grown and unborn livestock. Especially, it is ridiculous for a financial institution to take possession of farming products. It is unthinkable, for example, for a bank to possess a camel or cow until the settlement of the debt. Hence, except for products stored in a warehouse, the interest of a creditor is better to be perfected through registration.

Yet, perfecting the a security interest in farming products through registration is not flawless. As it is specified under the proclamation, during the registration of security interest in the collateral registry, the collateral shall be described in "*a manner that reasonably allows their identification" (emphasis added).*[98] This requirement is set to inform other creditors about the preexisting security interest easily through online searching. Besides, the NBE directive on Codification, Valuation, and Registration of Movable Properties as Collateral for Credit indicates some manners of describing the farming products in a collateral registry. Concerning livestock

[97] Supra, p. 9, Section 1.3, Para. 1.

[98] Movable property Security Rights Proclamation, supra note 3, Art. 30/1.

collateral, it requires that the registration to describe the livestock using the ear tag number of the livestock, which is codified and supplied by the ministry of agriculture or its authorized distributors.[99] Nevertheless, this method of description is not sufficient to allow the identification of the collateral by other potential lenders. First, it is very challenging to supply a plastic ear tag number for livestock in remote areas. It is also hardly possible to describe future animal collaterals using ear tag number. It is very tricky to describe reasonably, for example, the unborn animal in perfecting the interest in the collateral. It is also too difficult to describe reasonably the bee and poultry collateral.

Second, though the directive requires any livestock collateral to be codified by the plastic ear tag number, it is uncertain that the ear tag number will keep on the ear of the livestock until the settlement of the credit. It may be damaged, cut-off or the owner of the livestock may intentionally detach the plastic ear tag after he receives the loan. This could deny potential lenders to verify the existence of security interest on the livestock. In fact, the directive tries to minimize such problems by requiring the grantor to report whenever the ear tag is damaged, lost or detached which, otherwise, results in the early settlement of the credit or possession of the livestock by the secured creditor.[100] However, this works only when there is close supervision of the collateral by the secured creditor. In the Ethiopian case, it is difficult that lenders would make close supervision of the livestock collateral in remote areas. Therefore, it is very challenging to inform other potential creditors by describing livestock in the collateral registry using the plastic ear tag number.

For the same reason, it is very hard to describe crops in a way that reasonably allows their identification. Like the case of livestock, the directive on codification, valuation, and registration of movable properties as collateral for credit provides the manner of describing the crop. Crop collateral is required to be described using the tax identification number of the owner, the unique parcel identification number of the landholding certificate of the person who offered it as collateral for the credit; the type of crop being pledged, the expected maximum output and the maximum output to be pledged for credit.[101] Looking the practice in other jurisdictions, for

[99] National Bank of Ethiopia, Codification, Valuation, and Registration of Movable Properties as Collateral for Credit, Directive No. 186/2020, art. 5.3
[100] *Ibid*. art. 5.6.4
[101] *Ibid*. art. 6.3

example, in the USA, "indicating the name of the owner of the land, approximate number of acres, the [state] the land is in, popular name, [and] the appropriate distance from a named town or well-known landmark" is sufficient to notify other creditors who will look for such information.[102] However, in Ethiopia, it is very tough for those lenders who reside in town to go to remote rural areas and try to get such information regarding the crop since the country lacks an infrastructure to do so. It is very challenging that a bank, for example, to send its loan officers too far distance in the rural areas (with poor infrastructure) to observe whether the said crop exists, to identify the type of crop harvested, asses the maximum amount from the collateralized crop, its distances from the town, to measure the land's acre and other related specifications. Thus, description of crop collateral is not easy if the crop is being harvested in remote areas.

Of course, the description can be made using wide-ranging expressions such as 'all existing and future animals' or 'all existing and future crops'. Such description in the collateral registry will adequately inform other prospective creditors of the debtor at least by looking the name of the debtor in the registry. From the perspective of the secured creditor, it is the best advisable means of describing farming products in general terms. Because the security interest is extended to all the existing and future animals or all the existing and future crops, the secured creditor will have an overriding interest in such general assets of the borrower in case he defaults. Nevertheless, such kind of transaction affects the interests of farmers adversely. Once a farmer grants all his animals or crops to secure his loan, he will not have any property left to be used as collateral if he needs an additional loan. The farmer will benefit should the collateral is a specific farming product saving the challenges in the description. Thus, it is very challenging to use specific farming products, other than warehoused goods, as a security to get a loan from lenders. The farmer can get a loan only if he grants all his crop products and/or animals as security and the location of such properties is near to a town. Except this, farming products secured credit will not be fully pragmatic as much as the new movable property security right proclamation intends.

2.2. Competition between Secured Creditors and Potential Buyers

It is obvious that a farmer to trade with his farming products to generate an income for different purposes. He may sell, for example, a farming product granted as collateral for the loan he has

[102]Keith G. Meyer, 'The 9-307(1) Farm Products Puzzle: Its Parts and Its Future', North Dakota Law Review 60, 417 (1984).

borrowed from the lender for celebrating his child's wedding. In such a case, an important concern may arise. That is, what would be the fate of the secured creditor whose interest is perfected before the sale? Alternatively, should a buyer take that farming product free from any security interest or prior claim?

Regarding this issue, there are two lines of scholarly proposed arguments. Some scholars argue that buyers of a collaterally given farming product shall be allowed to take it free from any claims of secured creditors.[103] To substantiate their argument, they put forward the following reasons. First, they argue that unless buyers of farming products are allowed to take such goods free from prior interests, it will destruct the commercial expectation of good faith buyers.[104] Second, as the interests of the secured party extended to proceeds, the creditor can claim his interest over the proceeds of the product sold, rather than calming back from the buyer.[105] Third, since, in most cases, farmers need to sell their farming products to pay their debt, buyers must be allowed to take them free so that borrowers can sell their products.

In contrast, some others argue that buyers of farming products shall not be allowed to take free from secured creditor's claims. In justifying this, first, they argue that, usually, buyers of farming products are "high-level" buyers who are expected to have an experience of searching the existence of security interest over the product.[106] Through searching prior records, buyers can inspect the existence of secured creditors. Second, should there be permission for buyers to take such products free of encumbrance; the interests of lenders will be affected.[107] Hence, they must not be permitted to take free from claims of secured creditors.

In respect to this issue, the Uniform Commercial Code (UCC) of the USA passed two stages. The 1962 and 1972 text of U.C.C. provides under section 9-3079(1) that "ordinary course buyers of farm products (crops or livestock) cannot take free from a prior perfected security interest covering the farm product."[108] In U.C.C, the phrase 'ordinary course of business is defined as a person that "buys goods in good faith, without knowledge that the sale violates the rights of

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[103]*Ibid*. 434.
[104]Barkley Clar, 'Secured Transactions', 4 the Business Lawyer 42, 1335 (1987).
[105]*Ibid.*
[106]Meyer, supra note 97, at 434.
[107]*Ibid.* 435.
[108]Clar, supra notes 99, at 1334-1335.

another party to goods."[109] The main justification for this rule was to encourage lenders to lend to the agricultural sector.[110] However, because of the pressures of buyers of agricultural products, section 9-307 (1) of UC.C. was amended by the 1985 Federal Food Act of the USA and the amendment provides the following provision.[111]

> *[N]otwithstanding of any other provision of federal, state or local law, a buyer who is in the ordinary course of businesses buys a farm product from a seller engaging in farming operations shall take free of a security interest created by the seller, even though the security interest is perfected; and the buyer knows of the existence of such interest.[112]*

Thus, currently, according to the 1985 Federal Food Act, a buyer can take the farming product free of a perfected security interest provided he buys in the 'ordinary course of business' regardless of his knowledge about the existence of security interest. It shifts the risks from buyers to lenders.[113] Of course, this act does not neglect the interests of the lenders. The buyer takes the product subject to the security interest provided he receives written notice from the lender or seller within one year before the sale; the lender has filed its security interest in the central filing system; or the buyer failed to be registered in the central filing office before he purchases due to which the lender unable to notify its interest to potential buyers.[114] Generally, the current stand of the USA is that though buyers of farm products in the ordinary course of business can take free from the security interest created over the product, the buyer takes the product subject to security interest provided either of the aforementioned condition is fulfilled.

Unlike the USA, under the new movable security right law of Ethiopia, there is no an exception of 'ordinary course of business' when the grantor sells the collateralized farming product. The secured creditor has always an absolute priority right against any buyer of the farming product. The directive on Codification, Valuation and Registration of Movable Properties as Collateral for

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[109]Uniform Commercial Code, section 1-201(9), (1978).
[110]Daniel P Johnson, 'Federal Legislation Provides Protection for Buyers of Farm Products: Food Security Act Supersedes the Farm Products Exception of UCC Section 9-307(1)', 47 U Pitt L Rev 749, 752(1986).
[111]Clar, supra note 99, at 1336.
[112]*Ibid*. 1336.
[113]Keith G. Meyer, 'A Garden Variety of UCC Issues Dealing with Agriculture', 58 U Kan L Rev 1119, 1152(2010).
[114]Keith G. Meyer, 'Current Article 9 Issues and Agricultural Credit', 10 Drake J Agric L 105, 128 (2005) (see on the footnote).

Credit makes the sale of a pledged farmed product without the consent of the secured creditor an offence and *requires the product sold to be transferred to the secured creditor (emphasis added).*[115] This directive disregards the impact of such prohibition on the marketability of farming products. Unless buyers of farm products are allowed to take the product free of encumbrance, they may not prefer to buy such products. This is a hurdle for the commerciality of collateralized farming products. Consequently, farmers will not be able to sell their property even to get money to repay their debt. This will drain the capacity of the borrower to repay the credit he has taken from the secured creditor.

Since buyers are not permitted to take free of security interests, they are obliged to make an online search to check whether the product is covered by the preexisting security interest. This is impossible with the current reality of Ethiopia. The existing infrastructure does not allow every potential buyer to do so. There is no networks to search for and electric powers to recharge our electronic devices in every part of the country to search for it online. Therefore, it is very difficult to assume that potential buyers will be informed through public search in the collateral registry site. Even it is very challenging to give notification to the potential buyers of farming products like the case in USA, as there is no practice of registering potential buyers in a centralized registry system. Even potential buyers of such products may be illiterate ones. They may not know, for example, how the search in the collateral registry can be made. In fact, the free-taking of the collateralized farming product discourages lenders to accept agricultural products as collateral as well. If buyers are allowed to take free of encumbrance, it may result in loss of security right of secured creditor provided the borrower defaults. Yet, the lender has another opportunity i.e. to claim payment from the proceeds of the product sold as his interest extends to proceeds too.[116] The creditor can claim, for example, its money from the income that the borrower received because of the sale. Of course, it may be difficult to identify and claim the money collected from the sale, as it may be mingled with other bank deposits.[117] Even so, the law should allow, at least, buyers of the farming products in the ordinary course of business to

[115] National Bank of Ethiopia, Codification, Valuation and Registration of Movable Properties as Collateral for Credit, Directive No. 186/2020, art. 5.6.6 and art. 6.4.4.
[116]Movable property Security Rights Proclamation, supra note 3, Art. 7.
[117]Henry Deeb Gabriel, 'The New Zealand Personal Property Securities Act: A Comparison with the North American Model for Personal Property Security', *34* The International Lawyer4, 1123(2000), at 1128.

take free of encumbrance. Otherwise, it will destruct the normal business transaction in farming products.

2.3. Risks or Catastrophes Associated with Farming Products and its Impact on Farming Product Secured Transaction

The agricultural sector in Ethiopia has suffered many catastrophes so far. We have witnessed that this sector has been a victim of different catastrophes at different times.[118] It has been a victim of serious drought and floods.[119]"The country has long history of recurring droughts, which have increased in magnitude, frequency, and impact since the 1970s."[120] Because of such droughts, farmers have been losing their crop and livestock productions.[121] Besides, in some cases, their livestock becomes a victim of livestock diseases.[122] As a study shows, livestock in Ethiopia is experiencing a severe livestock disease that surges from time to time.[123] This shows that agricultural products are highly exposed to risk or natural catastrophes.

Because of this, lenders need to protect their interest in requiring borrowers (smallholder farmers) to buy an insurance policy for such collaterals, and it is called borrower-placed collateral insurance.[124] If the borrower buys an insurance policy for farming product collateral, the interest of the creditors on the collateral is secured. In such a case, the lender can proceed against the insurance company provided the collateral is damaged or lost. However, the borrower may not buy insurance for the collateral. In such a case, the lender may buy an insurance policy for the collateral, and we call this lender/creditor-placed insurance, collateral protection

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[118]Temesgen Tadesse Deressa, *Assessment of the vulnerability of Ethiopian agriculture to climate change and farmers' adaptation strategies,* PhD Thesis, Faculty of Natural and Agricultural Sciences, University of Pretoria, (2010), at 18
[119]*Ibid*.
[120]The World Bank Group, 'Climate Risk Profile: Ethiopia', (2020), at 10.
[121]*Ibid* at 11 &12.
[122]The Association of Ethiopian Microfinance Institutions (AMFI), 'The Potential for High-Value Livestock Indemnity Insurance in Ethiopia's Oromia Region', 41-42 (2010).
[123]*Ibid.*
[124]Jennifer Ifftetal, 'Farm Debt Use by Farms with Crop Insurance' (2013) 28 (3)The magazine of food, farm, and resource issues', <http://www.choicesmagazine.org/choices-magazine/theme-articles/current-issues-in-risk-management-and-us-agricultural-policy/farm-debt-use-by-farms-with-crop-insurance>last accessed on December 20, 2019.

insurance, or forced-placed insurance.[125] Lender-placed insurance means "a policy that is ultimately meant to protect the lender from uninsured losses and will not typically provide coverage for the borrower's personal property."[126] By using force-placed collateral insurance, the lender secures its interest over the collateral for the event that the collateralized property is damaged or lost.[127] Of course, even in lender-placed insurance, the ultimate cost rests upon the borrower, as the lender will add it to the loan. Lender-placed collateral insurance is costly compared with borrowers-placed insurance.[128] Hence, ensuring the collateral through a lender-placed insurance system exposes the borrower to a higher premium cost.

As the previous studies show though farmers in Ethiopia are willing to insure their agricultural products, their income level becomes a restraint.[129] The practice shows that farmers are reluctant to buy a collateral insurance policy since their income does not allow them to pay the premium. For example, research conducted in Tigray Regional State shows that the interests of a farmer to pay weather index insurance premium decreased while there is a decrease of subsidies in the premium payment.[130] According to this study, farmers insist on insuring their agricultural products without subsidies.[131] This shows that farmers cannot afford to pay the insurance premium by themselves. The effect is that the farmer will not get access to credit unless there is some subsidy to buy collateral insurance.

Besides, previous studies show that the reality of the country is not conducive enough for insurance companies to provide insurance services for smallholder farmers. There is no updated and accurate data in the country for assessing the potential risks in the property to be insured.[132] For example, the National Metrological Agency does not publicize the weather index data in the country timely and accurately.[133] Because of this, insurance companies cannot able to assess the

[125]First Service Corporation, 'Lender-Placed Insurance', <http://www.fscinsurance.com/lender-placed-insurance> last accessed on December 23 2019.
[126]*Ibid.*
[127]*Ibid.*
[128]Julia Kagan, 'Force Place Insurance', <https://www.investopedia.com/terms/f/forced-place-insurance.asp>last accessed on December 23, 2019.
[129]A. Wong, 'Weather insurance for Ethiopian farmers',<https://includeplatform.net/publications/final-findings-weather-insurance-for-ethiopian-farmers/>last accessed on December 24, 2019.
[130]*Ibid.*
[131]*Ibid.*
[132]Eyob Miherette, "Providing weather index and indemnity insurance in Ethiopia", <https://agroinsurance.com/en/10839/>last accessed on December 25, 2019.
[133]*Ibid.*

imaginable risks of weather insurance to provide weather index insurance to smallholder farmers.[134] Besides, studies show that insurance companies even hesitate to implement agricultural insurances fearing the losses since agricultural insurance is the riskiest one.[135] Moreover, as farmers are residing in rural areas that lack adequate infrastructures, it is difficult for insurance companies to assess the potential risks attached to the property insured and to supervise the insured property. Generally, the existence of high risks associated with farming products, the inability of farmers to pay a collateral insurance premium, and the challenges to insurance companies to provide the service are prospective barriers to a farmer getting funds from lenders using farming products collateral.

Concluding Remarks

In August 2019, Ethiopia passed a new proclamation on movable property security rights that bring wide-ranging rules on security rights in movable properties. This Proclamation broadens the type of movable properties that can be granted as collateral. Farming products are properties, among others, that the proclamation lists as property to be given as collateral. A person can use farming products including but not limited to crop grown, growing or to be grown, forest, timber, and other wood products, livestock, born or unborn, bees and poultry, and the produce and progeny thereof, supplies used in the farming operation, or products of livestock in their unmanufactured states as collateral to secure the interests of a creditor. The main reason for expressly allowing using the farming products as collateral is to enable farmers to access credit easily.

Though the proclamation intends to increase access to finance for farmers, this paper argues that farming product secured transactions will face some challenges to be practiced as much as the proclamation intends. This is because, first, most farming product collaterals, other than products stored in a warehouse, are not conducive to perfect the interests of secured creditors. To inform other potential creditors adequately, the farming product collateral in which a security interest is created shall be described in ‘a manner that reasonably allows their identification.’ For example, according to the NBE directive on codification, valuation, and registration of movable property

[134] *Ibid.*
[135] Nahu Senaye, ‘Weather Insurance for Farmers: Experiences from Ethiopia’, Conference on New Directions for Smallholder Agriculture, Rome, 12 (2011).

collaterals, livestock collateral is required to be described using the plastic tag number supplied by the Ministry of Agriculture. However, the ear tag number is not adequate to inform other potential creditors as it may be damaged; cut-off, or intentionally detached by the owner. To avoid this problem, it is better to create a security interest over all livestock of the debtor or, at least, in a specific category of livestock. If the collateral is a crop, it is required to be described using the tax identification number of the owner, the unique parcel identification number of the landholding certificate of the person who offered it as collateral for the credit; the type of crop being pledged, the expected maximum output and the maximum output to be pledged for credit. Nevertheless, it is difficult to describe crops since most crops are located in remote areas. Loan officers may not be able to go by foot a long distance for getting information for description. An improvement of infrastructures shall be made in the rural areas in order to put into action the crop collateralized secured credit in the country.

Second, the total prohibition of grantors to sell the collateralized farming product destructs the marketability of the product in the market. Potential buyers would be discouraged to buy farming products fearing the claim of secured creditors. The law does not even favor those buyers who buy the collateral 'in the ordinary course of the seller's business and without the knowledge that the selling of the collateral violates the lender's interest. Rationally, this restricts the marketability of the farming products as buyers are always at risk for their right in the farming product is subordinate to the secured creditor's right even when they buy the product in the ordinary course of the seller's business. Therefore, in order to avoid these problems, the NBE directive needs to provide an exception to the priority right of secured creditors. Exceptionally, it should make the rights of secured creditor subordinate to the buyer of the farming product in the ordinary course of the seller's business. This facilitates transactions in farming products.

Third, the farming product secured transaction is impracticable due to risks or catastrophes associated with farming products. Farming products in Ethiopia are exposed to catastrophes or risks. They may be a victim of drought, flood, or other natural or synthetic risks. In such cases, the farmer will lose the collateralized farming products, which, in turn, result in the loss of the right to the lender, in case there is a default of the debtor. This problem, of course, can be minimized by insuring the collateral. Nevertheless, the problem in insuring the collateral is that it increases the cost of a loan to borrowers. A farmer may not afford to pay an insurance policy

premium. Most of the Ethiopian farmers are farming in a subsistence way. Therefore, expecting them to cover the collateral with an insurance policy would be absurd. They apply for a loan because of the scarcity of capital to fund their agriculture. They would not apply for a loan, had they had a fund to purchase an insurance premium. Actually, lenders can buy an insurance policy for the collateral through a forced or lender-placed insurance system. Yet, the farmer assumes the cost by adding on the loan. Even, it is challenging to insurance companies to provide insurance services for remotely located farming products as it is challenging to evaluate and monitor potential risks and supervise the insured property.

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