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# 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 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 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 and Jimma Zone 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 skill before they graduate.

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# Internally Displaced Persons in Africa: A Glimpse View of the Protections Accorded in the Kampala Convention

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**Abstract**

Internal displacement is one of the most pressing problems throughout the world. There is an influx of displaced persons within the borders of their own countries as a result of armed conflict, internal strife, serious violations of human rights, natural disasters and the like. Uprooted from their homes, separated from family and community support networks, and shorn of their resource base, internally displaced persons suddenly find themselves stripped of their most basic means of security and survival. Compounding their plight, displacement exposes its victims to additional vulnerabilities and risks. Despite these, internally displaced persons did not receive proper attention at the international level. However, the same cannot be said at the regional level, specifically for Africa. Africa has been at the forefront in developing binding legal instruments on internal displacement, the 2009 Kampala Convention. This article thus considers whether the move of African States with regard to internally displaced persons is sufficient to bring the intended result. It tries to examine the legal protections granted for internally displaced persons in the Kampala Convention. It argues that though the convention provides legal protection to internally displaced persons, the limitations in the formulation of the rights and the enforcement mechanism chosen has weakened its protection.

**KEYWORDS:** African States; Binding legal instrument; Internal displacement; Internally displaced persons; Kampala Convention; Legal protection

## 1. Introduction

Internal displacement, which may be resulted from armed conflicts, internal strife, serious violations of human rights, national calamities and other reasons, is one of the pressing problems in many jurisdictions. Persons who flee from their homes suffer a lot of problems including

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armed attack, physical assault, sexual violence, forced conscription and shortage of adequate food, water, shelter and medical care and other terrible situations.[1] Thousands are displaced every year by armed conflict, disasters and environmental hazards, and large-scale development projects.[2] Therefore, the problems facing IDPs are as grave as those facing refugees.

Despite such facts, IDPs have not received appropriate attention in the protection of their interests at the international level. Besides, though most IDPs share similar factual circumstances with refugees, the international legal regime for the protection of refugees is not readily adaptable to their situation due to sovereignty reasons.[3] They have been given scant attention and thus suffering a lot. This absence of a binding legal instrument and institutional framework that specifically address the needs of the internally displaced persons, as it can be understood from the preamble of the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (hereinafter the 'Kampala Convention'), has initiated the African Union to adopt a convention for alleviating the sufferings of the IDPs and provide them better protection. Africa has thus taken a pioneering role in the promulgation of binding regional treaty for the protection of IDPs.[4] The Kampala Convention, which was adopted on 23 October 2009 and came into force on 6 December 2012, is the first continent-wide regional treaty governing internal displacement in Africa. The promulgation of the Convention involved a process of drafting that commenced in 2004 and culminated in the first ever dedicated African Union Assembly on forced displacement held in Kampala, Uganda between 19 and 23 October 2009.[5] The adoption of the Kampala Convention was a significant milestone in the evolution of the normative framework with respect to the protection of and assistance to IDPs in Africa. It adopts a very comprehensive approach where all causes and phases of displacement are addressed. It covers protection from displacement, protection during displacement, protection after displacement. The

[1] Erin D. Mooney, 'Towards a Protection Regime for Internally Displaced Persons' in Edward Newman and Joanne van Selm (eds), *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (United Nations University Press, 2003) 159.
[2] Brookings-Bern Project on Internal Displacement, *Protecting Internally Displaced Persons: A Manual for Law and Policymakers* (2008), 46 47<https://www.brookings.edu/wp-content/uploads/2016/06/10_internal_displacement_manual.pdf > accessed 24 February 2017.
[3] Won Kidane, 'Managing Forced Displacement by Law in Africa: The Role of the New African Union IDPs Convention' (2011) 44 Vanderbilt Journal of Transnational Law 1, 5.
[4] Allehone Mulugeta Abebe, '*Special Rapporteurs as Law Makers: the Developments and Evolution of the Normative Framework for Protecting and Assisting Internally Displaced Persons*' (2011) 15 The International Journal of Human Rights 2, 294.
[5] Ibid, 295.

Convention further recognizes the applicability of other human rights law and humanitarian law as an important legal framework for the protection and promotion of the rights of IDPs.

The first section of this article discusses some of the developments which led to the adoption of the Kampala Convention. The following section explains the characteristics relevant for identifying who IDPs are as implied in the Convention. Then the article deals the rationales for the need of separate legal framework for IDPs in Africa. The level of protection of IDPs in the Kampala Convention is addressed in the fourth section. In dealing with the level of protection the article did not focus on the specific rights included in the convention. It instead discussed the formulation of the rights as it is essential to assess the level of protection. The relationship of Kampala convention with the African Charter on Human and Peoples' Rights (hereinafter the 'African Charter') and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (hereinafter the 'OAU Refugee Convention') is discussed in the fifth section. The sixth section discusses the enforcement mechanisms of the convention; and the seventh section examines the implication of the convention to the signatory States. Finally, this article ends with conclusion and a couple of recommendations.

## 2. Who are Internally Displaced Persons?

At the international level, there is no legally binding instrument that addresses the question of 'who are the internally displaced persons?' However, at the regional level, the Kampala Convention defines IDPs in the following manner:

> IDPs are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.[6]

[6] African Union Convention for the Protection and Assistance of IDPs in Africa (Kampala Convention), 23/10/2009, Article 1 (k). This definition is directly taken from the 1998 UN Guiding Principles on Internal Displacement. On this point see UN Guiding Principles on Internal Displacement (hereinafter the 'Guiding Principles'), 1998, Introduction part, Para. 2.

This definition contains two decisive conditions that should be fulfilled for considering persons as IDPs; namely: the involuntary nature of the displacement and the displacement should not involve border crossing. These conditions are discussed in some detail in the following sub-sections.

### *2.1. Involuntary Nature of the Displacement*

The first condition is the persons must be forced to leave their homes or place of residence. This requirement indicates the involuntary or coercive nature of the movement. That is, the persons fleeing their homes or places of habitual residence must be compelled by external forces that are beyond their control. Hence, it excludes voluntary evacuation of individuals from the ambit of IDPs. In order to show the involuntary nature of the movement, the definitional article of the Kampala Convention includes causes that results for displacement. Accordingly, armed conflict, violence, human rights violations, and disasters are identified as the possible causes of displacement. As can be understood from the definition, these causes may not necessary happen at the time of displacement. The phrase '…in order to avoid the effects of…' employed in the definitional article implies that the happening of the causes is not required. What is required is the legitimate expectation of their happening.[7]

Here, a question as to the exhaustiveness of the lists may be raised; because having regard to the conjunction 'or' used to make connections between the causes of displacement and the absence of a phrase like 'other causes' at the end of the lists, one may argue that the definitional article is not formulated in an open-ended manner. When rules are not formulated in an open-ended manner, unless we follow purposive rule of interpretation[8], it is difficult to include other possible factors that might oblige individuals to flee their homes or places of habitual residence. For instance, although there is very little information on the number of Africans displaced by

[7] Internal Displacement Monitoring Centre, *Training on the Protection of IDPs, Who is an Internally Displaced Person?* 1 < http://idp-key-resources.org/documents/0000/d04393/000.pdf > accessed 24 February 2017.

[8] This rule of interpretation allows for the inclusion of unidentified but related lists (implied causes of internal displacement), provided that such construction enables for the achievement of the intended objective of the convention. On this point see Vienna Convention on the Law of Treaties, 1969.

development projects, it is the recurrent event in Africa.[9] In such situations, if we apply the plain meaning rule of interpretation,[10] it is hardly possible to consider the persons fleeing their homes or places of habitual residence due to development projects as IDPs; because the IDP definition in the Kampala Convention does not specifically mention development projects as a possible cause of displacement.

However, such kind of construction is misleading for various reasons. To begin with, the phrase "in particular" used in the definitional article to introduce the listed examples of causes of displacement indicates the non-exhaustiveness of the lists and their illustrative nature.

Besides, one may also argue that development projects, such as the construction of hydroelectric dams, which leave communities without adequate resettlement and compensation, are a human-made disaster and a human rights violation.[11] Hence, since human-made disaster and human rights violations are among the specifically listed causes of displacement under the Kampala Convention, those displaced as a result of development projects fall within the definition of IDPs in the Kampala Convention. However, the argument that equates development projects as human-made disaster and human rights violations seems odd. Firstly, as noted by Walter Kälin, one of the drafters of the Guiding Principles, development projects have significant contribution in the realization of human rights.[12] Secondly, development is a right in itself to which all people should have access. In fact, it is a right that has got legal recognition both at the international[13] and regional[14] level as well as at the domestic level[15]. Nevertheless, it is equally odd to consider

[9] Elizabeth Ferris, *Internal Displacement in Africa: An Overview of Trends and opportunities* (Presentation at the Ethiopian Community Development Council Annual Conference "African Refugee and Immigrant Lives: Conflict, Consequences, and Contributions, May 2-4, 2012) 5.

[10] This rule of interpretation advocates for the consideration of the common, unspecialized meaning of the words used in the law.

[11] Internal Displacement Monitoring Centre, *Training on the Protection of IDPs, Development-Induced Displacement*, 4 < https://www.google.com/?gws_rd=ssl#q=Training+on+Development-induced+displacement > accessed 24 February 2017.

[12] Ibid.

[13] See, for instance, Article 1 (1) of the 1966 International Covenant on Economic, Social and Cultural Rights, which recognizes the right to development by allowing all peoples to freely pursue their economic, social and cultural development. Besides, in 1986, the UN General Assembly adopted a Declaration on the Right to Development, which states that "every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised."

[14] See, for instance, Article 22 (1) of the 1981 African Charter on Human and Peoples' Rights, which deals with the right to development. This Article states that, 'all peoples shall have the right to their economic, social and cultural

all development projects as free from violations of human rights, because sometimes they may leave the displaced persons without adequate resettlement and compensation. Thus, just as people have a right to development, they have the right to be protected from the negative effects of development, including arbitrary eviction and the loss of other human rights.[16] Although people displaced by development projects may generally be seen as a necessary sacrifice on the road to development, it should be justified and lawful.[17] At this juncture, it should therefore be noted that what is considered as a human-made disaster and a violation of human rights is those development projects that leaves communities without adequate resettlement and compensation.

Moreover, Article 10 of the Kampala Convention explicitly covers development-induced displacement. It requires States to prevent displacement caused by projects. However, the prohibition of displacement in cases of projects is not total as the state is only required to strive as much as possible.[18] A similar prohibition has been found in the Guiding Principles.[19] However, the prohibition in the two instruments is not the same. Under Principle 6 (1) of the Guiding Principles, everyone has the right to be protected against being arbitrarily displaced from his/her home or place of habitual residence. Under sub-principle 2 of the same Principle, the Guiding Principles identifies displacements that are considered as arbitrary and thus prohibited. Accordingly, among others, displacement resulted from large-scale development projects, which are not justified by compelling[20] and overriding[21] public interests is identified as one of the prohibited arbitrary displacements.[22] That is, under the Guiding Principles, displacement induced by large scale development projects is permissible only if it is justified by

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development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind'. Sub-article 2 of the same Article requires States to ensure, individually or collectively, the exercise of the right to development.

[15] On this point see for instance Article 43 of the Federal Democratic Republic of Ethiopia Constitution, which explicitly recognized the right to development.

[16] W. Courtland Robinson, *Minimizing Development-Induced Displacement* (January 1, 2004) < http://www.migrationpolicy.org/article/minimizing-development-induced-displacement/ > accessed 24 February 2017.

[17] Internal Displacement Monitoring Centre, (note 11 above).

[18] Kampala Convention, (note 6 above), Article 10 (1).

[19] Guiding Principles, (note 6 above), Principle 6.

[20] The word 'compelling' indicates the absence of other feasible alternatives.

[21] The word 'overriding' shows the need to balance the public and private interests.

[22] Guiding Principles, (note 6 above), Principle 6 (2/c/).

compelling and overriding public interests.[23] Nevertheless, this does not mean that persons displaced by justifiable and lawful projects are not internally displaced. In fact, the Guiding Principles describe anyone as an internally displaced person if he/she is coerced to leave his/her home or place of habitual residence, regardless of whether the displacement was legal or not.[24]

Like the Guiding Principles, the Kampala Convention has identified arbitrary displacements that are prohibited.[25] However, unlike the Guiding Principles, the Kampala Convention does not consider displacements resulted from development projects as arbitrary. This omission and the inclusion of the phrase 'as much as possible' in Article 10 (1) of the Kampala Convention may give the impression that, under the convention, people displaced by development projects are generally seen as a necessary sacrifice on the road to development. The dominant perspective among drafters of the convention seems that the positive aspects of development projects, the public interest, outweigh the negative ones, the displacement or sacrifice of a few.[26]

In fact, as indicated above, the lawfulness or otherwise of the displacement has no effect regarding the status of the IDPs. Despite such fact, the consideration of the displacement as arbitrary or otherwise has legal implication especially concerning remedies available for the displaced persons. For instance, if the displacement is considered as arbitrary, the displaced persons might be able to claim to be restituted, which is not the case when displacement is not arbitrary. In the latter case, they can claim resettlement and compensation. Hence, comparatively, though it lacks legal binding effect, the Guiding Principles literally gives much

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[23] A similar approach is followed in the Great Lakes Protocol. On this point see International Conference on the Great Lakes Region, Protocol on the Protection and Assistance of Internally Displaced Persons, Nov. 30, 2006, Article 5 (1). This protocol is the first legally binding multilateral treaty preceding the Kampala Convention. However, it is at sub-regional level (it is adopted by eleven countries of the Great Lakes region).

[24] Internal Displacement Monitoring Centre, (note 11 above).

[25] Kampala Convention, (note 6 above), Article 4 (4).

[26] This can for instance be seen from the omission of development projects in the list of causes of displacement in the final text of the convention while it was in the draft text. The Draft Kampala Convention in its reads as Article 9 (1) follows:

> States parties shall prevent displacement caused by development projects by public or private actors, except where such displacement is due to the construction of large scale development projects that are justified by compelling and overriding public interest because of their contribution to the sustainable development of the country or because they are in the interest of the people, including persons or communities displaced by such projects.

On this point see Flavia Zorzi Giustiniani, '*New Hopes and Challenges for the Protection of IDPs in Africa: The Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa*' (2011), 39 DENV. Journal of International Law and Policy 2, 356.

better protection to the IDPs than the Kampala Convention concerning development-induced displacement.

### *2.2. No Border Crossing*

The second condition provided in the definition of IDPs under the Kampala Convention is the movement should take place within the borders of the State.[27] That is, the displace persons should not cross the national border. This explains why IDPs are not refugees[28]. Refugees, by definition, are outside their country of nationality.

The displaced persons should not cross the national border to be considered as IDPs. This does not however mean that they should never cross the border; certainly they can. It rather means they should not cross to settle. This requirement should thus be understood in a broader sense. It refers to the place where the displaced persons find refuge. Such construction would enable those displaced persons who have to transit through the territory of a neighboring state in order to gain access to a safe part of their own country; first go abroad and then return (voluntarily or involuntarily) to their own country but cannot go back to their home or place of origin or habitual residence for reasons indicated in the definitional article; or left voluntarily to another part of their country but cannot return to their homes because of events that occurred during their absence that make return impossible or unreasonable.[29]

Here it has to be noted that the Kampala Convention does not refer to the notion of citizenship. Thus, foreigners may also qualify as internally displaced persons. However, the phrase "…to flee or to leave their homes or places of habitual residence" included in the definitional article of IDPs indicates that their presence in the country concerned cannot be of just a passing nature but must have reached some permanency.[30] Accordingly, the following categories of persons could qualify as IDPs:[31]

- ☞ Internally displaced citizens of the country concerned;

[27] Ibid, Article 1 (k).
[28] The other difference between IDPs and refugees is that, refugees require a special legal status as result of being outside their country and without its protection, but IDPs need not to have a special legal status. The latter remain entitled to all the rights and guarantees as citizens and other habitual residents of a particular State.
[29] Brookings-Bern Project on Internal Displacement, (note 2 above) 12.
[30] Ibid.
[31] Ibid, 12-13.

- ☞ Former refugees who have returned to their country of origin but are unable to return to their former homes or find another durable solution through social and economic integration in another part of the country;
- ☞ Displaced stateless persons who have their habitual residence in the country concerned;
- ☞ Displaced nationals of another country who have lived there for a long time (may be even generations) and have largely lost contact with their country of nationality; and
- ☞ Displaced nationals of another country who have their habitual residence in the country concerned because they have been admitted permanently or for prolonged periods of time.

IDPs who are non-citizens, however, are not automatically entitled to rights mentioned in the Kampala Convention that may be specifically reserved to citizens under applicable international law, such as the right to public participation, and the right to vote and to be elected to public office as stated in its Article 9 (2/l/).

Refugees displaced in their country of refuge or asylum remains refugees, but it would be appropriate to apply the Kampala Convention by analogy to the extent that applicable refugee law does not address their displacement-related needs. The same is true for displaced migrants with short-term permits or in irregular situations. They remain migrants and their rights as migrants must be respected. However, to the extent that these norms do not address their displacement-related needs for humanitarian assistance and protection, the Kampala Convention may be applied by analogy.

In sum, the above definition rather than showing its normative concept indicates the characteristics of IDPs that make them inherently vulnerable.[32] Thus, it is more of a descriptive type that enables us to identify who is an IDP rather than what is IDP. Despite such fact, this definition is used in this article for two major justifications. Firstly, the notion is commonly used at the international level.[33] Besides, the main focus of this article is analyzing the Kampala Convention. Employing the definition provided therein is thus sound and justifiable.

[32] Ibid, 11.
[33] Ibid.

## 3. Why Separate Legal Framework for IDPs?

IDPs have been compelled to leave their homes and often cannot return because they face risks at their places of origin from which State authorities are unable or unwilling to protect them, because they might have been specifically prohibited to return, or because their homes have been destroyed or are being occupied by someone else. They also may face the risk of forced return to an area that is unsafe.[34]

Primary responsibility for protecting IDPs and all persons within their own country rests with the national authorities of the country. National responsibility is a core concept of any response to internal displacement. It is a fundamental operating principle of the international community and is routinely emphasized by governments themselves, as a function of their sovereignty.[35] Yet, it is sometimes the very governments responsible for protecting and assisting their internally displaced populations that are unable or even unwilling to do so and, in some cases, they may even be directly involved in forcibly uprooting civilians.[36] Even then, however, the role of international actors is to reinforce, not replace, national responsibility. This requires a two-pronged approach to encourage States and other authorities to meet their protection obligations under international law while also supporting the development of national and local capacities to fulfill these protection responsibilities.[37]

IDPs are entitled to enjoy, equally and without discrimination, the same rights and freedoms under international and national law as do other persons in their country. International law does not specifically address the plight of IDPs, but this does not mean that they are not protected under the law. In fact, the following three bodies of law provide a comprehensive legal framework for protection in all situations of internal displacement, including during armed conflict: international human rights law; international humanitarian law; and international criminal law. Besides, as citizens or habitual residents of their country, IDPs remain entitled to

[34] Global Protection Cluster Working Group, *Handbook to the Protection of Internally Displaced Persons* (2008) 9.
[35] Ibid.
[36] Ibid. see also Flavia Zorzi Giustiniani, (note 26 above), 348.
[37] Global Protection Cluster Working Group, (note 34 above), 9-10.

full and equal protection under the State's national law, which should be compatible with the State's obligations under international law.[38]

Despite all these, the Kampala Convention was adopted by African States. The need for such kind of move by African States might be necessitated by many factors. To begin with, as can be inferred from the otherwise reading of the preamble of the Kampala Convention, it is intended to avert the continuing instability and tension within African States. The convention considers the gravity of the situation of IDPs as a source of continuing instability and tension for African States,[39] which is needed to be cured. That is, improving the situation of IDPs is essential to bring the much sought stability within the continent. This in turn calls for provision of durable solutions to the situation of IDPs, which can be achieved by establishing an appropriate legal framework for their protection and assistance.[40]

In addition, the second preambular paragraph of the Kampala Convention states that, 'the Heads of State and Government of the Member States of the African Union (AU) are conscious of the suffering and specific vulnerability of IDPs. Meaning, though the existing legal frameworks provide protection for IDPs as human beings like any other individuals, the general legal frameworks are not sufficient enough to address the specific needs of IDPs and thus necessitated its adoption.[41]

Besides, Africa is believed to be the home to around half of the global total of IDPs.[42] Providing a legal response to the situations of these persons is thus another factor.

Moreover, lack of binding legal and institutional framework specifically applicable for the prevention of internal displacement and the protection of and assistance to IDPs both at the regional and international level is another factor.[43]

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[38] Ibid, 20.
[39] Kampala Convention, (note 6 above), Preamble, Para. 1.
[40] Ibid, Preamble, Para. 4 and Article 2 (a).
[41] Ibid, Preamble, Para. 14.
[42] NGO Commentary endorsed by Amnesty International and et al, *The African Union Convention for the Prevention of Internal Displacement and the Protection of and Assistance to IDPs in Africa* < https://www.fidh.org/IMG/pdf/IDPconventionAUngoComments.pdf > accessed 12 February 2017.
[43] Kampala Convention, (note 6 above), Preamble, Para. 13.

Furthermore, it is obvious that an effective response to displacement require legally binding instrument. That is typically because, first, current laws pose unintended obstacles to the ability of IDPs to realize their rights or, second, they do not, on their own, provide a sufficient basis for addressing the needs of IDPs. Likewise, though international law provides relevant rules applicable to IDPs, some gaps and grey areas exist where the law does not provide sufficient protection. For instance, there is a normative gap regarding the right not to be arbitrarily displaced, the right to personal identification documents, and the right not to be forced to return or resettle.

## 4. The Protection of IDPs in the Kampala Convention

The determination of the level of protection of rights depends on the modalities of their incorporation as well as the usage of the terms of their formulation.[44] Thus, in this section the writer discusses the level of protection of rights of IDPs under the Kampala Convention by analyzing the modes of incorporation as well as the precision of their formulation.

Unlike most other regional[45] and international[46] human rights instruments that contain provisions specifically addressing rights, the Kampala Convention has incorporated the rights of IDPs in the form of an imposition of duties on the part of states. This can be understood from the close reading of most of the provisions of the convention, which contain the phase "the states parties shall…" instead of "every IDPs has…" or other similar phrases indicating the right. The duties of the state consist of both action[47] and omission[48]; that is, some of the duties require the state to act

[44] Osita. C. Eze, *Human Rights in Africa* (1984) 27.

[45] See for instance, African Charter on Human and Peoples' Rights, 1981; African Charter on the Rights and Welfare of the Child, 1990; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003.

[46] See for instance, International Covenant on Civil and Political Rights, 1966; International Covenant on Economic, Social and Cultural Rights, 1966; Convention on the Elimination of all forms of Discrimination against Women, 1979; Convention on the Rights of the Child, 1989.

[47] For instance, Article 3 (2a) of the Kampala Convention provides that, "States Parties shall incorporate their obligations under this convention into domestic law by enacting or amending relevant legislation on the protection of, and assistance to, IDPs in conformity with their obligations under international law." This indicates the duty of the state to take legislative measures for incorporating its obligations under the convention to its domestic law, which can be done only by the action of the state rather than by abstention.

[48] The duty to refrain from arbitrary displacement of populations under Article 3(1a) of the Kampala Convention can be cited as an example for the inaction duty of the state under the convention.

for the realization of the right, others require the state to refrain from interfering in the enjoyment of the rights.

The writer believes that this form of incorporation would weaken the level of protection due to the fact that it would create a doubt as to the exact rights of an individual, who is internally displaced, and it is difficult to prove violations of his/her rights; because the person may be required to prove the failure of the state in addition to violation of the right. That is, proving the failure of the state is more difficult as compared to that of the violations of one's right due to the existence of possibilities of violation without the existence of failure on the part of the state or without having sufficient evidence showing the failure of the state. For instance, assume that the state has provided, to the extent possible, the necessary funds for protection and assistance of IDPs as required in Article 3 (2d) of the Convention. But the funds provided may not be sufficient enough to provide the necessary protection and assistance to the IDPs. In such cases there is a possibility of violation without the existence of failure on the part of the state.

However, one may argue that this form of incorporation is preferable since the rights that could accrue to the IDPs are already incorporated in different human rights instruments including the African Charter. Hence, it is better to indicate the specific obligation of the state to the IDPs rather than what they already have due to the absence of those obligations in other human rights instruments.

Although this argument could not be disregarded as a result of its indication of the relevance of other human rights instruments to internally displaced persons, it fails to see the gaps existed in those instruments and the purposes of having a separate convention for vulnerable groups of the society. First, one of the purposes of having a separate convention is for addressing the legal gaps prevalent in the existing human rights instruments by including the specific problems of the group. Second, there also seems inconsistency in the protection of the vulnerable group of the society. This can be evidenced by the adoption of separate instrument to deal with the rights of the child and women in addition to the provisions of the African charter and other instruments applicable to them. Thus, the failure to incorporate the rights of IDPs in the form of rights rather than state obligations should not be attributed to the existence of other applicable instruments.

Another factor that would weaken the level of protection is the lack of precision of the formulations of the rights incorporated in the Kampala Convention. As we can see from the provisions of the convention, there are some rights that are formulated in general and in some cases vague terms. For instance, Article 9 (2a) of the convention contains a phrase "… with adequate humanitarian assistance." The usage of such kind of terms would create difficulty in the determination of the normative contents of the rights specially when there is no any indicative list as to what it consists of.[49] In order to indicate the problems of using vague terms, Philip Alston says that:

> *It is generally agreed that the major shortcoming of the existing international arrangements for the promotion of respect for economic rights is the vagueness of the rights as formulated in the covenant and the resulting lack in the clarity as to their normative implications.*[50]

Although the usage of vague and general terms has some drawbacks, their importance should not also be underestimated. It would permit for the inclusion of implied rights by way of interpretation[51], which would minimize the fear that the usage of vague terms could diminish the level of protection provided under the Kampala Convention. However, it requires two related things. First, it needs an active judiciary or any other responsible body capable of using the vaguely formulated terms to drive implied rights through interpretation. Second, it needs a system that allows the judiciary or any other responsible body to use the vaguely formulated terms to drive implied rights by interpretation.

Moreover, the existence of provisions that acknowledge the applicability of other relevant humanitarian and human rights instruments as well as the function of the African Commission on Human and Peoples' Rights have some help in extending the protections to the internally

[49] However, the existence of some indicative lists like "…which shall include food, water, shelter, medical care and other health services, sanitation, education, and any other necessary social services," under Article 9(2a) of the Kampala Convention may have some help in determining the normative contents of the right to get an adequate humanitarian existence.

[50] Philip Alson, 'No Right to Complain about Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant' in Asbjorn Eide and Jan Helsesen (ed), *The Future of Human Rights Protection in a Changing Word: Fifth Years Since the Four Freedoms Address-Essays in Honour of Torkel Opshl* (1991) 86.

[51] For instance, the usage of phrases like '… and any other necessary social services' under Article 9(2a) of the Kampala Convention allows for the inclusion of other implied rights that falls under the realm of this phrase. On this point see Sisay Alemayehu, '*The Constitutional Protection of Economic and Social Rights in the Federal Democratic Republic of Ethiopia*' (2008) 22 Journal of Ethiopian Law 2, 139-140.

displaced persons. This acknowledgement will help the convention to rectify its problems by filling the gaps existed on both its substantive content of the rights and the enforcement mechanism, which are discussed in section 5 and 6 of this article. Furthermore, the Kampala Convention is the first legally binding international instrument of its kind.[52] Although the United Nations Guiding Principles on Internal Displacement has tried to distil the rules and principles of national and international law most relevant to the protection of IDPs from, during and after displacement into a single framework, it lacks the legal binding nature. Thus, incorporating rights that specifically address the issues of IDPs in a legally binding instrument is a big step in the protection of their interests and in effect strength the level of protection.

Therefore, the discussion so far made indicates the existence of strong level of protection if the convention is put into practice effectively with the exception of some draw backs attributable to the form of incorporation of the rights.

## 5. Kampala's Convention Relation with other Instruments

Despite the existence of the 1951 United Nations Convention on the Status of Refugee as modified by the 1967 protocol, the OAU has adopted the 1969 convention to govern the special aspects of refugee problems in Africa.[53] Similarly, although the African Charter allows all individuals to enjoy the rights and freedoms recognized therein, IDPs are most of the time at risk of multiple threats to their security and welfare, life and are vulnerable to the denial of other civil and political as well as economic, social and cultural rights. Consequently, the African Union has adopted a convention that specifically addresses the human rights of IDPs.[54] This section thus discusses the relationship of this convention with the African Charter and the OAU Refugee Convention.

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[52] NGO Commentary endorsed by Amnesty International and et al, (note 42 above); see also African Union Addressing the Challenge of Forced Displacement in Africa: African Union Special Summit of Heads of States and Government on Refugees, Returnees and IDPs in Africa (Hosted by the Government of the Republic of Uganda, Kampala, April 2009) < http://www.aftica-union.org/root/ua/conferences/2008/nov/PA/05-11nov/Joint%20Briefing%20Note%20on%20AU%20summit.doc > accessed 11 January 2010.

[53] The UN Convention of 1951 on Refugee Status as modified by the 1967 protocol fails to address the specific problems of African refugees due to the restricted grounds available for claiming refugee status and the existence of 'well-founded fear of persecution' as prerequisite in the determination of refugee status. For further analysis see Osita C. Eze (Note 43 above) 166-167.

[54] Kampala Convention, (note 6 above).

### *5.1. The Kampala Convention and the African Charter*

As human beings, IDPs are automatically entitled to the protection provided for under human rights law including the African Charter, which recognizes and protects the attributes of human dignity inherent to all individuals. States, in turn, are obliged to ensure respect for those recognized human rights essential to ensure the survival, wellbeing and dignity of all persons subject to their territorial jurisdiction.[55] This obligation is also reiterated under the African charter, which states:

> *The member states of the OAU parties to the present charter shall recognize the rights, duties and freedoms enshrined in this charter and shall undertake to adopt legislative or other measures to give effect to them.*[56]

This provision indicates not only the duty of the states to recognize the rights, duties and freedoms enshrined in the charter, but also the duties of the state to take measures for the full realization of them. Thus, the African Charter has provided the legal framework for the protection of every one including the IDPs.

However, it is difficult to consider that the African Charter has provided an effective legal protection to IDPs due to the existence of gaps arising from the lack of an explicit provision addressing their specific needs like that of the absence of the principle of non-refoulement, and the inefficient coverage of the causes, conditions of displacement and search for solutions.[57] As a result, the need to have a comprehensive human rights law that addresses the gaps existed in the African Charter is thus apparent. Therefore, the adoption of the Kampala Convention is not to exclude the application of the African Charter for IDPs rather to complement the latter.[58]

The complementary relationship of the Kampala Convention and the African Charter can also be drawn from the reading of the provisions and preambles of the former convention. For instance, Article 20 (1) of the Kampala Convention provides that, no provision in this convention shall be

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[55] Erin D. Mooney (note 1 above) 161.
[56] African Charter on Human and Peoples' Rights (note 45 above) Article 1.
[57] Erin D. Mooney (note 1 above) 162.
[58] See Campaigning for the Rights of IDPs in Africa < http://www.idpaction.org/index.php/news/5-whyauconvention > accessed 11 January 2010.

interpreted as affecting or undermining the right of IDPs to seek and be granted asylum within the framework of the African Charter on Human and Peoples' Rights. This article indicates that the framework of the convention is not replacing the protections granted to the IDPs in the African Charter rather providing better protection to them. Thus, it has maintained the good protections accorded to them in the African Charter. This assertion is also supported by the provision of sub article 2 of the same article since it affirms that the application of the convention should not be prejudicial to the human rights of IDPs under the African Charter. In addition, the second sentence of Article 20 (2) also indicates that the objective of the convention is providing better protection to IDPs rather than restricting, modifying or impeding existing protections accorded to them under the African Charter. The maintenance of the role of the commission to examine state reports and receive individual complaints even from the IDPs under Article 14 (4) and Article 20 (3) of the Kampala Convention respectively also shows the existence of a complementary relationship between Kampala Convention and the African Charter. Moreover, the recalling of the application of the African Charter for the IDPs under the preamble of the Kampala Convention also can help to show the existence of such relationship between the two. Last but not least, the incorporation of similar provisions dealing with the same issues in both instruments can show their complementarities.

Generally, from the foregoing discussion, the preamble of the convention which recalls the application of the African charter on issues of IDPs, and the deep scrutiny of its provisions, the purpose of the convention is not to create a new legal instrument that disregards the application of other international and regional human rights instruments relevant for IDPs; but to improve the legal protection provided to them in the existing human rights instruments by establishing a specific framework for the protection and assistance of them as vulnerable section of the society by virtue of their status as internally displaced. Therefore, the relationship of the Kampala Convention with the African Charter is complementary.

### *5.2. The Kampala Convention and the 1969 OAU Refugee Convention*

The failure of the 1951 United Nations Convention on the Status of Refugee as modified by the 1967 protocol to address the specific problems of African refugees forced Africans themselves to adopt their own convention addressing those problems. Consequently, the OAU Convention Governing Specific Aspects of Refugee Problems in Africa was adopted in 1969.[59]

According to Article 1 of this Convention, the scope of application of the Convention is limited to those persons that fulfill the requirements necessary for the determination of refugee status. Pursuant to the provision of this article, there are four cumulative prerequisites that a person should fulfill to obtain refugee protection under the Convention. These consist of: first, there must be a well-founded fear of being persecuted; second, the persecution must be for reasons of race, religion, nationality, membership of a particular social group or political opinion; third, the person must be outside the country of his nationality; and lastly he/she must be unable or unwilling, owing to such fear, to avail him/herself of the protection of the country of origin.[60] However, sub-article 2 of this article extends the protection by avoiding the requirement of the existence of well-founded fear of persecution and by extending the grounds which would force persons to flee outside his country of origin.

As we can see from the provision of Article 1(1) and (2) of the OAU Refugee Convention, refugees are not under the control of their governments since they are outside the territory of their home country. This prerequisite for the determination of refugee status and the limited application of the scope of the Convention only to refugees excludes IDPs from obtaining protection under the OAU Refugee Convention. Hence, it can be said that this Convention does not apply to IDPs.

From this, one may conclude that the 1969 OAU Refugee Convention and the 2009 Kampala Convention have no any relationship. However, the deeper examination of the problems both the refugees and IDPs have confronted and the principles existed in both conventions like the principle of humane treatment indicates some commonalities between the two. That is, as

[59] Osta C. Eze (note 44 above); see also OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969, Article 1.
[60] OAU Convention Governing the Specific Aspects of Refugee problems in Africa (note 58 above) Article 1(1).

problems encountered by IDPs are very similar to those of refugees and since there are some principles relevant for the protection of internally displaced persons, the OAU Refugee Convention can serve as a point of comparison and might also inspire standard setting for IDPs.[61]

In addition, like that of the African Charter, Kampala Convention has maintained the application of the OAU Refugee Convention wherever it is relevant for the protection of the IDPs. This can be understood from the close reading of the preamble of the Kampala Convention, which recalls the importance of the OAU Refugee Convention, and Article 20 (1) of the Kampala Convention. As enshrined in the latter article, the application of the convention does not affect or undermine the right of IDPs to seek protection, as a refugee, within the purview of the OAU Refugee Convention. This would have the connotation that IDPs have the right to claim refugee status that would contradict the provision of the OAU Refugee Convention since the latter protects only persons outside the country of origin.

However, according to the rule of interpretation, a treaty should be interpreted in good faith according to its context, purpose and objectives.[62] And the purpose and object of Article 20 (1) of the Kampala Convention is providing better protection to the rights of IDPs. Hence, the provision should not be considered as contradictory to the provision of the OAU Refugee Convention; because the provisions of the latter may be applied by analogy for the protection of IDPs.

Therefore, though it is difficult to apply the provisions of the OAU Refugee Convention directly to IDPs, it is possible for analogous application of them for the protection of the latter. So, we can say that the relationship of the Kampala Convention with the OAU Refugee Convention is not contradictory rather they complement each other by analogous application of their provisions wherever they are important for the protection of the IDPs as well as refugees.

[61] Catherine Phuong, *The International Protection of Internally Displaced Persons* (2004) 47.
[62] Vienna Convention on the Law of Treaties (note 8 above), Article 31(1).

## 6. Enforcement Mechanisms of the Kampala Convention

Unlike the African Charter[63] or the African Charter on the Rights and Welfare of the Child,[64] which establishes an independent institution to monitor and supervise the implementation of the respective instruments, the Kampala Convention does not establish an independent body. It does not also explicitly give such power to the African Commission on Human and Peoples' Rights like that of the Protocol to the African Charter on Human and Peoples' Rights of Women in Africa[65]; because it is not a protocol intended to supplement the African Charter substantively or procedurally. However, in order to ensure the observance of the obligations undertaken by states parties to the convention, Article 14 of the Kampala Convention provides for the establishment of a Conference of States Parties. According to this article the Conference of States Parties has the power to monitor and review the implementation of the objectives of the convention.

Although Article 14 provides for the establishment of the Conference of States Parties to monitor and review the implementation of the objectives of the convention, there are some weaknesses which would affect the effectiveness of the supervisory body of the convention. First, unlike Article 30 of the African Charter that advocates for the establishment of the African Commission on Human and Peoples' Rights, Article 14 of the Kampala Convention does not indicate the specific functions of the Conference of States Parties.[66] For instance, as indicated under Article 30 of the African Charter, the African Commission on Human and Peoples' Rights is established under the African Charter to promote human rights and ensure their protection in Africa. These mandates of the commission are further elaborated under Article 45 of the African Charter. According to this article the promotional mandate of the commission consists of awareness-

[63] African Charter (note 45 above), Article 30 which advocates for the establishment of the African Commission on Human and Peoples' Rights to promote human and peoples' rights and ensure their protection in Africa.

[64] African Charter on the Rights and Welfare of the Child, 1990, Article 32 provides for the establishment of the African Committee of Experts on the Rights and Welfare of the Child for the promotion and protection of the rights and welfare of the child.

[65] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003, Article 26 empowers the African Commission on Human and Peoples' Rights to monitor the implementation of the protocol.

[66] See the African Union IDPs Convention: a Unique Opportunity to Strengthen the Protection of the IDPs in African, endorsed by Advocates International, Campaign for Innocent Victims in Conflict (USA), IDP Action (UK), Institute for Human Rights and Development in Africa (The Gambia), International Federation of Human Right, Maryknoll Office for Global Concerns (USA), PACT (USA), Refugees International, Resolve Uganda, and Zimbabwe Exiles Forum, (16 October 2009) < http://www.refugeesinternational.org/press-room/press-release/African-union-idps-convention > accessed 11 January 2010.

raising programs such as conferences, seminars and symposia, and standard setting involving the formulation of principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislations. The protective mandate of the commission, on the other hand, includes considering cases and communications.[67] But, there is no similar provision in the Kampala Convention. Thus, it would create controversy as to the actual mandate of this body. Second, Article 14 (3) says that, 'the Conference of States Parties shall be convened regularly…' It fails to clarify what 'regularly' mean. Third, the designation of political body as a treaty monitoring body will also affect the implementation of the convention; because, it will compromise the independence and impartiality of the members of the monitoring body, which is essential to secure full observance of the rights of IDPs guaranteed in the convention.

The AU holds its first meeting of the Conference of States Parties to the Kampala Convention in Harare, Zimbabwe, on 5th April 2017. The main objective of this meeting was to formally constitute the Conference of State Parties, as a mechanism for fostering cooperation and solidarity among States Parties in the implementation of the Convention.[68] At this meeting the ministerial conference of State Parties adopted the first action plan (the Harare Plan of action) for the implementation of the Kampala Convention. This meeting was driven by the need to address root causes of forced displacement to progressively eliminate the phenomenon of forced displacement on the continent altogether. Further, it focused on the humanitarian situation in Africa and introduced the AU Regulatory Framework on IDPs. It also provided the platform to deliberate how to implement the Kampala Convention and adopted recommendations on IDPs in Africa. The meeting also elected the first bureau for the Conference of states parties.

In addition to the aforementioned weaknesses, the enforcement mechanism of the convention is not clear. That is, what mechanisms should the Conference of States Parties use to monitor and review the implementation of the objective of the convention is not answered clearly. Generally speaking, there are two major types of enforcement mechanisms used in various human rights instruments. These are complaint procedure, which may be individual complaint or inter-state

[67] Chidi Anselm Odinkalu, '*Analysis of Paralysis or paralysis by analysis? Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Right'* (2001) 23 Human Rights Quarterly, 352.
[68] ICGLR's Levy Mwanawasa Regional Centre (LMRC), 2018, < http://www.icglr-lmrc.org/index.php/news1/91-au-holds-first-conference-of-states-parties-to-the-kampala-convention > accessed 4 August 2018.

complete and state reporting procedure.[69] There are also some human rights instruments that adopted inquiry procedure as additional enforcement mechanism.[70] There is no clear provision that shows which types of enforcement mechanisms are devised under the Kampala Convention for the monitoring and reviewing of the implementation of the convention by the Conference of States Parties.

However, the deeper scrutiny of the provisions of Article 14 (4) and Article 20 (3) of the Kampala Convention shows that the state reporting procedure and the individual compliant procedure are preferred for the supervision of the implementation of the convention though the Conference of States Parties is not the body empowered to function on such procedures; because the two provisions indicate not the empowerment of the Conference of States Parties rather the implied empowerment of the African Commission on Human and Peoples' Rights to receive state reports and individual complaints, which will be discussed in the following few paragraphs.

At the first glance since the Kampala Convention is not a protocol to the African Charter, it seems that the African Commission on Human and Peoples' Rights has no role in the supervision of the implementation of this convention. However, the close reading of the provision of Article 14 (4) and Article 20 (3) indicates otherwise.

According to Article 14 (4) of the Kampala Convention the states parties are required to indicate the legislative and other measures that have been taken to give effect to this convention when they present their reports under Article 62 of the African Charter. Although this article does not require the states parties to present separate report regarding the measures taken for the implementation of the Kampala Convention, it obliged the states parties to include the measures taken for the implementation of the convention in their reports to the African Charter. Thus, the African Commission on Human and Peoples' Rights is empowered to examine the compliance of

[69] Scott Davidson, *Human Rights* (1993) 166-172; Soren C. Prebensen, 'Interstate Complaints under Treaty Provisions: The Experience under the European Convention on Human Rights' in Gudmundur Alfredsson, Jonas Grimheden, Bertram G. Ramcharen, and Alfred De Zayas, *International Human Rights Monitoring Mechanisms-Essays in Honour of Jakob Th.Moller* (Vol.7, 2001) 533; Malcolm Evans and Rachel Murray, 'The State Reporting Mechanism of the African Charter' in Malcolm Evans and Rachel Murray (ed), *The African Charter on Human and Peoples' Rights: the System in Practice 1986-2006* (2nd ed, 2008) 49.

[70] For instance, the International Covenant on Economic, Social and Cultural Rights by its optional protocol recognize inquiry procedure as an enforcement mechanism. See The optional protocol to ICESCR, 2008, Article 11.

the state to its obligations under the Kampala Convention while reviewing the reports of the state parties to the African Charter.

As far as the individual complaint procedure is concerned, Article 20 (3) of the Kampala Convention provides that "the right of IDPs to lodge a complaint with the African commission… shall in no way be affected by this convention." This provision does not explicitly empower the African Commission on Human and Peoples' Rights to receive individual complaint. Nevertheless, the close examination of this provision tells us the implied empowerment of the African Commission on Human and Peoples' Rights to receive complaints from internally displaced persons. This argument can also be supplemented by the provisions of Article 20 (1 and 2) of the same convention since these provisions exclude the convention from modifying or negatively affecting the rights of IDPs in other human rights instruments. Moreover, the main purpose of the Kampala Convention as expressed in the preamble is better protection of the IDPs in Africa, among others. Ousting the jurisdiction of the African Commission on Human and Peoples' Rights would thus have the effect of defeating the objective and purpose of the convention.

All the aforementioned justifications imply the upholding of the rights of IDPs to lodge complaint with the African Commission on Human and Peoples' Rights. But, the question that remains to be answered here is that whether the IDPs can base their complaint on the provisions of the Kampala Convention or not, in the circumstances where there is no indication to this effect under Article 20 or any other provisions of this convention. This can be answered by looking at the jurisprudence of the African Commission on Human and Peoples' Rights in the case between the African Institute for Human Rights and Development vs. Guinea.[71] In this case the commission uses the OAU Refugee Convention to determine the merits of the case and finds the violation of Article 4 of this convention in addition to the violation of the provisions of the African Charter.[72] Thus, there is no reason for keeping out the IDPs from basing their complaint on the provisions of the Kampala Convention in so far as it is important for the better protection of their interest.

[71] *African Institute for Human Rights and Development Vs. Guinea* (African Commission on Human and Peoples' Rights, 2004) in Christof Heyns and Magnus Killander (ed), *Compendium of Key Human Rights Documents of the African Union* (3rd ed, 2007) 173-174.
[72] Ibid, Para. 68 and the finding of the commission.

Therefore, for the writer, though there is weakness in the selection of the monitoring bodies of the convention, the acknowledgement of the role of the African Commission on Human and Peoples' Rights is crucial in facilitating the implementation of the convention. However, having the resource constraints and the caseloads that may exist in the commission[73], it may be difficult for the commission to provide effective supervision in the implementation of the convention. Thus, the failure of the convention to set up separate independent monitoring body could have negative effect in the implementation of the convention.

## 7. Implication of the Kampala Convention to Signatory States

Regional and international human rights instruments can only be enforced and be effective where they are ratified and states parties recognize the competence of the respective enforcement body.[74] However, this does not mean that the convention has no implication to the state before it has ratified the same. This can be derived from the reading of the provision of the Vienna Convention on the Law of Treaty.[75] According to Article 18 (a) of this treaty 'a state is obliged to refrain from acts which would defeat the object and purpose of a treaty it has signed…' That is, even if the entry into force of the convention is pending, the state has an obligation to act in good faith for respecting the object and purpose of the treaty. Thus, the signing of a treaty has some implication to the signatory state. The Kampala Convention was signed by 40 member states of the AU[76], and as of June 15, 2017, ratified by 27 countries[77].

[73] The Commission is composed of eleven Members elected by AU Heads of State and Government, who serve in their individual capacities on a part-time basis. It is not a permanent body. As can be seen from rule 25-27 of the Commissions Rule of procedure, the Commission holds two ordinary sessions per year and may meet, if need be, in extraordinary sessions. As of May 9, 2018 there are 232 (Two Hundred Thirty-Two) Communications pending before the Commission. On this latter point see African Commission on Human & Peoples' Rights, 44th Activity Report of the African Commission on Human and Peoples' Rights, p. 6 <http://www.achpr.org/files/activity-reports/44/actrep44_2018_eng.pdf> accessed on 13 November 2018.

[74] Rakeb Messele, Enforcement of Human Rights in Ethiopia (2002) 13.

[75] Vienna Convention (note 8 above), Article 18 (a).

[76] The 40 countries that signed the convention are Angola, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Côte d'Ivoire, Comoros, Congo, Djibouti, Democratic Republic of Congo, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea-Bissau, Guinea, Lesotho, Liberia, Madagascar, Mali, Mozambique, Mauritania, Namibia, Nigeria, Rwanda, Sahrawi Arab Democratic Republic, Senegal, Sierra Leone, Somalia, South Sudan, Sao Tome & Principe, Tanzania, Togo, Tunisia, Uganda, Zambia and Zimbabwe.

[77] The 27 countries that ratified the convention are Angola, Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Côte d'Ivoire, Congo, Djibouti, Gabon, Gambia, Guinea-Bissau, Lesotho, Liberia, Mali, Malawi, Mauritania, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, Sierra Leone, Swaziland, Togo, Uganda,

## 8. Concluding Remarks

The Kampala Convention has provided protection to IDPs by specifically addressing their needs. Although the protection provided by this convention has some weaknesses due to the modes of incorporation of the rights and the precision of their formulation as well as the enforcement mechanism chosen, it is a good move as it is the first of its kind at the regional level. Besides, though the usage of general terms has some negative effect in finding the normative framework, it has also positive effect in providing better protection for IDPs, because the usage of general terms would provide a wide margin for deriving implied rights. Moreover, the existence of provisions acknowledging the application of other human rights instruments and the African Commission on Human and Peoples' Rights is also important in strengthening the level of protection.

Although IDPs are automatically entitled to benefit from the application of the other legally binding human rights instruments, the existence of gaps in them and the failure of them to address the specific needs of IDPs forced the African Union to adopt separate convention, which resulted in the adoption of the Kampala Convention. However, this convention was not intended to affect the application of other human rights treaties including the African Charter and the OAU Refugee Convention. Thus, we can say that the relationship of the Kampala Convention with the African Charter and OAU Refugee Convention is that of complimentary. This can be derived from the reading of its provisions and the purpose of having a separate convention. However, the limited scope of the application of the OAU Refugee Convention may invite one to question the relevancy of it for IDPs as it is only applicable to persons who flee outside the border of their home country. But, although it is difficult to apply the convention to IDPs directly, there is possibility for analogous application of the relevant principles. Therefore, they have also complementary relationship like that of the African Charter though their application is different.

The Kampala Convention has provided for the establishment of a Conference of States Parties to monitor and review the implementation of the objectives of the convention. It does not specify

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Zambia and Zimbabwe. As of June 15, 2017, 11 countries (Algeria, Botswana, Cape Verde, Egypt, Kenya, Libya, Morocco, Mauritius, South Africa, Seychelles and Sudan) have neither signed nor ratified the convention.

the actual mandate of this monitoring body as well as the enforcement mechanisms. This would have the effect of flagging the implementation of the convention. However, the empowerment of the African Commission on Human and Peoples' Rights to receive state reports and individual complaints would have some help in minimizing the above problem, though the effectiveness of the Commission to supervise the convention having the limited resource and the caseloads is questionable. As far as the power of the African Commission on Human and Peoples' Rights to receive individual complaint based on the provisions of the Kampala Convention is concerned, its jurisprudence in the case between the African Institute for Human Rights and Development vs. Guinea (2004) shows the existence of such possibility.

Lastly, the convention has some implications to signatory but none ratifying states like Ethiopia. According to Article 18(a) of the Vienna Convention on the Law of Treaty, signatory states are required to refrain from acing contrary to the object and purpose of the treaty that they have signed.

Finally, based on the above discussions, the writer provides the following recommendations. Firstly, the incorporation of the rights in the form of state party obligations has a negative consequence in the protection of the IDPs since it imposes a high burden of proof as compared to the burden required for proving the violation of individual rights. Thus, it is better if the convention is amended to incorporate rights in the form of individually self-executing rights. Secondly, the making of political parties as a treaty monitoring body without identifying its mandate weakens the enforcement mechanisms of the convention. Although the acknowledgement of the role of the African Commission on Human and Peoples' Rights in the supervision of the convention is crucial, the lack of resource and the existence of caseload in the commission coupled with the limited time that the commission has to function will affect the effectiveness of the commission. In addition, it would also create inconsistency in the protection of the different vulnerable segment of the society since there is an independent committee of experts for the protection of the right and welfare of the child. Therefore, it is better if the African Union reconsiders it and establishes an independent committee for the monitoring of the convention by adopting an establishing protocol. Thirdly, the signatory states to the convention have taken good steps in the protection of the internally displaced persons. However, the mere fact of signing the convention without ratifying it would make their consent expressed through

their signatures meaningless. So, the states parties which have not ratified the Convention should ratify it without undue delay. They should also take positive measures in order to refrain from defeating the object and purpose of the convention until they ratify it. Fourthly, the different human rights treaty monitoring bodies including the African Commission on Human and Peoples' Rights should try to clarify the normative contents of the rights incorporated in the convention for bringing its implementation practical.

# Reflections on Legitimate Expectations of Foreign Investors in Ethiopia

Haftu Tekleab Alema*

## Abstract

*An investor`s legitimate expectations have emerged as essential element of the Fair and Equitable Treatment (FET) standard in international investment. Although the principle is traditionally related to transparency, it is often considered as a further development of the concepts of stability, predictability and consistency of investment environment. This article investigates the extent to which Ethiopia has protected foreign investors' legitimate expectations by focusing on the practice of Addis Ababa City vis-à-vis the legal regime. In so doing, the article brings the issue of legitimate expectations of foreign investors into the attention of policy makers so that measures that can promote legitimate expectations and thus positively impact inflow of FDI are taken. The study was conducted based on interview, observation and document analysis and employed qualitative method of study. The study shows that there is arbitrary exercise of power by public officials which is against the legitimate expectations of foreign investors.*

## Keywords:

Assurance, Contractual commitment, FET, Legitimate expectations, Ethiopia.

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## 1. Introduction

Since 1992, the Ethiopian Government has successfully implemented a series of reform programmes in order to transform the economy from command to market economy, speed up the integration of the economy into the world economy.[1] These series of reforms include promulgation of a liberal investment law for the promotion and encouragement of private investment, both foreign and domestic.[2] These measures are taken to enable foreign investment to play its role in the country's economic development.[3] Therefore, there is a concern among states as to the methods of stimulating these investment flows into their territories. On the other hand, there is investors' decision to invest on secure and stable business environment in the host state. So, in this regard, the fair and equitable treatment [hereinafter, FET] standard is a crucial concern in contemporary international investment agreements. The standard protects investors against serious instances of arbitrary, discriminatory or abusive conduct by host States.[4]Protection of legitimate expectations of foreign investor as one component of the principle of fair and equitable treatment is envisaged in international investment laws to encourage foreign investors to make adequate business decisions based on the legal regime and representations made by the host state.[5]

The major problem at this juncture relates to implementation of the protection of legitimate expectations of foreign investors, consistency the practice with the law and behaviours of officials. Exploring and analysing of the issue is needed to identify the challenges of implementations of legitimate expectations of foreign investor in Ethiopia. Therefore, this article attempts to investigate issues of legitimate expectations of foreign investors in the laws and the practical problems that relates to implementation in the Addis Ababa city.

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[1] Ethiopian Investment Commission, Ethiopia: A Preferred Location for Foreign Direct Investment in Africa. An Investment Guide to Ethiopia (2015) at 6.

[2] *Id*.

[3] Investment proclamation, Proclamation No. 769/2012, FED. FEDERAL NEGARIT GAZETA, 18th Year, No. 63 Addis Ababa, 17th September, 2012 (hereafter Investment proc.) Art. 5(7).

[4] Kenneth J. Vandevelde, *A Unified Theory of Fair and Equitable Treatment*, *New York University Journal Of International Law & Politics 43*, Thomas Jefferson School of Law Research Paper NO. 2357642 ", (2010), at 52.available at:http://nyujilp.org/print-edition/#43 [accessed on March 10, 2017]

[5] Felipe MutisTe´llez, *Conditions and Criteria for the Protection of Legitimate Expectations under International Investment Law*, *ICSID REVIEW FOREIGN INVESTMENT LAWJOURNAL, ICSID REVIEW STUDENT WRITING COMPETITION* (2012), at 1, available at ICSID Review: www.oxfordjournals.org/page/4395/7 (accessed on March 20 5, 2017).

## 2. Conceptual Frameworks on Legitimate Expectations of Foreign Investors

### 2.1. Determining the Concept of Legitimate Expectations

Legitimate expectations of foreign investor as an intrinsic component of FET standard, is found in different countries administrative law which in turn becomes source of international law as a general principle of law pursuant to article 38(1)(c) of the statute of International Court of Justice.[6] It is a principle recognized by many domestic public law systems and often used as a standard to judge governmental decision-making. Hence, its contents are determined by comparing the standards common to most national legal system and practice.[7]

Thus, the doctrine of legitimate expectations relates to public law that protects individuals from arbitrary exercise of the government power[8]; and emphasizes on stability and predictability of business environment to enable foreign investor to make rational business decision on the reliance of the host state representations.[9] It can be considered as a principle of natural justice which confers right to hearing to a person affected by an arbitrary exercise of government power and the government should not deprive legitimate expectations of a person without following the principles of natural justice.[10] This is more of the procedural aspect of legitimate expectations.

This principle originated from the English administrative law, which was first used by Lord Denning in 1969, and from that time onwards it became a significant doctrine of public law in almost all states.[11]From this time, there is a growing jurisprudence of legitimate expectations of foreign investors at international level by Tribunals.[12] For instance, in 2003 the Tribunal in *Tecmed v. Mexico* noted that FET requires treatment of international investment without

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[6] Trevor Zeyl, *Charging the Wrong Course: The Doctrine of Legitimate Expectation in Investment Treaty Law*, Alberta Law Review, Vo. 41, NO. 1(July 2011), at 205.
[7] *Id*.
[8] Seemeen Muzafar, *Doctrine of Legitimate Expectation in India: An Analysis*, International *Journal of Advanced Research in Management and Social Sciences*, Vol. 2, No. 1 (January 2013), at 116.
[9] Felipe MutisTe´llez, *supra note* 5, at 1.
[10] Seemeen Muzafar, *supra note* 8.
[11] *"Schmidt v. Secretary of State (1969) 1 AII ER 904.In this case it was held that an alien who was granted to enter the U.K. for a limited period had legitimate expectation of being allowed to stay for the permitted period"*, as cited in. Meher Nigar and Homaira Nowshin Urmi, *Doctrine of Legitimate Expectation in Administrative Law: A Bangladesh Perspective*, *The Chittagong University Journal of Law*, VOL. XIV, (2009), at 52.
[12] Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, Vol. 12, Issue 1,*Santa Clara Journal of International Law* 7 (2014). Available at: <http://digitalcommons.law.scu.edu/scujil/vol12/iss1/2>(Accessed on March 11, 2017), at 134.

affecting basic legitimate expectations of foreign investors that were considered in deciding to make the investment.[13]

Basically, there has been some debate as to whether legitimate expectations of foreign investor in international investment regime can cover substantive benefit or it is a mere entitlement to have a procedural aspect that concerns on administrative issues such as license, benefits and other privileges.[14]As elaborated above, legitimate expectation is derived from domestic legal systems and became a general principle of law. But, in most countries, legitimate expectation provides only procedural protection that relates to expectations created by administrative conduct.[15] Due to practical difficulties, substantive aspects of legitimate expectations were rarely protected by most domestic legal systems.[16]

Initially, the English law provided only procedural protection of expectations that relates to with license, benefits and other privileges.[17] However, this traditional approach has recently shifted to adopt the substantive legitimate expectations.[18] This principle is also, well-established in a number of other administrative systems such as, civil law, German and Dutch.[19]

Procedural legitimate expectations provide a limited form of protection that relates to hearing and participation, right to make representation during decision making process in the administrative decision.[20] This kind of expectations do not concern about compensation or remedies to individuals. Rather this concerns on the participation of individuals to improve standards of administration and outcomes.[21]

Substantive legitimate expectation, on the other hand, protect the individual by providing government body to make good its representation to the individual by altering or keeping its

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[13] Trevor Zeyl, *supra note 3*, at 207.
[14]Meher Nigar and Homaira Nowshin Urmi, *supra note11*.
[15] M. Sornarajah, *The International Law on Foreign Investment*, (Cambridge: Cambridge University Press) (3rd Ed. 2010), at 334.
[16]*Id*.
[17]Meher Nigar and Homaira Nowshin Urmi, *supra note 11*.
[18]*Id*.
[19] Michele Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept, 28 ICSID REVIEW* (2013) 88-122, at 12 available at: http://icsidreview.oxfordjournals.org (Accessed on March 6, 2017)
[20]*Id*, at 9.
[21] Abhijit P.G. Pandya, *Interpretations and Coherence of the Fair and Equitable Treatment Standard in Investment Treaty Arbitration*, (Ph.D. thesis, London School of Economics, 2011), at 49, available at: <http://etheses.lse.ac.uk/338/> (Accessed on March 1, 2017).

policy, or law, where it harms an individual's interests.[22] Hence, this aspect of legitimate expectations of individuals is recognized in domestic legal system of different countries as elaborated above.

The emergence of substantive legitimate expectations in domestic jurisprudence has contributed to the introduction of substantive legitimate expectations in investment treaty arbitration.[23] Investment tribunals develop a comprehensive concept of FET to include the jurisprudence of legitimate expectations. They considered it as an element of FET though in diverse contexts and different wordings in the great majority of BITs as well as in major multilateral investment treaties, making FET the most frequently invoked standard in investment disputes.[24]

Therefore, legitimate expectations of foreign investors contain a wider meaning encompassing the stability of the legal and business environment as an element of FET covered by various BITs, multilateral and regional investment and trade treaties.[25]This provides certainty to the foreign investors in making decision to invest, and in attracting foreign investment to the state at hand.[26] However, legal certainty may restrict executive action and regulatory power of the state. Therefore, caution should be taken in this regard. Details on this and other related issues are elaborated in the following sections.

### 2.2. Condition for Reliance of Investors

Since foreign investment is a complex area that involves different activities and there are no treaty provisions specifically addressed to investors' legitimate expectations, it is difficult to single out the extent and scope of legitimate expectations of foreign investors.[27] That said, some yardsticks are emerging from arbitral awards.[28] So, it is necessary to ascertain the existence of legitimate expectations of foreign investor and conditions on which the foreign investor relied.

[22]*Id*.
[23] Trevor Zeyl, *supra note* 6 at 219.
[24]*Id*.
[25]Shamila DLF, *Rationalize of Host State's Regulatory Measures and Protection of Legitimate Expectations of Foreign Investor: Analyzing the State of Necessity in the Investment Treaty Context, South East Asia Journal of Contemporary Business, Economics and Law*, Vol. 2, Issue 3 (June, 2013) ISSN 2289-1560, at35.
[26] Felipe MutisTe´llez, *supra note* 5 at 2.
[27]*Id*.
[28]*Id*.

### A. Assurances and Representations

Legitimate expectations of foreign investor may arise from host state's assurance or representations on which the investor has relied.[29] Those unilateral representations of the host state could create legitimate expectations on the foreign investors that can be relied on.[30] Such representations of the host state may be provided in any form, including licenses, permits or some other specific oral or written representations.[31] The legitimacy of reliance by the foreign investor on this unilateral act of the host state comes from the principle of good faith.[32] This was raised by different tribunals. For instance, the tribunal in the *Waste Management v Mexico case*, noted that "in applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant"[33]

Legitimate expectations may also be derived indirectly from specific representations as a general act of the host state declared to attract foreign investment for certain sectors.[34] For instance, in *CMS v. Argentina,* due to the privatization of gas transmission in Argentina, at the time of making the investment, Argentina granted the U.S. Company the right to calculate tariffs in US dollars and then convert them to Argentina pesos at the prevailing exchange rate, and to adjust tariffs every six months to reflect changes in inflation, and the U.S. Company had invested in Argentina gas Transmission Company induced by the offer describing the tariff regime.[35] The regime included calculations of the tariffs in dollars and certain future adjustments in the tariff amounts. However, later Argentina amended the law and ceased to calculate the tariff rate in Dollars and to make inflation adjustments due to the economic crises that occurred in the country.[36] In this case, the tribunal held that Argentina violates the representation made prior to the operation of the investment; 'stability and predictability' are not separable from FET.[37]

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[29] Rudolf Dolzer, *supra note* 12 at 24.
[30] *Id*.
[31] Newcombe & Paradell, *Law and Practice of Investment Treaties*, Kluwer Law International, (2009), at 282, cited in Moshe Hirsch, *Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change inInternational Investment Law*, *Journal of World Investment & Trade* Vo. 12, (2011) at 798.
[32] Rudolf Dolzer, *supra note* 16 at 24.
[33] Aninditaa Chander, *In light of Investment Arbitral Decisions, Examine the Protection of Foreign Investors? Legitimate Expectations with in the Concept of Fair and Equitable Treatment*,*International Investment Law* at 21, available at: Academia: http://www.academia.edu/6793628 (Accessed on March 6, 2017).
[34] *Id*.
[35] Kenneth J. Vandevelde, *supra note* 4 at 75.
[36] *Id*.
[37] *Id*.

Therefore, representations or assurances are capable of creating legitimate expectations to foreign investors and the host state should not arbitrarily change the assurance or representations it made to foreign investors which induced them to invest.

### B. Contractual Commitments

Protection of legitimate expectations of foreign investor may also be derived from contractual commitments with the foreign investor. When the host state fails to provide license grant or contractual arrangements with the investor, legitimate expectations of foreign investor under the FET is violated.[38]

On the one hand, it is widely recognized by tribunals that, "repudiation of a contract by the host state violates the rights of the investor even in the absence of a BIT under the minimum standard of international law".[39]On the other hand, ordinary commercial disputes are not subject of BIT in the absence of Umbrella clause which incorporated in the BIT.[40] Therefore, when the conduct is sovereign rather than commercial conduct, it is capable of creating legitimate expectations to the foreign investor to be protected under treaty.[41]

### C. Legal Framework

Legitimate expectations of foreign investor can be created through the host state's regulatory frameworks existed at the time of the investment[42]. It can also be created afterwards provided that there is a change to the legal framework on which the foreign investor relied up on and developed a legitimate expectation.[43]This sub-element of legitimate expectation has been often buttressed through a reference to the BIT's preamble, that stability and predictability of legal framework to be considered as one of the aims of the treaty.[44]

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[38]*Id* at 69.
[39] Rudolf Dolzer, *supra note* 12 at 25.
[40]*Id*.
[41] Laura Isotalo, *Climate Compatible Investment Treaty Law: The Role of Legitimate Expectations, ScottishCentre For International Law Working Paper Series*, Working Paper No. 6 at 6, available at: <http://www.scil.ed.ac.uk> (Accessed on February 17, 2017)
[42] Moshe Hirsch, *Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change inInternational Investment Law*, *Journal of World Investment & Trade* Vo. 12, (2011) at 799.
[43] Christoph Schreuer and Ursula Kriebaum, *At What Time Must Legitimate Expectations Exist?* (2009) at 8, available at: www.univie.ac.at/intlaw/pdf (Accessed on March 6, 2017).
[44]Michele Potestà, *supra note* 19 at 28.

For instance, in the *Occidental Exploration & Production Company v Ecuador case*, the tribunal used the BIT preamble as a reference and noted that stability of the legal and business framework is an essential element of FET and there is an obligation on the host state not to change the legal and business environment in which the investment has been made.[45] Hence, the act of tax refund by Ecuador led to a breach of the FET clause; "the tax law was changed without providing any clarity about its meaning and extent and the practice and regulations were also inconsistent with such changes."[46]

Nevertheless, arbitral tribunals' rulings show that regulatory change by itself is not enough to be protected under FET; i.e. the regulatory change should be supported by additional factors such as abuse of authority that amount to the breach of legitimate expectations of foreign investor.[47]Unless the reliance of the investor on a host state's legal framework is not repudiated by additional factor such as abuse of authority, the mere change of the legal framework does not amount to the violation of legitimate expectations. Thus, when a host state's regulatory change is accompanied by exceptional factors [negative conduct of the host state], the combination thereof may amount to a breach of legitimate expectations protected by the FET principle.

Generally, the term legitimate expectations of foreign investors could be treated as one component of FET clause and can be derived from different patterns, such as, assurance or representation, contractual arrangement and legal framework of the host state. However, these patterns of legitimate expectations may sometimes overlap and remain interrelated. Thus, majority of tribunals affirmed that the host state is responsible for the violation of legitimate expectations of foreign investors.

### 2.3. Controversies on the Interpretation of Legitimate Expectation

As elaborated in the above sections, protection of legitimate expectations of foreign investors is an obligation of the host state under the principle of FET. However, expectations of foreign investors and the interest of the host state to preserve its public values needs to be considered. Thus, a host state may want to put some limitations on the application of the standard due to economic, social and political development so as to "ensure a proper balance between the

[45] *Id*.
[46] Moshe Hirsch, *supra note* 42.
[47] Moshe Hirsch, *supra note* 42.

protection of investors and the inherent right of a State to regulate economic conduct within its borders".[48]

On this point there are broad and narrow approaches developed by Tribunals` interpretations of legitimate expectations.[49] The broad approach gives interpretation to the principle that host state is responsible to provide protection to the legitimate expectations of foreign investors; it is expected to act in a stable and predictable manner with the rules that the investor knows in advance.[50] It focused on the strict application of the principle of legitimate expectations that the host state should not change the legitimate expectations of the investor.[51]

In this regard, the *Tecmed v. Mexico case*, the tribunal noted that foreign investor can rely on the stability and predictability of the host state.[52] The host state breached legitimate expectations of the investor by changing the unlimited license of the investor to operate a landfill with a time limited license, "leading to the claim that the change in trading and legitimate space of the investment violates the fair investment treatment between Spain and Mexico."[53] The tribunal held that the Mexican officials violated the legitimate expectations of the foreign investor through "unclear and ambiguous" act[54].

This approach gives greater protection to and benefits the foreign investor without considering majority of citizens in the host country, the right to regulation of the host state for political and economic changes occurred over time by preferring investor's interests to national priorities.[55] Hence, this is a risk to the sovereignty of the state since tribunal may potentially acquire the authority to examine all state policies which can affect interests of the investor.[56] Therefore, this approach is criticized for being too broad that did not consider the right to legislate of the host state and is not achievable.

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[48] Peter Muchlinski, *Caveat Investor? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard*, *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY*, VO. 55, (2006) at 528, doi:10.1093/iclq/lei104

[49]Zeinab Asqari, *Investor's Legitimate Expectations and the Interests of the Host State in Foreign Investment, Asian Economic and Financial Review*, (2014), 4(12):1906-1918, available at: Asian Economic and Financial Review: <http://www.aessweb.com/journals/5002> (Accessed on February 17, 2017).

[50]*Id*.

[51] Felipe MutisTe´llez, *supra note* 5 at 8.

[52]*Id*.

[53]*Id*.

[54]*Id*.

[55]*Id*.

[56] Abhijit P.G. Pandya, *supra note* 21 at 63.

The narrow approach argues for restrictive interpretation of the legitimate expectations of foreign investor; since the FET obligation and stabilization clauses are not the same and could not serve the same purpose.[57] Consequently, this approach seeks to introduce a balance between the need for flexible public policy and the legitimate reliance on particular investment operations.

### 2.4. Balancing Legitimate Expectations and Regulatory Right of the Host State

In applying the principle of legitimate expectations, it is required to consider the interest of the investor and the regulatory rights of the host state within its territory. In spite of some commitments undertaken by the host state, it might be practically impossible and unrealistic to protect "expectations of foreign investor considering different situations".[58]

Tribunals have observed that the investor's legitimate expectations required to consider host state's specific characteristics in terms of investment environment.[59] In order to protect legitimate expectations, the expectations of foreign investor need to be reasonable. Reasonableness requirement of expectations need an examination of "all circumstances that the investor should consider when making the investment, including the level of development of the host country."[60] Thus, the level of expectations from developing countries and developed countries is not the same, since there is a difference on socioeconomic, cultural and historical conditions.

In determining the reasonability of foreign investor's expectations, the tribunal in the *Duke v. Ecuador case*, noted the following statement as a holistic approach:

> *"The assessment of the reasonableness or legitimacy [of the investor's expectations] must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State."*[61]

Thus, in addition to the subjective expectations of the investor, the objective expectations based on the conditions offered by the host state are essential in determining reasonableness. States are sovereign and have undeniable right and privilege to exercise legislative power on their

[57] Felipe MutisTe´llez, *supra note* 5 at 8.
[58] *Id*.
[59] Michele Potestà, *supra note* 19, at 35.
[60] *Id*.
[61] *Id*.

sovereign.[62] They have the right to enact and change laws within their jurisdiction. Thus, legitimate expectations should not interfere in the host state's sovereignty to freeze regulatory framework and should not be equated with a stabilization clause in the investment agreement.[63] However, this legislative power should not be unfairly, inequitably or unreasonably exercised.

To this end, it is crucial to balance these legitimate expectations of foreign investors and public interests of the host state under the principle of FET. Thus, the foreign investor will have protection of legitimate expectation if it is reasonable taking into consideration the circumstances such as, political, socioeconomic, cultural and historic conditions prevailing in the host state; and the potential change of the legal environment of the host state. However, as to the weight on the balancing of these conflicting interests, arbitral tribunals have not yet established more detailed criteria that can avoid uncertainties in the application of this important component of fair and equitable treatment.[64]

# 3. Evaluating Legitimate Expectations of Foreign Investors in Ethiopia

## 3.1. Legal Analysis on Legitimate Expectations of Foreign Investors

### 3.1.1. Treaties Ratified by Ethiopia

In the international investment regime, many developing countries signed BITs with developed countries to attract FDI by creating confidence in foreign investors at the pre-investment stage[65] and protect their legitimate expectations. BITs are known for defending foreign investments since, currently in Ethiopia, there is no comprehensive multilateral investment instrument for the regulation of foreign investment. Thus, BITs increase the inflow of foreign investments to a host state by providing guarantees to certain rights of foreign investors.[66] Those treaties set forth standards for the treatment of foreign investments, among others, National treatment, most favored nation treatment, protection against expropriation and Fair and equitable treatment are guarantees for the protection the interests of foreign investors.

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[62] Roland Klager, *Fair and Equitable Treatment in International Investment Law*, (U.S.A.: Cambridge University Press, 2011) at 174.
[63] Moshe Hirsch, *supra note* 42 at 802, see also Laura Isotalo, *supra note 41* at 20.
[64] Roland Klager, *supra note* 62.
[65] Martha Belete Hailu and Tilahun Esmael Kassahun, *Rethinking Ethiopia's Bilateral Investment Treaties in Light of Recent Developments in International Investment Arbitration, Mizan Law Review,* VOL. 8, No.1, (September 2014) at 121.
[66] *Id*.

In Ethiopia, due to the economic liberalization followed since 1991 there is a high inflow of FDI to the country. From that time onwards, there is also an interest on the Ethiopian government to protect foreign investors' interests so as to attract FDI. To this end, there are a lot of BITs and multilateral investment treaties signed by the Ethiopian government with different developed and developing countries.

BITs are instruments provided principally to protect FDI.[67] One of the protections accorded by BITs is FET. As a result, they are important tools in securing legitimate expectations of foreign investors. Thus, foreign investors rely on BITs than domestic legislations as the latter may not be stable and are subject to amendment in response to national interest of the states. To avoid such risk on foreign investors, developing countries including Ethiopia sign BITs, in order to attract FDI and as a sign of encouraging future investment.[68] Thus, Ethiopia has signed BITs with 33 countries; namely, Algeria, Austria, Brazil, Belgium-Luxemburg, China, Denmark, Djibouti, Egypt, Equatorial Guinea, Finland, France, Germany, India, Iran, Israel, Italy, Kuwait, Libya, Malaysia, Morocco, Netherlands, South Africa, Spain, Sudan, Russia, Sweden, Switzerland, Tunisia, Turkey, United Kingdom, USA, United Arab Emirates, and Yemen.[69] Hence, these BITs ratified by the country are an integral law of the land.[70]

Almost all of these BITs signed by the country incorporates the standard of FET. However, the wording used in the incorporation of FET clause as one of the standard of treatments varies from one BIT to another BIT and none of these treaties provides a specific provision that deal with legitimate protections of foreign investors.

The problem is that there is no clear meaning of FET and its interpretation is controversial. In most BITs concluded by Ethiopia, the FET clause is more general in its wording and does not mention of the legitimate expectations of foreign investors.

When we see thoroughly the provisions of all these BITs with regards to the interpretation of FET and legitimate expectations of foreign investors almost all BITs signed by Ethiopia refer to

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[67] M. Sornarajah, *supra note* 15 at 416.

[68] *Id*.

[69] UNCTAD, *Ethiopian, Bilateral Investment Treaties*, available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/67 (Accessed on November 9, 2018).

[70] The Constitution, Proclamation No. 1/1995, FED, FEDERAL NEGARIT GAZETA, 1st Year, No.1, (Addis Ababa, 21st August, 1995), (hereafter FDRE Constitution), Art. 9(4).

the plain meaning. However among the BITs concluded by Ethiopia, the one made with the government of the Republic of France[71] refers to the application general rules of international law in the following manner:[72]

> *"Either contracting party shall extend fair and equitable treatment in accordance with the principles of international law to investments made by nationals and companies of the other Contracting Party on its territory or in its maritime area, and shall ensure that the exercise of the right thus recognized shall not be hindered by law or in practice."*

This provision links FET to the international minimum standard required by customary international law. The assessment of the violation of FET by one of the parties to this treaty needs to be in accordance with the recognized minimum standard of treatment set under customary international law.[73] However, the minimum standard of treatment is difficult to identify all its normative contents[74].

Consequently, almost all other BITs signed by Ethiopia prescribe plain and ordinary meaning of FET. For instance, the treaty between the Federal Republic of Germany and the FDRE[75] provides:

> "*Each Contracting Party shall in its territory in any case accord investments by investors of the other Contracting Party fair and equitable treatment*."

Thus, the ordinary meaning of FET should be interpreted according to the circumstance of the case in good faith in light of the object and purpose of the BIT pursuant to the principle of article 31(1) of the Vienna Convention on the Law of Treaties.[76] Whether the investor has been treated

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[71]Signed on June 25, 2003.
[72] Article 3
[73] OECD Working Papers onInternational Investment, *Fair and Equitable Treatment Standard in International Investment Law*, (2004) at 8, dx.doi.org/10.1787/675702255435.
[74]Olatokunbo Lad-Ojomo, *what is the Distinction between the Fair and Equitable Treatment Standard and the Minimum Standard of Treatment under Customary International Law*, at 19, available at University of Dundee: <http://www.dundee.ac.uk> (accessed on March 23, 2017)
[75] Art. 2(2) of the treaty between the Federal Republic of Germany and the FDRE, (signed on January 19, 2004).
[76] Vienna Convention on the Law of Treaties, (1969) 1155 UNTS 331, as cited in Jacob Stone, *Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment, Leiden Journal of International Law*, Vo. 25, (2012) at 77, doi:10.1017/ S0922156511000598.

fairly and his legitimate expectations has been protected should be analyzed on a case by case basis taking in to consideration the purpose of the BIT.

Primarily the purpose of BITs signed by Ethiopia is to create a favorable condition for the investments of one contracting party in the territory of the other contracting party. This statement is clearly provided in the preambles of BITs signed by Ethiopia. Thus, the provision of FET should be interpreted cumulative with the preamble so as to include legitimate expectations of foreign investors. This protects investors from arbitrary act of the government and enables them to make reasonable business decisions to invest in Ethiopia by relying on the county's representations.

Consequently, any unreasonable prejudice or discriminatory measures on the management, maintenance, use, enjoyment or disposal of investments by the government of Ethiopia is a violation of legitimate expectations of foreign investors. Putting it differently, any government measure which negatively affects the decision of the investors to invest in Ethiopia amounts a violation of legitimate expectations.

*From the cumulative reading of the preambles of BITs and the specific provision on FET* it requires treatment of foreign investor without affecting basic legitimate expectation of foreign investors that were considered in deciding to make the investment (emphasis added ).[77]

Some BITs signed by Ethiopia incorporate the standard of FET in different expressions in combination with other standards such as national and most favored nation treatments. They mix the standard of FET with national treatment and most favored nation treatment. For instance, Article 3(2) of the treaty between the Federal Democratic Republic of Ethiopia and the Government of the Republic of Sudan[78] provides:

> *"Each Contracting Party shall ensure fair and equitable treatment within its territory to investments of the other Investors of the other Contracting Party and shall not be less favorable than that accorded to investments made by its own Investors or Investors of any third states."*

[77] Trevor Zeyl, *supra note* 9, at 205.
[78]Signed on March 7, 2005.

The BITs Ethiopia signed with China[79], Denmark[80], Iran[81], Kuwait[82], Libya[83], Netherlands[84], Russia[85] and Yemen[86] contains similarly worded provisions.

This kind of provision demand the treatment of foreign investors to be in accordance with the national treatment and most favored national treatment standards. This preference is different from the essence of FET, since FET is a non-contingent standard that makes it a different standard from national and most favored nation treatment. A non-contingent standard of treatment does not refer to other investment or investor to protect the legitimate expectations of the investor at hand.[87] Rather it should be determined independently, which ensures a minimum level of protection is accorded to the foreign investor regardless of whether nationals of the host state are treated the same way.[88] Thus, FET standard on the one hand and national and most favored nation treatments on the other hand, are two independent standards. It is ensuring that a minimum standard of investment protection exists even in situations not contemplated by the specific treaty provisions.

Though unlike the contingent standards, FET is a standard which does not focus on external factor/ standards which are applicable to other investor, mixing of the standard of FET with the contingent standard could create a problem on the protection of the legitimate expectations of foreign investors. i.e. if the investor from the most favored nation is not protected, the legitimate expectations of foreign investor at hand maybe not protected. FET standards tied to MFN and

[79] Agreement between the government of the FDRE and the government of the People's Republic of China concerning the encouragement and reciprocal protection of investments, (signed on May 11, 1998).
[80]Agreement between the FDRE and the Kingdom of Denmark concerning the promotion and reciprocal protection of investments, (signed on April 04, 2001).
[81] Agreement of Reciprocal Promotion and Protection of Investments Between the Government of the FDRE and the Government of the Islamic Republic of Iran, (Signed on October 21, 2003).
[82] Agreement between the FDRE and the State of Kuwait for the encouragement and reciprocal protection of investments, (signed on September 14, 1996).
[83]Agreementbetween the government of the FDRE and the Great Socialist People's Libyan Arab Jamahiriya concerning the encouragement and reciprocal protection of investments, (signed on January 27, 2004).
[84]Agreement on encouragement and reciprocal protection of investments between the FDRE and the Kingdom of the Netherlands, (signed on May 16, 2003).
[85] Agreement between the Government of the FDRE and the Government of the Russian Federation on the promotion and reciprocal protection of investments, (signed on February 10, 2000).
[86] Agreement on the Government of the FDRE and the Government of the Republic of Yemen on the reciprocal promotion and protection of investment, (signed on April 15, 1999).
[87] Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, (2000) at 105, available at University of van Amsterdam: http://bybil.oxfordjournals.org (accessed on march 26, 2017)
[88]Olatokunbo Lad-Ojomo, *supra note* 74 at 7

NT standards, such as the one at hand, could trigger treaty breach even where there's no investor that is treated more favorably. In other words, MFN and NT standards tied to FET could serve the same purpose that standalone MFN and NT BIT clauses serve. Because, the standard of most favored nation depends on a reference to the treatment accorded to other investment and its contents are determined by reference to the host states treaties with other countries. This makes difficult to the reasonableness of expectations of foreign investor to the regulatory measurement of the state.

### 3.1.2. Domestic laws as guarantees to foreign investors

In order to attract and promote foreign investors many countries have adopted domestic investment laws that protect their investment from adverse measure of the government. Legislations often seek to provide incentives to promote private capital investment, especially by promoting participation of foreigners in the national economy. Legal guarantees protect the investor from adverse measure of the government and assures safe business environment which is expected by the foreign investor.

Domestic law guarantees to foreign investors are important where there are investment treaties giving protection to the investment; the violation of these guarantees may amount to a violation of treaty standards of protection.[89] Therefore, domestic laws guarantees are significant to implement treaty standards and protect legitimate expectations of foreign investors.

Since 1991 the national investment law of Ethiopia has been amended several times. Thus, the present regulatory regime governing FDI in Ethiopia is based on a series of Investment Proclamations issued between 1992 and 2014, principally Proclamations 15/92, 37/1996, 116/1998 (amendment), 280/2002, 375/2003(amendment), 769/2012, 849/2014 (amendment) (emphasis added).[90]

[89] M. Sornarajah, *supra note* 15 at 101.
[90] UNCTAD, *Investment and Innovation Policy Review, Ethiopia*, United Nations, (New York and Geneva, 2002) at 26.

In Ethiopia, "Increasing the inflow of capital and speed up the transfer of technology into the country" is one of the purposes of Ethiopian investment law.[91] This indicates the intention of the country to attract foreign investors to the country's economic development.

The repealed investment proclamation no. 37/96 protects legitimate expectations of foreign investors by recognizing the stability of the regulatory framework existing at the time of investment. Article 41(1) (b) of this proclamation provides:

> *"Incentives provided for in Proclamation No.15/1992 and in directives issued thereunder shall remain applicable in respect of investments approved prior to the effective date of this Proclamation."*

Thus, investors who relied on the incentives provided by the investment proclamation no. 15/1992 are protected by this provision. This is a treatment of foreign investment not to affect the legitimate expectations of foreign investor who made reasonable business decisions to invest in Ethiopia by relying on the county's regulatory framework and representations.

Similarly, Article 41(1) of the investment proclamation no. 280/2002 demands for stability of the proclamation no. 37/96 with its amendment, regulation and directives for investors who relied on that prior to the issuance of this proclamation. This is clearly incorporated to protect the legitimate expectations of investors.

Nevertheless, the investment proclamation no.769/2012 does not specifically incorporate the issue of FET standard and legitimate expectations of foreign investors. These issues should have been at least briefly stated through indicative way in the preamble and the provisions of the proclamation like bilateral investment treaties signed by Ethiopia.

The special investment proclamation No. 678/2010, a proclamation to promote sustainable development of mineral resources also tried to incorporate the protection of legitimate expectations of foreign investors who concluded an agreement with the Ethiopian government prior to the coming in to force of this proclamation to invest their capital in mineral resources. Thus, Article 81(1) of this proclamation provides that:

[91]Investment Proclamation, preamble.

> "*Any license or mining agreement issued or concluded prior to the coming into force of this Proclamation shall, in so far as it is consistent with this Proclamation, continue in force for the remaining period of its validity; and thereafter, it may be renewed in accordance with the provisions of this Proclamation.*"

Only a license issued prior to the coming in to force of this proclamation is protected and remains in force if it is consistent with this proclamation [regulatory change]. What could happen if the license granted pursuant to the previous investment laws is inconsistent with this proclamation? Does it mean the investor could not be protected? On this regard sub-article 2 of this article provides the following statement:

> *"Notwithstanding with the provisions of sub-article (1) of this article, according to the appropriate agreement where a party undertaking a mineral activity the benefit of which sustains damage due to this proclamation, upon the request of the other party under damage, both parties may agree to make the necessary correction in good faith mutual discussions."*

Therefore, the government should undertake negotiations with investors when there is damage as a result of this regulatory change in spite of the inconsistency of a license with the new proclamation.

When we see the investment proclamation no.769/2012, though it doesn't expressly incorporate the FET standard and the protection of legitimate expectations of foreign investor, it indirectly adopted in its preamble and provisions. To begin with the preamble, it provides that "the system of administration has to be transparent and efficient". This system applies both to the domestic and foreign investors. Transparency of the government in the decision making could create certainty on the foreign investor in making decisions to invest in Ethiopia. This transparency of government action is a related concept of legitimate expectations of foreign investors.[92] Foreign investors legitimately expect the Ethiopian government to act in a transparent manner. Any legal framework and decisions that can affect the interest of foreign investor should be clear.[93] Therefore, from this statement, it can be concluded that the Ethiopian government is expected to

[92] Rudolf Dolzer and Christoph Schreuer, P*rinciple of International Investment Law*, (United States: Oxford University Press, 2008) at 133.
[93] *Id*.

notify foreign investors regarding the changes or possible changes to the investment status and the investor will perform accordingly. If the government is not transparent in dealing with a foreign investor, it is a violation of FET.

The Ethiopian government considers foreign investment as an essential factor for the economic development of the country. This is clearly provided in Article 5(7) of the investment proclamation as one of the objectives of the proclamation. This sub-article reads "to enable foreign investment play its role in the country's economic development." Therefore, in order to meet this objective, the government needs to protect the interests of foreign investors and comply with the international standards of treatment so as to attract them to come and invest their capital in the country.

As it has been examined in the previous section, Ethiopia tried to meet this objective by signing BITs with various countries and by adopting various standards of treatment including FET. Surely this could attract foreign investors by signaling that their legitimate expectations will be protected by these treaties. However, additionally there should be domestic guarantees to meet the objective of this proclamation. Thus, it is the belief of this researcher that the proclamation should adopt the standard of FET in its provisions to increase the confidence of foreign investors in making decisions to invest in Ethiopia.

Article 25 of the proclamation no. 769/2012 provides investment guarantees and protections. Though this article applies both to domestic and foreign investors--foreign investment guarantees and protections are broad concepts and include FET, national treatment, most favored nation treatment, protection from unlawful expropriation, protection against other government measures which are seriously detrimental to the investors' interests such as Protection against measures that would restrict the possibility to transfer funds i.e.; currency control.[94] However, under this provision only the protection against unlawful expropriations or nationalizations is provided as guarantees and protections for investors.[95] This could be considered as one means of protecting legitimate expectations of foreign investors in Ethiopia. This article stipulates that every expropriation and nationalization involving a foreign investor should be for public purpose and be accompanied with adequate compensations corresponding to the prevailing market value paid

[94] Rudolf Dolzer and Christoph Schreuer, *supra note* 92 at 119-191.
[95] Investment Proclamation No. 769/2012, *supra note* 3, article 25(1).

in advance.[96] This creates expectations on the foreign investor to have an effect on the assessment of compensation where the foreign investor suffers damage as a result of action by the government contrary to this provision. This legal framework provided by the county is an important source of legitimate expectations of foreign investors. What matters for the investor's legitimate expectations is the state of law of the country at the time of investment.[97] And this state of law should be transparently implemented by the government.

With regards to the standards of compensation for expropriations of foreign investor there is difference between developing and developed countries. The developed countries preferred full, prompt and effective compensation according to international law which is known as the "Hull formula" named after the United States Secretary of state Cordial Hull, who made such a claim in relation to Mexican expropriation; while developing countries preferred national treatment to have appropriate compensation which is known as Calvo doctrine named after the Argentine diplomat Carlos Calvo.[98] The detail issues concerning the expropriations and assessment of compensation are out of the scope of this article.

Notwithstanding these difference most bilateral investment treaties commonly refer to the Hull formula.[99]When we see most of the BITs signed by the Ethiopian government adopts the Hull formula of full, prompt and effective compensation.[100] Thus, the legitimate expectations of foreign investors concerning expropriations of property in Ethiopia is guaranteed by the BITs and domestic investment law. The other means of guarantees and protections of foreign investors such as FET, national treatment and most favored nation treatments are not directly adopted in this provision.

### 3.2. Practical Problems of Legitimate Expectations of Foreign Investors

Legitimate expectations of foreign investors demand the host state to refrain from changing the law and business scenario as well as to properly implement its laws and policies. Therefore, foreign investors expect that their economic rights and interests will be protected in Ethiopia,

[96] *Id*, Article 25 (2).
[97] Rudolf Dolzer and Christoph Schreuer, *supra note* 92 at 105.
[98] R. Doak Bishop and James E. Etri, *International Commercial Arbitration in South America*, at 2 available at: www.kslaw.com (accessed on February 19, 2017).
[99] *Id*.
[100] Martha Belete Hailu, *Standards of Expropriation for Compensation of Foreign Investment in Ethiopia: The Tension between BITs and Municipal law*, *Journal of Ethiopian Law*, Vol. 26, No.2, (2014) at 18.

since the country has BITs and moderate investment laws. In addition to macroeconomic stability, peace and security in the country, foreign investors are motivated to invest in the country by incentives and legal protections provided by law, representations provided in different symposiums by higher government officials.[101]

As has been examined in the previous section, Ethiopia has already signed BITs with 30 countries. In theory, this together with the attractive incentives and protections extended to foreign investors by law, could enhance their legitimate expectations and thus promote investment in the country. However, the practice shows that there is a clear problem in meeting the legitimate expectations of foreign investors.

There are various incentives given to foreign direct investment in Ethiopia. These include exemption from payment of export custom duties, income tax holidays from 2 to 7 years depending on the region and the sector of the investment, exemption for two years for investors exporting at least 60% of their products or supply their product as input to exporters.[102] For instance, Julphar Gulf Ethiopia Pharmaceutical P.L.C, a pharmaceutical industry owned by UAE, is among the beneficiaries of income tax exemption for a period of four years.

Ato Aschalew Tadesse, FDI promotion Director of the Ethiopian Investment Commission opines that:

> *"These incentives and other expectations provided by the law are implemented accordingly. Pursuant to the law their legitimate expectations are protected. But in relation to land it could not be according to their expectations. There might be some unnecessary delay and bureaucracy which is not transparent at all".*

Moreover, promises or representations provided by higher officials of the government are mostly for political purposes which may not have legal basis, and there may be discrepancies between

[101]Interview with Ato Mubarek Ahmed, General Service Manager, Julphar Gulf Ethiopia Pharmaceutical industry, UAE plc. (Addis Ababa, March 31, 2017).

[102] Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation, Regulation No.270/2012, FED. FEDERAL NEGARIT GAZETA, 19th year No. 4, Addis Ababa, November, 2012; Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers (Amendment) Regulation, Regulation No.312/2014, FED. Federal Negarit Gazeta, 20th year No. 62, Addis Ababa, August, 2014.

the law and representations given formally or informally by the government.[103] In such cases, the expectations of foreign investors may not be met. The executive body is not aware of the concept. Especially in relation to land, the practice is against the legitimate expectations of foreign investor. Ato Mubarek observes that :

> *"We have requested land before to expand the investment and we got the permission, even the prime minister personally came and saw our investment and promised us to support the investment. But there is a problem on the land administration officers who implement the laws and policies. From acquiring land to getting a building permit; from renewing a business license to obtaining tax clearance, the bureaucracy in Ethiopia moves lethargically. Still we have not got the land".*

A foreign investor expanding or upgrading his existing enterprise in relation to the additional income generated by the expansion of the enterprise is also entitled to income tax exemption. But, due to the problems on implementation foreign investors could not get land for expansion of their investment and could not be the beneficiaries of income tax exemptions based on expansion of investment.[104]

The doctrine of legitimate expectations of foreign investors in essence imposes a duty on the authority to act fairly. Thus, any legal framework and decisions of the host state that can affect the interest of foreign investor should be clear. It is a frustration of legitimate expectations of foreign investors when there is a failure on the part of the concerned authority to act fairly in taking the decision. But the practice shows arbitrary exercise of power by the administrative authority which is not clear and fair to foreign investors. Failure to ensure transparency and give decision without ambiguity based on the legal framework is a violation of legitimate expectations of foreign investors. This happens despite the Corruption Crime Proclamation No. 881/2015, which identifies undue delay of matters by a government official to be a criminal act. Article 18 of this Corruption Crime Proclamation provides "any public servant or employee of a public organization who with intent to obtain an advantage, directly or indirectly…fails, without good cause, to decide on or delays the matter… shall be punishable." Therefore, administrative

[103] Interview with AtoYohannes Lammato, Contract Administrator Team, Ethiopian Investment Commission, (Addis Ababa, and March 24, 2017).
[104] Interview with Ato Mubarak Ahmed, supra note 101.

practices should be able to comply with the principle of legitimate expectations of foreign investors.

Similarly, W/ro. Muna Ahmed[105] says "practically there are problems on the implementations of legitimate expectations". Moreover, the system is not clear and foreign investors are not aware of their rights what to do and not to do. Similar observations were made by representataives of other foreign investors: Ato Endale Eyayu[106] W/ro Helina Solomon[107] and Mr. Ashok Shiva.[108] These investors invested in Ethiopia by relying on the BITs signed and laws of the county that the laws and system of implementations are good enough in protecting their rights. But they maintained that practice is below their expectations.

This creates confusion to foreign investors who are interested in investing in the country. Foreign investors cannot be sure whether the legal guarantees will be realized to protect their interests. Consequently, the objective of investment laws and BITs to promote and protect of investment may be imperiled.

However, lacking confidence to the system, mostly they do want to bring formal complaints. Rather they informally and repeatedly ask public officials to implement their rights.[109] Foreign investors have doubts on the rule of law, on how the officials will act, on transparency to protect their economic rights and interests and public officials are not aware of the concept of legitimate expectations.[110]Ultimately, they doubt whether the legal system will ensure stability of a legal framework buttressed through a reference to the BITs preamble, which refers stability as one of the goals of treaty. For this reason, most foreign investors are not interested to bring formal complaint and confront with the government, rather as a last resort they want to take their investment to other host countries.[111] Therefore, my interview with foreign investors reveals that,

[105]Interview with W/ro Muna Ahmed, Deputy General Manager, East African Pharmaceutical Industry, Sudanese, and Yemeni and Saudi plc. (Addis Ababa, April 4, 2017).
[106]Interview with Ato Endale Eyayu, General Manager, DLM Textile Industry, Indian company plc. (Addis Ababa, March 18, 2017).
[107]Interview with W/ro Helina Solomon, Deputy Manager, NH BAY Furniture industry, China Company, (Addis Ababa, March 17, 2017).
[108] Interview with Mr. Ashok Shiva, General Manager, Fonix Plastic Industry, Indian Plc. (Addis Ababa, March 17, 2017).
[109] Interview with Ato Mubarek Ahmed, *supra note* 101 and interview with W/ro Muna Ahmed, *supra note* 106.
[110]*Id*.
[111] Interview with Ato Abreham Minalew, License and Registration Higher Expert, Ministry of Trade, (Addis Ababa, March 25, 2017).

though legitimate expectations did not appear anywhere in a judgment and is impossible to establish in which specific case the government violated legitimate expectations of foreign investors, legitimate expectations of foreign investors are not fully protected.

A more frustrating issue for foreign investors, according to Ato Mubarek,[112] is the absence of mechanisms to enforce arbitrations. Though the Ethiopian investment law provides for dispute settlement through negotiation and international arbitration, there is a doubt on foreign investors with regard to the recognition and enforcement of foreign arbitral awards in Ethiopia, since Ethiopia is not a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which seeks to provide common legislative standards for the recognition and enforcement of arbitration agreements as a means of settling international commercial disputes. So, investors are not confident whether their agreement or arbitration decision is enforced in Ethiopia.

Foreign investors believe that domestic administrative legal procedures are insufficient and lacked internal coherence or transparency to measure legitimate expectations of foreign investors. When the administrative legal procedure is not consistent and transparent, the state can be found to be in breach of the legitimate expectations and/or FET provisions based on the preamble in a BIT which has the objective of promoting and protecting investment. Officials of the state are expected to act in a consistent manner, ensuring clarity and transparency. Thus, the state's failure to act with transparency might result in violations of FET standard included in a treaty.

However, not all expectations of foreign investors are legitimate. As it has been examined in the previous section, foreign investor's expectations need to consider host state's specific characteristics in terms of investment environment.[113] Foreign investors should have to consider reasonableness requirement inherent in expectations to examine all circumstances when making the investment, including the level of development of the host country.[114]

[112] Interview with Ato Mubarek Ahmed, *supra note* 101.
[113] Michele Potestà, *supra note* 19, at.1-35.
[114] *Id*

Practically, some foreign investors are not asking their expectations reasonably. According to Ato Frew Mamo[115], some foreign investors are informal in requesting their rights, and they want to cheat the government. For instance, Ato Frew says:

> *"Import-export trade is allowed to domestic investors. But we have seen and controlled investors who came from Turkey illegally involved in import and export trade*. *They don't have a legitimate ground to involve on this trade"*.

Hence, foreign investors may not request incentives from the Ethiopian government without performing their obligations. For example, there are agreements with Turkey and Indian investors to export 80% of their products since the government need hard currency.[116] But evidence shows that 90 % of foreign investors in the textile industry provide their product to the local market.[117]

## Concluding Remarks

It has been discussed that Ethiopia has signed different BITs and multilateral agreements to protect foreign investments. These agreements are important in securing the legitimate expectations of foreign investors, viz.; to protect them from arbitrary act of the government and enable them to make reasonable business decisions to invest in Ethiopia. Thus, based on these international agreements, Ethiopia is expected to apply the fair and equitable treatment standard in general and its component—legitimate expectations of foreign investors, in particular.

In the domestic investment laws, the investment proclamations prior to the investment proclamation no. 769/2012 and the special investment proclamation No. 678/2010, a proclamation to promote sustainable development of mineral resources protects legitimate expectations of foreign investors by maintaining the stability of the regulatory framework existing at the time of investment. But the investment proclamation no.769/2012 does not specifically incorporate the issue of legitimate expectations of foreign investors. Rather the proclamation indirectly adopted it in its preamble and some of its provisions, such guarantees

[115]Interview with Ato Fraw Mamo, Legal Directorate Director. Ministry of Trade, (Addis Ababa, March 25, 2016).
[116]*Id*.
[117]*Id*.

and protections for investors as transparency and efficiency of the administrative system, protection against unlawful expropriations or nationalizations.

The major problems relate to implementation of the protection of legitimate expectations of foreign investors, Consistency of the practice and behavior of officials with the law.For instance, the practice in Addis Ababa shows that, in some cases public officials act arbitrarily, handed down decisions that lack transparency and clarity. They act in a manner that is inconsistent with the domestic laws and the BITs thereby undermining the legitimate expectations of foreign investors. This creates confusion among foreign investors interested in investing in the country. They cannot be sure whether the legal guarantees will be realized to protect their interests.

Therefore, the researcher recommends the following points for consideration:

- The Ethiopian investment proclamation shall incorporate legitimate expectations of foreign investors
- Primarily, the Ethiopian Investment Commission is empowered by law to implement and enforce the investment laws. As a result, to avoid the inequitable treatment foreign investors, the commission should take necessary measures. Such as, share experience and coordinate with other implementing institutions to ensure the proper application of legitimate expectations of foreign investors. It should facilitate and follow up the implementation of the legitimate expectations of foreign investor specified in treaty provisions and the law.
- Most government officials dealing with foreign investment are not aware of the concept of legitimate expectations of foreign investor. Thus, awareness creation should be given through different trainings and seminars.

# Physical persons That are Ineligible to Acquire Membership in Business Organizations: *A Descriptive Analysis of Ethiopian Legal Framework*

Manaye A. Shagrdi *

## Introduction

A business organization is an anthropomorphic person that plays a pivotal role in the socio-economic development of a country. Although it is an autonomous entity capable of shouldering and exercising rights and obligations, its initial establishment and perpetual existence; however, is contingent upon the capacity of its members. It can be established only among persons who are capable,[1] and it would be dissolved if a member becomes incapable after its formation.[2]Consequently, it is essential that members of a particular business organization (Hereinafter BO) are legally capable of acquiring membership.

Book II of the Commercial Code of Ethiopia, which recognizes and governs the constitution and operation of six forms of BOs, does not lay down express rules that govern capacity of persons to acquire and maintain membership in the BOs.[3] As a result, one has to synthesize membership capacity through a harmonious reading of Ethiopian private laws. In this regard, the CCE declares that physical persons are presumed to be capable of performing juridical acts unless

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[1]All business organizations arise out of a partnership contract that needs to be concluded among persons who are capable under the Civil Code of Ethiopia. *See* Civil Code of the Empire of Ethiopia, Gazette Extraordinary Proclamation No. 165 of 1960, Negarit Gazette, 19th Year, No. 2, Addis Ababa, 5th May 1960 (Hereinafter CCE), Art. 1678 (a); Commercial Code of the Empire of Ethiopia, Gazette Extraordinary Proclamation No. 166 of 1960, NEGARIT GAZZETE, 19th Year No. 3, Addis Ababa, 12 May 1960 (Hereinafter ComCE), Arts. 210 & 211.

[2]Incapacity of a member is a ground for dissolution of General Partnership, Limited Partnership, Joint Venture and Ordinary Partnership forms of business organizations. ComCE, Arts. 218(2), 278 & 206(1) cum 265 & 303. Share Companies and Private Limited Companies could also be dissolved if the composition of its members fell below the legally apposite number of members due to incapacity of a member, and replacement is not made within a reasonable period of time, six months in the case of Share Companies. ComCE, Arts. 311 & 511.

Besides, incapacity of a member has also a bearing on the capacity of a BO in which the person has become a member of. For example, foreign nationals are rendered incapable of acquiring membership in a BO engaged in economic activities reserved for domestic investors per article 12 of the 2012 Investment Proclamation. If a foreigner happened to have acquired membership in such BO, the BO itself would be barred from carrying out the activity reserved for domestic investors pursuant to article 26 of the ComCE. As such, the incapacity of the person may have effect on the capacity of the BO. ComCE, Art. 26; Investment Proclamation, Proclamation No. 769/2012, FED. NEGARIT GAZZETA 18th Year No. 63, Addis Ababa, 17 September 2012 (Hereinafter 'Investment Proclamation'), Art. 12.

[3] *See* ComCE, Arts. 210-560.

otherwise declared by an express proscriptive law which puts the person under general or special disability.[4] This presumption also works for physical persons' capacity to acquire membership in BOs by virtue of a cross-reference made by article 1 of the ComCE.[5] Therefore, a physical person is presumed to be legally capable of acquiring and maintaining membership in BOs unless declared otherwise by law pursuant to a cumulative reading of article 1 of the ComCE and article 192 of the CCE.

Incapacity to acquire membership, on the other hand, is not presumed and needs to be determined through a holistic examination of Ethiopian laws. Given that capacity is presumed, the primary concern of this article is to make a critical analysis of scenarios whereby physical persons could be rendered incapable of acquiring membership in Ethiopian BOs.[6]*Particularly, can minors, interdicted persons, and persons under non-compete duty acquire membership in Ethiopian BOs? If they cannot, what circumstances could trigger their incapacity? Does their incapacity bar them from acquiring membership in all forms of BOs? Can minors and judicially interdicted persons acquire membership through the instrumentality of their parents and tutors?* Despite its practical adverse effect, these and other issues in relation to membership incapacity have not been a subject of adequate scholarly scrutiny.[7]The purpose of this article is, therefore, to investigate Ethiopian legal proscriptions on membership capacity of minors, interdicted persons, foreigners and persons under non-compete duty, which are heretofore unexamined by past scholarly works.

This article is structured into five sections. Assuming that membership incapacity of physical persons can primarily be analyzed in terms of *mode of membership acquisition* and the ensuing *membership status*, the first section distinguishes between two modes of acquisition, viz., original and derivative acquisition, and two types of membership status, viz., a trader and a non-

[4] CCE, Art. 192.

[5] Article 1 of the ComCE states that *"[u]nless otherwise provided in [the ComCE], the provisions of the [CCE] shall apply to the status and activities of persons and [BOs] carrying on a trade."*

[6] This article is limited to a doctrinal analysis of Ethiopian laws on capacity of physical persons to acquire membership in BOs that are established pursuant to Book II of ComCE.

[7] Only Goldberg has slightly touched upon the issue. In his attempt to provide for the skeleton of Ethiopian law of BOs, he briefly addressed membership capacity of minors, judicially interdicted persons and married persons in an introductory manner. As stated in his conclusion his analysis was not meant to be exhaustive. Besides, much water has run under the bridge since the publication of his article in 1972. For example, his analysis regarding capacity of minors and judicially interdicted persons are based on Civil Code provisions that are now replaced by Federal and State Family Codes. Everett F. Goldberg, An Introduction to the Law of Business Organizations, 8 J. Eth. L 495, 519 (1972)

trader membership. The second section examines membership capacity of minors, judicially interdicted persons and legally interdicted persons in light of the conceptual framework set under the first section. Then, the nature and scope of potential restrictions on membership capacity of persons under non-compete duty and foreigners are respectively discussed under the third and fourth sections. Finally, the last section makes concluding remarks and recommendations.

**KEYWORDS:** Business Organizations, Membership, Capacity, Physical Persons, Ethiopia

## 1. "MODES OF ACQUIRING MEMBERSHIP" AND "MEMBERSHIP STATUS" AS TOOLS FOR ASSESSING INCAPACITY

ComCE recognizes six types of BOs viz., Ordinary Partnership (Hereinafter OP), General Partnership (Hereinafter GP), Limited Partnership (Hereinafter LP), Joint Venture (Hereinafter JV), Share Company (Hereinafter SC) and Private Limited Company (Hereinafter PLC).[8]Although each of these forms of BOs has its own distinctive features, all of them exhibit some common features. First, their formation and continued existence is guided by plurality of membership.[9] Second, they all arise out of a special type of contract known as 'partnership agreement'.[10]Third, they all are anthropomorphic creations with a juridical personality acquired through a process of incorporation, except for JVs.[11] Fourth, all members of BOs are required to make contributions and can participate in the profits and losses.[12] Fifth, membership shares in BOs are transferrable to third parties. Sixth, BOs are characterized by a delegated management.[13]

[8] ComCE, Art. 212(1).

[9] *See* ComCE, Arts. 210 cum 211, 307(1) & 510(2). However, there may be variations to plurality of membership in the case of government owned provisional one man SC. Ethiopian law recognizes a one man SC as an interim form of BO for handling privatization process of public enterprises. A public enterprise under privatization will be converted to an SC and the government will temporarily be the sole member of the SC until shares get transferred to private investors. *See* Privatization of Public Enterprises Proclamation, Proclamation No. 146/1998, FED. NEGARIT GAZZETA, 5th Year No. 26, Addis Ababa, 29 December 1998, Art. 5(1-3). Besides, the Draft Commercial Code of Ethiopia recognizes one man company. One may, therefore, anticipate that there could be variation to plurality of membership based on future amendment or revision of the ComCE. *See* Draft Commercial Code of Ethiopia, FDRE Attorney General, June 2017 (Hereinafter Draft ComCE), Arts. 210 & 505(2).

[10] ComCE, Arts. 210 & 211.

[11] ComCE Code, Arts. 210(2); *Also See* Commercial Registration and Business Licensing Proclamation, Proclamation No. 980/2016, FED. NEGARIT GAZZETA, 22nd Year No. 101, Addis Ababa, 5 August 2016, Art. 7.

[12] ComCE, Arts. 211 & 215, 229-232 cum 295 & 303.

[13] All BOs transact with third parties or act in legal proceedings through their agents. Therefore, the provisions of the CCE (arts 2179–2265) dealing with agency are applicable. *See* ComCE, Art 216.

Finally, all BOs are dissolved where the purpose for which they were established is achieved or cannot be achieved; where the period for which they were established lapses (when the BO is set up for a defined or fixed period); where the partners agree to dissolve the BO; and where a court pronounces judicial dissolution because of good cause.[14]

In addition to the above common features of BOs, the fact that no incapable person may become a member of BOs is an important common attribute of BOs that could be analyzed by reference to mode of acquisition of membership and the membership status thereby acquired.

### 1.1. Modes of Acquiring Membership and the Relevant Law for Assessing Incapacity

The mode of acquiring membership is relevant for identifying the law applicable to determine membership incapacity. A person may acquire membership in various ways. She may acquire membership by signing a partnership contract, through inheritance or donation *inter vivos* or *mortis causa* or as a result of execution levied by court. These various modes of acquisition can be generally classified into '*original acquisition*' and '*derivative acquisition* 'for the purpose of analyzing membership capacity of physical persons. Original acquisition of membership happens when a person, by participating in the negotiation and signing of the partnership agreement out of which a BO arises, makes a contribution that would make her a member in a newly established BO. Derivative acquisition, on the other hand, refers to acquisition of existing membership shares through a transfer from a member of an already established BO.[15]

In relation to original acquisition of membership, the relevant laws applicable to assess membership incapacity are the laws that govern a person's capacity to conclude a contract. This is because original acquisition involves the signing of a partnership contract required for the establishment of all types of BOs,[16]and persons who are allowed to conclude this contract are required to be capable under the law.[17] Accordingly, a conclusion one can draw with a reasonable certainty is that a person who is not capable of concluding a contract is also not

[14] ComCE, Arts. 217 & 218; *See also Yared Sisay v. Algreen Agro Industry PLC,* FDRE Supreme Court Cassation Division Case Book, Vol. 13, File No. 71134, p. 399, (Decision of 04 Sene 2004 E.C.). (*Ruling that a PLC may not be judicially dissolved without showing a good cause*)

[15] In this work, a person who acquires membership through original acquisition is referred to as *'an original member,'* while a person who derivatively acquires membership is referred to as '*a derivative member'*.

[16] *See* ComCE, Arts. 210 & 211.

[17] The contract will also be voidable where it is concluded by an incapable person and the contracting parties will be reinstated to a position they were before the conclusion of the contract. CCE, Art. 1678(a), 1808(1) & 1815-1817.

capable of acquiring original membership in a BO; and also that membership incapacity is determined on the basis of rules of capacity to conclude a contract.

The law applicable to assess membership capacity in the case of derivative acquisition; however, is not necessarily based on the rules regarding a person's capacity to conclude a contract. It rather involves identifying the law that governs the transfer of membership share from an existing member of a particular BO to a transferee whose capacity is under inquiry. Where a person inherits membership share through intestate or testate succession, law of successions and family law would be relevant to assess her capacity to inherit and maintain membership; where she buys membership share, the rules on capacity to contract and other rules relevant to sale of membership share would be relevant; and where she acquires membership via donation, the rules governing donation of membership share would be applicable to assess incapacity.[18]Due to such variations in the sources of derivative acquisition, capacity to become a derivative member of a BO has to be analyzed in juxtaposition with the laws that govern the transfer.

### 1.2. Membership Status and Assessment of Incapacity

While distinguishing between the two modes of acquisition of membership is useful to determine the law applicable for assessing capacity, membership status is a tool that can be used to identify the type of membership a person may not be allowed to acquire. Article 11(1) of the ComCE proclaims that persons who are incapable under the civil law may not carry on any trade. It means that they are incapable of becoming a trader. However, membership in BOs does not necessarily entail a trader status. Consequently, we need to classify membership into membership with a trader status and without a trader status in order to make a proper analysis of membership incapacity.

The ComCE explicitly provides for membership with a trader status by labeling a partner in a commercial GP,[19] a general partner in a commercial LP,[20]and a partner in a commercial JV[21]as

[18] In fact, the ComCE rules governing transfer of membership share is also relevant. The ComCE sets rules addressing the nature of approval and requirements for transferring membership share in each type of BO. However, most of these rules are mainly concerned with the capacity of the transferor – not the transferee. *Generally see* ComCE, Arts. 210-560.

[19] ComCE, Art. 280(2).

[20] ComCE, Art. 300 cum Art. 280(2).

[21] ComCE, Art. 271 cum Art. 280(2).

traders. Accordingly, persons that are incapable of becoming a trader are also incapable of becoming such members in these three BOs.

On the other hand, members in non-commercial BOs[22] acquire a membership without a trader status. Members in such BOs cannot be regarded as traders since the BOs themselves are not labeled as traders.[23]Hence, members in a non-commercial GP, a non-commercial LP, and a non-commercial JV acquire membership with a non-trader status. Besides, members of commercial BOs that enjoy limited liability coupled with a generally limited participation in management could be regarded as members without a trader status.[24] Accordingly, shareholders of a PLC and an SC and a limited partner in an LP are members without a trader status, and an incapacity to become a trader per article 11(1) of ComCE would not bar a person from acquiring membership in such scenario.

## 2. MEMBERSHIP CAPACITY OF MINORS, JUDICIALLY INTERDICTED PERSONS AND LEGALLY INTERDICTED PERSONS

### 2.1. Minors

Minors are persons who are under the age of 18 and who, until they attain majority or get emancipated, are rendered incapable of personally performing juridical acts that could make them a member of BOs.[25]Even when they get emancipated, minors are rendered incapable to

[22] These BOs are further classified into commercial BOs (*sociétés commerciales*) and non-commercial BOs (*sociétés civiles*).[22] Commercial BOs are trading entities that are engaged in *fonds de commerce* (business) with *un but lucrative* (profit-making objective), and BOs pigeonholed under this category are Commercial GP, Commercial LP, Commercial JV, SC and PLC. On the other hand, non-commercial BOs are civil entities that do not engage in trade, and BOs falling under this category are OP, Non-commercial GP, Non-Commercial LP and Non-Commercial JV. *See* ComCE, Arts. 10 & 213.

[23]A BO itself becomes a trader where it, professionally and for gain, undertakes one or more commercial activities listed under article 5 of the ComCE and subsequent legislations. While article 5 of the Code lists 21 commercial activities, this list is not exhaustive since subsequent legislations have expanded this list. For example, some of the 1352 commercial activities listed under Ethiopian Standard Industrial Classification do not fall within the ambit the list under article 5 of the ComCE. However, a non-commercial BO is not a trader since it cannot lawfully engage in commercial activities. *See* ComCE, Art. 5cum Art. 10; and FDRE Ministry of Trade, Ethiopian Standard Industrial Classification (Rev. 1, 2015).

[24] Although the ComCE does not expressly address scenarios whereby membership could be acquired without a trader status, this conclusion can be warranted from the rule regarding membership status in commercial LP. Only a general partner is regarded as a trader since her rights and obligations similar with that of a partner in a commercial GP, who is regarded as a trader. This partner has unlimited liability and has a managerial role in the LP. On the other hand, a limited partner in the LP does not participate in management and her liability is limited. As a result, she is not regarded as a trader. The liability and participation of a limited partner resembles that of shareholders in an SC and a PLC. *See* ComCE, Arts. 280, 296, 300, 301, 304(1), 347-428, 510(1) & 525-538.

[25] For example, unless they are represented by their tutors, minors are incapable of personally concluding partnership contracts. *See* ComCE, Arts. 210 & 211; CCE, Arts. 193, 199 & 1675 & 1678(a); The Revised Family Code, Proclamation No. 213/2000, FEDERAL NEGARIT GAZZETE EXTRA ORDINARY ISSUE, 6th Year No. 1, Addis Ababa, 4 July 2000 (Hereinafter FDRE Revised Family Code), Arts. 215 & 216.

carry on a trade.[26] However, their tutors are allowed to undertake juridical acts on behalf of the minors with regard to the minors' pecuniary interests and property administration. *Can minors, therefore, acquire original or derivative membership with or without a trader status through the instrumentality of their tutors?* Article 12 of the ComCE specifically provides that "tutors may not carry on a trade in the name and on behalf of a minor except in the cases provided in article 288 of the CCE." *Do these restrictions also render minors incapable of acquiring membership in BOs?* This work argues that the restrictions that can be imposed on a minor's membership capacity are partial; and that minors can derivatively or originally acquire membership with or without a trader status under the following three circumstances.

First, a minor is capable of acquiring membership with a non-trader status irrespective of the mode of acquisition. There is no rule that prohibit a minor, who is represented by a lawfully acting tutor, from derivatively or originally acquiring membership with a non-trader status. A tutor is authorized to acquire, keep and alienate membership share on behalf of a minor.[27] A tutor; however, can invest the capital of a minor and make the minor a member in BOs that do not make the minor a trader due to a clear restriction under article 12 of the ComCE.[28] Accordingly, a minor represented by a tutor is capable of acquiring membership without a trader status. Therefore, a minor who is represented by a tutor can become a derivative or original member of a BO in non-commercial BOs; a limited partner in a commercial LP; and a shareholder in a PLC and an SC.

Second, a minor should be capable of derivatively acquiring membership with a trader-status provided that the minor inherited membership share through the operation of intestate succession. Article 12 of the ComCE allows a minor to acquire membership with a trader status

[26] ComCE, Art. 13; *But see* Draft ComCE, Arts. 17.

[27] A tutor is required to invest monies belonging to the minor within three months from the time they are at her disposal where such monies exceed five hundred Ethiopian Birr. This obligation of the tutor is further stressed by the imposition of a liability to pay legal interest where the tutor has failed to invest the capital which exceeded Birr 500.Where appropriate, the tutor may also be condemned to pay damages for a failure to invest.27 This shows that a minor, represented by a tutor, may become an original or derivative member of a BO. FDRE Revised Family Code, Arts. 280(1), 281(1) & 282.

Besides, a tutor is required, per article 273 of the Revised FDRE Family Code, to safely deposit securities belonging to a minor. This presupposes that a minor can become a member of an SC by keeping equity security. Moreover, article 278 impliedly authorizes a tutor, who is a father or a mother of a minor, to keep registered and bearer securities on behalf of the minor while it requires other tutors either to alienate or convert bearer securities owned by the minor to registered securities. When read jointly, these provisions lead to a valid conclusion that a minor, who is represented by a tutor, may become a member in a BO without a trader status.

[28] Article 12, only prohibits a minor from becoming a trader – it does not prohibit the minor's participation in a BO as a member where the membership does not lead to acquisition of the status of a trader.

where the requirements of article 288 of the CCE are complied with.[29]According to article 276 of the Revised FDRE Family Code, which replaced article 288 of the CCE, a minor can acquire a derivative membership in a BO. The provision allows a tutor to trade in the name and on behalf of a minor where the minor inherits a commercial, industrial or other form of enterprise where: (1) the tutor is a father or a mother of the minor and she decides to keep the enterprise going; or (2) a court has instructed the tutor to keep the enterprise.[30] In such situations, article 276 of the Revised Family Code can be analogically applied to render a minor capable of derivatively acquiring membership shares which form part of her inheritance.[31] This leads us to assume that if a minor is authorized to inherit and keep the whole of a particular business enterprise, she should, for a stronger reason, also be allowed to inherit and keep membership in that enterprise.[32] Therefore, a minor should be able to derivatively acquire a trader membership in a BO provided that a decision to keep the inherited membership is made in accordance with article 276 of the Revised Family Code.

Finally, a minor should also be able to acquire derivative membership in a BO even where her membership could make her a trader provided that she acquires the membership share through *inter vivos* or *mortis causa* donation[33] by a person who made an instruction that the tutor of the minor shall keep the membership on behalf of the minor unless a court makes a variation upon

[29] However, article 288 of the CCE is now repealed and replaced by Federal and Regional Family Codes. *For example see* FDRE Revised Family Code, Art. 276; Oromia Family Code, Proclamation No. 69/1995, MEGELATA OROMIA, Finfine, 1995 (Hereinafter Oromia Family Code), Art. 293; Amhara Family Code, Proclamation No. 79/2003, ZIKIRA HIG, 8th Year No. 3, Bahir Dar, 25 June 2003 (Hereinafter Amhara Family Code), Art. 287.

[30] ComCE, Art. 12; FDRE Revised Family Code, Art. 276. Where the tutor is not a father or a mother of the minor, the tutor is required to seek authorization of the court. Application for authorization can be made by one of the ascendants or brothers or sisters of the child who has attained majority. Before pronouncing the authorization the court is required to make the decision by taking the longevity of the tutorship and the abilities of the tutor as well as the interests of the minor into account.

[31] It has to be noted that article 276 of the Revised Family Code does not expressly deal with a transfer of membership share through inheritance. It is express about a minor who inherits an enterprise itself – not just a membership share in the enterprise.

[32] There are compelling reasons for suggesting analogical application. First, it is a matter of common sense and elementary logic that if you are allowed to acquire and keep a whole of something, you may as well be allowed to acquire and keep a part in the whole of the thing. Second, a minor who inherits a business enterprise will be a trader as a sole proprietor, and article 276 of the Family Code even authorizes the minor to become a trader. Thus, a minor who inherits a membership right in a BO should also be able to acquire a membership share with a trader status as in the case of a partner in a GP and LP. Finally, analogical application would be in line with the rationale behind incapacity of a minor, which is protection of the minor against herself. A minor is more protected in acquiring membership in a BO than acquiring an enterprise as a sole proprietor since one of the advantages of a BO is that it creates more risk sharing mechanisms than a sole proprietorship would.

[33] Pursuant to article 2427 of the CCE donation is defined as "a contract whereby a person, the donor, gives some of her property or assumes an obligation with the intention of gratifying another person, the donee."An *inter vivos* membership share donation is a donation which becomes effective during the life time of the donor and which is regulated by Book V Title XV Chapter 3 (Arts. 2427-2470) of the CCE while a *mortis causa* membership share donation is a donation which becomes effective after the death of the donor and the rules regarding wills (Book II Title V Chapter 1 Section 3 Arts. 857-941) are applicable to its transfer. *See* CCE, Arts. 2427-2470, 2428 & 857-941

the application of the tutor. Although not explicit enough, article 275 of the Revised FDRE Family Code has authorized a transferor to enable a minor to acquire membership shares (which is an object of property or a *res*) with a trader status.[34] One may wonder about whether the tutor should dispose a membership share transferred to a minor in the absence of an implied or express instruction to keep the membership share. Once again the author contends that article 276 of the Revised Family Code, which applies to inheritance of membership, should be analogically applied since acquisition through inheritance and donation are similar in nature.[35]Besides, the best interest of the minor may also demand the application of Article 276.[36]Due to such fundamental similarity, a minor who derivatively acquires a membership in a BO from a donor who has not made an instruction to keep the membership right should be allowed to keep her membership provided that the conditions laid down under Article 276 are complied with.

In conclusion, a minor, even where she is represented by a tutor, is incapable of acquiring original membership with a trader status. She is not also allowed to acquire derivative membership with a trader-status except where the membership is inherited or is donated to her. However, a minor is capable of derivatively or originally acquiring membership without a trader status.

### 2.2. Judicially Interdicted Persons

Notoriously insane persons[37] and persons with apparent infirmity[38] are persons for whom an organ of protection such a tutor or a guardian is not appointed under the law. However, a

[34] Article 275 of the Revised FDRE Family Code provides as follows:

> *Article 275. - Property Transferred to the Minor by Donation or Succession.*
>
> *1) A person, who donates property to a minor or from whose succession a minor inherits property, may order that the tutor shall follow certain appropriate rules in the administration of such property.*
>
> *2) Where it subsequently appears that the observance of such rules is impossible or prejudicial to the interests of the minor, the tutor may apply to the court to vary them.*

[35] Like inheritance of membership, a minor who acquires membership through donation is a beneficiary who does not need to pay for the membership share she acquires. The difference between the two is that in the case of inheritance, transfer is a result of the operation of the law, while in the case of donation, transfer is a result of a generous juridical act by the donor.

[36] *See* FDRE Constitution, Art. 36(2).

[37] A notoriously insane person is a person who does not appreciate the importance of her actions and third parties know or should know this condition of the person. The CCE defines an insane person as a person who does not understand the importance of her actions due to insufficient mental development, mental disease or senility. It also provides that feeble-minded persons, drunkards and prodigals may be assimilated to insane persons in appropriate cases. And insanity is regarded as notorious where: (1) the insane person is an inmate of a hospital, mental institution or nursing home due to her mental condition; or (2) in a rural community of less than 2,000 habitants, the insane person's liberty of movement is restricted and she is kept under the watch of her family or a person living with her. See CCE, Arts. 339,341 & 342.

juridical act performed by a notoriously insane person, such as acquisition of membership in a BO, can be invalidated upon the application of the person, her representatives or her heirs.[39] Besides, persons with apparent infirmity who are in a situation where they cannot protect their interests may also voluntarily, but not through the operation of the law, demand to be regarded as incapable with a view to seek invalidations that a notoriously insane person would be able to invoke.[40] That said, an insane and infirm person would become a judicially interdicted person[41] after so is pronounced by court. Once interdicted, they are generally regarded as incapable and an organ of protection such a tutor and a guardian is appointed to look after their pecuniary and personal interests respectively.

Like the case of a minor, a judicially interdicted person is generally prohibited from becoming a trader and her tutor is also prohibited from trading in the name and on behalf of the interdicted person.[42]Once again, this work avers that the interpretation of this prohibition under the ComCE and the incapacity of judicially interdicted persons under the CCE does not entail an absolute restriction on their membership capacity, and that judicially interdicted persons should be capable of acquiring membership under the following four circumstances.

First, a judicially interdicted person should be able to acquire original and derivative membership with a non-trader status since she is only prohibited from becoming a trader – not from becoming a member in BOs with a non-trader status.[43] Accordingly, the above analysis with regard to minors is analogically applicable and a judicially interdicted person, represented by a lawfully

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[38] An infirm person is a feeble-minded, visually disabled person or a person with other permanent infirmity that inhibits her from taking care of herself or from administering her property. CCE, Art. 340. Although the issue of apparent infirmity is mentioned under article 343(2) of the CCE, what makes infirmity "apparent" is not provided under the CCE. A reference to a lexical dictionary for defining the adjective word "apparent" could, however, provide that 'something is apparent if it is clearly visible or understood.' Accordingly, one may logically argue that infirmity is apparent where third party can clearly know the infirmity of the person.

[39] CCE, Art. 343 (1). Where the insanity is not notorious, a juridical act performed by the person cannot be invalidated on the ground of her insanity. It can be invalidated only when she shows that; like a sane person, her consent was not free and non-defective. Heirs and creditors of the person can also seek invalidation only if: (1) the insanity was caused by contents of the juridical act, or (2) an application demanding judicial interdiction of the person is submitted and interdiction was pronounced before the death of the person. *See* CCE, Arts. 347 & 348

[40] CCE, Arts. 340 & 343(2).

[41] A judicially interdicted person is an insane or infirm person who is declared incapable by a court because it was proved to be necessary action to protect the interests of the person or her presumptive heirs. It is based on the application of the person, her spouse, her relatives or by the application of a public prosecutor; and the decision pronouncing her interdiction is effective as of a fixed date, and is publicized and registered in a public record. *See* CCE, Arts. 351-354 & 356.

[42] ComCE, Arts. 11(1) & 12

[43] ComCE, Art. 12.

acting tutor, can acquire derivative and original membership in a PLC and an SC, and, as a limited partner, in an LP.[44]

Second, a judicially interdicted person, being represented by a tutor, should be able to acquire derivative membership with a trader status pursuant to article 12 of the ComCE, which makes a reference to a mutatis-mutandis application of article 288 of the CCE. However, the application of this provision to membership capacity of interdicted persons is highly questionable. As mentioned in the above section, article 288 of the CCE, which deals with capacity of minors to inherit and sustain business enterprises with the support of a tutor, is repealed and replaced by FDRE and Regional States' subsequently enacted Family Codes. This reference made by article 11(1) and 12 of the ComCE for the application of the provisions on capacity of persons, in general, and of article 288 of the CCE, in particular, to determine capacity of a person to engage in commercial activities may not coalesce with other laws of the country introduced with the advent of the present federal government structure. Currently, the power to legislate commercial code falls within the mandate of FDRE House of Peoples Representatives while the power to enact civil laws, which includes the laws on capacity of members, is within the mandate of the Regional State councils.[45] This means, states can have separate and, perhaps, contradictory rules of capacity. For example, rules of capacity of minors and their protections are now governed by FDRE and Regional Family Codes, and the rules of minor's capacity found under "Law of Persons" provisions of the CCE are, thus, replaced by these Family Codes.[46]Instead of solving this issue, the Draft ComCE made it worse by removing the reference to Article 288 and replacing it with a rule that authorizes reference to regional laws. Accordingly, the reference made byboth the ComCE and the Draft should be abolished and the House of Peoples Representatives should enact rules regarding a person's capacity to become a trader and become

[44] She may also become a member in a JV provided that an arrangement that limits her liability to her contribution is made by the joint venture agreement and the agreement is executed by the tutor in accordance with the law applicable to JVs. In fact, the tutor would be liable if she executed the agreement in a manner that would create unlimited liability on the interdicted person. This applies both in the case of membership of a minor and a judicially interdicted person in a JV. *Generally see* ComCE, Arts. 271-279

[45] FDRE Constitution, Arts. 55 (4 & 6) cum 52(1).

[46]*For example see* FDRE Revised Family Code, Art. 319(1a); Oromia Family Code, Art. 336(1a); Amhara Family Code, Art. 33(1a), SNNPR Family Code, Proclamation No. 75/1996, SNNPR NEGARIT GAZZETA, 6th Year No. 1, Hawassa, 1996, Art. 334; and Tigray Family Code, Proclamation No. 116/1999, TIGRAY NEGARIT GAZZETA, 15th Year No. 1, Mekelle, 1999, Art. 246(1).

a member of BOs as part of the ComCE because this is part of its mandate and also because it is necessary for creating a single economic community envisaged by the FDRE constitution.

That said, until a legislative solution is provided to resolve the matter, one has to find a functional solution for enabling derivative membership of a judicially interdicted person in commercial BOs. One way of doing that is resorting to the legislative intent of the time and applying article 288 of the CCE as it is. Accordingly, a judicially interdicted person can acquire derivative membership in a BO with a trader status where she inherits a share in that BO and a tutor is instructed/authorized by court or family council to keep the membership on behalf of the interdicted person.[47] Another way of resolving the issue could be by interpreting the corresponding provisions of the family codes that replaced article 288 of the CCE in a manner that would allow the interdicted person to inherit and keep derivative membership upon a court or family council authorization since this too would maintain the legislative intent.

Third, a judicially interdicted person is capable of acquiring derivative membership with a trader status where she acquired the share from a donor who made an instruction that the tutor shall keep the membership on behalf of the interdicted person and no variation to the instruction is made by court.[48]

Finally, a judicially interdicted person should be able to acquire both derivative and original membership with a trader status if the effect of her interdiction does not include a prohibition from becoming a trader. In this regard, article 371 of the CCE proclaims that *"the court may, in pronouncing the interdiction or after such decision, limit the effects of the interdiction"* or *"it may authorize the interdicted person to do certain acts [herself]."*[49] Hence, the interdicted person may acquire original and derivative membership of any kind if the effect of the interdiction does not include such prohibition or an express authorization that could be interpreted to authorize acquisition of membership is given by the court. In this situation, the

[47] Like a minor, a judicially interdicted person is represented by a tutor with regard to the administration of her pecuniary rights. The tutor of the interdicted person, who is necessarily appointed by court, has the same powers and duties as a minor's tutor with the exception of minor deviations provided under article 359-379 of the CCE. As part of the exception, the tutor, whether she is the father or mother of the interdicted person, is required to seek the instruction and authorization of a membership share inherited by the interdicted person. *See* CCE, Arts. 288, 359(1) cum 358 & 365.

[48] *See* CCE, Art. 358. For further discussion see the above analysis on membership capacity of minors.

[49] CCE, Art. 371.

interdicted person is rendered to be capable of acquiring, not only original membership, but also derivative membership.

### 2.3. Legally Interdicted Persons

A legally interdicted person is a person from whom the law withdraws her capacity to administer her property due to a criminal sentence passed upon her in accordance with criminal law.[50] Hence, such person should be barred from becoming a member in BOs only where there is an express criminal law provision authorizing the interdiction. In this regard, article 123(C) of FDRE Criminal Code provides that a person found guilty of a crime may be deprived of *"[her] right to exercise a profession, art, trade or to carry on any industry or commerce for which a license or authority is required"*.[51] This deprivation is authorized *"where the nature of the crime and the circumstances under which the crime was committed justify such an order, and the criminal has, by [her] unlawful act or omission, shown [herself] unworthy"* of exercising these rights.[52] While a sentence of death or of rigorous imprisonment carries with it an automatic deprivation of all civil rights under article 124(1) of the FDRE Criminal Code, the author argues that the phrase "civil rights" in the provision shall not be interpreted to include deprivation of a right to trade or to carry on any industry or commerce as a sole proprietor or as a member of BOs. This is because, on the one hand, article 123 has created a substantive distinction between "civil rights", "family rights" and "right to carry on trade" and; on the other hand, civil life and commercial life of individuals are governed by separate laws – the CCE and the ComCE respectively.[53]

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[50] See CCE, Arts. 380, 383(1) & 387.

[51]The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414 of 2004, Addis Ababa, 9th May 2005 ( hereinafter FDRE Criminal Code), Art. 123(c)

[52] The court is also required to determine the duration of the deprivation by taking into account the gravity of the crime, the antecedents and character of the criminal, the danger of a relapse into crime, the need for, and utility of the deprivation or the probable effect of the punishment and the interests of society. FDRE Criminal Code, Arts. 123 & 124(1). Besides, this interdiction may be a temporary deprivation ranging from five months to five years or, unless it becomes a subject of pardon, amnesty or reinstatement, a permanent deprivation in the case of death sentence and rigorous imprisonment for life. FDRE Criminal Code, Arts. 124, 229, 230, & 232-237.

[53] Generally see article 123 of the FDRE Criminal Code which reads as follows:

*Article 123. - Deprivation of Rights.*

*Where the nature of the crime and the circumstances under which the crime was committed justify such an order, and the criminal has, by [her] unlawful act or omission, shown [herself] unworthy of the exercise of any of the following rights, the Court may make an order depriving the criminal of:*

*a) [her] civil rights, particularly the right to vote, to take part in any election or to be elected to a public office or office of honour, to be a witness to or a surety in any deed or document, to be an expert witness or to serve as assessor; or*

By taking the above analysis and the relevant provisions of the CCE into account, it is plausible to argue that an interdicted person may be able to acquire derivative and original membership in BOs if her interdiction does not include the prohibitions under article 123(C) of the Criminal Code. It means she can acquire membership with or without a trader status as though she were fully capable. That being said, even where the person's interdiction falls within the ambit of article 123(C), it, in and of itself, does not lead to an absolute prohibition from acquiring membership. What is prohibited is trading and engaging in commercial and industrial activities for which a license or authorization must be sought. Since acquisition of membership in BOs with a non-trader status does not require a license or authorization, even a person whose interdiction falls within the scope of article 123(C) of the FDRE Criminal Code can lawfully acquire derivative and original membership in a PLC and SC, and a membership in a LP as a limited partner.

Finally, an interdicted person may also acquire derivative membership where she inherits membership in BOs and her tutor is authorized to keep the membership on behalf of the interdicted person. This is similar with that of a minor, and judicially interdicted persons except the fact that authorization to the tutor in this case is given only by court.[54]

## 3. NON-COMPETE DUTY BASED INCAPACITY

Although Ethiopian competition law aims at promoting a healthy competition among business competitors,[55] a non-compete duty may be imposed with a view to deter unfair competition. This non-compete duty does not pose a general incapacity to become a member of a BO. It may; however, trigger incapacity in specific situations. The following paragraphs examine the scope and nature of certain persons' membership incapacity due to a non-compete duty imposed upon them by contract or law. In particular it analyzes non-compete duties and scope of incapacity of *commercial employees, partners in a GP and an LP, Directors* and *sellers of a business.*

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*b) of [her] family rights, particularly those conferring the rights of parental authority, of tutorship or of guardianship; or*
*c) [her] rights to exercise a profession, art, trade or to carryon any industry or commerce for which a license or authority is required.*

[54] ComCE, Art. 12 cumulatively with CCE, Arts. 288 cum 381 & 385.

[55] Trade Competition and Consumer Protection Proclamation, Proclamation No. 813/2013, FED. NEGARIT GAZZETA, 20th Year No. 28, Addis Ababa, 21 March 2014, Art. 3

### 3.1. Commercial Employees

A commercial employee[56] is under a legal obligation not to compete with her employer during the time of her employment, and may be put under a contractual non-compete duty to be effective after expiry of her employment. Pursuant to article 30 of the ComCE, a commercial employee cannot be a member in a BO that is engaged in a business similar to the business of her employer.[57] Her incapacity; however, is limited to membership with a trader-status. This incapacity is in force during the time of her employment. This non-compete duty based incapacity – which is not created by contract but imposed by the law itself – is flawed in that the restriction is not limited by space. It would be rational if the employee is restricted from competing with her employer only in places where the employer operates. Where the employee operates at a different place from the place of business of the employer, competition does not exist between them; and the restriction should not have covered all similar businesses irrespective of where the employee might operate.

The non-compete duty continues after termination of employment if a valid contractually imposed non-compete duty exists. Article 2589 (1) of the CCE states that '*where the work given to the employee enables [her] to meet the clients of the employer or enter into the secrets of [her] business, the parties may provide that the employee shall not, after the termination of the contract, enter into competitive business with [her] employer or engage in any way whatsoever in an undertaking which would compete with the employer.'*[58]Based on this provision and articles 2590 and 2592 of the CCE, an employee under a contractually imposed non-compete duty enjoys a lesser restriction when compared with the legally imposed non-compete duty discussed in the

[56] Commercial employees, as defined by the ComCE, '*are persons who are bound to a trader by a contract of employment and who assist the trader by doing work of a non-manual nature as a sales man, secretary, accountant, guardian, inspector or director*.' ComCE, Art. 28 (1)

[57] Article 30 of the ComCE states as follows:

*Art. 30. - Prohibition from carrying on private trade.*

1) *A commercial employee may not carry on, on [her] own behalf or on behalf of a third party, a trade similar to the trade carried on by [her] employer. Where an employee infringes this prohibition, [her] employer may claim damages and may cancel or refuse to renew the contract of employment in accordance with Art. 2591 of the Civil Code.*
2) *A contract of employment may only contain a prohibition from carrying on private trade upon the expiry of the contract of employment on the conditions specified in Art. 2589, 2590 and 2592 of the Civil Code*

[58] CCE, Art. 2589(1). Although many of the CCE laws on employment relations are replaced by the Labor Proclamation. Article 2589, 2590 and 2592 of the CCE are not replaced by the Labor Proclamation which only repealed laws that are not consistent with the proclamation. Hence, these provisions are still in force pursuant to article 190(2) of the Labor Proclamation. Labor Proclamation, Proclamation No. 377/2003, FED. NEGARIT GAZZETA, 10th Year No. 12, Addis Ababa, 26 February 2004, Art. 190(2).

preceding paragraph.[59] In conclusion, a commercial employee under a contractual non-compete duty is also capable of derivative and original membership with a non-trader status even where the BO in which she becomes a member of is engaged in a similar business with her employer.

### 3.2. Partners in GP and General Partners in LP

Like that of commercial employees, certain restrictions are also imposed on membership capacity of partners in a GP and general partners in an LP due to a non-compete duty imposed upon them by the law. In this regard, article 292 of the ComCE states as follows:[60]

> *Art. 292. -Restrictions on private trade.*
>
> *1) Unless otherwise agreed, no partner may carry out transactions on behalf of a third party or on [her] own behalf which relate to business carried on by [her] firm, nor may [she] be a partner with joint and several liability in the management of a firm carrying on a similar business.*
> *2) An unlimited agreement under sub-article (1) shall be valid for one year only.*

A major restriction that can be fathomed out of the above provision is that partners in GP and general partners in LP cannot be members with joint and several liability in the management of a firm carrying on a similar business.[61] This restricts a partner from derivatively or originally acquiring membership in another BO where: (1) the other BO is engaged in a similar business with the partnership in which the partner is already a member; (2) the partner assumes joint and several liability if she were to become a member of the other BO; and (3) the partner participates in the management of the other BO. Accordingly, where these three cumulative conditions are fulfilled and where there is no valid contract[62] that could render the non-compete-duty

[59] The CCE provides that such duty will be valid only when it is made in writing; that imposition of the duty must be necessary for the protection of the legitimate interests of the employer and does not unfairly impede the economic future of the employee; and that it must expressly stipulate the forbidden business and the restriction has to be limited as to time and place. This non-compete duty will lapse if: (1) it is proven that the employer has no material interest in its maintenance; (2) the employer terminated the contract of employment without a good cause; and (3) the employee terminated the contract of employment with a good cause. CCE, Arts. 2589(2), 2590 & 2592.

[60] ComCE, Art. 292. This provision is organizationally put under rules governing GP. However, it is also applicable to general partners in an LP by virtue of a mutatis-mutandis application called for under article 300 of the ComCE.

[61] This prohibition, like the prohibition on commercial employees, is aimed at protecting the partnership against unfair competition.

Another restriction imposed on partners is a prohibition from carrying out, on behalf of themselves or others, transactions that relate to the partnership's business.

[62] A contract concluded by partners of a partnership may suspend the non-compete duty for a fixed time. For example, they may, by the contract, suspend the non-compete duty for 3, 5 or 6 years. The contract remains valid as long as it fulfills requirements for validity of contract under Book V of the CCE and fixes the duration for which the suspension lasts. If the suspension is indefinite, the contract will be valid only for one year and the non-compete duty resumes to be effective. ComCE, Art. 292(2).

ineffective for a fixed period of time, partners in GP and general partners in LP are not capable of becoming members in another GP and general partner in another LP. In another word, they can acquire original and derivative membership with or without a trader-status in all BOs as long as they are not engaged in a similar business with their partnerships. Accordingly, even where the BO is engaged in a similar business, they can be members of a LP with a limited partner status since such partner's liability is limited and the partner is barred from engaging in management. Besides, they can be members of SCs, for their liability is limited as long as they are not elected to a director position since directors participate in management and are jointly and severally to the company and third parties for a breach of their duties. They are also capable of becoming members of PLCs, since their liabilities are limited as long as they do not also work as the manager of the PLC.[63]

### 3.3. Directors

Directors[64] are also under a non-compete duty pursuant to article 355 of the ComCE.[65]The non-compete duty of a director, as stated under Article 355, is similar with the non-compete duty of partners in GP and LP except that the language used here is better in terms of limiting the scope of the restriction. The non-compete duty under Article 355 prohibits the director from becoming a member in '*rival* 'BO, whereas the non-compete duty of a partner under Article 292(1) is unnecessarily and unreasonably broadened to prohibit a partner from becoming a member in a BO engaged in *'a similar business'* with the partnership in which the partner is a member of, irrespective of whether they are rivals or not.[66] Other than this, the incapacity of a director to

[63] ComCE, Arts. 364, 366 & 530.

[64] An SC is supervised and managed by a board of directors composed of three to twelve directors. Directors are shareholders of an SC who are appointed by ordinary general meeting the SC with a responsibility of directing and ensuring financial solidity of the SC. They are held jointly and severally liable to the SC and third parties where they breach their duties under the law, company statutes and company resolutions. *See* ComCE, Arts. 347, 350(2), 362–364 & 366.

[65] Article 355 of the ComCE proclaims as follows:

> *Art. 355.-Restrictions on private trade.*
>
> *Unless authorized by a general meeting, directors may not be partners with joint and several liability in rival companies nor compete against the company either on their own behalf or on behalf of third parties.*

[66] The phrase 'similar business/similar trade' used in article 30(1), in relation to non-compete duty of commercial employees, and article 292(1) of the ComCE, regarding partners in GP and LP, is unreasonably broad. When construed broadly, the phrase could mean any trading of similar or interchangeable goods and services that are geographically located in different towns, cities or even countries. According to this interpretation a person may not become a member in another BO where the BO is engaged in a similar business but it is not in a competition with the enterprise that receives the protection of non-compete duty. When construed narrowly, the phrase could mean similar trade by rival business enterprises reaching out to customers in the same geographical market. Under this interpretation, a person is incapable of becoming a member of a BO only if there is a competition between the BO and the beneficiary of the non-compete duty. The author argues that the phrase needs to be

become a member of another BO is limited to the same situations as that of partners discussed in the above heading.

### 3.4. Seller of a Business

A business, *fonds de commerce,* is an incorporeal movable consisting of all movable property brought together and organized for the purpose of carrying out commercial activities.[67] It mainly consists of good will and may also consist of incorporeal elements such as trade name, special designation under which the trade is carried on, the right to lease the premises in which the trade is carried on; patents or copyright, and such special rights as attach to the business itself and not to the trader.[68]A business is regarded as an object of property, a *res,* and, as such, it can be sold, leased and mortgaged.

Where an owner of a business sells her business she is under a legal obligation not to compete with the buyer. Article 158 of the ComCE, which governs non-compete duty of sellers of a business, creates ambiguity due to its failure to expressly address a seller's duty to acquire membership in BOs that compete with the business sold by the seller, a rule of membership capacity may be derived through interpretation of the provision.[69] Like article 30 of the ComCE, which governs non-compete duty of commercial employees, Article 58 bars a seller of a business from competing with the buyer as a trader. It does not expressly govern situations whereby the seller acquires membership in a BO that is engaged in a similar business with the sold business. Yazachew Belew and Dominique Ponsot were right in proposing that article 158 of the Code *"should extend to cases of trading through a straw man or a legal entity owned or controlled by*

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construed narrowly in order to mitigate the spillover effect of non-compete duties that impede a person's constitutional right of carrying on trade as a sole proprietor and as a member of BOs. It is also necessary to construe it narrowly so that its effect is limited to providing protection to the beneficiary of the non-compete duty. In fact, a narrow construction of a non-compete duty is applied to determine the scope of a non-compete duty under article 355 of the ComCE. As such, this work suggests that 'similar business/similar trade' should be determined by an assessment of a juxtaposition of both 'product market' and 'geographical market' – an assessment adopted by Ethiopian competition law in order to determine existence of a firm's dominant position. *See* Trade Competition and Consumer Protection Proclamation, *supra note 55,* Art. 6 (3 & 4).

[67] ComCE, Art. 124

[68] ComCE, Art. 127; For a thorough discussion on the concept of business under Ethiopian law, see Yazachew Belew, The Sale of Business as a Going Concern under the Ethiopian Commercial Code: *A Commentary*, 24 J. Eth. L 2, 90, 90-138 (2010)

[69] Article 158 of the ComCE states as follows:

*Art. 158. -Seller prohibited from competing.*

1) *During five years from the sale, the seller shall refrain from doing any act of competition likely to injure the buyer. [She] may not carry on, in the vicinity of the business [she] sold, a trade similar to the trade carried on by the buyer.*
2) *The contract of sale may specify the extent of such prohibition which shall in no case exceed five years.*

*the seller."*[70]That said, the author contends that Article 158 did not completely fail to address the seller's participation in rival BOs. The seller is prohibited from carrying on a similar trade. That is, she cannot be a trader who engages in a business similar to the one she sold. This also means that she cannot be a member of a rival BO with a trader status. Accordingly, a rule of capacity that prohibits the seller from derivatively or originally acquiring a membership share with a trader status, as in GP and LP, can be drawn from article 158 of the Code; and, hence, the seller is capable of acquiring membership in a rival BO with a non-trader status as the acquisition does not amount to be an act of competition that could injure the buyer of the business.[71]

The restriction under Article 158 of the ComCE is narrow. In terms of geographical scope, the non-compete duty is only effective in the vicinity of the business sold – which means the seller is not under incapacity to acquire membership shares in BOs engaged in a similar business but geographically located in a different place from the business sold by the seller. In terms of duration the duty is effective only for five years from the date of sale, unless the contract of sale of the business stipulates a lesser duration. Consequently, the seller is also capable of acquiring derivative and original membership in a BO, with or without a trader status, where: (1) the BO is not located in the vicinity of the business sold by the seller, (2) the BO does not engage in a similar business with the sold one, or (3) the seller's non-compete duty has lapsed.

## 4. MEMBERSHIP CAPACITY OF FOREIGNERS

Article 389(1) of the CCE proclaims that foreigners are fully assimilated to Ethiopian nationals regarding the enjoyment and exercise of civil rights.[72] With regard to the meaning of the phrase "civil rights," in this context, article 389(2) of the CCE proclaims that '*all rights the exercise of which does not imply any participation in the government or administration of the country shall be considered to be civil rights*.'[73]Thus, foreigners are generally capable of acquiring derivative

[70]Yazachew Belew, *Supranote 68*.

[71] For e.g., The seller is prohibited from acquiring original membership in rival BOs with a non-trader status since participation in setting up of a BO that engages in a similar business with the sold business may amount to be an act of competition prohibited under article 158(1) of the ComCE.

[72] CCE, Art. 389(1).

[73] CCE, Art. 389(2).

and original membership just like Ethiopian nationals since this act amounts to a civil act under the CCE[74] and there are no express proscriptions under the CCE[75] and the ComCE.[76]

However, a restriction is imposed by Ethiopia's Investment Proclamation[77]and Council of Ministers Regulation.[78]Under article 12(3) of Ethiopia's Investment Proclamation, a foreign investor[79]who intends to acquire membership share through purchase is required to apply for a prior authorization from FDRE Ministry of Trade.[80]The Ministry will approve the transfer and the foreigner would be allowed to acquire membership only if: (1) the BO in which membership is sought for is engaged in economic activities that are allowed for foreign investors; (2) the membership share the foreigner intends to acquire complies with minimum capital requirement

[74] Participation in BOs by becoming a member the BOs is a right which does not imply a participation in Ethiopian government, nor does it imply participation in the administration of the country. Indeed, BOs are established are established between two or more persons acting in a private capacity. Their objective is to carry out activities of economic nature, not administrative nature. And their function is to produce commercial goods and services with a view to make profit for themselves. Hence, their objectives and the nature of their activities does not involve participation in the government nor does it relate to administration of the country. Membership in BOs is, therefore, regarded as a civil right which foreigners capable of exercising pursuant to article 389(2) of the CCE.

[75] The only civil act the CCE, renders foreigners incapable of is the act of acquisition of ownership or acquisition of rights assimilated to ownership of immovable things situated in Ethiopia. *See generally* CCE, Arts. 390-393.

[76] Although article 389(3) of the CCE anticipates that the capacity of foreigners to become members in BO may be subjected to a restriction imposed by a special law, such restriction is not imposed by the ComCE. Article 100(1) of the ComCE proclaims that *'any Ethiopian or foreign person or business organization carrying out commercial activities within the Empire of Ethiopia shall be registered.*' What transpires from this provisions is that foreigners are capable of becoming traders as an individual and they are also capable of becoming members in BOs with or without a trader-status. The issue is indirectly addressed by article 330(f) of the ComCE, which is applicable to SCs only. The provision declares that '*every share … shall show a statement showing whether a share may be transferred to a foreigner*.' This could be interpreted to mean that they can be members in SCs; that their capacity to acquire derivative membership is not restricted by the ComCE; and that derivative membership my, however, be restricted by the memorandum of association of the SC. Even in this scenario, foreigners are generally capable of acquiring original and derivative membership with or without a trader-status under mandatory provisions of the *See* ComCE. CCE, Art. 389(3); Commercial Code, Arts. 100(1) & 330(f).

[77]Investment Proclamation. Article 40(1) of the proclamation has repealed the previous Investment Proclamation No. 280/2002 along with amendments made thereto.

[78]Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation, Regulation No. 270/2012, FED. NEGARIT GAZZETA, 19th Year No. 4, Addis Ababa, 29 November 2012.

[79] Article 2(4) of the investment proclamation classifies investors into a foreign investor and a domestic investor. Persons who are labeled as foreign investors under the proclamation are: (1) a physical person, who is a foreign national and who has invested a foreign capital in Ethiopia; (2) a business enterprise, whether incorporated in or outside of Ethiopia, wholly owned by foreign nationals and has invested a foreign capital in Ethiopia; (3) a business enterprise, whether incorporated in or outside of Ethiopia, owned by foreign nationals jointly investing with a domestic investor; and (4) an Ethiopian national permanently residing abroad and preferring treatment as a foreign investor. And a "foreign capital" is defined under article 2(7) of the proclamations as '*a capital obtained from foreign sources, and includes the reinvested profits and dividends of a foreign investor*.' *See* Investment Proclamation, Arts. 2(6) & 2(7).

[80]It proclaims that *'… a foreign investor intending to buy an existing enterprise in order to operate it as it stands or to buy shares of an existing enterprise shall obtain prior approval from the Ministry of Trade.'* Investment Proclamation, Art. 12(3)

set under the proclamation;[81] and (3) the acquisition of the share is done in accordance with the Commercial Registration and Business Licensing Proclamation.[82]

With the exception of the third condition, the process of acquisition of membership share by a foreign investor through a purchase is different from that of a domestic investor. The process is made restrictive and onerous by the first and second requirements for approval. Besides, unlike article 12(2) of its predecessor (the repealed Investment Proclamation No. 280/2002), which provides that a decision of approval or rejection must be made within ten days of a complete application by the foreign investor, the Proclamation has not set a reasonable time within which a decision of approval must be made. Accordingly, foreigners' capacity to derivatively acquire membership share through purchase is considerably reduced by the onerous capital requirement and undefined period of approval set under the regulation.

In addition to the above restriction on a derivative acquisition, a foreign national is prohibited from acquiring a membership share in BOs whose business object is carrying out economic activities listed under article 3 of Council of Ministers Regulation No. 270/2012.[83]

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[81]In relation to the minimum capital, a foreign investor is required to acquire membership share that represents at least $ 200,000 in the capital of a BO she intends to be a member of. This requirement is applicable where all the other members of the BO are also foreigners. However, where the BO also has domestic investors as members, the requirement is reduced to $ 150,000. The requirement is further reduced to $ 50,000, where there are members who are domestic investors and the BO is engaged in architectural or engineering works or related technical consultancy services, technical testing and analysis or in publishing work. That said, a foreign investor who reinvests her profits or dividends generated from her existing enterprise in Ethiopia is exempted from allocating a minimum capital. Investment Proclamation, Art. 11 (1, 2, 3b &4).

[82]Investment Proclamation, Art. 12 (3). The list provided under article 12(3) of the proclamation, which provides for a list of cumulative factors that should be considered in making a decision of approval or rejection of a foreigner's application to buy a share, can be regarded as an improvement to article 12 (2) of the repealed investment proclamation no. 280/2002, which gives unreasonably wide discretion by totally failing to list factors that need to be considered. That said, article 12(3) of the proclamation is still dotted by flaws because, as it stands, it creates another layer of unreasonable discretion by failing to prescribe that the three cumulative lists are the only conditions that would be considered by the Ministry in the decision making. *See* Investment Proclamation (As Amended), Proclamation No. 280/2002, FED. NEGARIT GAZZETA 8th Year No. 27, Addis Ababa, 2 July 2002, Art. 12(2)

[83]Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation, Regulation No. 270/2012, FED. NEGARIT GAZZETA, 19th Year No. 4, Addis Ababa, 29 November 2012, Art. 3. Article 3 of the regulation reads as follows:

*Article 3:- Investment Areas Reserved for Domestic Investors*

*1. The following areas of investment are exclusively reserved for Ethiopian nationals:*

- *a) Banking, insurance, micro-credit and saving services;*
- *b) Packaging, forwarding and shipping agency services;*
- *c) Broadcasting service;*
- *d) Mass media service;*
- *e) Attorney and legal consultancy services;*
- *f) Preparation of indigenous traditional medicines;*
- *g) Advertisement, promotion and translation works; and*
- *h) Air transport services using aircraft with a seating capacity up to 50 passengers.*

In accordance with this provision, a BO may engage in the listed activities only if all of its capital is owned by Ethiopian nationals. Even a BO incorporated in Ethiopia with the object of carrying out activities listed under article 3 of the regulation will not have Ethiopian nationality unless all its members are Ethiopian nationals.[84] And if the BO is not Ethiopian, then it cannot carry out the listed activities. Accordingly, foreigners are incapable of acquiring derivative and original membership in BOs that are engaged in activities listed under article 3 of the Regulation.

That said, the restriction imposed by article 3 of the Regulation does not apply to a foreign national of Ethiopian origin who hold an identification card issued in accordance with Proclamation No. 270/2002.[85] They have a right to be considered as a domestic investor and restrictions imposed on foreign nationals regarding the utilization of economic, social, and administrative services are not applicable to them.[86]However, their membership capacity in financial BOs is restricted by a directive recently issued by National Bank of Ethiopia.[87] The directive prohibited foreigners of Ethiopian origin from acquiring or maintaining membership share in banks, insurance companies and other financial institutions.[88] To sum up, foreign nationals of Ethiopian origin having the identification card are capable of becoming a member in

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*2. For the purpose of sub-article (1) of this Article, a business organization may have Ethiopian nationality, provided that its total capital is owned by Ethiopian nationals*

[84] The way Article 3(2) defines Ethiopian BOs for the purpose of article 3(1) of the regulation begs more questions than it answers. For one thing, the provision creates a confusion regarding how nationality of BOs is established, which contributes uncertainties that already exists due to absence of Ethiopian Private International Law. If the rule is aimed at excluding foreigners from becoming a member in Ethiopian BOs, it could state that "BOs are allowed to engage in the listed activities only if their capital is fully owned by Ethiopian nationals." The other is that BOs should be regarded as of Ethiopian nationality if the majority of their capital is held by Ethiopians. While this work is destined to establishing capacity of persons, in general, and of foreigners, under this section the issue needs to be addressed by another normative study, the author holds a guiles opinion that BOs should be regarded as Ethiopians if majority of their capital is held by Ethiopians. Besides, although there might be a rational explanation for restricting foreigners from engaging in certain activities, their capacity to be members in BOs that are engaged in listed-activities should not be restricted as long as majority of the BOs capital is not held by foreigners.

[85]*See generally* Providing Foreign Nationals of Ethiopian Origin with Certain Rights to be Exercised in Their Country of Origin Proclamation, Proclamation No. 270/2002, FED. NEGARIT GAZZETA, 8th Year No. 17, Addis Ababa, 5 February, 2002.

Under article 2(1) of the Proclamation, a "Foreign National of Ethiopian Origin" means a foreign national other than a person who forfeited Ethiopian nationality and acquired Eritrean nationality, who had been Ethiopian before acquiring a foreign nationality, or at least one of her parents, grandparents or great grandparents was Ethiopian national.

[86] Ibid, Art. 5.

[87] National Bank of Ethiopia Manner of Relinquishing Shareholdings of Foreign Nationals of Ethiopian Origin in a Bank or an Insurer Guideline, Guideline No. FIS/01/2016 28 October 2016.

[88]*Ibid.* The author is of the opinion that the prohibition under this guideline, which is issued by the National Bank of Ethiopia, is contrary to the permission given to foreign nationals of Ethiopian origin under article 5 of Proclamation no. 270/2002. Legally speaking, the Proclamation is higher in hierarchy because it was passed by the FDRE House of Peoples Representatives and the National Bank does not have a power to pass a guideline (directive) which contradicts the proclamation. Besides, the directive breaches article 15 of the proclamation which proclaims that '*any laws, regulations, directives, decisions or procedural practices shall not be applicable in so far as they are inconsistent with this Proclamation.'* Economically speaking too, the prohibition imposed by the guideline will damage the country's development by restricting inflow of foreign currency.

all BO including those BOs that are engaged in activities listed under article 3(1) of the regulation with the exception of those engaged in banking, insurance, micro-credit and saving services.

In conclusion, one may drive a principle that foreigners are capable of acquiring derivative and original membership with or without a trader-status unless there is a special legislation prohibiting the acquisition. Among the restriction imposed by special laws are: prohibition of foreigners, with non-Ethiopian origin, from acquiring any form of membership in BOs that are engaged in activities listed under article 3(1) of Regulation No. 270/2012; prohibition of foreigners of Ethiopian origin from acquiring any form of membership in BOs that are engaged in the finance sector; and the requirement of prior approval for foreign investors who intend to derivatively acquire membership through purchase.

## 5. CONCLUDING REMARKS AND RECOMMENDATIONS

All physical persons are presumed to be capable of undertaking juridical acts and, hence, are also capable of acquiring membership in BOs recognized under the ComCE. However, this presumption could be rebutted by an express proscriptive law that could prohibit a physical person from acquiring membership. This article, therefore, undertakes a comprehensive analysis of circumstances under which Ethiopian law renders physical persons incapable of acquiring membership under Ethiopian law. In particular, it analyzes and describes potential restrictions on membership capacity of minors, interdicted persons, persons under non-compete duty and foreigners.

It does so, on the basis of modes of acquiring membership and the membership status thereby acquired. It applies two modes of acquisition to identify the law applicable to assess membership capacity: viz., original acquisition and derivative acquisition. Original acquisition happens where membership is acquired at the time of formation of a BO and a person is capable to acquire membership only if she is capable of signing partnership contract. The law applicable to assess membership capacity in such acquisition is, therefore, the law that determines a person's capacity to contract. On the other hand, derivative acquisition refers to a membership acquired through a transfer of share in an existing BO and the law applicable to assess membership capacity in such acquisition is the law applicable to the transfer. Besides, it applies two types of membership status in order to assess membership capacity: viz., membership with and without a

trader status. Membership with a trader status is acquired where a person becomes a partner in a commercial GP and JV and a general partner in commercial LP. Membership without a trader status is acquired when a person becomes a member in non-commercial BOs; a limited partner in commercial LP; and a shareholder in a PLC and an SC.

It concludes that minors, represented by tutors, should be capable of acquiring original and derivative membership with a non-trader status since articles 11 through 13 of the ComCE only bar minors from becoming traders. It argues that these provisions have to be interpreted to allow minors' membership capacity with a non-trader status. Consequently, a tutor, who is required to invest the capital of the minor as foreshadowed under article 280(1) and 281(2) of FDRE Family Code, acting on behalf of a minor can acquire membership in PLCs, SCs and limited partner share in LPs. Besides, a minor should be able to acquire derivative membership with a trader status where the minor inherits or receives a donation of membership share if the requirements of article 275 and 276 of the FDRE Family Code are complied with. In other words, a minor is incapable of acquiring membership with a trader status in other situations.

A judicially interdicted person can be regarded as capable of acquiring derivative or original membership with or without a trader status if her interdiction does not have the effect of restricting her membership capacity pursuant to article 371 of the CCE. However, where her interdiction also bars her from becoming a trader, she is only barred from acquiring membership with a trader status. Accordingly, she, represented by her tutor, can acquire derivative and original membership with a non-trader status per article 12 of the ComCE. Besides, a judicially interdicted person cannot acquire membership with a trader status. However, she should be capable of derivatively acquiring membership share, with a trader status, through inheritance or donation.

A legally interdicted person shall be barred from acquiring a membership in BOs only when a sentencing which prescribes such interdiction is authorized by law. Although article 124(1) of the FDRE Criminal Code automatically suspends *civil rights* of convicted persons under a sentence of death penalty or rigorous imprisonment, the phrase "civil rights" should not be interpreted to restrict the convicted person's right to trade. Even where there is an express restriction authorized by law, it should only bar the interdicted person from becoming a trader – not from becoming a member of a BO with a non-trader status. Accordingly, the interdicted

person should be capable of acquiring derivative and original membership with a non-trader status, for so would not harm the purpose of her punishment as long as she does not acquire a controlling share in the BO she became a member of. In addition, like minors and judicially interdicted persons, she should be able to derivatively acquire membership share with a trader status through inheritance or donation in accordance with a cumulative reading of article 381 and 385 of the CCE.

Physical persons under a contractually or legally imposed non-compete duty may also be rendered incapable of derivatively or originally acquiring a membership share in a BO. In particular, *commercial employees, partners in GP and LP*, *directors* and *sellers of a business* are under a non-compete duty and are rendered incapable of acquiring membership in specific BOs under specific circumstances. They are contractually or legally barred from competing with the beneficiary of the non-compete duty. It was argued that they should be barred from acquiring membership in a BO that engages in a similar business with the business of the beneficiary. Besides, the incapacity should be geographically restricted to the place where the business of the beneficiary operates; that it should be time bound; that it should be effective only when acquisition of membership would amount to be an act of competition that would injure the beneficiary; and that restrictions imposed by a non-compete duty must be construed narrowly since they impose a restriction on a person's constitutional right to freely engage in economic activities beneficiary.

Foreigners are generally capable of acquiring derivative or original membership with or without a trader status pursuant to article 389(1) of the CCE. However, they cannot acquire membership in Ethiopian BOs that are engaged in investment areas that are reserved for domestic investors under the Investment Proclamation (No. 769/2012) and Council of Ministers Regulation (No. 270/2012). They cannot also acquire membership in a BO that prohibits membership of foreigners under its memorandum of association. Even where the memorandum of association permits membership of foreigners, foreigners who want to purchase membership share by using foreign capital need to meet a higher capital requirement, ranging from $50,000 to $200,000, and secure the authorization of FDRE Ministry of Trade in order to derivatively acquire membership share with or without a trader status. Hence, each BO and each potential shareholder who is regarded as a foreign investor is required to meet these requirements in order to become a

member of Ethiopian BOs. Because of this, it was argued that this process needs to be reconsidered since it is unreasonably restrictive, onerous and susceptible to abuse.

In an attempt to analyze and describe membership capacity of physical persons in Ethiopian BOs, this work also addresses and makes conclusions about the nature and content of Ethiopian law on membership capacity of physical. First and foremost, the law is non-comprehendible even for legal professionals. Second, the law is characterized by gaps. For example, many rules of incapacity emanating from a non-compete duty fail to determine the geographic and product market in which the duty is effective; and the duration within which the FDRE Ministry of Trade has to approve derivative acquisition of membership by a foreigner is not set.

Third, the rules on membership capacity do not strike chord with the current federal government structure because capacity of minors to become both a trader and a member of a BO is now determined by FDRE and Regional Family Codes. For example, article 12 of the ComCE makes a cross reference to article 288 of the CCE with a view to establish trading capacity of minors and judicially interdicted persons. However, this provision is repealed and replaced by FDRE and Regional Family Codes. This does not coalesce with the present federal government structure because the power to legislate commercial Code falls within the mandate of FDRE House of Peoples Representatives while the power to enact civil laws, which includes the family law rules on capacity of minors, is within the mandate of the Regional State councils. As a result, states can have separate and, perhaps, contradictory rules of capacity.

Based on these findings, the author recommends that Book II of the ComCE needs to be amended to include a comprehensive rule on the capacity of persons to become a member of BOs. Apart from filling in the gaps in a comprehendible manner, the amendment could avoid inconsistencies that may happen as a result of potential variations in the rules of capacity under regional laws.

# Reversal of Burden of Proof in Case of the Crime of Illicit Enrichment: Appraisal of its Existence and Constitutionality in Ethiopia

Markos Debebe Belay*

## I ABSTRACT

Akin to the international and regional anti-corruption instruments, many domestic jurisdictions have an unequivocally recognised crime of illicit enrichment as an anti-corruption kit. This fast and vast recognition, however, does not absolve it from controversy. The law on the crime of illicit enrichment, rather than demanding the public prosecutor to proof the asset in question is ill-gotten, it requires the accused to satisfactorily prove (in the Ethiopian context) how she/he amassed it. Therefore, it has become debatable whether this burden is a mere evidentiary burden or the shift of a legal burden of proof and hence constitutes a reversal of the onus of proof or not.

This author contends that the burden is a legal burden of proof and is not in tandem with the FDRE Constitution. It violates the constitutional provisions on the principle of presumption of innocence and protection against self-incrimination. However, unlike the often-accustomed recommendation,[1] the author urges that the proclamation's provision on the crime of illicit enrichment should not be nullified. To the author's mind, the position of the detail law is in line with the interest of the public and apt to fight the crime of corruption. It is also the opinion of the writer that the FDRE Constitution fails to foresee the nature of such special and complicated kinds of crimes. Therefore, the detail law provision on the crime of illicit enrichment shall be validated by amending the constitutional provisions that make it an unconstitutional.

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1 Often, whenever a certain law is found to be contrary to the supreme law of the country, the recommendation is for the detail law to be null and void.

**Keywords:** Illicit enrichment, Reversal of burden of proof, Self-incrimination, Presumption of innocence, Corruption, Ethiopia.

## 1 SETTING THE CONTEXT

Currently, the ‘‘cancer’’[2] of corruption is causing an unspeakable harm around the globe. It is affecting both the private and public sectors at all levels.[3] For example, pursuant to the World Bank and the International Monetary Fund, corruption is the greatest impediment to lifting millions of people out of poverty.[4] Consonant with this, corruption is considered as the major challenge to the World Bank Group’s ‘‘twin goals of ending extreme poverty by 2030 and boosting shared prosperity for the poorest 40 percent of people in developing countries’’.[5] To illustrate the extent of the problem in figure, businesses and individuals pay an estimated $1.5 trillion in bribes each year.[6] This is about 2% of global GDP—and 10 times the value of overseas development assistance.[7] Likewise, the International Monetary Fund’s study exhibits that investment into countries with little corruption is significantly more than in countries with widespread corruption.[8] In Ethiopia, too, there is an entrenched corruption. For example, according to the 2017 Transparency International’s Corruption Perception Index Report, Ethiopia ranks 35 out of 100, zero being the most corrupt whereas 100 is the least corrupt country.[9] The perception of the transparency international is uncontestably confirmed by the Ethiopian government itself.[10]

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2 The World Bank President James Wolfensohn used this terminology for the first time in 1996. See, James Wolfensohn, Speech on ‘People and Development’, Annual Meetings (1 October 1996) as cited in Peters A (2015) ‘‘Corruption and Human Rights’’ *Basel Institute on Governance Working Paper Series* 20 at 7.

3 Boles J (2014) ‘‘Criminalizing the Problem of Unexplained Wealth: Illicit Enrichment Offenses and Human Rights Violations’’ 17 *Legislation and Public Policy* 835- 880 at 838.

4 Chaikin D and Sharman J (2009) *Corruption and Money Laundering a Symbiotic Relationship*: Palgrave Macmillan US at 1.

5 The World Bank, Combating Corruption, available at http://www.worldbank.org/en/topic/governance/brief/anti-corruption (visited 10 August 2018).

6 The World Bank, Combating Corruption, available at http://www.worldbank.org/en/topic/governance/brief/anti-corruption (visited 10 August 2018).

7 The World Bank, Combating Corruption, available at http://www.worldbank.org/en/topic/governance/brief/anti-corruption (visited 10 August 2018).

8 See, Press Release, Tenth United Nations Crime Congress in Vienna, 10–17 April, United Nations (Apr. 6, 2000), available at http://www.unis.unvienna.org/unis/en/pressrels/2000/cp373.html (visited 10 August 2018).

9 See, the Transparency International, the 2017 Corruption Perception Index, available at https://www.transparency.org/news/feature/corruption_perceptions_index_2017 (visited 24 April 2018).

10 For example, Abiy Ahmed Ali (PhD), the Prime Minister of the Federal Democratic Republic of Ethiopia, during his speech while he was sworn in as a prime minister of Ethiopia unequivocally admitted the presence of deep-rooted corruption in Ethiopia. See, Opride, Full English Transcript of Ethiopian Prime Minister Abiy Ahmed’s Inaugural Address, available at https://www.opride.com/2018/04/03/english-partial-transcript-of-ethiopian-prime-minister-abiy-ahmeds-inaugural-address/ (visited 24 April 2018).

This ingrained problem of corruption at all levels ignites the need to fight it. However, some of its unique natures such as the fact that it is committed surreptitiously[11] and have the wilful act of all the parties during its commission[12] as well as the absence of a single person that can be directly identified as a victim[13] pose a challenge against the effectiveness of the anti-corruption discourse. In other words, in case of the investigation and prosecution of the crime of corruption, there is a problem in gathering adequate evidence to prove criminality beyond a reasonable doubt. In response to this, the international community including Ethiopia have been employing various mechanisms to thwart corruption. Generally, there are four pillars to fight corruption: Prevention; Criminalisation; Transnational Anti-Corruption Cooperation; and, Asset Recovery.

Regarding criminalisation, there is an introduction of a new form of crime − illicit enrichment − also known as 'Possession of unexplained property'[14] Compared to other forms of corruption crimes, the crime of illicit enrichment is not only very young but also it is highly controversial. Unambiguously, the controversy is related with the type of burden imposed on the accused to be acquitted. It is not clear whether it is a mere evidentiary burden of proof or a legal burden of proof. Likewise, it is equally dubious whether this burden is consonant with the constitutionally recognised human rights of accused persons.

Despite the above controversial nature of the crime, Ethiopia has unequivocally criminalised illicit enrichment. Accordingly, many individuals have been prosecuted suspecting of committing this crime. This article, therefore, aims to determine the type of burden imposed on the accused; stated differently, whether it is a legal or evidentiary burden of proof; and then, its constitutionality in view of the FDRE Constitution.

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11 Perdriel-Vaissiere M (2012) ''The Accumulation of Unexplained Wealth by Public Officials: Making the Offence of Illicit Enrichment Enforceable'' *U4 brief* 1 at 2. See also, Kofele-Kale N (2006) ''Presumed Guilty: Balancing Competing Rights and Interests in combating Economic Crimes'' 40 *the International Lawyer (ABA) 4 SMU Dedman School of Law Legal Studies Research Paper No. 233* 909-944 at 914-915; Wilsher D (2006) ''Inexplicable Wealth and Illicit Enrichment of Public Officials: A Model Draft That Respects Human Rights in Corruption Cases'' 45 *Criminal Law & Social Change* 27–53 at 27; and, Derenčinović D (2012) ''Criminalisation of Illegal Enrichment'' *Freedom from Fear Magazine* available at: http://f3magazine.unicri.it/?p=469 at 1-2 (visited 10 July 2018).

12 Taube M, Johann G, and Schramm M (eds) (2004) *The New Institutional Economics of Corruption*: Routledge at 145. See also, Wilsher (2006) at 26.

13 Peters A (2015) at 11. See also, Jayawickrama N, Pope J, and Stolpe O (2002) ''Legal Provisions to Facilitate the Gathering of Evidence in Corruption Cases: Easing the Burden of Proof'', 2 *Forum on Crime and Society* 23-31 at 23. However, dissenter such as Ninsin argues that corruption is not a victimless crime wherein merely the public are the victim. For him, specifically, the workers and the peasants are the victims of corruption. On this point, see, Ninsin K (2000) ''The Root of Corruption: A Dissenting View'' in Mukanda R (ed.) *African Public Administration, a reader Mount Pleasant* at 462.

14 Muzila L, Morales M, Mathias M, and Berger T (2012) *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*: World Bank Publications at 6.

## 2 REVERSE BURDEN OF PROOF: A CONCEPTUAL ELUCIDATION

In conventional criminal cases, unlike civil litigation wherein the standard of proof is a preponderance of evidence,[15] the standard of proof is beyond a reasonable doubt.[16] Accordingly, before the burden shifts onto the accused, the prosecutor is required to prove each and every element of the alleged crime beyond a reasonable doubt.[17] However, recently, owing to the nature of some crimes, there is eccentricity from this classical criminal law rule. To put it concisely, in the prosecution of crimes such as the crime of illicit enrichment, the prosecution office, which has the support of the gargantuan hand of the State,[18] is not required to prove all the substantive elements of the crime. To be acquitted from the criminal charge, the accused is required to prove the absence of some of the elements of the crime; surprisingly, before the prosecutor proved its existence.[19] This is what is often called reverse onus of proof. Indeed, plainly, reversing the onus means that ''in a criminal trial, instead of the prosecution proving the guilt of the accused, the accused would have to prove her/his innocence''.[20] Nevertheless, the controversy comes not when the burden of proving all the elements of the crime is shifted to the accused[21] but only some or a single element.

To easily comprehend the notion of reversal of burden of proof in the context of the crime of illicit enrichment, the author finds it apposite to explain two typologies of burden of proof.

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15 Sedler R (1968) *Ethiopian Civil Procedure*: Faculty of Law, Haile Sellassie I University in association with Oxford University Press at 195. See also, James B (1982) ''Inevitable Errors: The Preponderance of the Evidence Standard in Civil Litigation'' 18 *Tulsa Law Review* at 79-80.

16 Boles (2014) at 858. For detail discussion of the notion of beyond reasonable doubt, see, Mandlenkosi D (1998) Proof beyond a Reasonable Doubt, PhD dissertation, Faculty of Law, University of Zululand**)** at 67-115.

17 Ashworth A (2006) ''Four Threats to the Presumption of Innocence'' 10 *The International Journal of Evidence & Proof* 241-278 at 250-251. See also, Gupta J (2012) ''Interpretation of Reverse Onus Clauses'' 5 *National University of Juridical Sciences Law Review* 5, 49-64 at 50, Kiros S (2012) ''The Principle of the Presumption of Innocence and its Challenges in the Ethiopian Criminal Process'' 6 *Mizan Law Review* 2, 273- 310 at 289; Amin Z *et al* (2016) ''Burden of Proof and Presumption of Innocence in the Prosecution of Illicit Enrichment with Reference to the Jordanian Legislation'' 49 *Journal of Law, Policy and Globalization* 25- 29 at 25. For detail discussion, see, Mandlenkosi (1998) at 228-281,

18 Amin Z *et al* (2016) at 25.

19 Singh R (2001) ''Reverse onus Clauses: A Comparative Law Perspective'' 12 *Student Advocate* 148-182 at 149. See also, Speville B (1997) ''Reversing the Onus of Proof: Is it Compatible with Respect for Human Rights Norms'' the 8th International Anti-Corruption Conference, available at http://8iacc.org.s3-website.eu-central-1.amazonaws.com/papers/despeville.html (visited 21 August 2018).

20 Singh (2001) at 149.

21 Because, in this case, it is an apparent violation of the constitutionally guaranteed rights of the accused.

### 2.1 Evidentiary burden of proof

Evidentiary burden also known as the ‘‘burden of production of evidence’’, ‘‘provisional or tactical burden’’, or the ‘‘burden of going forward with evidence’’,[22] is about ‘‘the obligation of a party to a dispute to lead evidence to show his/her case.’’[23] In this case, the party is not under duty to prove or disprove anything.[24] It is simply required to raise a reasonable doubt[25] as to the issue in question.[26] Its aim is to show that the party's claim and defence is not without any foundation. Succinctly, whereas the prosecutor is required to show evidence that is sufficient to prevent the court from dismissing its charge on the ground that there is no case to be defended, the accused is required to show that there is reasonable evidence that could challenge the charge brought by the prosecutor. Hence, evidentiary burden is all about pointing[27] towards certain evidence that make the issue in a case alive, and that further deliberation on the issue is required before coming to a decision.

### 2.2 Legal/Persuasive burden of proof

The legal burden of proof, unlike evidentiary burden, is about proving or disproving the claim of the parties. The legal burden of proof is mainly explained in light of the elements of the crime. In criminal cases, the prosecutor must prove the fulfilment of all of the elements of the crime by adducing the necessary evidences. Therefore, the accused is said to have assumed the legal burden of proof and the onus of proof is reversed if she/he is required to prove one or more element(s) of the crime.[28] When the accused assumes a legal burden, she/he must prove an ultimate fact necessary to the determination of guilt or innocence.[29] The same can also be said concerning the public prosecutor. Moreover, criminal law evidence principle dictates that while the legal burden of proof remains on a single party for the duration of the trial, by contrast the evidentiary burden may shift between parties over the course of the proceedings.[30] Further,

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22 Yaze W (2014 a) ‘‘Burdens of Proof, Presumptions and Standards of Proof in Criminal Cases’’ 8 *Mizan Law Review* 252-270 at 255.

23 Yaze (2014 a) at 255.

24 Yaze (2014 a) at 256. See also, Hamer D (2007) ‘‘The Presumption of Innocence and Reverse Burdens: A Balancing Act’’ 66 *Cambridge Law Journal* 142-171 at 143.

25 The question of when do we say that the person raises or not a reasonable doubt is debatable. However, since it is not the issue of this article, the writer reserves himself from making further discussion about it.

26 Hamer D (2011) ‘‘Dynamic Reconstruction of the Presumption of Innocence’’, 31 *Oxford Journal of Legal Studies* 417–435 at 418.

27 Not actually adducing them and proof the facts.

28 Hamer (2007) at 418.

29 Kofele-Kale (2006) at 927.

30 Speville (1997). The author submits that evidentiary burden can be shifted only when the court satisfied that the party (for example, the prosecutor) has pointed the existence of enough evidence that can show that its claim is not a mere allegation. If the prosecutor fails to point the presence of the evidence, the case would be throwing away and hence the accused would not be required to show any evidence. Similarly, if the failure was on the part of the accused, she/he would be convicted and hence the prosecutor would not have to move

unlike evidentiary burden where evidence is ‘‘adduced to raise an issue before the trier of fact’’,[31] in the case of legal burden of proof evidence is produced to prove or disprove the claim asserted by the party.

Generally, the question of reversal of the onus of proof is not in principle related to the evidentiary burden of proof. Reverse burden of proof comes into picture only when there is shifting of the legal/persuasive burden of proof. It occurs when the accused is required to prove or disprove all or some elements of the crime before the public prosecutor proves its existence beyond a reasonable doubt. Therefore, to determine whether there is reversal of onus of proof or not, it is necessary to determine which type of onus is assumed by the accused.

## 3 REVERSAL OF ONUS OF PROOF REGARDING THE CRIME OF ILLICIT ENRICHMENT

### 3.1 Theoretical underpinning of the crime

It is not uncommon to witness, when some people amass a huge sum of money or live a lavish lifestyle that is incomparable with their legitimate known source of income. This mismatch begs a question as to the source of the income. For many, even without having credible evidence, the presumption as to this asset is an illicit source. The crime of illicit enrichment comes in such scenario - when there is a misalliance between the legitimate known source of income and the asset at hand.

Although various international and regional anti-corruption instruments as well as domestic laws have incorporated and defined the crime of illicit enrichment, here, the author mainly uses the definition accorded by the Ethiopian anti-corruption law.[32]

Ethiopia, a party to United Nations Convention against Corruption (hereinafter UNCAC)[33] and the African Union Convention on Preventing and Combating Corruption (hereinafter AU Convention),[34] criminalises illicit enrichment by the 2015 Corruption Crimes Proclamation.[35] This proclamation under its Article 21 defines the crime of illicit enrichment as follows:

to adduce all her/his case to proof beyond a reasonable doubt. In other words, the accused right to be presumed innocent ceased to exist.

31 Kofele-Kale (2006) at 928.

32 The reasons are: First, there is no significant difference between the Ethiopian and other laws’ definition; second, whenever it is necessary and the Ethiopian law does not cover the issue, cross reference will be made with other laws; finally, the focus of the article is Ethiopian law.

33 It signed UNCAC on 10 December 2003 and ratified it on 26 November 2007.

34 It signed the AU Convention on 1 June 2004 and ratified it on 18 September 2007.

35 Corruption Crimes Proclamation, 2015, Proclamation, No. 881, Fed. Neg. Gaz. (hereinafter, Corruption Crimes Proclamation).

Article 21: Possession of unexplained property

1) Any public servant or employee of a public organisation, being or had been in office, who:

a) maintains a standard of living above that which is commensurate with the official income from his present or past occupation or other means; or,

b) is in control of pecuniary resources or property disproportionate to the official income from his present or past occupation or other means;

unless *he proves satisfactorily* before the court of law as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, shall be punishable …….

*2)* where the court, during proceeding under paragraph (b) sub-article 1 of this article is satisfied that there is reason to believe that any person, owing to his closeness to the accused or other circumstances, was holding pecuniary resource or property in trust for or otherwise on behalf of the accused, such resources, or property shall, in the absence of evidence to the contrary, be presumed to have been under the control of the accused.

Based on this definition, the offense of illicit enrichment has the following constituent elements.

### *3.1.1 Person of interest*

Person of interest is about the subjects of the crime. Under Ethiopian law, the crime of illicit enrichment is mainly interested in public servants or employees of a public organisation. A public servant refers to 'any person, who is employed, appointed or elected to work either temporarily or permanently in a public office[36] or public enterprise[37] and includes a member of the management board'.[38] According to the Ethiopian anti-corruption law, public organisations refers to

[36] Corruption Crimes Proclamation, Art. 2(1).
[37] Corruption Crimes Proclamation, Art. 2(3).
[38] Corruption Crimes Proclamation, Art. 2(2).

> any organ in the private sector which in whatever way administers money, property or any other resource collected from members or from the public or any money collected for the benefit of the public which includes appropriate company, but does not include religious organisations, political party, international organisation and *edir* or other similar traditional or religious associations.[39]

From the above definition, one can understand that, unlike the international and regional anti-corruption instruments,[40] but relatively similar to the AU Convention,[41] the Ethiopian anti-corruption law in general; the crime of illicit enrichment provision in particular is also applicable to the private sector corruption but in a limited scope.[42]

#### *3.1.2 Period of check*

The period of check is about the time span during which the person could be held responsible for the crime of illicit enrichment.[43] According to the Inter-American Convention against Corruption (hereinafter, IACAC), in order for the suspect to be charged for the crime of illicit enrichment, it is not mandatory for her/him to actually start the official duty. They could be charged from the date they have been selected, appointed, or elected.[44] Moreover, if there were discovery of an apparent subsequent enrichment that did happen during the performance of an official duty, they would be liable even after they have left their office. This shows that although the period of check in principle overlaps with the officials' term of office, there is a chance that they still could be prosecuted while they did not actually start their official function or have already left their office.

Under the Ethiopian anti-corruption law, there is an ambiguity on the period of check. The law simply states that the person should be a public servant or an employee of a public organisation, being or had been in office, and the asset is disproportional to her/his present or past occupation or other means.[45] The law does not clearly provide the time-span until when the official could be charged after she/he has left office or before she/he actually starts the work. In this regard,

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39 Corruption Crimes Proclamation, Art. 2(4).

40 United Nations Convention against Corruption (hereinafter UNCAC), (2003) Art. 20; and, Inter-American Convention against Corruption (hereinafter, IACAC), (1996), Art. 9.

41 African Union Convention on Preventing and Combating Corruption (hereinafter, AU Convention) (2003) Arts. 1 cum 8.

42 Corruption Crimes Proclamation, Art. 21(1).

43 Muzila, Morales, Mathias, and Berger (2012) at 16.

44 Manfroni C and Werksman R (eds) (2003) *The Inter-American Convention against Corruption Annotated with Commentary*: Lexington Books at 71.

45 Corruption Crimes Proclamation, Art. 21.

Worku rightly argues that the period of check is open-ended.[46] However, this does not mean that there is no period of limitation at all. The period of limitation provided under the general part of the FDRE Criminal Code is applicable. Accordingly, the period of check is determined based on Articles 216 and the following provisions of the Criminal Code. Moreover, akin to the IACAC, it can be argued that although the proclamation is silent, for the person of interest to be prosecuted, it is not necessary to wait until they actually start the work. They could be charged since she/he has been selected, appointed, or elected.

### *3.1.3 Significant/Disproportionate increase in assets*

In the crime of illicit enrichment context, asset constitutes, among others, the lifestyle of the accused person. Hence, it is not only about pecuniary resources or property. Regarding the magnitude of the disparity in asset, the international and regional anti-corruption instruments use the phrase 'significant increase'.[47] In comparison, the Ethiopian law employs phrases 'above that which is commensurate with the official income from his present or past occupation or other means', and 'disproportionate to the official income from his present or past occupation or other means' concerning the standard of living and control of pecuniary resources and property, correspondingly.[48] This means, in Ethiopia, as per the wording of the law, there is no minimum amount concerning the asset in question to constitute the crime of illicit enrichment.[49] How bagatelle the disparity may be, it can be a ground for illicit enrichment prosecution.[50]

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46 Yaze W (2014 b) ''Criminalization of 'Possession of Unexplained Property' and the Fight against Public Corruption: Identifying the Elements of the Offence under the Criminal Code of Ethiopia'' 8 *Mizan Law Review*, 45-83 at 77-78.

47 UNCAC, Art. 20; AU Convention 37, Arts. 1 cum 8; and, IACAC, Art. 9.

48 Corruption Crimes Proclamation, Art. 21(1) (a) & (b).

49 Unlike the Ethiopian approach, some countries expressly provided a minimum threshold in percentage. For instance, in India, the divergence in asset should be 10%. Nothing less than 10% can be a ground for illicit enrichment prosecution. See, Muzila, Morales, Mathias, and Berger (2012) at 18-19.

50 This approach is not acceptable by some writers such as Manfroni. Manfroni opines that the disparity in asset should be 'gross'. For him, calling for a complete accuracy would be an onerous load on the person of interests. It would collude against the peace of mind they require to perform their official and other functions effectively. Moreover, demanding such stringent standards would easily be manipulated. It could be used as a political weapon to attack political opponents. See, Manfroni (2003) at 72. However, there are also arguments in favour and against the approach taken by the international and regional anti-corruption instruments-, the requirement of 'significant disparity' or as Manfroni calls it 'gross disparity. On the positive side, it could proscribe prosecution for trivial asset discrepancies. In doing so, it serves as a controlling mechanism against the investigation and prosecution offices. It bars them from harassing public officials and other persons under the pretext of the crime of illicit enrichment. On the negative aspect, it may send a signal that certain level of corrupt practice is tolerable. It may suggest that insignificant amount (petty corruptions) are acceptable or out of the realm of corruption. See, Muzila, Morales, Mathias, and Berger (2012) at 18.

### *3.1.4 Mental element*

In formulating the offense of illicit enrichment, as often as not, there is a tendency of omitting the required *mens rea*. For example, the Ethiopian law, akin to many other anti-corruption instruments,[51] provides no express *mens rea* requirement. For the author, this absence should be construed as intentional state of mind. This argument emanates from the understanding that intention is an overarching element in the definition of crimes. As such, it is not always mandatory to spell it out in every case.[52] Hence, if there is omission concerning mental element of a crime, the required *mens rea* is intention.[53]

### *3.1.5 Absence of justification*

In any jurisdiction, accruing asset *per se* is not a crime. What matters is the means used to amass such asset. It may be, in principle, also possible to say that not every person may be required to call and prove the legitimacy of such asset. However, because of the nature of their official capacity, in illicit enrichment's context, some groups of persons are required to satisfactorily prove the legitimacy of the asset they have accumulated in excess of their legitimate source of income. For example, the Ethiopian anti-corruption proclamation, specifically the provision on the crime of illicit enrichment, requires the accused to prove satisfactorily before the court of law as to how she/he was able to 'maintain*s* a standard of living above that which is commensurate with the official income from his present or past occupation or other means' or how she/he 'is in control of pecuniary resources or property disproportionate to the official income from his present or past occupation or other means'.[54] In the words of the law, if the person of interests fail to adduce evidence that can prove the legitimacy of the asset satisfactorily, they would be criminally responsible. It should be noted that this burden on the accused is imposed not after the prosecutor proved the illegitimacy of the asset in question. What the law required the prosecutor in this regard is to merely show the incongruity between the living standard/pecuniary resource or property of the accused on the one hand and the official income from the accused's present or past occupation or other means on the other. Accordingly, this element of the crime of illicit enrichment is mystifying. It is not clear whether it is imposing evidentiary or legal burden of proof on the accused. Consequently, it is necessary to determine what it is and then assess it in view of the constitutionally guaranteed due process rights of accused persons to determine its constitutionality.

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51 For example, see, the AU Convention, Arts. 1 cum 8. See also, the IACAC, Art. 9.

52 Muzila, Morales, Mathias, and Berger (2012) at 21.

53 Moreover, Article 34 of the Corruption Crimes Proclamation supports this assertion. The provision allows the application of the FDRE Criminal Code's General Part.

54 Corruption Crimes Proclamation, Art. 21.

## 4 REVERSAL OF ONUS OF PROOF UNDER INTERNATIONAL AND REGIONAL ANTI- CORRUPTION INSTRUMENTS

Albeit debatable, various international and regional instruments have recognised the likelihood of shifting of onus of proof onto the accused. Of these instruments, although not in the crime of illicit enrichment context, the Vienna and Palermo Conventions are the front-runners. These Conventions, allow their states parties to reverse the onus of proof for the sake of mainly confiscating and seizing the proceeds of the crimes.[55] However, this reversal required to be in harmony with the principles of such states parties' domestic law and the nature of the judicial and other proceedings.[56] Moreover, though this reversal can play a significant role in fighting the perpetrators by going after their money, the inclusion of the approach in those Conventions was not made without a dispute. For example, Colombia, while signing the Vienna Convention, expressly declared that it does not consider itself bound to the provision of the reversal of onus of proof provision; because, it is determined as incompatible with the fundamental rights of the accused.[57]

In the crime of illicit enrichment context, the first convention that encompasses the contentious notion of reversal of burden of proof is the IACAC.[58] Afterwards, the AU Convention[59] and UNCAC[60] accepted it almost in similar fashion.[61] Alike the Vienna and the Palermo Conventions, the inclusion of the notion under these Conventions had no unanimous support. For instance, Canada and the US in the case of the IACAC, and Switzerland in case of UNCAC strongly opposed the criminalisation of illicit enrichment in general and its justification element in particular. These countries argue that the adoption of illicit enrichment as one form of corruption crime in general and its justification element in particular would contradict with the constitutional rights of accused persons such as the presumption of innocence.[62] For these countries, the justification element imposed by the corruption crime of illicit enrichment is a

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55 The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter, the Vienna Convention), (1988), Art.5 (7). See also, the United Nations Convention against Transnational Organized Crime (hereinafter, Palermo Convention) (2000), Art. 12(7). While the Vienna Convention is limited to trafficking in drugs, the Palermo Convention embraces other organised/transnational organised crimes.

56 The Vienna Convention Art. 5(7). See also, the Palermo Convention, Art. 12(7).

57 Kofele-Kale N (2012) *Combating Economic Crimes Balancing Competing Rights, and Interests in Prosecuting the Crime of Illicit Enrichment*: Routledge at 36.

58 The IACAC, Art. 9.

59 The AU Convention, Arts. 1 cum 8.

60 UNCAC, Arts.20 & 31(8).

61 Amin Z *et al* (2016) at 25.

62 The UNODC, the *Travaux Preparatoires* of the negotiations for the elaboration of the United Nations Convention against Corruption (2010) Vienna, available at https://www.unodc.org/unodc/en/treaties/CAC/travaux-preparatoires.html at 195 *(*visited 21 August 2018).

shift of a legal burden of proof to the accused. Further, similar to the Vienna and Palermo Conventions, the above major anti-corruption instruments require the reversal of burden of proof notion to be consonant with the principles of states parties' respective domestic law and the nature of their judicial and other proceedings. These qualification prefaces in the major anti-corruption conventions, besides showing the absence of unanimity during their deliberation stage on the notion, they also signify the necessity of checking whether the constitutionally guaranteed due process rights of accused persons such as the presumption of innocence and the protection against self-incrimination allows limitation or not. Put differently, the provisions are not mandatory but discretionary. If, in the domestic constitution of the states' parties, the protections are absolute to which limitations are not allowed, the notion of reverse burden of proof is not tolerable. Because the argument is that, among others, the qualification prefaces indicate the type of burden of proof imposed on the accused is a legal burden of proof. If it were evidentiary burden of proof, as argued by the supporters of the inclusion of the crime of illicit enrichment in the conventions, there would have been no need to have such conditional prefaces. To recap, at international and regional anti-corruption instruments level, there is no consensus concerning the nature of burden of proof imposed on the accused in case of the crime of illicit enrichment via its justification requirement.

## 5 REVERSAL OF ONUS OF PROOF IN CASE OF THE CRIME OF ILLICIT ENRICHMENT: THE ETHIOPIAN LAW CONTEXT

As indicated above, Ethiopia is a state party to the major anti-corruption instruments: UNCAC and the AU Convention. Moreover, while ratifying these instruments, it did not oppose the application of their position on the crime of illicit enrichment under its domestic legal tradition.[63] Indeed, Ethiopia's law explicitly criminalises illicit enrichment.[64]

Although there is no codified evidence law in Ethiopia yet,[65] under Ethiopian legal tradition, arguably, the public prosecutor has the duty to prove all elements of a crime beyond a

[63] This can be construed into ways: it may mean that Ethiopia is of the opinion that the rights provided to accused persons are not absolute – allows limitation; or, Ethiopia believes that the burden imposed on the accused by the crime of illicit enrichment is not a legal but an evidentiary burden of proof.

[64] Ethiopia did not introduce illicit enrichment first as a corruption crime but as evidentiary rule in 2001. Ethiopia criminalises illicit enrichment for the first time in 2004. Following then, in 2015, with the aim of making its anti-corruption law consonant with the continental and international instruments, it enacted a new proclamation on corruption crimes. See also, the Anti-Corruption Special Procedure and Rules of Evidence, 2001, Proclamation, No. 236. Fed. Neg. Gaz, Art. 37; and, Corruption Crimes Proclamation, preamble, paragraph, 1 & 2 and Art. 21.

[65] This absence of a codified evidence law in Ethiopia causes a problem; specifically, it is difficult to know the standard of proof recognised under the Ethiopian criminal justice system.

reasonable doubt.[66] Both the evidentiary and legal burden of proof are imposed on the prosecutor. At least, the latter type of burden cannot be shifted on to the accused before the prosecutor proves her/his case beyond a reasonable doubt. However, the observance of this rule in case of some crimes such as the crime of illicit enrichment is dubious. Nevertheless, except some scholars, the issue did not attract enough attention in Ethiopia. Hence, the subsequent section is, besides briefly summarising the position of some of these scholars, devoted to explicate the nature of burden of proof imposed on the accused in case of the crime of illicit enrichment in Ethiopian law.

### 5.1 Account on the Ethiopian law on the crime of illicit enrichment and burden of proof: Illustrative scholars' vs. the author's view

Of the corruption crime forms, there is no other crime that has been as debatable as the crime of illicit enrichment. The criminalisation of illicit enrichment at both international level and various domestic jurisdictions level, mainly owing to the nature of the burden it imposed on the accused, has attracted the attention of significant number of writers- those who argue in favour of its criminalization (believe that the burden is evidentiary burden) and against it (believe that the burden is a legal burden).

For example, Ndiva Kofele-Kale[67] and Margaret K. Lewis,[68] argue that in case of the crime of illicit enrichment, there is no shifting of legal burden of proof. According to them, what the accused bears is an evidentiary burden. In a relatively similar fashion, Nihal Jayawickrama *et al* argue that there is no shifting of burden of proof. They say the problem starts in the use of the phrase 'reverse onus'. For them, it is both unfortunate and inaccurate to use such phrase to refer to the situation.[69] They say, in case of the crime of illicit enrichment, there is no shifting of onus of proof but a mere easing of evidentiary burden of proof and they try to justify their position arguing that the measure is both necessary and desirable because it plays a role in 'deterring potential offenders and facilitate the investigation and successful prosecution of corruption offences'.[70] Furthermore, Bertrand de Speville holds a similar position.[71] Zainal

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66 For detail discussion, see, Mandlenkosi (1998) at 228. See also, Kiros (2012) at 289; Ashworth (2006) at 250-251; and, Gupta (2012) at 50. Specifically, for detail discussion on the Ethiopian legal tradition, see, Arayaselassie H (2014) ''The Standard of Proof in Criminal Proceedings: The Threshold to Prove Guilt under Ethiopian Law'' 8 *Mizan Law Review* 84-116. The writer concurs with the position of Hanna on the standard of proof required from the public prosecutor in case of criminal cases.

67 Kofele-Kale (2006) at 909-944.

68 Lewis M (2012) ''Presuming Innocence, or Corruption, in China'' *Columbia Journal of Transnational Law 287-369* at 312.

69 Jayawickrama, Pope, and Stolpe (2002) at 29.

70 Jayawickrama, Pope, and Stolpe (2002) at pp. 29-30.

71 Speville (1997) at 16.

Amin Ayub *et al*, on their part, adopted a systematic understanding of burden of proof and try to provide justification for the reversal of burden of proof than denying its presence. They say 'the burden of proof should be understood as an instrument to curb corruption and deprive corruptors from the proceeds of crimes rather than the exaggeration of the presumption of innocence.'[72] For them, the right of accused persons must be balanced against the interest of society so that 'preserving public fund is a strong argument to justify the shift of burden of proof partly to the defendant to explain the nexus of excessive wealth to legal sources, which eventually, does not constitute a violation against the presumption of innocence'.[73] Their position is relatively similar with Ndiva Kofele-Kale's argument of 'the collective right to a corruption-free society'.[74]

On the other hand, others such as Dan Wilsher and Jeffrey R. Boles do not concur with the argument of evidentiary burden. While Dan Wilsher argues that the defendant has the legal burden of disproving the presumption in case of the crime of illicit enrichment,[75] Boles argues that 'illicit enrichment violates fundamental human rights of the accused and therefore must be replaced by alternative enforcement mechanisms'.[76] Boles argues that 'illicit enrichment statutes aggressively combat governmental corruption, but the placement of the burden of proof upon the criminal defendant constitutes an impermissible presumption that violates the human rights of the accused'.[77] He even advices jurisdictions worldwide to resist using illicit enrichment offenses to combat corruption.[78] Moreover, for Snidert and Kidane, criminalizing illicit enrichment is 'a remedy that is worse than the ailment'.[79] Similar to Boles, they also recommend countries not to implement illicit enrichment provision of international and regional anti-corruption instruments at domestic level.[80] For them, illicit enrichment is 'fundamentally flawed as a matter of recognized principles of criminal justice.'[81]

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72 Amin Z *et al* (2016) at 25.

73 Amin Z *et al* (2016) at 28-29.

74 Kofele-Kale N (2000) ''The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law'' 34 *International Law* at 149 as cited in Kofele-Kale (2006) at 910.

75 Wilsher (2006) at 30. He states 'Inexplicable wealth crimes may take the form of employing a presumption of corruption upon proof of excessive wealth. The defendant then has the legal burden of disproving the presumption. Alternatively, the offence may be one of strict liability (the defendant is liable for the act of possessing excessive wealth) with a defence or exception of satisfactory (i.e. non-corrupt) explanation'.

76 Boles (2014) at 859-860.

77 Boles (2014) at 880.

78 Boles (2014) at 880

79 Kidane W and Snidert T (2007) ''Combating Corruption through International Law in Africa: A Comparative Analysis'' 40 *Cornell International Law Journal* 691- 748 at 729.

80 Kidane and Snidert (2007) at 729.

81 Kidane and Snidert (2007) at 729.

Ensuing to Ethiopian law, there are handful writers that put pen to paper on the issue of reversal of onus of proof in case of the crime of illicit enrichment.[82] Of all, the one who gives a due emphases for the issue is Worku. In his detail and successive works, he argues that under Ethiopian law, specifically concerning the crime of illicit enrichment, there is no reversal of onus of proof. He argues that 'what is provided under Art 419 (1) goes in line with the constitutional principle of presumption of innocence and under Arts 141 and 142 of the Criminal Procedure Code.'[83] Another writer Mesay also has more or less similar position with Worku.[84] Finally, in his article titled 'the Principle of the Presumption of Innocence and its Challenges in the Ethiopian Criminal Process',[85] Simeneh argues that presumption of innocence is being violated in Ethiopia by various subsidiary laws, procedures and practices.[86] He specifically states that there are ''various provisions in the criminal law that limit (or arguably disregard) the presumption of innocence''. For him, these criminal law provisions ''assume as proved the existence of some of the elements of certain crimes without requiring the public prosecutor to submit evidence.''[87] Moreover, he mentions the Criminal Justice Administration Policy adopted in 2011 and contemplates shifting the burden of proof to the defendant in selected serious crimes, and finally the courts also wrongly shift burden of proof to the accused regarding certain facts in various court decisions.[88]

However, compared to the above works, this article offers a different account on the question of reversal of burden of onus under the Ethiopian anti-corruption law. The author, based on the rationales and practical cases discussed below, argues that the burden imposed on the accused in case of the crime of illicit enrichment under the Ethiopian anti-corruption law is a legal burden of proof.

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82 These scholarly works were written before the promulgation of the current anti-corruption law (Corruption Crimes Proclamation (2015)).

83 Yaze W (2014) ''Burdens and Standards of Proof in Possession of Unexplained Property Prosecutions'' 8 *Mizan Law Review* 1-44 at 24. Worku further explain that 'the binding interpretation adopted in *Workineh Kenbato & Amelework Dalie* case is erroneous and calls for its rectification in future cases that involve similar issues'.

84 Tsegaye M (2012) The Legal Framework of Illicit Enrichment in Ethiopian Anti-Corruption Law, LL.M. thesis, Faculty of Law, University of the Western Cape (South Africa) & Humboldt University (Germany) at 47. For further reading, one could also read Girma T (2007) Possession of Unexplained Property as a Crime under the Criminal Code 2007, LL.B. thesis, Faculty of Law, Addis Ababa University.

85 Kiros (2012) at 273 - 310.

86 Kiros (2012) at 273.

87 Kiros (2012) at 273, 303, 304, 309.

88 Kiros (2012) at 273.

### *5.1.1 The presumption on the source of the asset in question*

Once the public prosecutor proves the fulfilment of the other elements, the law assumes, though rebuttable, the asset in question is an ill gotten. Put differently, it requires the accused to proof its legality. Meaning, rather than requiring the prosecutor to prove the illegality of the asset amassed by the accused, the law demands the latter to prove its legality. This suggests that in case of the crime of illicit enrichment, the punishment is not merely for possessing a disproportionate asset or a lavish lifestyle, which is incompatible with the legitimate source of income. But, the punishment is for the mere presumption that the asset is proceed of a criminal activity- a corrupt practice. Transliterated, what the prosecutor is required to show is causing a doubt for the presumption of illegality to set in motion. However, the accused is required to satisfactorily prove the legality of the asset. If she/he fails to do so, the result would be conviction for the crime of illicit enrichment. Hence, logically, one can safely conclude that the burden imposed on the accused is far more cumbersome than the prosecutor. This signifies that proving the legality of the asset in question is the essential element and question in case of the crime of illicit enrichment; however, it is imposed on the accused. The onus of the prosecutor is limited to the extent of adducing circumstantial evidence that show the possible commission of a corrupt practice. This circumstantial evidence is limited to the extent of showing disproportionality. Stated differently, it is almost equal to causing a reasonable doubt, which is much less than the standard of proof required in case of criminal prosecutions- beyond a reasonable doubt.[89] On the other hand, the close examination of the burden imposed on the accused revealed that it is not about causing doubt but proving the legality of the asset satisfactorily.[90] Therefore, the burden assumed by the accused is a clear instance of a legal burden of proof and hence there is reversal of onus of proof.

### *5.1.2 The wording or expression used under the law*

The wording of the law that criminalise illicit enrichment can also be counted as an additional evidence that confirms the existence of reversal of burden of proof under the Ethiopian criminal justice system, at least, concerning the crime of illicit enrichment. To be specific, the proclamation that introduced the notion of reversal of burden of proof in Ethiopia, Proclamation No. 236/2001, used the expression 'shifting of burden of proof'.[91] Moreover, the Criminal Justice Administration Policy that was adopted by the Council of Ministers in 2011

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89 Albeit, in Ethiopian, there is debate whether the standard of proof in case of criminal cases is beyond a reasonable doubt or not, it is but unanimously agreed that it is higher than preponderance of evidence.

90 Corruption crimes proclamation, Art. 21(1).

91 Anti-Corruption Special Procedure and Rules of Evidence Proclamation, 2001, Proclamation, No. 236, Fed. Neg. Gaz, Art. 37.

also anticipates the shifting of burden of proof onto the defendant in some serious crimes.[92] It should be noted that corruption is among the crimes mentioned as serious in the policy.[93] Further, the current Ethiopian anti-corruption law, unlike the previous laws[94] and international and the African anti-corruption instrument to which Ethiopia is a state party,[95] clearly require the accused to *prove* the legitimacy of the asset satisfactorily.[96] Therefore, the cumulative reading of the above facts strengthens the argument of the shift of legal burden of proof onto the accused and hence there is reversal of onus of proof in case of the crime of illicit enrichment. The writer, as explained above, is duly aware that this burden is imposed on the accused following the prosecutor has sufficiently shown the disparity between the official income and the unknown. However, the writer is of the opinion that such burden imposed on the prosecutor is much easier and circumstantial when it is compared to the onus imposed on the accused.

### *5.1.3 Practical consequence on the accused*

Effect wise, specifically from the perspective of the accused, there is no difference between evidentiary and legal burden of proof. In both cases, failure on the part of the accused results her/him to conviction for the crime of illicit enrichment. To state it plainly, if someone assumes that the burden imposed on the accused is an evidentiary burden, it means that after the prosecutor shows the existence of evidence, which indicates the presence of disparity between the official income and the unknown, the burden shifts onto the accused to cast evidence as to the legitimacy of the asset in question. If the accused fail to do so, there will be an immediate conviction, which is also true in the case of legal burden of proof. However, if the accused

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92 This is what the policy provides on the issue:
***4.4*** *<u>የማስረዳት ሸክም ወደ ተከሳሽ ስለሚዛወርበት ሁኔታ</u>*
*ማንም ሰው በወንጀል ጥፊተኛ ሊሰኝ የሚችለው ሥልጣን ባለው ፍርድ ቤት አቃቤ ሕግ በሚያቀርበው ማስረጃ ጥፊተኝነቱ ሲረጋገጥ ብቻ ነው። ይሁንና ተከሳሹ በሕገ-መንግሥታዊ ሥርዓት ላይ አደጋ ማድረስ፣ እንደ ሽብርተኝነት፣ ሙስና ወይም በተደራጁ ቡድኖች በተፈፀሙ ወንጀሎች የተከሰሰ እንደሆነ አቃቤ ሕግ የማስረዳት ሸክምን ወደ ተከሳሽ ለማዛወር የሚችል መሠረታዊ ፍሬ ነገሮችን ካስረዳ የማስረዳት ሸክም ወደ ተከሳሹ ሊዛወር የሚችልበትን ሥርዓት የሚመለከቱ ድንጋጌዎች አግባብነት ባላቸው ሕጎች ውስጥ ይካተታሉ።* see, The Criminal Justice Administration Policy of Ethiopia adopted on 4 March 2011 by the Council of Ministers. For further discussion on the policy, see, Kiros (2012) at 282-284.

93 See, The Criminal Justice Administration Policy of Ethiopia adopted on 4 March 2011 by the Council of Ministers.

94 The FDRE Criminal Code Article 419(1) used to require the accused only to give satisfactory explanation. Indeed, the interpretation of the Federal Supreme Court Cassation Division on this provision, however, clearly indicates that the burden imposed on the accused was much more than reasonable doubt and explanation but prove.

95 UNCAC, the AU Convention and the IACAC use the expression 'reasonably explain' rather than proves satisfactorily. See, UNCAC, supra note 36, Art. 20; the IACAC, Art. 9; and, the AU Convention, Arts. 1 cum 8.

96 Corruption crimes proclamation, Art. 21.

indicates the presence of evidence that shows the legality of the asset in question, contrary to the rule in case of evidentiary burden, the burden would not be reverted to the public prosecutor to prove the illegality of the asset in question; instead, the accused would be acquitted. Therefore, from this specific scenario perspective, the difference made between evidentiary and legal burden of proof is merely theoretical. It is more of game of words that does not appreciate its implication on the ground. Indeed, under Ethiopian law context, in both practice and theory, evidentiary burden is not even recognised.[97]

To conclude, as affirmed by the next section, based on the existing Ethiopian anti-corruption law, contrary to what some argues, the burden imposed on the accused in case of the crime of illicit enrichment is a legal burden of proof; hence, there is a reversal of onus of proof.

### 5.2 Exploration of illustrative illicit enrichment cases before the federal courts

Albeit the offense of illicit enrichment is a relatively new crime under the Ethiopian law, there have been numerous cases before the Federal and Federating Units' Courts. In this regard, Worku, for example, in his work entitled 'Criminalization of 'Possession of Unexplained Property' and the Fight against Public Corruption: Identifying the Elements of the Offence under the Criminal Code of Ethiopia'[98] has listed and assessed some cases. His assessment clearly shows that, under the Ethiopian law, the crime of illicit enrichment is not a crime that remains on paper. Accordingly, in this section, this author does not find it necessary to make a discussion to show the fact that the provision is practically being used in Ethiopia; rather, he directly proceeds to the question of reversal of onus of proof.

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97 The only provisions, but very arguably, that seem to recognize evidentiary burden of proof under the Ethiopian legal tradition are Article 136(1) and 142(2) of the Criminal Procedure Code. While Article 136(1) 'After the plea of the accused has been entered, ***the public prosecutor shall open his case explaining shortly the charges he proposes to prove and the nature of the evidence he will lead***. He shall do so in an impartial and objective manner', Article 142(2) in a similar fashion states 'The ***accused or his advocate may then open his case and shortly explain his defence stating the evidence he proposes to put forward***. He shall then call his witnesses and experts, if any, who shall be sworn or affirmed before they give their testimony. Emphasis added. For the author, these two provisions hardly constitute evidentiary burden of proof; and; unlike the requirement provided in case of the crime of illicit enrichment under Article 21 of Proclamation No. 881/2015, the 'burden' imposed on the two parties, the public prosecutor and the accused, is to briefly explain the charge and defence; respectively, not to satisfactorily prove, which is the case in case of the crime of illicit enrichment.

98 Yaze (2014 b) at 42.

### *5.2.1 The Federal Ethics and Anti-corruption Commission (FEACC) v. Yared Getaneh T/Haymanot*[99]

The FEACC's prosecutor brought two charges against the accused, Yared Getaneh T/Haymanot. The first charge is based on Article 419(1) (a) (b) of the FDRE Criminal Code while the second charge is based on Article 684 (1) of the same code.[100] In his amended charge, the prosecutor claimed that the accused has amassed a disproportionate amount of asset from 25 June 2001(18 *Sene* 1993 E.C) to 16 June 2010(9 *Sene* 2002 E.C). During these years, the accused has worked in different government offices as a public servant and amassed asset worthy of ETB 1,399,377.35. This asset is registered both under his and his wife's name. To show the disproportionality in asset, the prosecutor, besides indicating the known source of the accused's income, stated that the accused has no other sources of income. Additionally, the prosecutor counted witnesses and listed various documents. The prosecutor's charge is detailed and clear enough. However, it does not indicate the mental element of the accused.

After verifying the identity of the accused and reading out the charge to the accused, the Court asked him whether he has an objection against the prosecutor's charge, and committed the crime or not. The accused responded that he has no objection to the charge but pleaded not guilty arguing that the assets are acquired lawfully. Following, based on the prosecutor's request, the Court immediately ordered the prosecutor to adduce its evidence only on the second charge and notified the accused that he will produce his defence subsequently. This means, for the mere fact that the prosecutor showed the asset is disproportional to the known sources of income and its ownership is admitted by the court; the Court is satisfied by the charge brought against the accused and ordered him to defend himself. In this case, the prosecutor was not required to show that the assets owned by the accused are fruits of a criminal conduct. Once the prosecutor has finished adducing evidence that showed the existence of disproportionality between the known source of income of the accused and the actual asset he has amassed, what follows was conviction and punishment. Then after, following appeal, the Federal Supreme Court confirms the decision of the Federal High Court. The case also appeared before the Federal Supreme Court Cassation Division. However, the Cassation Division decided that there is no basic error of law.

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99 Yared Getaneh T/Haymanot v. The FEACC (Federal Supreme Court, Cassation File No. 107480/2015) Federal Supreme Court Cassation Decisions.

100 Since the focus of this work is the crime of illicit enrichment, the question of reversal of onus of proof, the discussion is limited to the first charge.

First, it is good to note that Yared Getaneh T/Haymanot's case, arguably, demonstrates how illicit enrichment cases have been and are being adjudicated before all level of Courts in Ethiopia, both at Federal and Federating Units level. Hence, although it might be a bit debatable, the conclusion reached based on this case can safely be transposed to other crime of illicit enrichment cases in Ethiopia.

In criminal cases, the prosecutor has a legal duty to prove the commission of a criminal conduct to the required standard, beyond a reasonable doubt.[101] The prosecutor must prove the fulfilment of all the elements of the alleged crime before the burden shifts to the accused.[102] The evidence used by the prosecutor to prove the commission of the crime should not also be acquired by incriminating the accused person.[103] Furthermore, it should not also violate the accused's rights to be presumed innocent until proven guilty and the right to remain silent. The burden of proof imposed on the prosecutor is derived from the constitutionally guaranteed rights of accused persons. In the same vain, it is often agreed and logical that the accused is not required to disprove the case against her/him to the extent of beyond reasonable doubt standard. On this point, Worku argues that the accused is needed only to produce evidence that causes reasonable doubt on the prosecution's evidence.[104]

However, in case of the crime of illicit enrichment, as demonstrated by the case at hand, the prosecutor did not prove the illegality of the asset. Indeed, the law that criminalises illicit enrichment does not require the public prosecutor to do so. The prosecutor did not show that the disproportionate asset is an ill-gotten but simply assumed as such by the law.[105] It was up to the accused to show the lawfulness of the asset in question. In other words, as witnessed from the above case, the moment the accused admitted the ownership of the asset in question, the Court ordered him to defend the prosecutor's charge. Absolving the prosecutor from proving the commission of a criminal conduct and limiting his duty to the extent of showing a mere disparity in asset is a clear instance of shifting the onus of proof, and this is what has happened in the case at hand.

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101 Mandlenkosi (1998) at 228. See also, Kiros (2012) at 289, Ashworth (2006) at 250-251; and, Gupta (2012) at 50. Specifically, for detail discussion on the Ethiopian legal tradition, see, Arayaselassie (2014) at 84-116.

102 Mandlenkosi (1998) at 228. See also, Kiros (2012) at 289, Ashworth (2006) at 250-251; and, Gupta (2012) at 50 and, Arayaselassie (2014) at 84-116

103 See, for example, the FDRE Constitution, 1995, Year 1, Fed. Neg. Gaz., Arts. 19(5) & 20(3). See also, the the International Covenant on Civil and Political Rights (ICCPR) (1966), Art 14(3)(g).

104 See, Yaze W (2010) "Presumption of Innocence and the Requirement of Proof Beyond Reasonable Doubt: Reflections on Meaning, Scope and their Place under Ethiopian Law" in Wondwossen D (ed.), *Human Rights in Criminal Proceedings: Normative and Practical Aspects,* 3 *Ethiopian Human Rights Law Series* at 128 as cited in Arayaselassie (2014) at 93.

105 The author appreciates the doubt as to the legality of the asset amassed by the accused. But, he is with the opinion that the doubt is not equivalent to beyond the shadow of doubt.

### *5.2.2 The Southern Regional State's Anti-Corruption Commission v. Mr. Workneh Kenbatu et al*[106]

This case started at Hawassa High Court. The Regional State's Anti-Corruption Commission Prosecutor charged Mr. *Workneh Kenbatu* and Mrs. *Amelework Dale* for the crime of illicit enrichment. According to the prosecutor's charge, the accused have accumulated an asset worth of ETB 2, 081, 468.90 cents in violation of Article 32(1) (b) cum 33 cum 419(1) of the FDRE Criminal Code. In their sequence, the prosecutor and the accused persons have adduced various evidences. Afterwards, arguing that defendants have presented evidences that rebutted the case of the prosecution, the Court acquitted the accused based on Article 149(2) of the Ethiopian Criminal Procedure Code. Following that, the prosecutor has lodged an appeal to the Regional State's Supreme Court that affirmed the decision of the lower Court. The prosecutor then lodged its petition to the Regional State's Supreme Court Cassation Division arguing that the lower Courts have committed a basic error of law. The Division has accepted the petition and reversed the decision of the lower Courts. To do so, the Regional State's Supreme Court Cassation Division argued that the evidences adduced by the defendants were not credible and capable enough to refute the prosecutor's charge. Consequently, the accused petitioned to the Federal Supreme Court Cassation Division. The petitioners argued that the Regional State's Supreme Court Cassation Division has no power to evaluate the credibility and probative value of the evidences. They argued, its power is limited to determining the existence or otherwise of a basic error of law. The Federal Supreme Court Cassation Division accepted the petition but confirmed the decision of the Regional State Supreme Court's Cassation Division decision. To resolve the case, besides others, the Federal Supreme Court Cassation Division found it necessary to determine the level of onus of proof required from the accused. It asked what level of onus of proof is required from the accused in case of the crime of illicit enrichment proceeding. Is it to prove the accurate legitimate source of the asset in question or simply causing a doubt? To give response to the above questions, the Cassation Division opted to analyse the onus of proof imposed on both parties by Article 419 of the FDRE Criminal Code, the then law on the crime of illicit enrichment.[107]

For the Cassation Division, once the prosecution shows the existence of disproportionality in asset, the burden of proof shifts onto the accused. The court interprets Article 419 of the FDRE

[106] Workneh Kenbatu et al. v. SNNPR Ethics and Anti-Corruption Commission Prosecutor (Federal Supreme Court, Cassation File No. 63014/2012) Federal Supreme Court Cassation Decisions, Vol. 13, pp. 359- 365).

[107] It is necessary to note that there is no difference between Article 419 of the FDRE Criminal Code and Article 21 of the contemporary Corruption Crimes Proclamation No. 881/2015 Article 21.

Criminal Code and states that the prosecutor is free from proving the illegitimacy of the asset. Moreover, pursuant to the Cassation Division, the accused can only defend the case by showing the accurate legitimate source of the asset. Unlike other criminal cases, causing a reasonable doubt on the prosecutor's charge or evidence(s) is not enough but proving the legitimacy of the asset accurately.[108]

The writer believes that the above interpretation of Article 419 of the FDRE Criminal Code by the Cassation Division clearly shows that the burden imposed on the accused is not the so-called evidentiary but a legal burden of proof. Put differently, as contemplated under the previous case, the Cassation Division affirms that there is a reversal of onus of proof in case of illicit enrichment prosecution.[109]

To recap, the above illustrative cases clearly show the existence of a reversal of onus of proof in case of the crime of illicit enrichment under Ethiopian anti-corruption law. The cases show that the onus imposed on the accused is to exactly prove the legitimacy of the asset in question – simply- a legal burden of proof.

## 6 REVERSAL OF ONUS OF PROOF IN CASE OF THE CRIME OF ILLICIT ENRICHMENT: APPRAISAL ON ITS CONSTITUTIONALITY

Besides ending impunity and the misappropriation of public property, the battle against the 'cancer' of corruption complements the protection of constitutionally guaranteed rights. Effective anti-corruption measures and protection of human rights are mutually reinforcing.[110] However, owing to its reversal of onus of proof element, there is a doubt concerning the compatibility of criminalisation of illicit enrichment as a tool to fight corruption on the one

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108 "ከዚህም የምንረዳው ዓቃቤ ህግ በግልፅ ከሚታወቀው ሀገዊ ገቢ በላይ ነው በማለት በክሱ የገለፀውን እና በማስረጃ ያረጋገጠውን ሀብት **ትክክለኛ ምንጭ የማስረዳት ግዴታ (burden of proof) በተከሳሾች ላይ የሚወድቅ መሆኑን ነው**።የተከሳሾች የማስረዳት ግዴታም ዓቃቤ ህግ በክሱ ከገለፀውና በማስረጃ ካረጋገጠው ውጭ ተከሳሾች ሌላ ገቢ የሚያገኙበት ስራ ወይም የገቢ ምንጭ ያላቸው መሆኑን ብቻ ለፍ/ቤቱ በማሳየት የሚወሰን ሳይሆን፤በዓቃቤ ህግ ክስ እና ማስረጃ ከተረጋገጠው ገቢ ውጭ በእጅ እንደተገኘ የተረጋገጠው ገንዘብ እና ሀብት **ትክክለኛ ምንጭ ምን እንደሆነ የማስረዳት ግዴታ እና ሀላፊነት ያለበት መሆኑን ከወንጀል ህግ አንቀፅ 419(1) ሶስተኛው ፓራግራፍ ድንጋጌ አቀራረፅ እና ይዘት ለመረዳት ይቻላል**።" This position of the Federal Supreme Court's cassation is contrary to the Cassation Court of Egypt. In one case, their Court held that 'if the accused failed to prove the origin of the significant increase of the wealth, which does not commensurate with the lawful sources of his wealth, this is not sufficient *per se* to come to a decision of criminalizing and convicting the accused, due to the deficiencies in ground of the judgment" because it will be contrary to the principle of the presumption of innocence. See, Amin Z *et al* (2016) at 26.

109 In order to understand the implication of this interpretation, it is necessary to note the legal effect of the Federal Supreme Court Cassation Division interpretations. The interpretation is binding on federal as well as regional courts; see, the Federal Courts Proclamation, 1996, Proclamation No. 25, Fed.Neg.Gaz, as re-amended, Federal Courts Proclamation, 2005, Proclamation No. 454, Art. 10(4). This shows that the case is not a mere court practice but a law that has a binding legal effect throughout the country.

110 The United Nations Human Rights Office of the High Commissioner, The Human Rights Case against Corruption, available at http://www.ohchr.org/EN/NewsEvents/Pages/HRCaseAgainstCorruption.aspx, p. 5, (visited 23 April 2018).

hand; and, the protection of the constitutionally guaranteed rights of accused persons on the other. From this point of view, in other jurisdictions, there have been discussions concerning the constitutionality of the crime of illicit enrichment. However, in Ethiopia, despite the apparent application of the crime in practice; and as argued before, the existence of a reversal of onus of proof; hitherto, the constitutionality issue has not been raised before the appropriate organs.

Consequently, the next section is devoted to scrutinise the reversal onus of proof element of the crime of illicit enrichment in light of the various rights of accused persons guaranteed under the FDRE Constitution.

### 6.1 Scrutiny in light of the principle of presumption of innocence

Various key international and regional human rights instruments,[111] as well as domestic jurisdictions have recognised the presumption of innocence as a bedrock principle.[112] Moreover, in almost all domestic jurisdictions, it has the status of a higher constitutional norm.[113] The principle gives every person the right to be presumed innocent until proven guilty; in doing so, protecting innocent defendants is its main aim.[114]As a generic notion, the presumption of innocence contains three fundamental components: the onus of proof first lies on the prosecution; the standard of proof is beyond a reasonable doubt; and the method of proof must accord with fairness.[115]

However, with the birth of very complicated and new crimes such as the crime of illicit enrichment, countries have started setting different standards concerning the principle of presumption of innocence mainly for the effective administration of the criminal justice. Accordingly, many countries allow an express limitation to the principle of presumption of innocence.[116] Likewise, in countries where there is no express limitation, the principles of rationality and proportionality test have been used as a means to restrict the principle.[117] These tests are developed following the decision of the European Court of Human Rights(hereinafter, ECHRs) in *Salabiaku v. France.*[118] In line with the Court's argument, although countries have

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111 For example, see, the African Charter on Human and Peoples Rights (ACHPR) (1981), Art. 7(2). See also, the ICCPR, Art. 14(2); and, the Universal Declaration on Human Rights (UDHR) (1948), Art. 11.

112 See, for example, the UK, Canada, the US, Indian and Ethiopian law.

113 Wilsher (2006) at 29.

114 Ashworth (2006) at 253.

115 Jayawickrama, Pope, and Stolpe (2002) at 25.

116 Wilsher (2006) at 29.

117 Muzila, Morales, Mathias, and Berger (2012) at 49.

118 The court stated that 'Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, requires the Contracting States to remain within certain limits in this respect as regards criminal law. It requires States to confine them within reasonable limits which consider the importance of what is at stake and maintain the rights of the defence'.

no express exception in their legislation, limiting the presumption of innocence have been found still to be constitutional. The limitation is justified based on the public's interest in convicting corrupt public officials and the severity and pervasiveness of public-sector corruption.[119] Similarly, under the international instruments, albeit they seem absolute, in practice, courts have held that this right can be qualified.[120] The question is: Is it valid to adopt the same construal under the Ethiopian legal system?

The FDRE Constitution provides that 'During proceedings accused persons have the right to be presumed innocent until proven guilty according to law and not to be compelled to testify against themselves.'[121] While the English version of this provision has the phrase 'according to law' as to how guilty should be proven, the same requirement could not be found in the Amharic version that has a final legal authority.[122] However, in this specific provision, the English version is more persuasive and untarnished.[123] Be the translation problem as it may, the question remains whether the presumption of innocence under the FDRE Constitution is an absolute or a qualified protection.

The FDRE Constitutional provision on the presumption of innocent has no an express limitation clause. Moreover, in Ethiopia, there is lack of jurisprudence on how this constitutional provision should be interpreted. Accordingly, unlike those countries that provide an express limitation to the principle, constitutionality is an issue under the Ethiopian legal tradition. Looking how limitations to fundamental rights are provided under the FDRE Constitution, it is safe to say that the presumption of innocence has no limitation.[124] Hence, for the author, in Ethiopia, unlike those common law countries, in the absence of an express limitation, applying the rationality and proportionality tests to justify the limitation of the accused's rights is unconstitutional.

To conclude, undoubtedly, criminalising illicit enrichment has a paramount importance in the battle against the 'cancer' of corruption. Its importance is very significant especially in least developing countries such as Ethiopia. It eases the fight against corruption by solving the problem in relation to gathering evidence. However, the author submits that this fight should be carried out in a manner consistent with the fountainhead of laws, the FDRE Constitution. In

See also, Attorney General v Hui Kin Hong and the Privy Council in Attorney General v Lee Kwong-Kut, (Hong Kong Court of Appeals, 1995).

119 Hong Kong Court of Appeals, 1995.

120 Salabiaku v France (EHRR, 1988).

121 The FDRE Constitution, Art.20(3).

122 The FDRE Constitution, Art. 106.

123 The omission of the phrase in the Amharic version creates an ambiguity on how guilty should be proved

124 Other writers such as Simeneh also confirm this stand. See, Kiros (2012) at 274.

Ethiopia, at least theoretically, the presumption of innocence is an absolute right. Put differently, the public prosecutor should prove the fulfilment of all elements of the crime beyond a reasonable doubt. Any procedure or crime that contradicts this constitutional norm is not tolerable. The FDRE Constitution as it is today allowed no limitation to ease the prosecutors' burden or shift it onto the accused for whatsoever reason. Moreover, unlike some countries such as South Africa,[125] there is no general limitation clause in it. Therefore, under the current Ethiopian constitutional system, not only shifting (legal) burden of proof but also easing burden of proof is not tolerable. It is contrary to the accused right to be presumed innocent until proven guilty.

### 6.2 Analysis in light of the protection against self-incrimination

Akin to the presumption of innocence, the protection against self-incrimination is recognised under various human rights instruments[126] and domestic jurisdictions.[127]As a fundamental due process right, it is developed in opposition to the unfair methods of compulsory interrogation and prosecution. It protects anyone who is suspected or accused of a crime from giving a testimony that incriminates them. This protection is justified by the inherently cruel and immoral nature of making anyone an instrument of his/her own conviction.[128]

Moving to the nature of the protection, unlike the presumption of innocence, thus far, although there is no a supranational organ that has ruled on the relation of the protection against self-incrimination and the crime of illicit enrichment, there have been challenges to convictions for illicit enrichment in several domestic jurisdictions. For example, in Zambia, illicit enrichment was held to be unconstitutional since it is considered as contrary to the accused persons' protection against self-incrimination.[129] Under Ethiopian law, akin to the presumption of innocence, although in a limited scope, the protection against self-incrimination is an absolute right. Accordingly, any attempt to get the confession of the accused without her/his full and informed consent is unconstitutional.

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125 Kassie A (2011) ''Human Rights under the Ethiopian Constitution: A Descriptive Overview'' 5 *Mizan Law Review* 41-71 p. 58. See also, Kassie A (2011) ''Limiting Limitations of Human Rights under the FDRE and Regional Constitutions'' in Yonas B (ed) *Some Observations on Sub-national Constitutions in Ethiopia* 4 *Ethiopian Constitutional Law Series* (2011) Faculty of Law, Addis Ababa University at 63, 69-73, 74.

126 For example, see, the ICCPR, Art 14(3)(g).

127 For example, See, the FDRE Constitution, Arts. 19(5) & 20(3).

128 Louisell D (1965) ''Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma'' 89 *California Law Review* 89-102 at 95.

129 Stapenhurst R, Johnston N, and Pelizzo R (eds) (2006) *The Role of Parliament in Curbing Corruption* The International Bank for Reconstruction and Development / The World Bank at 230. See also, Kabwe J (2014) Criminalising Possession of Unexplained Wealth by Public Officials: Legal Perspectives from Zambia, LL.M. thesis, Faculty of Law, University of the Western Cape (South Africa) & Humboldt University (Germany), at 40-41.

However, the offense of illicit enrichment requires accused persons to adduce evidence that could exonerate them from conviction. It demands the accused to *say* something to *prove satisfactorily* about their disproportionate amount of asset or lavish living standards. Refusal or failure to do that will lead him/her to criminal conviction. This consequence, be convicted for the offense of illicit enrichment, shows how the accused is forced to speak out something that may make her/him criminally responsible. The pressure imposed by the nature of the crime of illicit enrichment via its 'proves satisfactorily' requirement is not consonant with the constitutional protection accorded to accused and arrested persons. Therefore, even if the protection against self-incrimination is not primarily about burden of proof, the shifting of burden of proof may indirectly force the accused to speak something that incriminates her/him.

### 6.3 Exploration in light of the right to remain silent

Although the right to remain silent is another manifestation of the presumption of innocence and the protection against self-incrimination, for the sake of clarity and owing to its special nature, the author decides to make a separate discussion. Similar to the FDRE Constitution,[130] various human right instruments[131] have recognised the right to remain silent. This right entitles arrested persons the right not to say a word in response to any question that may be poses to them by the investigators and/or prosecutors. In various domestic jurisprudences, most often, the right to remain silent is not considered as an absolute right. Indeed, the ECHRs also affirms it.[132]According to the Court, albeit it is hardly possible to convict the accused solely based on the accused's silence or on a refusal to answer questions, the accused's decision to remain silent throughout criminal proceedings does not necessarily mean it has no implications. It should be possible to make an inference from the accused's silence. This inference can be made upon the fulfilment of two conditions: if the prosecution has exhibited a *prima facie case*, and/or only common-sense inferences are permissible.[133] However, since reversal of onus of proof came into picture during a prosecution stage, one question that needs an answer is whether the right to remain silent is guaranteed to accused person or not. On this point, the author is of the opinion that since the right is a manifestation of the protection against self-incrimination and the presumption of innocence, accused persons should have such right.

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130 The FDRE Constitution, Art. 19(2).

131 The ICCPR, Art. 14(3)(g).

132 See, Murray (John) v UK (EHRR, 1996). The author submits that the manner how the court interprets this right cannot by and in itself be conclusive evidence to conclude how this right should be understood in Ethiopia. Here, it is used only to show the practice.

133 For further discussion, see, Jorge G, The Romanian Legal Framework on Illicit Enrichment, CEELI promoting the rule of law, (2007), available at https://apps.americanbar.org/rol/publications/romania-illegal_enrichment_framework-2007-eng.pdf, (visited 8 October 2018).

Moving to the compatibility or otherwise of the crime of illicit enrichment and the right to remain silent as a constitutional right, not unlike the presumption of innocence and the protection against self-incrimination, in Ethiopia, the right to remain silent is formulated in an absolute form but only for arrested persons.[134] Therefore, the accused persons' right to remain silent has no a constitutional ground. Accordingly, even logically, the same strict protection for arrested persons cannot be guaranteed for accused persons. The author believes that allowing accused persons to remain silent for the whole proceeding would not be the intention of the makers of the constitution. There should be a time when the accused should say or adduce the necessary evidence to be acquitted from the criminal charge. Therefore, there is no violation of the right to remain silent in case of the crime of illicit enrichment.

## 7 CONCLUSION

Corruption is a global problem. It indiscriminately affects both the developed and developing countries albeit the extent may differ. Currently, there is a global anti-corruption discourse. This discourse employs various mechanisms to combat corruption. Of these mechanisms, the introduction of the crime of illicit enrichment is one.

Since its introduction, the crime of illicit enrichment has been not only controversial but also been recognised by various international and regional anti-corruption instruments as well as domestic jurisdictions. The controversy on the crime of illicit enrichment comes from the fact that it requires the accused to *prove* satisfactorily (in Ethiopian context) how she/he amassed the asset in question. There is no unanimity concerning the interpretation of this onus imposed on the accused. It is debatable whether it is a mere evidentiary burden or a legal burden of proof and hence constitutes reversal of onus of proof or not.

This author argues that the burden is a legal burden of proof and is not in tandem with the FDRE Constitution as it violates the constitutional provisions on the principle of presumption of innocence and protection against self-incrimination. However, the author also believes that criminalising illicit enrichment is necessary and it needs to be validated than be nullified. Accordingly, in order to validate it, the constitutional provisions on the presumption of innocence, and the protection against self-incrimination should be amended and should expressly allow for limitation;[135] because, the revision would provide a better protection for the interest of the society by validating the important kit in fighting corruption.

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134 The FDRE Constitution, Articles 19 and 20.

135 The author clearly is aware of what is provided under Article 9(1) of the FDRE Constitution and its effect. But, he is of the opinion that in this specific scenario the constitution has a limitation and needs to be reconsidered.

# Jimma University Legal Aid Center 2017/18 Report: The Success Stories and Challenges

Gebre Negash Darge, Director of the JUSL-LAC

## 1. Introduction

JU is Ethiopia's first innovative Community Oriented Education Institution of higher learning. In line with this philosophy, Jimma University School of Law Legal Aid Center (here in after JUSL-LAC) was established based on the unanimous decision of Academic Commission of the then Law Faculty (now School of Law) on Dec 25, 2008.

JUSL-LAC was primarily established with the vision of providing free legal services to indigents and ***vulnerable groups*** like the poor, women, veterans, HIV/AIDS victims and children in and around Jimma town on one hand, and to expose students of the Law School to the practical aspect of law on the other hand.

Having these multifaceted goals JUSL-LAC has been rendering its cherished legal service at eleven centers including the one at the head office in Jimma University. Initially, service delivery was started by opening two centers at Jimma Zone High Court and Jimma Woreda Court. However, the number of centers was increased by six more in the year 2003 EC by opening new centers in Agaro, Dedo, Serbo and Jimma Zone Prison Administration. In 2008 EC new centers have been opened at Gera, Omo Nada and Shabe Woreda courts. Currently, the center has a total of ten (10) centers.

## 2. Background of the JUSL-LAC

Justice is the major concern of our democracy that we cannot take for granted. Our laws guarantee basic rights and protection for all of us – not just those who can afford to hire a lawyer. The Constitution also requires that justice should be available without unnecessary delay. By contrast, we usually find family cases in which women's rights are violated, children abused by trafficking and domestic ill-treatments, and other classes of the society adversely affected by the system. On the contrary, the people have failed to defend the injustice and even when they want

to do so, they face many tackles. These problems resulted because of the deep rooted financial problem the society is trenched in. Indeed, vulnerable people who have the means to pay for a lawyer also face a problem of getting access to justice. Providing free legal service to these vulnerable groups means the difference between food on the table and hunger, life and death penalty, shelter and homelessness, economic stability and insolvency, productive work and unemployment.

The initiative to establish JUSL-LAC came up because of this apparent growing need of our society to have access to justice. The Civil Procedure Code and FDRE Constitution have made an attempt to help the poor to have access to justice by allowing suit by pauper and bestowing the right to get appointed council respectively.

But this attempt alone does not suffice to watch justice in motion. First, allowing suit by pauper in civil matter by itself alone is not a guarantee to have access to justice. It simply means that one can bring his/her claim to courts without paying court fees. Although, it is one step in creating access to justice, it is way far from creating access to justice in its full sense. The person should be able to effectively defend his/her rights upon initiating a civil suit. This can be done if the person gets legal support even after s/he institutes her claim. In civil matters, our laws (like the laws of other nations) do not provide a duty that the government shall appoint a counsel for a needy person in civil matters. Therefore, the attempt to create access to justice for the needy in civil matters is very limited.

Secondly, the Constitutional guarantee that accused persons have the right to be represented by a state appointed counsel if they do not have financial means and thereby a miscarriage of justice may happen is hampered by the government's limited resource. Besides, the law provides legal assistance when the accused has no sufficient financial means – it does not address other vulnerable groups such as women, children, HIV/AIDS victims, veterans, and disabilities who are usually underserved. Therefore, the constitutional guarantee to create access to justice in criminal matters is hampered by lack of resource and lack of comprehensive focus on all types of vulnerability. It is with the aim of achieving these objectives that the JUSL-LAC is established.

Apart from helping the society, the JUSL-LAC would help the students to know how law is being practiced. Law students should be able to acquire practical knowledge to be able to serve the society in the future and be able to cope up with the dynamic world under tornado of change. Traditionally, law students were not exposed to the practice of law. This had been making the

students unable to live up to what is expected from them. The Justice and Legal Systems Reform Institute of Ethiopia (which is renamed the Federal Justice and Legal Research and Training Institute in 2018) has also noticed this problem, and has spearheaded the inclusion of practical courses in Ethiopian Law School Curriculum.

For prospective law graduates, trying to serve the society without having a glimpse of the legal practice could be like trying to walk while you don't have one leg. Providing free legal service to the society without equipping graduates of law with practical legal knowledge would not solve the legal problems of the society in the long run. Doing so would be like '*hitting a snake on the tail – not on the head'.* Indeed, creating access tojustice for the needy should be coupled with producing competent legal professionals who work in the justice system. The last decades practice in legal education in Ethiopia shows that law students were being taught merely based on theory. In this type of legal education, it is difficult to produce law graduates who understand legal problems of the society and who put their effort into solving those problems rather than watching as a passerby. When graduates are theory based, they will have a reduced capacity to create access to justice and play a role in the democratization process of the nation.

Indeed, this is why the vision of JUSL-LAC should be both creating access to justice for the needy and equipping law graduates with practical legal knowledge. The experience law students acquire by working at JUSL-LAC would make them agents of change in Ethiopian legal system, and would give them the exposure to see legal problems of the society ahead and makes them aspire to solve the problems upon their graduation.

In order to remedy the problems stated in the above paragraphs, and reach out to the ardent hope and fervent desire of the society, a further justice for all initiative is still required. The best, actually the prominent, initiative is to employ the ripe and talented skill of the Junior lawyers, law school instructors and students in order to cast this prevailing problem aside. Thus, organizing to make use of this skilled man power by sustaining, the existing centers, and opening new legal aid centers has paramount importance in the lives of hundreds of thousands of people JUSL-LAC aspires to serve.

## 3. The Services provided by the center

There are three main activities that JULAC provides. These are legal services, legal education and research and capacity building.

### a. Legal Services

These services are those services which in one way or other connected with justice sectors and administrative government organs. Through its legal services the Centers provide the following major services to its clients

- free legal counsel
- writing statement of claim
- writing statement of defense
- writing different applications to the court and other organs
- Advocacy (Representation before the court)
- Mediation (with the view to reach on amicable solutions)

So far the Centers are offering these legal services to the population in its 10 service centers located in seven towns (Dedo, Serbo, Agaro, Shebe, Gera, Omo Nada and Jimma). In six of the service centers, at Dedo, Serbo, Shebe, Gera, OmoNada and Agaro, the Centers have managed to employ junior lawyer to run the services. The Center however relies on School of Law students to run the services at Jimma Woreda Court, Jimma zone High Court and Jimma Zone prison Administration. The students are assisted by the academic staffs of the School. The Center's office located at the JU Main campus functions as a coordinating center for all the services and functions.

### b. Legal Education (Awareness Raising Program)

The Center believes that the majority of abuses and human rights violations suffered by the vulnerable parts of the population are the result of lack of awareness especially of the rights of these groups. Accordingly, it strongly believes that ensuring respect for their rights can better be realized through effective and broad-based community legal education programs. Thus far the Center has relied on the Jimma University Community Radio in which it has been able to run two hours-long awareness raising program per week in two languages (Amharic and Afan

Oromo) but there are critical limitations both in terms of the structure, breadth, effectiveness and sustainability of running the program through this medium. Accordingly, different laws related to Prisoners' Rights, Child and Women's Right, Human Rights Laws, Procedural law and Self-Advocacy skill, Oromia Land Law, Family Law, Law of Property and Succession, Employment and Labor Law, Tort Law, Anti-Corruption Law, Administrative law and good governance, Law of Contracts and Commercial Laws have been broadcasted through the community radio so as to enhance the society's basic knowledge on those subject matters.

The Center however, aims to run the program effectively by utilizing various available means and media such as community organizations, centers and other channels with broad audiences but this requires the availability of adequate financial and infrastructure (including transportation) supports.

## 4. Research and Capacity Building

It is crucial that legal service and legal education programs at the Center be supported by appropriate evidences. Research is therefore a critical part of its strategic approach as it helps to identify the need and areas of focus for its services. In addition to this, it also helps engaging with the community and stakeholders in addressing the problems in a more effective and sustainable manner. Rresearch also plays a crucial role in empowering and building the capacity of the community, stakeholders and the Center itself in dealing with the root causes of the problem of human rights violations and lack of access to justice to the vulnerable members.

Thus far there is no baseline research conducted not just in Jimma Zone but in the whole Country in relation to the state of need for free legal aid service. There is also no standard developed in relation to providing the service. In fact, the level of awareness of the idea of free legal aid and its role is at a critically low level in the Country. The Center aims to address these problems by using research and capacity building as its strategic approach. To this end the following are areas in which the Center needs strong support for its areas of activities:

- organizing thematic and generic conferences and workshops and training programs
- publication
- conducting baseline survey for legal aid services need in Jimma Zone

- developing standards and guidelines for the provision of services

In this regard, due to high budgetary constraints the center has only managed to develop standards and guidelines for service provision.

## 5. Summary of overall activities

Resisting all the challenges it faced, the center has managed to reach 7,398 (seven thousand three hundred ninety eight) beneficiaries in the 2017/18 work year. The types of the services rendered and the beneficiaries together with the centers that have provided the legal service have been summarized as follows.

| **Type of legal Service** | **Jimma Woreda** | **Jimma Zone** | **Head Office** | **Jimma Zone Prison** | **Agaro** | **Serbo** | **Dedo** | **Gera** | **Shabe** | ***Omo Nada*** | ***Total*** |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Counseling | 450 | 391 | 282 | 1090 | 307 | 219 | 258 | 182 | 218 | 244 | **3,741** |
| ADR | 58 | 28 | 39 | - | 49 | 17 | 19 | 22 | 11 | 19 | **262** |
| Documents | 432 | 308 | 158 | 972 | 307 | 307 | 118 | 239 | 169 | 127 | **2,916** |
| Representation | 160 | 50 | 42 | 36 | 77 | 25 | 17 | 27 | 13 | 30 | **479** |
| Total | 1,098 | 781 | 542 | 2,049 | 656 | 399 | 533 | 400 | 373 | 420 | **7,398** |

### 5.1. Some of the cases the center represented and won in 2017/18

There are a number of cases that the center has represented in different branches. The numbers of cases have been increased tremendously this year and more than 216 cases have been litigated through representation of the center at different courts where the branches of the center are located. These cases were those in which our fifth year law students and lawyers in different

centers have represented the clients and won at Jimma woreda court, Jimma zone high court, Agaro woreda court, Serbo Woreda court, Shabe woreda court and Omonada woreda court.

***The following are the details of some of the cases entertained by the center:***

| S.N | Name of the client and story of his/her case | Sex | Type of the case | Court entertained | File no. | Judgment/award |
|---|---|---|---|---|---|---|
| 1 | **Tolossa Belay**<br>√ Our client suffered bodily injury due to damage caused as a result of collision with vehicle<br>√ The age of our client was 12 years<br>√ The tortfeasor is punished criminally<br>√ The center sued the liable individual and earned 13,500 birr as compensation | M | Tort | Agaro | 34318 | 13,500 birr awarded for the damage |
| 2 | **Alem Tadesse**<br>√ There was a conflict with her husband on the property they acquired during marriage | F | Contract | Agaro | 35080 | They agreed with help of the center and family arbitrators and dropped the suit |
| 3 | **Iriftu Beyene**<br>√ She has given cows on the terms to share the profits equally<br>√ The recipient denied the contract and the existence of the cows<br>√ He used the cows for himself alone | F | Succession | Agaro | 32686 | She is entitled to half of the land that was in dispute |
| 4 | **Rabiya Abatemam**<br>√ it was a claim made for maintenance of a child<br>√ her husband has divorced her and refused to | F | Maintenance | Agaro | 34016 | 300 birr monthly Installment |

| | | | | | | |
|---|---|---|---|---|---|---|
| | pay maintenance<br>√ she is entitled to 300 birr monthly installment | | | | | |
| 5 | **Muslima Tibabu**<br>√ she appeared at the center to write an application for maintenance<br>√ the father of her three children was not volunteer to pay the maintenance<br>√ the center represented her in court and earned her 700 birr maintenance monthly | F | Maintenance | Agaro | 30160 | Entitled to 700 birr monthly installment |
| 6 | **Awaliya Abanura**<br>√ she wanted to represent her in court to partition a rural land gained from succession<br>√ after proving she was a genuine successor she is entitled to the part of the land with other successors | F | Succession | Agaro | 31572 | She got the land with other successors |
| 7 | **Yideg Zemed**<br>√ a minor injury caused to our client<br>√ the person who caused damage has been punished criminally<br>√ the center claimed compensation from the family of the tort feasor and earned compensation | M | Tort | Agaro | 34162 | He is entitled to 11,50 birr award |
| 8 | **Mohamedzen Abagaro**<br>√ in his defense with third party, the advocator of the third party took the property of his opponent<br>√ the properties taken were coffee land and a cow<br>√ the center represented him and entitled to | M | Tort | Agaro | 34394 | The advocator gave back the property he has taken unlawfully |

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| | the properties taken by the advocator | | | | | |
| 9 | **Admasu Waritu**<br>√ our client was an employee at Ethio telecom south region<br>√ he is dismissed from his job unlawfully<br>√ the center represented the client and earned him 6 months' salary, different fringe benefits and his reinstatement to the job | M | Labor | Agaro | 33044 | Entitled to 11,657.80 birr payments during his suspension from job and reinstated to work |
| 10 | **Bulti Shehked**<br>√ she denied the right to share common property gained in marriage<br>√ the property they used to own in common include house which values 300,000 birr, land used to cultivate chat and coffee and others household equipments<br>√ in addition, her husband refused to pay maintenance to three children they got in marriage<br>√ finally, the court decided to partition all properties equally and pay monthly installment of 700 birr to the children | M | Family | Agaro | 31832 | Entitlement to partition of common property and maintenance of 700 birr monthly |
| 11 | **Awdi Elias**<br>√ a 16 year old Awdi got pregnant from a man named Aman<br>√ the man is sued and punished for having sex with minor<br>√ but Aman disowned the child, and the center litigated on behalf of the minor Awdi which resulted in establishment of paternity of Aman<br>√ then Awdi is entitled to monthly installment | F | paternity and Maintenance | Agaro | 35054 | The defendant is established to be the father of the child and decided to pay maintenance |

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| | of 400 birr until the child reaches majority | | | | | |
| 12 | **Elias Abamecha**<br>√ our client has been suspected for committing crime and detained<br>√ as there was no formal charge instituted against him, the center defended for his right to bail which he finally has been awarded | M | Bail right | Omon ada | 15714 | The court acquitted him with bail |
| 13 | **Hawwi A/ Diga**<br>√ Our client has suffered from physical injury by the defendant which cause 40% reduction of his capacity.<br>√ The defendant was also punished criminally.<br>√ Our center has instituted an action against the defendant and the court has awarded 9,895 ETB for our client. | M | Tort | Serbo | 20793 | The court has awarded 9895 ETB for our client up on institution of a court action by the center. |
| 14 | **Fedila M/Zein**<br>√ The defendant borrowed 17,000 ETB from our client and the defendant denied the money.<br>√ Our center has instituted an action against the defendant and the court has<br>decided for the payment of the amount | F | Family | Agaro | 34666 | The court has decided for payment of 17,000 for our client. |
| 15 | **Mekonnen Zeleke**<br>√ He was an employee at a private institution<br>√ Due to his imprisonment his employment contract was terminated lawfully<br>√ He didn't use annual leave in the institution where he served for 31 years and the employer didn't want to pay | M | Labor | Jimma wored a court | 41538 | The annual leave for the duration he spent at work paid in cash which is 16,494 birr |
| 16 | **Sofia Mohamed** | F | Tort | Jimma | | She is entitled to |

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| | √ Her minor child got bodily injury by others<br>√ The child has been disabled in which his working capacity is reduced by 4%<br>√ She has no evidence for all the expenses spent for medication | | | zone High court | | 21,596 birr compensation for the injury her child sustained |
| 17 | **Sintayehu Assefa**<br>√ The employer of Sintayehu dismissed him unlawfully from the job which he has worked for more than 10 years<br>√ There was no notice given to the client even | M | Labor | Jimma wored a court | 39270 | He is entitled to compensation of 22,200 birr |
| 18 | **Warke Zerga**<br>√ She is an employee at Ethiopian electric service south west region<br>√ She is dismissed unlawfully and without notice | M | Labor | Oromia supreme court cassation bench | 254969 | The cassation bench of the region finally decided to entitling Adissu with 55,000 birr as compensation |
| 19 | **Berhanu Mitiku**<br>√ He is dismissed from Jimma Degitu Hotel where he used to serve as club manager<br>√ The termination was unlawful | M | Labor | Jimma wored a a court | 41716 | 29,000 birr compensation is awarded to our client |
| 20 | **Abdulkerim Kemal**<br>√ He is dismissed from his job unlawfully<br>√ The employer agreed to pay him compensation which is set by the negotiation between the center and the two parties | M | Labor | Mana wored a a court | | 51,000 birr is paid to our client as a compensation |
| 21 | **Etaferaw Damto**<br>√ She was a teacher in Tesfa Tewahido primary school where she was fired for asking | F | labor | Jimma wored a court | 41361 | Entitled to 14,000 birr compensation |

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| | her rights<br>√ the center open file for unlawful breach of employment contract<br>√ the court decided 14,000 birr compensation in favor of our client | | | | | |
| 22 | **Birtukan Abamecha**<br>√ she was in marriage with Zeynu, from whom she gave birth ten children<br>√ the marriage dissolved and the court decided the common house to be Birtukan's property<br>√ the husband appealed the judgment up to the federal cassation but all the courts upheld the lower court's decision | F | Property | Jimma zone high court | 40794 | The house that was in dispute is decided to be our client's personal property |

## 6. Challenges

JUSL-LAC is rendering an exemplary community service and equipping law students with practical skills. This, however, is not without challenges. There are a number of challenges which hinder the center's service delivery. The followings are the major challenges, among others:

- **Financial constraints** - the existing finance is not sufficient, timely and is not sustainable.
- **High turnover**- there is high turnover of center lawyers due to very low salary.
- **Transportation** – lack of adequate transportation for students and supervisors.
- **Lack of phone service**- particularly for center lawyers in order to communicate with their clients.

- **Absence of secretaries**- specifically outside Jimma city where lawyers are carrying out the legal service and other jobs (particularly typing and reporting) by themselves without a hand of secretaries.
- **Busy schedule**- from the coordinators of the center and the service providers, comparing to the increasing number of service seekers.
- Lack of responsiveness from some stakeholders

## Summary

The center is providing legal services for children, women who are victims of domestic violence, peoples living with HIV, people living with disabilities and the like. In addition, the center admits students for clinical courses and externship programs and they acquire basic knowledge of the practical world. Moreover, the center is providing basic legal education to hundreds of thousands of residents of Jimma Zone via Jimma Community FM Radio. Capacity building training is also one of the functions of the center in order to enhance the knowledge of the lawyers working at the center.