

Criminalization of ‘Possession of Unexplained Property’ and the Fight against Public Corruption:

Identifying the Elements of the Offence under the Criminal Code of Ethiopia

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Abstract

Despite countervailing arguments, there is a growing national and global trend of criminalization of ‘possession of unexplained property’. Since the end of the 20th century, many national, regional and global instruments that deal with corruption have criminalized possession of unexplained property (illicit enrichment). It is believed that this would facilitate deterrence and the recovery of public money/assets. It is further assumed that such measure would help facilitate investigatory, prosecutorial and adjudicatory activities in corruption cases. Ethiopia has joined these pursuits, and has criminalized ‘possession of unexplained property’ under the 2004 Criminal Code. The proper interpretation and application of this law presupposes sound understanding of the notion of the offence of illicit enrichment and the rationales that justify its criminalization. It also presupposes the proper identification of its constitutive elements and an appreciation of the contexts in which the offence can be invoked. This Article examines the reasons for the criminalization of possession of unexplained property, discusses the nature and salient elements of this crime and related issues of concern. The aim of the Article is to examine the notion of illicit enrichment, its criminalization and ingredients with a view to contributing toward the proper interpretation and enforcement of the law in Ethiopia.

Key words

Possession of unexplained Property, illicit enrichment, corruption, Criminal Code of Ethiopia

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Introduction

The problem of public corruption is one of the pressing issues in Ethiopia today. The legal and institutional frameworks that combat against corruption¹ include Ethiopia's substantive criminal law that criminalizes forms of corruptive and abusive behavior. The Criminal Code defines specific forms of wrongdoing that constitute crimes of corruption and prescribes respective sanctions.² Special procedural and evidentiary rules and provisions are also put in place to facilitate the effective prevention, detection, prosecution and/or adjudication of corruption crimes.³ Some of these laws encompass provisions which facilitate the investigation and prosecution of corruption crimes.

'Possession of unexplained property' is one of the kinds of corruption offence that is expressly proscribed by the Criminal Code. This is a new form of offence introduced since 2004. Since the entry into force of the new Criminal Code in May 2005, the Federal Ethics and Anti-Corruption Commission (FEACC) and the Ethics and Anti-Corruption commissions of some regional states have started prosecuting suspected public officials/servants and other individuals (alleged to have some form of participation with the former ones) under Art 419 of the Criminal Code.

As some of the court cases involving 'possession of unexplained property' demonstrate, there are some confusions and dilemmas on certain crucial aspects of the concept of 'possession of unexplained property' and its prosecution. The confusion particularly relates to 'period of interest' and relevant 'money' or 'property' that should be part of the criminal investigation, prosecution, adjudication and confiscation. There is no sufficient clarity regarding the temporal scope of the offence and the circumstances that justify initiating and

¹ Currently there are various institutional, administrative and regulatory measures that are put in place. These include: the Revised Federal Ethics and Anti-Corruption Commission Establishment Proclamation No. 433/2005, *Federal Negarit Gazeta*, 11th Year No.18; the Disclosure and Registration of Assets Proclamation, No.668/2010, *Federal Negarit Gazeta*, 16th Year No.18; the Ethiopian Federal Government Procurement and Property Administration Proclamation No.649/2009, *Federal Negarit Gazeta*, 15th Year No. 60. Ethiopia is also a party to both the United Nations Convention against Corruption (UNCAC) and the African Union Convention on Preventing and Combating Corruption (AUCPCC).

² See Book IV, Title III of the Criminal Code (2004) of the Federal Democratic of Ethiopia, Proclamation No 414/2004, (hereinafter to be referred to as the FDRE Criminal Code or the Criminal Code) from Chapter I through Chapter III especially Arts 402- 431 and other cross-referred provisions such as Art 684.

³ The Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005, *Federal Negarit Gazeta*, 11th Year No.19; Also see the proclamations mentioned above at *supra* note 1.

continuing criminal investigation, prosecution and adjudication. There are enormous confusions and dilemmas relating to issues of burdens and standards of proof. The major sources of confusions and dilemmas seem to arise from misconceptions on the notion of the crime of ‘possession of unexplained property’ and its peculiar features, such as nature of the crime, the justifications of its criminalization, the specific *material* and *mental* conditions that constitute the offence, and other crucial issues.

This Article examines the notion of ‘possession of unexplained property’ and the rationales justifying its criminalization. It outlines the constitutive elements of the offence and highlights its distinctive features. The importance of enforcing the law dealing with this offence meanwhile evokes the need for caution against violating the principle of legality and other components of the right to a fair trial as well as other fundamental human rights. The perpetrators the law seeks to deter as well as the property or money that can be recovered in such criminal proceedings should also be clearly identified.

The first section of the article examines the concept and nature of the offence of ‘possession of unexplained property’. Section 2 outlines the basic ingredients of this offence in the light of some regional and international conventions that deal with the fight against corruption. In addition to identifying the basic constitutive elements of the offence, this section highlights the particular contexts in which the offence can arise, and considers major issues of concern which emanate from the criminalization of illicit enrichment. In the light of the discussion in these two sections, Section 3 makes a brief analysis of the constitutive elements of this offence under the Ethiopian Criminal Code.

1. The Concept and Nature of the Crime of ‘Possession of Unexplained Property’

1.1 Historical Origin and Definition

Possession of unexplained property, also known as illicit enrichment or possession of unexplained wealth, or possession of inexplicable wealth, or possession of excessive wealth,⁴ is a relatively new form of crime when compared with other forms of corruption offences such as bribery, fraud and embezzlement. It was unknown as a punishable form of corruption offence until

⁴ Nihal Jayawicrama, Jeremy Pope & Oliver Stolpe (2002), ‘Legal Provisions to Facilitate the Gathering of Evidence in Corruption Cases: Easing the Burden of Proof’, 2 *Forum on Crime & Society*, No. 1, at 24 (hereinafter Jayawicrama *et al*). Thus in this piece the terms “illicit enrichment”, “possession of unexplained wealth”, “possession of unexplained property” or “possession of unexplained assets” are employed interchangeably to refer to same idea.

the 1960s. It was during the 1960s that a few countries started to employ this term in their laws – first, as an *evidentiary* measure, and later on, as a *form of corruption offence*.⁵ Lindy Muzila *et al* state the time, place and context in which this offence originated and spread out.⁶ They relate its emergence with an Argentine Congressman's observations in 1936. The congressman, named Rodolfo Corominas Segura, was astonished with the unexpected increase in the assets and the sudden rise in a certain public official's wealth within a short period of time since the official took office:

Rodolfo Corominas Segura was traveling by train from his home in Mendoza to Buenos Aires when he encountered a public official displaying the wealth he had accumulated since taking office, wealth that Corominas Segura felt could not possibly have come from a legitimate source. Inspired, Corominas Segura introduced a bill stating that the government would penalize 'public officials who acquire wealth without being able to prove its legitimate source'.⁷

In 1964, Segura's idea and proposal got acceptance and as of that time *illicit enrichment* has become a punishable corruption offence in Argentina. Through time, this idea of criminalization has spread to some other countries. However, its pace was slow throughout the 20th century. Until the dawn of the 21st century, it was only a handful of national jurisdictions in Latin America, Asia and Africa that have had such an offence in their criminal laws.

In due course, many countries have recognized possession of unexplained property as a type of corruption offence. Lindy Muzila *et al* write:

In 1964, [...], Argentina and India became the first countries to criminalize illicit enrichment. [...] In the 20 years since illicit enrichment was criminalized in Argentina and India, similar provisions have been introduced in Brunei Darussalam, Colombia, Ecuador, the Arab Republic of Egypt, the Dominican Republic, Pakistan, and Senegal. By 1990, illicit enrichment had been criminalized in at least 10 countries, by 2000 in more than 20 countries, and by 2010 in more than 40 jurisdictions.⁸

⁵ See Lindy Muzila, Michelle Morales, Marianne Mathias, and Tammar Berger (2012), *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*; Washington, DC: World Bank. DOI: 10.1596/978-0-8213-9454-0. License: Creative Commons Attribution CC BY 3.0, at 7-8, available at: <http://creativecommons.org/licenses/by/3.0> (last visited 10/7/2013), (hereinafter, '*On the Take: Criminalizing Illicit Enrichment to Fight Corruption*').

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

The idea of illicit enrichment refers to *illicit or illegal* way of getting wealth by using (misusing) or abusing one's public position or office thereby accumulating a disproportionate amount of wealth by a public official in a manner that cannot be justified by lawful gains. It arises in circumstances wherein a public official unexpectedly, suddenly and/or unjustifiably becomes rich with a boom in his wealth and/or drastic change in his living style which seems to have resulted from an unlawful or illegal exercise of one's public position.

Suspicion arises in circumstances that transpire an air of the commission of some form of corruption which could not be easily identified or fixed; it comes into the scene when investigative authorities are unable to locate or prove an identified illegal or illicit transaction (such as bribery, fraud, embezzlement, etc) that an official of a government is engaging in.⁹ Although one is unable to testify or prove any such corrupt or other illicit activities, the public official's extraordinary assets or expenditures could be noticeable as physical evidence to imply the commission of some form of corruption. The movable and/or immovable things, the extraordinary money or other precious things deposited in bank account which an official of a state owns, the lifestyle or living standard that an official of a state (and perhaps his family) is leading, etc., could be visible manifestations of the commission of some form of corruption. Unless the public official provides explanation about the lawful origins, these assets/wealth or expenditure appear to be the proceeds of some form of illicit or illegal activity that took place in public office or public service. It is such state of affairs that is criminalized as constituting one form of corruption offence.

One of the principal and distinctive features of the law dealing with the offence of illicit enrichment lies in its focus on the *results* of suspect criminal acts rather than on actual illicit or illegal practices or transactions behind the results.¹⁰ The other feature of the offence is that the targets of investigation and prosecution are primarily public officials, i.e., persons who enjoy public trust but who may abuse or misuse their positions of trust to enrich themselves or their families. Hence, laws that criminalize possession of unexplained property essentially aim at public officials who appear to lead a lifestyle or who appear to possess property beyond their legitimate sources of income.

⁹ If there is sufficient evidence to establish the commission of either of these *predicate* or any other corruption offences, the prosecutor would be in a position to institute a criminal charge against the suspect citing the breached provision of the criminal law. If, for example, there is sufficient evidence that a public official received some bribe, he will be prosecuted for committing an offence of bribery, not for committing an offence of illicit enrichment. N.B. the reference in the masculine in this Article refers to both sexes.

¹⁰ Jayawicrama *et al*, *supra* note 4, at 24; *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*, *supra* note 5, at 7.

Illicit enrichment can thus be defined as a *significant increase* in the assets of a public official which one *cannot reasonably explain* in relation to one's lawful salary and other legitimate incomes.¹¹ It is this unjustifiable, unexplainable and suspicious significant increase in the assets of a public official that is criminalized as a form of corruption offence. The essence of the concept is therefore linked with a *suspicious increase in the assets of a public official* - suspicion that some form of illicit activity or unlawful exercise of public office is a *raison d'être* for such unexplainable significant increase in the wealth of a person. This offence "penalizes public officials for possessing wealth disproportionate to their known lawful sources of income if they cannot provide a satisfactory explanation for this."¹²

1.2 Illicit Enrichment as a form of Corruption Offence and as a Weapon to Fight Public Corruption

Illicit enrichment is better explained in the context of the fight against public corruption. It is considered as a *type* of corruption offence and as a *tool* to fight public corruption. As is widely known, public corruption is a contemporary national, regional and global problem. It is a global phenomenon which is occurring in both developed and developing countries.¹³ It is identified as the main feeding source of organized crime; it is an evil that hampers political stability; it undermines economic and social foundations, disentangles cultural and moral values, compromises rule of law, and obstructs rendering of public services.¹⁴ It is widely observed that:

[Corruption] deepens poverty; it debases human rights; it degrades the environment; it derails development, including private sector development; it can drive conflict in and between nations; and it destroys confidence in

¹¹ International Council on Human Rights Policy (2009), *Corruption and Human Rights: Making the Connection*, at 65, available at: <www.ichrat.org> (last visited on 14/8/2013), hereinafter *Corruption and Human Rights: Making the Connection*.

¹² Maud Perdriel-Vaissiere (January 2012), 'The Accumulation of Unexplained Wealth by Public Officials: Making the offence of illicit enrichment enforceable', *U4 Brief*, No 1, at 2-3, available at: <www.U4.no> (last visited on 7/08/2013).

¹³ Ali Hajigholam Saryazdi (2007-2008), 'Basic Preconditions of Anti-Corruption Strategies', 4 *Int'l Stud. J.*, at 29. The term "public corruption" denotes that form of corruption occurring in the public sector context, in contrast to that which takes place in the private sector. For further details on the distinction between these two and related sub-forms see Indira Carr (2007), 'Fighting Corruption Through Regional and International Conventions: A Satisfactory Solution?', 15 *Eur. J. Crime Crim. L. & Crim. Just.*, at 131-138; Peter J. Henning (2001), 'Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law', 18 *Arizona J. Int'l & Comp L.*, at 793-827.

¹⁴ *Ibid.*

democracy and the legitimacy of governments. It debases human dignity and is universally condemned by the world's major faiths.¹⁵

Professor Jorge notes that “corruption lowers tax revenues, increases government operating costs, increases government spending for wages and reduces spending on operations and maintenance. Corruption also diminishes public trust in government institutions, which is a crucial factor in the transition to democracy.”¹⁶ As Professor Ndiva Kofele-Kale observes:

Corruption [...], reduces economic growth and discourages foreign direct investments because it undermines the performance, integrity and effectiveness of the private sector; it decreases and diverts government revenues by plundering revenue generating agencies such as tax collection, customs and excise; it misallocates scarce national resources by concentrating wealth among a small bureaucratic and political elite; and it undermines democratic institutions by undermining the rule of law among other things.¹⁷

It has been further observed that “a broad consensus has emerged in recent years that corruption retards development by slowing economic growth, weakening government institutions, and exacerbating poverty.”¹⁸ Wagner and Jacobs consider corruption as “the development issue of the twenty-first century”.¹⁹ It has become one of the most serious contemporary developmental challenges in the African continent.²⁰ As Udomban notes “[a]ll forms of corruption are

¹⁵ See David Hess and Thomas W. Dunfee (2000), ‘Fighting Corruption: A Principled Approach; The C² Principles (Combating Corruption)’, 33 *Cornell Int'l L.J.*, at 594 (quoting from the *Durban Commitment to Effective Action Against Corruption*, signed by 1600 delegates from 135 countries at the October 1999 Anti-Corruption Conference sponsored by Transparency International).

¹⁶ Guillermo Jorge (2007), ‘The Romanian Legal Framework on Illicit Enrichment’ at 36, available at: <www.aats.americanbar.org/.../romania-illegal_enrichment_framework-2007> (last visited on 12/06/ 2013).

¹⁷ Ndiva Kofele-Kale (2006), ‘Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes’, 40 *Int'l Law*, at 935. See also the Preamble of the *Council of Europe Criminal Law Convention on Corruption (1999)*. It reads: “corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society.”

¹⁸ Benjamin B. Wagner & Leslie Gielow Jacobs (2008-2009), ‘Retooling Law Enforcement to Investigate and Prosecute Entrenched Corruption: Key Criminal Procedure Reforms for Indonesia and Other Nations’, 30 *U. Pa. J. Int'l L.*, at 184.

¹⁹ *Ibid.*

²⁰ Thomas R. Snider & Won Kidane (2007), ‘Combating Corruption through International Law in Africa: A Comparative Analysis’, 40 *Cornell Int'l L.J.* at 691;

prevalent in Africa, ranging from small-scale bribes required for normal bureaucratic procedures to large-scale payment of considerable sums of money in return for preferential treatment or access.”²¹ Udomban notes:

The illicit acquisition of personal wealth by public officials and their cronies have had damaging effects on society, ethical values, justice, the rule of law, and sustainable developments in Africa. The level of corruption and the figures involved stagger belief; usually the figures constitute a substantial proportion of the resources of the state concerned.²²

Corruption is considered as a dangerous *cancer* to a healthy socio-cultural, economic and political life.²³ The fight against corrupt practices and abusive behavior is thus given due attention at national, regional and global levels. Toward this end, criminalization of forms of corrupt practices and abusive behavior is a key component in a comprehensive anti-corruption strategy. Despite measures of criminalization and other endeavors to fight corruption,²⁴ it has become more entrenched and sophisticated in many countries. Saryazdi notes some common factors and reasons for its steady entrenchment:

...[corruption] has grown at an alarming rate in recent years due to, in particular, economic liberalization and globalization, the widespread introduction and use of new cyber technologies, and the increasing role of multinational corporations in a rapidly evolving political and economic context.²⁵

In most instances, corruption is an appealing, financially rewarding and short-cut method to boost up wealth or to generate “profits” in a short span of time without incurring costs. Often, it occurs in hidden and clandestine settings, mostly with no or just a few direct victims. It takes place with the secret agreement of suppliers and recipients. It involves complex methods and leaves no or little trace of evidence. This makes investigation, prosecution and proof extremely difficult. It is established that “public officials who engage in

See also Nsonguruaj Udomban (2003), ‘Fighting Corruption Seriously? Africa's Anti- Corruption Convention’, 7 *Sing. J. Int'l & Comp. L.* at 449-450.

²¹ Udomban, *supra* note 20, at 450.

²² *Ibid.*

²³ See Robert Klitgaard (2008), ‘A Holistic Approach to the Fight against Corruption’, at 1; available at: <www.cgu.edu/pdf> (last visited on 14/8/2013).

²⁴ It has been noted that “Despite countless policy diagnoses, public campaigns to raise awareness, and institutional and legal reforms to improve public administration, research shows that it continues to flourish.” See *Corruption and Human Rights: Making the Connection*, *supra* note 11, at 1; see also Hess & Dunfee, *supra* note 15, at 595-596.

²⁵ Saryazdi, *supra* note 13, at 29-30.

corruption often use their exalted position to impede investigations and destroy or conceal evidence.”²⁶ Wagner and Jacobs write:

In all countries, public corruption is more difficult than most other illegal acts to investigate and prosecute. It is a secret crime, carried out by powerful and often sophisticated perpetrators intent on silencing potential witnesses and retaining access to the spoils. Investigative techniques geared toward violent crime and other single-instance illegalities do not work in the context of entrenched corruption, where multiple players, often integrated hierarchically, operate through self-sustaining networks.²⁷

National jurisdictions and the international community at large are thus forced to recognize and endorse new and advanced forms of criminal investigation and prosecution methods. At present, more proactive investigatory and prosecution strategies are being employed in many national jurisdictions to intensify the fight against corruption.²⁸ Use of infiltration and undercover agents, conducting surveillance and interception of correspondence (including wiretapping and eavesdropping), granting of immunity for some accomplice who willingly disclose corrupt activities and/or testify against corrupt public officials (the ‘divide and rule’ method), provision of protections to whistleblowers and witnesses, authorization of access to financial records, etc., can be mentioned in this regard.²⁹

Against this backdrop, the criminalization of *possession of unexplained property* has come into contemporary national, regional and global legal scenes as a *form* of punishable offence and as an additional *weapon* to intensify the fight against public corruption.³⁰ It is particularly and purposefully included in contemporary legal instruments to address the difficulty encountered by investigating and prosecuting authorities in the enforcement of anti-corruption laws. At regional level, the Inter-American Convention against Corruption (IACAC) is the first international legal instrument that expressly incorporated this form of crime, both as a *form* of punishable offence and as a *weapon* to effectively combat corrupt practices.³¹ The United Nations Convention against

²⁶ Kofele-Kale, *supra* note 17, at 912.

²⁷ Wagner and Jacobs, *supra* note 18, at 185.

²⁸ *Id.*, at 215-237. Most of these measures and procedures are endorsed in multinational treaties such as the IACAC, UNCAC and the AUCPCC.

²⁹ *Ibid.*; also, See Snider & Kidane, *supra* note 20, at 710.

³⁰ See Kofele-Kale, *supra* note 17, at 913.

³¹ The IACAC was adopted on March 29, 1996 by the Organization of American States and it entered into force on March 6, 1997. It is the first binding international convention aimed at combating corruption (*Id.*, at 698).

Corruption (UNCAC)³² and the African Union Convention on the Prevention and Combating of Corruption (AUCPCC)³³ have also recognized this crime as a form of corruption offence and as an anti-corruption measure.³⁴ As Lindy Muzila *et al* noted:

Today, illicit enrichment provisions can be found in most regions of the world, with the notable exceptions of North America and most of Western Europe. Among countries choosing not to criminalize illicit enrichment by public officials, many have enacted alternative means for tackling it, such as measures making it easier either to prosecute or to confiscate illicit proceeds.³⁵

In the aftermath of the adoption of these international and regional conventions, various countries have become parties to the conventions and have proceeded to incorporate the *crime of possession of unexplained wealth* in their domestic laws. Many countries have currently included this crime in their domestic laws as a weapon to effectively combat corruption, to deprive corrupt officials the enjoyment of their ill-gotten gains and to deter corrupted and would-be corrupted public officials.³⁶ It is believed that this would enable states to impose punishment on corrupt officials and to deprive them of the proceeds of corruption, through confiscation and recovery of public moneys and assets.³⁷ Such measure of criminalization is believed to have significant roles in enabling victim states to trace and recover public moneys and assets looted by corrupt officials and which might have been deposited in some foreign banks and other financial institutions. The specified forms of sanctions may include the

³² The UNCAC was adopted by the General Assembly of the UN on October 31, 2003 and entered into force on December 14, 2005.

³³ The AUCPCC was adopted in July 2003 and entered into force on August 5, 2006.

³⁴ See Article 20 of the UNCAC and Articles 1(1) & 4(1) (g) of the AUCPCC.

³⁵ See '*On the Take: Criminalizing Illicit Enrichment to Fight Corruption*' *supra* note 5, at 9.

³⁶ *Ibid*, at xiii; Jorge, *supra* note 16, at 66. See also International Council on Human Rights Policy (2010), '*Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities*', at 65; available at: <www.ichratorg/files/reports/58/131b_report.pdf>, (last visited on 2/08/ 2013), hereinafter to be cited as '*Integrating Human Rights in the Anti-Corruption Agenda*'; Perdriel-Vaissiere, *supra* note 12, at 2.

³⁷ Jayawicrama *et al.*, *supra* note 4, at 24.

confiscation of proceeds of corrupt activities.³⁸ This is particularly the case in Latin American, Asian and African countries.³⁹

There is an increasing tendency, both at the national and international levels, to criminalize the possession of unexplained wealth by introducing offences that penalize any (former) public servants who are, or have been, maintaining a standard of living or holding pecuniary resources or property that are significantly disproportionate to their present or past known legal income and who are unable to produce a satisfactory explanation. Several national legislators have introduced such provisions and, at the international level, the offence of "illicit enrichment" or "unexplained wealth" has become an accepted instrument in the fight against corruption.⁴⁰

Criminalization of illicit enrichment can have the following objectives:⁴¹

- a) to restore to the state losses that have occurred through corruption, (or to remedy the unjust enrichment of public officials who profit at society's expense);
- b) to punish public officials who engage in illicit enrichment;
- c) to prevent offenders from benefiting from ill-gotten gains, signaling through prosecution that crime does not pay, thereby providing an effective deterrence;
- d) to incapacitate offenders through dismissal or prison sentences.

It is of paramount importance to bear in mind that these objectives and intended goals inform law enforcement and judicial bodies in the investigation, prosecution and adjudication of this offence and at the same time watch against unintended effects that may ensue.

2. Ingredients of the Crime of Illicit Enrichment and Related Issues of Concern: Overview of Regional and Global Legal Instruments

One of the crucial issues in the investigation, prosecution and adjudication of illicit enrichment is identification of the essential elements of the offence. The elements of an offence are the bases of criminal investigation, prosecution and

³⁸ *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*, *supra* note 5, Appendix A, (at 67-88).

³⁹ *Ibid*, at 9. It is noted: "Today, illicit enrichment provisions can be found in most regions of the world, with the notable exceptions of North America and most of Western Europe."

⁴⁰ See the *United Nations Anti-Corruption Toolkit (February 2004)*, 2nd edition, at 513.

⁴¹ *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*, *Supra* note 5, at 53.

conviction. It is the identification and subsequent establishment (proof) of the essential elements of an offence that enable courts of law to convict and punish persons accused of committing some form of crime. The following preliminary questions arise in relation to the crime of illicit enrichment:

- On what particular elements should an investigative officer focus to build a case against a person suspected of committing an offence of illicit enrichment?
- What factual material and/or moral elements and circumstances should be included in a criminal charge involving illicit enrichment? In other words, what is the public prosecutor required to state in his charge as material and/or moral elements to justify the prosecution of a person and to demonstrate later on during trial? Or,
- What are the objects of proof which constitute this offence and which judges must check before passing judgment of acquittal or conviction?

These are some of the preliminary but basic issues that investigative officers, litigants and judges need to consider ahead of every criminal process that involves prosecution of illicit enrichment. It is also of paramount importance to be mindful of the basic concerns that arise in relation to the criminalization of illicit enrichment and its prosecution. Such an understanding of basic concerns and spillover effects helps in mitigating or preventing undesirable and unintended outcomes at the earliest time possible.

2.1 The Basic Elements of Illicit Enrichment as recognized under the IACAC, UNCAC and AUCPCC

To properly identify the constitutive elements of the offence of illicit enrichment one has to refer to the law that criminalizes such form of behavior and should focus on the law that defines the offence. In the context of national statutory laws, it is vital to consult the general parts, if any, and the special part that defines the offence. Apart from this general cautionary note, it is also desirable to consult other relevant and applicable global and regional legal instruments dealing with this particular offence. As already mentioned, illicit enrichment is criminalized under the IACAC, UNCAC and the AUCPCC.⁴² Apart from the definition that one may gather from the criminal laws of national jurisdictions, the definitions provided in these regional and global legal instruments may help one deduce the principal ingredients of the offence that should be the focus of criminal investigation, prosecution and adjudication.

⁴² Definitions adopted in such regional and global conventions would inevitably influence how national jurisdictions approach, define and formulate the offence of illicit enrichment in their respective criminal laws.

Article IX of IACAC defines illicit enrichment as “a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions.” The Convention requires States parties to the Convention to criminalize illicit enrichment in their respective domestic laws (of course, subject to constitutional and fundamental principles of each State Party’s legal system). Article IX reads:

Subject to its Constitution and the fundamental principles of its legal system, each State Party that has not yet done so shall take the necessary measures to establish under its laws as an offense a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions.

Among those States Parties that have established illicit enrichment as an offense, such offense shall be considered an act of corruption for the purposes of this Convention.

Article 20 of the UNCAC titled as “Illicit enrichment”, also stipulates:

Subject to its constitution and the fundamental principles of its legal system, each state party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

Likewise, Article 1(1) of the AUCPCC defines the offence as “the significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income.” It is one of the acts of corruption and related offences that AUCPCC listed under Article 4(1) (g).

While the two regional conventions and the UNCAC recognize the offense of illicit enrichment, there are some differences between the IACAC and the other two conventions, and between the three of them in respect of some detailed issues regarding the crime.⁴³ The major difference is that the IACAC uses mandatory language in requiring state parties to criminalize illicit enrichment, while the UNCAC and the AUCPCC use non-mandatory languages.⁴⁴ Subject to domestic constitutional and fundamental legal principles, a State Party to the IACAC is thus under duty to take measures to establish in its domestic law an

⁴³ For further details and comparative analysis, read Snider & Kidane, *supra* note 20, at 715-747.

⁴⁴ The former stipulates the obligation of a State party to the Convention in these terms: “...shall take the necessary measures to establish under its laws as an offense...” while according to the latter two conventions a State Party “...shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence....” (Id, at 728; Perdriel-Vaissiere, *supra* note 12, at 2.)

offence of illicit enrichment.⁴⁵ A State party to the UNCAC or to the AUCPCC, however, has the option to decide not to criminalize illicit enrichment after considering the matter as is made explicit in the expression “Subject to its constitution and the fundamental principles of its legal system....” In spite of this, many countries, particularly developing countries, have criminalized illicit enrichment.

A close scrutiny of the relevant parts of the IACAC, UNCAC and AUCPCC demonstrates that the offence of illicit enrichment consists of the following common and basic elements:⁴⁶

- (i) Individuals who may be prosecuted for the crime (persons of interest);
- (ii) The period during which a person can be held liable for having illicitly enriched himself/herself (Period of interest or period of check);
- (iii) Significant increase in assets (disproportionate assets);
- (iv) Intent (*mens rea*)⁴⁷; and
- (v) Absence of justification.

a) Persons of interest

This element refers to the *individuals who may be prosecuted for committing this offence*. The offence of illicit enrichment chiefly pertains to or specifically targets *public officials*.⁴⁸ But the words ‘public officials’ need to be examined. For example, Art 2 of the UNCAC provides a wide definition for “public official”, and it includes:

- (i) any person holding a legislative, executive, administrative, or judicial office of a state party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority
- (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the state party and as applied in the pertinent area of law of that state party;
- (iii) Any other person defined as a public official in the domestic law of a state party.

⁴⁵ Using this saving clause (some call it “escape clause”), the US and Canada have put their respective reservations to the IACAC and decided not to recognize such a crime called illicit enrichment.

⁴⁶ For the details of each element as well as the approaches of some jurisdictions on each element see, ‘*On the Take: Criminalizing Illicit Enrichment to Fight Corruption*’, *supra* note 5, at 13-22.

⁴⁷ While this element is explicitly included in the UNCAC, the other two, IACAC & AUCPCC do not contain such an explicit element.

⁴⁸ See ‘*On the Take: Criminalizing Illicit Enrichment to Fight Corruption*’, *supra* note 5, at 14.

Ultimately, it is for national jurisdictions to determine the scope of persons that could be subject to this offence. Accordingly, there are some jurisdictions that adopt a more expansive definition of ‘public officials’ to include persons that serve in non-governmental organizations or other organizations *which use public resources* other than public servants in the usual sense of the term. National jurisdictions may also decide to include private persons, mainly individuals who are family members to suspect/accused public officials.⁴⁹ Depending on the prevailing conditions relating to the fight against corruption, the scope of persons of interest may even extend beyond family members and relatives and include any person who is an accomplice or who participates in the receiving and hiding of some illicit gains of a public official.

b) Period of Interest (Check)

The second ingredient of the crime of illicit enrichment that forms the centerpiece of criminal investigation, prosecution, adjudication and punishment is ‘period of interest’ or ‘period of check’. This refers to the period during which a person can be held liable for having illicitly enriched himself. This pertains to the period during which the suspected/accused person acquired the extraordinary assets in question using or misusing his trusted public position.⁵⁰ This refers to the *period which should be within the focus of criminal investigation, prosecution and adjudication* in order to establish the suspected/accused person’s disproportionate assets alleged to have been obtained illicitly or illegally abusing or misusing one’s public position.

According to Article IX of the IACAC, the period of check refers to the time covered *during the performance of the public official’s functions*. Arts 20 and 8 of the UNCAC and the AUCPCC, respectively, do not explicitly provide for a specified period of check. But the reading of the term “public official” seems to at least imply the official’s period of performance during the term of office.

As can be observed from the above-mentioned provisions of the three conventions and a look at of the experience of national jurisdictions, there are three different approaches to the determination of ‘period of interest’.⁵¹ As noted by Lindy Muzila *et al*, in some national jurisdictions this period of check coincides with *the term of office* of the public official (i.e., coincidence with the performance of public functions). For example, if a suspected public servant has been working in public institution(s) from 20 December 2000 until 5 January 2013, the period of check (to investigate significant increase in his assets) will be for the same period. Without prejudice to the principle of legality that is attached to the time of entry into force of the criminal law of a national

⁴⁹ Ibid.

⁵⁰ Id, at 16.

⁵¹ Ibid.

jurisdiction and its specific scope, the investigation, prosecution and conviction/punishment of this person is, in such an approach, confined within this time range. In practice, it may be difficult to identify and establish if a given property or money which has been found under the possession of the suspected/accused person was one which he secured after or before he began his public function.

In national jurisdictions where there is an asset declaration and registration system that compels public officials to declare and register their property before assuming (and leaving) public office there may not be a significant problem in this regard. The challenge is graver jurisdictions such as Ethiopia⁵² where there is no *compulsory* asset declaration (disclosure) and registration system provided as a *prerequisite* for assuming public office or as a requirement to be observed within a short fixed time from the public official's assumption and termination of such a public position. Identifying whether a given property or money that has been found under the control of a public official was acquired *before* or *during* or *after* the assumption of such public position by the person under investigation, is thus a daunting investigative, prosecutorial and adjudicative responsibility in such jurisdictions.

In some jurisdictions, the 'period of interest' may extend *from the beginning of the term of office of a public official until some limited time after the end of the term of office* of such an official, say for example until five years after the termination of his term of office.⁵³ Compared to the first approach this gives more room for the state to go forward with its evidence and to establish its case. And, this approach enhances the opportunities for combating corruption. Other jurisdictions may leave the period of check *open-ended*. In this open-ended

⁵² Art 4 (1) of the Ethiopian Disclosure and Registration of Assets Proclamation No.668/2010 provides the following:

“Any appointee, elected person or public servant shall have the obligation to disclose and register:

- a) the assets under the ownership or possession of himself and his family; and
- b) Sources of his income and those of his family.”

While this provision provides for a system of mandatory Disclosure and Registration of Assets in Ethiopia, the Proclamation or any law does not make disclosure and registration a *prerequisite* upon assuming or leaving public office. The practice on the ground substantiates this. This author knows no appointee, elected person or public servant who has been required to disclose and register his assets or other sources of his income and those of his family before assuming public office. The author has never heard of any appointee, elected person or public servant who has ever been required to declare the same upon termination of his public position within a specified period of time identified as a governing norm.

⁵³ *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*, *supra* note 5, at 14.

approach, the person of interest remains criminally liable throughout his life (since the beginning of his functions in public office extending to the time beyond employment), save for any period of limitation, if applicable. Compared to the other approaches, this option makes corrupt officials more vulnerable.

c) Disproportionate Assets

The third constitutive element of illicit enrichment is ‘significant increase’ or ‘disproportionate assets’. The three conventions employ the term “*significant increase in assets*” in defining the offence. The existence of ‘significant increase’ in the assets of the public servant, or a manifestation of ‘a lifestyle’ or ‘standard of living’ which cannot be explained in comparison with the lawful sources of income/earning of a public servant is a necessary element to start and continue criminal investigation, prosecution and adjudication involving illicit enrichment. If the investigator gathers sufficiently strong evidence that establishes the accumulation of disproportionate assets or the leading of a life style that is not commensurate with one’s legitimate source of income (an *actus reus* element of the offence) and if all other basic elements are fulfilled, the prosecutor is more likely to determine to prosecute the suspected person. This is a crucial point since cases that do not warrant prosecution should not be pursued further.⁵⁴

There are a host of questions that come to one’s mind with regard to the determination of ‘disproportionate asset’. What should the public prosecutor check to justify his prosecution and later on to demonstrate the fulfillment of this ingredient of the offence during trial? How is it possible to establish (preliminarily or during trial) whether someone’s asset has shown ‘significant’ increase or that it is ‘disproportionate’ (or that there is significant increase) to his lawful earnings? And, what amount would constitute ‘significant’, or ‘disproportionate’, or ‘incommensurate’, or ‘above commensurate’ asset or living style? What is the point of reference for such a comparison? What and which money or property is to be considered for the comparison (and later on for the measure of confiscation)? These issues require extensive inquiry, and the scope of this article does not allow such discussion.

In short, the terms ‘significant increase’ or ‘disproportionate (above commensurate) assets or lifestyle’, or other equivalent terms, refer to the *increase in the assets or wealth of a public official as compared to his lawful sources of income, or the lifestyle he (and his family) that is manifested as*

⁵⁴ It is appropriate to take all the necessary care not to cause embarrassment to innocent public servants. It is vital to recall that *prevention of miscarriage of justice* that is likely to eventuate in the criminal process is one legitimate function of modern criminal procedure laws. Prevention of miscarriage of justice is, of course, a general public interest issue.

becoming above his lawful sources of income or earnings. Such a significant increase in the assets/wealth or living standard that appears to be above the lawful income of the public official can be known by considering and calculating the official's lawful gains and expenditures and comparing them with what he is/has been actually controlling or showing in his lifestyle *during the period of interest.* This is calculated by taking the sum of the official's earnings from lawful sources of income and then deducting all his expenditures and then comparing what remains with the actual assets of the person at the period of check. To put this mathematically:

Lawful earning from all lawful sources of income (X)

$$= \text{Earning from lawful source 1 (X}_1\text{)} \\ + \text{Earning from lawful source 2 (X}_2\text{)} \\ + (\text{Earning from lawful source 3 (X}_3\text{)} + \text{etc.})^{55}$$

The sum of all Expenditure (Y)

$$= \text{Expenditure 1 (Y}_1\text{)} + \text{Expenditure 2 (Y}_2\text{)} + \text{Expenditure 3 (Y}_3\text{)} + \text{etc.}^{56}$$

Lawful Asset of the official (Z) = X-Y

The occurrence or non-occurrence of illicit enrichment can be calculated by comparing what the suspect/accused currently (or previously during the period of check) actually possessed of (P) vis-à-vis Z. However, a slight positive difference or small increase in favor of P does not constitute 'significant increase' or 'disproportionate asset'. There is no fixed measurement (figure) to exactly determine the increase in the assets which constitutes a 'disproportionate asset'. Yet, the expression '*significant*' or '*incommensurate*' or '*above commensurate*' (or any other equivalent term) signifies that trivial or small increases are not, arguably, sufficient.

The above-mentioned regional and global conventions use the expression "significant increase in assets" leaving what this may mean to the interpretation of national jurisdictions. Accordingly, some jurisdictions expressly provide some specified threshold in percentage (e.g. India stipulates 10%) or simply state that small increases are not to be considered. Some others envisage the issuance of some guideline by the appropriate authorities. Still others leave the matter open-ended to be determined by the prosecutor and later on by courts.⁵⁷ Generally, the formula: *Illicit Enrichment = Actual possession of the Public official (P) – Z* can serve as a guidance to determine the existence or non-

⁵⁵ N.B. X₁ may refer to income from salary; X₂ may refer to income from inheritance; X₃ may refer to income from lottery prize; etc.

⁵⁶ N.B. Y₁ may refer to costs incurred in the purchase of food items; Y₂ may stand for the cost of house rent; Y₃ may refer to expenditure for children's school fee; etc.

⁵⁷ *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*, *Supra* note 5, at 18-19.

existence of some significant increase in the assets of suspected/accused public officials.

The money or property that would be considered in such calculations is another controversial issue in the investigation, prosecution and adjudication of illicit enrichment. Issues such as, whether debts or other obligations (of the accused or of his family) that have been cancelled could be considered, or whether labor services provided to the accused or his family could be taken into account, or whether future promises and guaranteed interests will be considered, etc., are issues that can be determined by countries.

It is important to determine the exact tenor of the expression 'lawful earnings'. In its narrow sense, this term may refer to salary and other related benefits only. In its broad sense it may include salary, related benefits and many other forms of income such as income from inheritance, lottery prize, lawful gifts, or income from other income generating investments, etc. Whether the term 'lawful earnings' (or its equivalent) is employed in the narrow or broader sense could bring substantial difference in the outcome of criminal proceedings.

Another debatable issue arises in relation to income that might have been derived from *unrelated* (to ones public position or office), illegal or illicit activities of an official. Like any other person in all walks of life, a public official may engage in some forms of illegal or illicit activities which are not related with his public office or public services. For example, one may engage drug trafficking etc., and may derive some benefits. There is no consensus on whether such gains from unrelated illegal/illicit activities could be considered in the assessment of the wealth of a suspected public servant.

d) *Mens rea*

Mens rea is a widely acknowledged and central element of crimes in any modern national or international jurisdiction.⁵⁸ It constitutes the subjective (mental) element of an offence. It forms the fault (culpability) element of an offence. As is widely accepted, there is no criminal punishment without criminal guilt or fault (*nulla poena sine culpa*) in modern criminal law.

The issue that arises in relation to illicit enrichment is whether the offence is a strict liability offence, or whether it is an ordinary offence that presupposes the proof of criminal guilt; and further, if it is a *mens rea*⁵⁹ offence, what state of

⁵⁸ Some jurisdictions recognize criminal liability irrespective of fault or strict liability only for some regulatory (public welfare) offences.

⁵⁹ The term *mens rea* may signify different states of mind in various legal systems of the world. In the broad sense, especially in continental law jurisdictions, it refers to criminal intention and criminal negligence. In continental legal systems *intention* basically takes two different forms reflecting prevailing degrees of *awareness* and *volition*: direct intention (*dolus directus*) and indirect intention (*dolus eventualis*). It

mind would constitute the required criminal guilt. It is to be noted that the above-mentioned conventions do not endorse strict criminal liability. UNCAC explicitly puts *intention* as an essential mental element of this offence. Even if the IACAC and the AUCPCC are silent in this regard, it appears that intentional commission of such an offence is held in view.⁶⁰ The experience of some jurisdictions also confirms this requirement. Moreover, *negligence* appears to have no place in the prosecution of illicit enrichment.⁶¹ It appears that only *intentional* commission of illicit enrichment entails criminal liability and punishment.

It is to be noted that intentional commission of crimes embraces *knowledge* (awareness) and *intent* (volition or desire). The degree of awareness could be either *certain*, or *near certain*, or mere *possibility*. And such awareness relates to as to one's act/omission (conduct), factual circumstance, illegality (unacceptability), and/or consequence of conduct. Volition, on the other hand, refers to the willingness or desire to behave in a manner that one is aware of, and/or to bring about such a result which one is aware of in a given factual circumstance.

With regard to the offence of illicit enrichment, the requirement of intention relates to the *increase in assets*.⁶² The *mens rea* element of illicit enrichment thus pertains to the knowledge (awareness) and volition of the suspect/accused in respect of the extra wealth or asset that is beyond his lawful income.

may further refer to such detailed forms as specific/special intention (*dolus specialis*) and indirect intention as to secondary factual circumstances (*dolus indirectus*). For more detail see Ronald Sklar (1972), ' "Desire", "knowledge of certainty," and *Dolus Eventualis*: Intention Under the Ethiopian Penal Code', 8 *J. Eth. L. No. 2*, at 373-393; Johan D. Van der Vyver (2004), 'The International Criminal Court and the Concept of *Mens Rea* in International Criminal Law', 12 *U. Miami Int'l & Comp. L. Rev.* at 57-65.

⁶⁰ *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*, *Supra note 5*, at 21.

⁶¹ Yet, the boundary between *dolus eventualis* state of mind and an advertent (conscious) negligence state of mind remains often blurred and controversial. Professor Johan D. Van der Vyver (*supra note 59*, at 63-64) wrote: "In Anglo/American legal systems, *dolus eventualis* is usually defined as a manifestation of fault in cases where the perpetrator acted "recklessly" in regard to the (undesired) consequences of the act. In legal systems where "recklessness" features prominently in the circumscription of fault, the distinction between *dolus eventualis* and negligence becomes blurred" (footnote omitted).

⁶² *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*, *supra note 5*, at 22.

e) Absence of justifications

The three conventions under consideration include ‘absence of justification’ as an essential ingredient of the offence of illicit enrichment. In addition to the foregoing elements, the offence would be constituted *only if* the public official “.... cannot reasonably *explain* in relation to his or her lawful income” (UNCAC) or “....cannot reasonably *explain* in relation to his lawful earnings” (IACAC), or “....cannot reasonably *explain* in relation to his or her income” (AUCPCC).⁶³ This refers to the *lack of reasonable justification for the disproportionate asset* found in the possession of the person of interest.⁶⁴ It is inconceivable to secure conviction on this offence without establishing this element.

There are important issues that arise in this regard: How is it possible to establish the fulfillment of this element in each case involving such prosecutions? What particular burdens do litigating parties bear in this regard and to what extent? As these issues relate to issues of *burdens and standards of proof*, it is not our immediate interest to dwell at length on these issues. Yet, we need to emphasize that establishing a lacking (negative) element- absence of justifications- is often difficult. To overcome such practical problems it is common to employ *legal presumption* as a tool in favor of the state. This is what one observes from the conventions. The statutory laws of national jurisdictions also confirm that such an approach is appropriate.

Where there is the proof of accumulation or possession of *disproportionate wealth* or the proof of leading *a life style that is above the commensurate amount* that could be earned from legitimate sources *during the period of interest*, and if there is no satisfactory explanation, a legal *presumption* of illicit enrichment is drawn.⁶⁵ If no satisfactory explanation is offered, the law *requires*

⁶³ [Emphasis supplied]. Apart from salary, lawful earnings or sources of income include incomes from inheritance, prize or reward, lottery, payments from part-time or other extraordinary works, gifts from family or friends not associated with any form of corruption, or any other income generated from other investments.

⁶⁴ This is another point that forms part of the *actus reus* element of the offence.

⁶⁵ Prior establishment of any *predicate offence* or any illegal or illicit practice that served as a source for accumulating a disproportionate amount of asset or for leading a standard of life that exceeds one’s legitimate and lawful income is not a prerequisite element of the offence. *Predicate offence* refers to criminal activities that give rise to disproportionate assets such as accepting bribes, committing frauds, or embezzlement, etc. It is noted that “...there is no need to prove the *source* of the illegally acquired wealth by identifying and proving the underlying offenses, such as bribery, embezzlement, trading in influence, and abuse of functions.” See ‘*On the Take: Criminalizing Illicit Enrichment to Fight Corruption*’, *supra* note 5, at 7.

or *authorizes* an assumption that the extra asset is a result of some (unidentified) illicit activity associated with the accused person's public position or office.

Considering all the elements highlighted so far in light of the terms of the conventions and experiences in some national jurisdictions, illicit enrichment is an offence that penalizes public officials for possessing wealth that is *disproportionate* ("above that which is commensurate with the official income") to one's known lawful sources of income or for leading a lifestyle which is incommensurate with one's lawful income for which one *cannot provide a satisfactory explanation*. The offence does not punish public servants for being rich. It rather punishes the *procuring of money or other assets through illegal or illicit practices* while in *public office* or *using such a public position*.

2.2 Major Concerns accompanying the criminalization of Illicit Enrichment

The merits of criminalization of illicit enrichment in enhancing effective law enforcement, recovering looted public moneys/assets and its contribution toward deterrence, at least in theory, seem to be too obvious to require further elaboration. On the other hand, however, there are crucial concerns and threats which such measure poses. Primarily, recognition of such an offence has severe impacts upon due process rights of accused persons. Its impact upon the right to remain silent is apparent. Moreover, the legal presumption embodied in the offence somehow interferes with the enjoyment of the right to presumption of innocence. Unlike most ordinary criminal proceedings, the accused in illicit enrichment proceedings does not enjoy the wider scope of the principle of presumption of innocence and other components of the right to a fair trial. The legal presumption that is drawn following the establishment of some *actus reus* elements by the prosecutor compels the accused to shoulder some form of burden.⁶⁶ Once the public prosecutor establishes some basic facts, the accused is required to provide a *satisfactory explanation*.⁶⁷

⁶⁶ Whether that is burden of *explanation* or burden of *proof* is an issue considered by this author in the note published in this volume of *Mizan Law Review*.

⁶⁷ It is to be noted that the accused is not required to *establish* or to *prove* something but to provide/give an *explanation*. There is understandable distinction between *providing* an explanation and *proving* something as the latter would require *convincing* judges about the facts in consideration. It should also be noted that the accused is required not to merely provide an explanation, but he has to provide *satisfactory* explanation to avoid any probable peril. While this is open for case by case determination, it is obvious that simple denial of the presumed facts is not enough. The accused is required to adduce some evidence in support of his version. These issues are addressed separately by this author's note published in this Issue of

Another concern relates to the adverse effect against the enjoyment of the right against self-incrimination. The formulation of the offence requires the accused to *say* something to *explain* about the disproportionate amount of money/property or changed living standards and to produce some evidence that supports his explanation. In making an explanation and in moving to adduce some evidence, a person may, on some occasions, be impelled to expose oneself as the author or associate of another crime.⁶⁸ For example, a public servant who is proved to possess a disproportionate amount of property may, if he wants to avoid such a conviction on this crime, explain to the court that the true source of such a disproportionate asset some other illicit act (e.g., theft) that he at one time had committed, or that it is an amount which is accumulated in violation of some tax duties (e.g., tax evasion). In such circumstances one would be ending up becoming a suspect of another offence which might not have been under investigation. This opens the door for investigative authorities to commence or to go ahead with another investigation which is unrelated to the offence of illicit enrichment.

Requiring an accused to explain an alleged disproportionate wealth would go, at least in some instances, to clash with the right to presumption of innocence, the right to remain silent as well as with the right against self-incrimination.⁶⁹ Hence, Snider & Kidane opined: “Although the crime of ‘illicit enrichment’ might appear to be a good weapon to combat corruption, it is fundamentally flawed as a matter of recognized principles of criminal justice.”⁷⁰ They further noted:

Regardless of this flaw, however, both the UNCAC and the AU Corruption Convention adopted the illicit enrichment provision, albeit in non mandatory language. It is highly doubtful that compromising the fundamental principle

Mizan Law Review (See ‘Burdens and Standards of Proof in Possession of Unexplained Property Prosecutions’).

⁶⁸ Or, if the accused had received some gift (unrelated with his public office) from a relative or close friend, or what he possesses is not his own property or money but of his close relative or friend, which the latter had obtained from some illegal source such as evasion of tax duties, contraband or black-market, or if he is hiding for any reason, the accused would be impelled to expose that person who made such a gift or who deposited such property/money.

⁶⁹ As to the nature, meaning and scope of the right of silence as well as the right against self-incrimination see Steven Greer (1990), ‘The Right to Silence: A Review of the Current Debate’, 53 *Mod. L. Rev.*, at 709 ff; Nicolas A.J. Croquet (2008-2009), ‘The Right of Silence and Not to Self-Incriminate under the European Convention on Human Rights: To what extent are they qualified?’, 4 *Cambridge Student L. Rev.*, at 214 ff; Rose M. D'SA (1990), ‘Reforming the Right of Silence in Criminal Trials: A Commonwealth Perspective’, 2 *Afr. J. Int'l & Comp. L.*, at 604 ff.

⁷⁰ Snider & Kidane, *supra* note 20, at 728.

of the presumption of innocence in the interest of combating unexplained material gains by government officials is a desirable course. This is particularly true in Africa where, [...] the crime of corruption is directly linked with the rule of law and good governance. In fact, it directly conflicts with the principles enshrined under recognized universal human rights instruments as well as the African Charter on Human and Peoples' Rights.⁷¹

The criminalization of illicit enrichment may violate the sanctity of private ownership of property as it involves seizure and confiscation.⁷² Depending on the unique circumstances arising in each case, it can also have the potential to threaten the right of privacy as well as the right to the liberty of individuals.⁷³ This offence may open a loophole for arbitrary prosecutions and embarrassment of dissidents⁷⁴ in countries where the values and culture of democracy and tolerance are not firmly rooted. Such criminalization is likely to produce undesirable outcomes for it is susceptible to be manipulated for purposes of attacking and embarrassing dissidents as well as for instituting false accusations. It is also argued that this offence goes against one of the fundamental principles of modern criminal laws, i.e., the principle of legality, particularly the requirement of *legal certainty- nullum crimen sine lege certa* (without clear criminal law there is no crime and punishment).⁷⁵

The offence may further give a wrong message, it is argued, for investigative authorities and public prosecutors: instead of conducting an extensive investigation to discover the actual truth (to know what sort of abuse or illegal exercise of power actually took place), law enforcement authorities may rather be tempted to rely on anticipated explanations of accused public servants. Moreover, even if criminalization may be found necessary to intensify the fight against corruption, some doubt the practicability of its implementation.⁷⁶ There

⁷¹ Id, at 729 (footnote omitted). These authors thus opined: "The implementation of this provision as written in the domestic sphere should not be encouraged, because it might mean prescribing a remedy that is worse than the ailment." (Ibid).

⁷² Lorana Bartels (July 2010), 'Unexplained Wealth laws in Australia', *Australian Institute of Criminology*, No. 395, at 5, Also, available at: <<http://www.aic.gov.au>>.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ 'On the Take: Criminalizing Illicit Enrichment to Fight Corruption', *supra* note 5, at 30-33. Criminal law can only perform its task as an authoritative basis for punishability if it describes with sufficient legal certainty both the criminalized act and the consequences thereof.

⁷⁶ Snider & Kidane, *supra* note 20, at 728-729. As Snider and Kidane (at 729) stated: "[i]n fact, it [the offence of illicit enrichment] directly conflicts with the principles enshrined under recognized universal human rights instruments as well as the African Charter on Human and Peoples' Rights. The implementation of this provision as

is the fear that such criminalization can be a source of miscarriage of justice (wrongful conviction). One may further raise questions or doubts about the propriety and legitimacy of such criminalization measures from the perspectives of the *principles of criminalization* and other related *policy issues* which a modern democratic state is expected to embrace.⁷⁷

While the potential threats and impacts posed by criminalization of illicit enrichment are discernible, many countries including Ethiopia have decided to be parties to regional and international conventions without putting any reservations thereto.⁷⁸ Indeed, many jurisdictions have already criminalized possession of unexplained property in their domestic laws. It appears that these jurisdictions have made this choice despite the risk of compromising, limiting or restricting the enjoyment of some fundamental rights in the face of the threat of public corruption.

Various jurisdictions such as the USA, Canada, UK and South Africa have rejected the idea of criminalizing illicit enrichment. These countries are of the opinion that recognition of such offence would be an intolerable measure and costly *vis-a-vis* due process and other fundamental rights (the right to

written in the domestic sphere should not be encouraged, because it might mean prescribing a remedy that is worse than the ailment” (footnote omitted). Some scholars argue that the offence is deemed to be proved *without proving any act that constitutes crime*. They argue that “*being a public official with excessive wealth*” does not constitute criminal activity; these are not elements of the offence as defined by the criminal laws of those countries that recognize such an offence. So, apart from posing a crucial threat against fair trial rights of the accused such as the right to presumption of innocence, right to remain silent, right against self-incrimination and other fundamental rights, the argument goes, this offence of illicit enrichment is against the principle of legality. They argue that such provision that criminalizes illicit enrichment does not clearly define a prohibited conduct that constitutes the basis of the offence. (See, ‘*On the Take: Criminalizing Illicit Enrichment to Fight Corruption*’, *supra* note 5, at 33; Perdriel-Vaissiere, *supra* note 12, at 3; *Integrating Human Rights in the Anti-Corruption Agenda*, *supra* note 36, at 65).

⁷⁷ It is beyond the scope of this work to dwell at length regarding possible arguments against such criminalization measure from the perspectives of the principles of criminalization and other policy issues. For an excellent background on principles of criminalization and related policy issues one may refer to Andrew Ashworth (2006), *Principles of Criminal Law*, 5th ed., particularly Chapter 2 (Criminalization) and Chapter 3 (Principles and Policies); Nils Jareborg (2004), ‘Criminalization as Last Resort (Ultima Ratio)’, 2 *Ohio St. J. Crim. L.*, 521- 534; Douglas Husak (2004), ‘The Criminal Law As Last Resort’, 24 *Oxford J. Legal Stud.*, at 207- 235.

⁷⁸ Many countries in South America, Asia and Africa have accepted this new offence. The US, Canada, most western countries and some African countries have, on the other hand, objected criminalization of illicit enrichment.

presumption of innocence, the right to remain silent, the right against self-incrimination, the principle of legality, private ownership, right to privacy and right to liberty) which would be interfered with.⁷⁹

It is beyond the scope of this article to dwell at length on the issue of why the international community at the UN level and AU levels and various national jurisdictions at regional and domestic levels, have opted to criminalize illicit enrichment (unlike most western and developed countries) while it is apparent that this measure can potentially compromise or interfere with many fundamental human rights principles recognized in international human rights instruments.⁸⁰ It suffices to mention here that there is no absolute right which always prevails in any circumstance. All fundamental rights including the right to presumption of innocence, the right to silence and the right against self-incrimination, although unquestionably basic, are not absolute rights.⁸¹ The enjoyment of any of these rights can be limited or restricted under certain justifiable circumstances. Thus the issue that can be raised is whether public corruption is such a great concern and whether societal problems justify the criminalization of illicit enrichment, and if so, whether such measure is an unavoidable necessary evil that individuals and societies should tolerate.

At present, there is consensus regarding the gravity and the adverse effects of corruption. Nonetheless, countries may take different positions on whether criminalization of illicit enrichment is a necessary device to address and effectively combat the problem of public corruption. Depending on prevailing circumstances and factors within particular jurisdictions, other measures such as administrative and/or civil law measures may suffice. Such measures may include fine, dismissal from work or office, confiscation and forfeiture of proceeds of corruption in civil or administrative proceedings, etc. Yet, these measures can be inadequate in other settings. As shown in the adoption of regional and international conventions as well as in the statutory laws of national jurisdictions, many countries (developing countries in particular) have preferred to further intensify the fight against corruption through the criminalization of illicit enrichment. Whether this approach is appropriate, necessary and proportionate remains debatable.

⁷⁹ *Integrating Human Rights in the Anti-Corruption Agenda*, *supra* note 36, at 65; ‘*On the Take: Criminalizing Illicit Enrichment to Fight Corruption*’, *supra* note 5, at 30-33.

⁸⁰ The scope of this article does not allow the presentation all arguments raised on both sides.

⁸¹ It is clear that there is no absolute right. But we may question whether it is wise to create such a new offence which has such severe impacts upon individual fundamental rights and interests rather than enhancing existing legal frameworks to intensify the preventive and suppressive measures.

3. Basic Ingredients of the Offence of Possession of Unexplained Property under the Criminal Code of Ethiopia

Ethiopia, a party to both the UNCAC and the AUCPCC, is one of the countries that have criminalized illicit enrichment as a punishable offence. It has incorporated this offence in the 2004 Criminal Code. As the Federal Supreme Court rightly observed in *Mulugeta Yayeh v. FEACC* case,⁸² the concept of *possession of unexplained property* is new to the Ethiopian legal system. Various major issues thus inevitably arise in the context of investigation, prosecution, adjudication, conviction and punishment (including confiscation measures). To the knowledge of this author, no special training has been given to those who are involved in the enforcement of this part of the Criminal Code until the time of this writing.

In spite of this, the Federal Ethics and Anti-Corruption Commission (FEACC) and the Ethics and Anti-Corruption commissions of some regional states have proceeded to prosecute public officials/servants and other individuals (alleged to have some form of participation with public officials/servants) under Art 419 of the Criminal Code since the entry into force of the law in May 2005 (Ginbot 1997 E.C). Some cases involving such prosecution are reaching to the Cassation Division of the Federal Supreme Court on grounds of basic error of *law*.⁸³

Cases involving possession of unexplained property are on the rise in Ethiopia. There are many more decided and pending cases before the federal and some of the regional states courts.⁸⁴ As some of the court cases demonstrate,

⁸² See Criminal Case File No.72231 (*Mulugeta Yayeh v. Federal Ethics & Anti-Corruption Commission (FEACC)*).

⁸³ See for example *Hankara Harqa v. SNNP EACC* (Cassation File No. 58514, decided on Tir 9, 2003 E.C), *Adem Abdu et al v. FEACC* (Cassation File No. 57938, decided on Hamle 14, 2003 E.C), *Tarekegn Teklu et al v. SNNP EACC* (Cassation File No. 67411, decided on Tahsas 30, 2004 E.C), *Workineh Kenbato & Amelework Dalie v. SNNP EACC* (Cassation File No. 63014, decided on Miazia 9, 2004 E.C), *Tesfaye Tumiro v. FEACC* (Cassation File No. 73514, decided on Hidar 6, 2005 E.C).

⁸⁴ See for example those cases that were, or are still, before the Federal High Court at Addis Ababa: *FEACC v. Yared Getaneh* case, the *FEACC v. Adem Abdu et al* case, the *FEACC v. Abdulkerim Adem et al* case, the *FEACC v. Seyfe Desta et al* (on 6th count against 2nd defendant, *Ahmed Seid Ebrahim*) case, and the *FEACC v. Elethabet W/Gabriel et al* case (particularly the 4th count against 5th defendant, *Mulugeta Yayeh*) and the *FEACC v. Birhanu Hika Roba* case. There are more other pending cases including *FEACC v. Melaku Fanta et al* case, *FEACC v. Gebrewahid*

there are some confusions and dilemmas on certain crucial aspects of the concept and its prosecution. Some lack sufficient clarity regarding the temporal scope of the offence and the circumstances that justify initiating and continuing criminal investigation, prosecution and adjudication.⁸⁵ They sometimes fail to properly identify the constitutive elements of the offence. It appears that there should be caution regarding the factual (physical and psychological) elements that constitute the *actus reus* and *mens rea* elements of the crime.⁸⁶ As some of the cases evince, there is the need for further clarity regarding ‘period of interest’ and relevant money or property that should be considered as part of criminal investigation, prosecution, adjudication, conviction and confiscation.⁸⁷ Moreover, there are crucial problems relating to the assessment and calculation of money/property alleged to form part of the accusation.⁸⁸ There are also

Woldegiorgis et al case (See አዲስ አድማስ (ጥቅምት 16 ቀን 2006 ዓ.ም) “... በሙስና የተከሰሱት ኃላፊዎች በሚሊዮን የሚቆጠር ሀብት አፍርተዋል ተባለ” available at:

<www.addisadmassnews.com> etc. In the Southern Nations, Nationalities and Peoples’ Regional State one may, for instance, mention, on top of the *Workineh Kenbato & Amelework Dalie* case, the *SNNP EACC v. Hankara Harqa & Hirpitu Hankamo* case (Awassa City High Court, File No.06693, decided on Nehassie 12, 2001 E. C), *SNNP EACC v. Tarekegn Teklu et al* case (Awassa City High Court, File No. 6646, decided on Meskerem 27, 2003 E.C); *SNNP EACC v. Hankara Harqa & Hirpitu Hankamo* case (SNNP Regional State Supreme Court, File No. 31614, decided on Ginbot 3, 2002 E.C), *SNNP EACC v. Tarekegn Teklu et al* case (SNNP Regional State Supreme Court, File No. 33970, decided on Meskerem 5, 2003 E.C.). In the Amhara Regional State we may mention the *ANRS EACC v. Dagim Dessalegn* case (West Gojjam High Court, File No. 41634, decided on Ginbot 28, 2004 E.C.), *ANRS EACC v. Adinew Abate & Lubaba Abegaz* (North Wollo High Court, File No. 04107), *Public Prosecutor v. Birhanu Admasu* case (West Gojjam High Court), etc.

⁸⁵ See for example how the *Tesfaye Tumiro* case reached the Cassation Division of the Federal Supreme Court.

⁸⁶ Art 23 (2) of the Criminal Code provides: “A crime is only completed when all its *legal, material* and *moral* ingredients are present” [Emphasis supplied]. There is the need for clarity regarding what has to be stated and established as a material element and on what has to be stated and proved as a moral element.

⁸⁷ One may, for example, check from the criminal charges and decisions of courts in the cases mentioned under footnotes 82 through 84. Prosecutors charged many public servants by stating the period of check whereupon the accused are said to have accumulated disproportionate assets/money; such period has been stated as starting from e.g., 1979 E.C, 1983 E. C, 1984 E. C, 1985 E.C, 1986 E.C, 1992 E. C, 1993 E.C, 1996 E.C. Assets/moneys that were alleged to have been under the control of the accused and incomes from salary obtained since such periods, etc were all considered to show the disproportion between alleged lawful gains and illicit gains.

⁸⁸ The major and recurring points of controversy include whether some amounts of money appearing in the bank statements are those that were withdrawn sometime in

uncertainties and controversies on alleged sources of lawful incomes (other than salary) that should or should not be part of the assessment.⁸⁹

Therefore, it is necessary to examine the constitutive elements of this offence and to critically analyze the specific factors that should or should not be considered in attempting to establish each constitutive element in the context of the Criminal Code.

3.1 Definition of the Offence

The Criminal Code does not offer a definition of the offence of ‘possession of unexplained property’. But it is possible to deduce one from what Art 419 of the Criminal Code provides. Article 419 which is titled as “Possession of Unexplained Property”⁹⁰ reads as follows:

- (1) Any public servant, being or having been in a public office, who:
 - a) maintains a standard of living above that which is commensurate with the official income from his present or past employment or other means; or
 - b) is in control of pecuniary resources or property disproportionate to the official income from his present or past employment or other means,

shall, unless he gives a satisfactory explanation to the Court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be punished, without prejudice to the confiscation of the property or the restitution to the third party, with simple imprisonment or fine, or in serious cases, with rigorous imprisonment not exceeding five years and fine.

the past and re-deposited after a while or are transfers from another bank or another’s person, or whether the estimation of an immovable has to be made based on the previous purchase or construction price of such an immovable or whether the current market-value of the immovable should be a basis of the calculation, etc. (Ibid).

⁸⁹ Ibid.

⁹⁰ The Amharic version of sub (1) of Art 419 reads:

አንቀጽ 419- ምንጩ ያልታወቀ ንብረትና ገንዘብ

(1) የመንግሥት ሠራተኛ የሆነ ወይም የነበረ ማንም ሰው

(ሀ) የኑሮ ደረጃው አሁን ባለበት ወይም አስቀድሞ በነበረበት የመንግሥት ሥራ ወይም በሌላ መንገድ ከሚያገኘው ወይም ሲያገኝ ከነበረው ሕጋዊ ገቢ የበለጠ እንደሆነ ወይም፤

(ለ) ያለው ንብረት ወይም የገንዘብ ምንጭ አሁን ባለበት ወይም አስቀድሞ በነበረበት የመንግሥት ሥራ ወይም በሌላ መንገድ ከሚያገኘው ወይም ሲያገኝ ከነበረው ሕጋዊ ገቢ ጋር የማይመጣጠን እንደሆነ፤ -

የዚህ ዓይነቱ የኑሮ ደረጃ እንዴት ሊኖረው እንደቻለ ወይም ያለው ንብረት ወይም የገንዘብ ምንጭ በእጅ እንዴት ሊገባ እንደቻለ ለፍርድ ቤት ካላስረዳ በስተቀር እንደሁኔታው የንብረቱ መወረስ ወይም ለባለቤቱ መመለስ እንደተጠበቀ ሆኖ በቀላል እስራት ወይም በመቀጮ፤ ነገሩ ከባድ ሲሆን ከአምስት ዓመት በማይበልጥ ፅኑ እስራትና በመቀጮ ይቀጣል።

- (2) Where the Court, during proceeding under sub-article (1) (b), 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.

Under this provision, it is an offence for any present or previous public servant to maintain or have maintained a standard of living above that which is commensurate with his present or past official income from his present or past employment or other legitimate source unless such person gives a satisfactory explanation thereof. It is an offence for a public servant to be in control of pecuniary resources or property disproportionate to his official income from his present or past employment or other legitimate source of income unless such person gives a satisfactory explanation thereto. It is also an offence if such a person is found *possessing such a disproportionate amount of money or other property through another person* such as relatives, or friends. From this we understand that the definition of the offence of possession of unexplained property in Ethiopia is basically the same as those definitions found under the IACAC, UNCAC and AUCPCC.⁹¹ Accordingly, we may define the offence of possession of unexplained property under the Ethiopian Criminal Code as the

⁹¹ The content of Art 419 of the Criminal Code is almost the same as those embodied in Article 20 of UNCAC and Article 1(1) and Article 4 (1) (g) of the AUCPCC. Except the part on penalty, it is perfectly the same as provided under Section 10 of the Prevention of Bribery Ordinance (1971) (as amended) of Hong Kong, China. To see the similarity or otherwise of illicit enrichment provisions of Ethiopia, Hong Kong and many other countries, one may refer to '*On the Take: Criminalizing Illicit Enrichment to Fight Corruption*', *supra* note 5, Appendix A, at 67-88. The criminalization of possession of unexplained property in Ethiopia is made in the face of many constitutional rights and freedoms. See the Constitution of the Federal Democratic Republic of Ethiopia Proclamation No.1/1995, *Federal Negarit Gazeta*, 1st Year, No.1 (FDRE Constitution). This Constitution embodies many aspects of the right to fair trial and other fundamental rights and freedoms which a criminal suspect or accused person may avail in the event of criminal investigation, prosecution and adjudication. Some of these include the right to presumption of innocence, right to remain silent, right against self incrimination, right to discovery and right to confrontation (Arts 19(2), 20 (3) & (4)). The Constitution has also incorporated the principle of legality under Art 22 and the right to equality under Art 25. Furthermore, Art 40 of the Constitution proclaims about right to private property. These rights are also found in the International Convention on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (African Charter) - both of which are ratified by Ethiopia and are therefore to be treated as part and parcel of the law of the country by virtue of Art 9(4) of the Constitution.

maintenance or leading of a standard of living or possession of money or other property by a previous or present public servant that is above or disproportionate to the public servant's official and other lawful sources of income which he cannot reasonably explain in relation to his official income during the performance of his functions or other means.

3.2 Elements of the Offence

Article 23(2) of the Code stipulates that “A crime is only completed when all its *legal, material* and *moral* ingredients are present.” Identifying (a) a particular criminal conduct, circumstance and/or state of affairs that establishes the act (or omission) and its prohibition by the law, i.e. the *actus reus* element, and (b) determining the required subjective element (i.e., the mental disposition or psychological condition) that establishes the *mens rea* (moral guilt) element of this offence. These elements need closer and critical scrutiny in each individual offence that is a subject-matter of investigation, prosecution or adjudication. The elements apply to all offences including the possession of unexplained property. This requires paying due attention to the nature or essence of illicit enrichment and to the legal, material and mental context in which the offence could be committed. It is also vital to consider what the UNCAC and AUCPCC provide in respect of these elements of this offence and other related issues.⁹²

Based on Art 419 of the Code and the three conventions highlighted above we can observe that ‘persons of interest’, ‘period of interest’, ‘disproportionate assets’, and ‘absence of justification’ are the pillars and the constituting elements of the offence. Besides, the reading of Art 419 together with Arts 23, 57-59 of the Criminal Code provide another constitutive element, i.e., the mental element.

a) Persons of interest

Art 419 of the Criminal Code indicates the persons who could be perpetrators of the offence of possession of unexplained property in Ethiopia. This offence is basically committed by *public servants*. Thus individuals who may be subjected to criminal investigation, prosecution, adjudication, conviction and punishment under this offence are *primarily* public servants.’

As defined under Art 402(1) of the Criminal Code, the term *public servant* (የመንግሥት ሠራተኛ) includes “any person who temporarily or permanently performs functions being employed by, or appointed, assigned or elected to, a

⁹² These conventions are to be treated as part of the law of Ethiopia by virtue of Art 9(4) of the FDRE Constitution. Hence what has been discussed earlier in Section 2 elucidates some issues in our present discussion.

public office or a public enterprise.”⁹³ This definition includes not only higher officials of the government working in public offices or public enterprises but also extends to all employees. The manner in which an individual assumed a position in a given public office or a public enterprise is immaterial. One might have been employed or assigned. Or, one might have come to assume that position through an appointment or election. Whether the duration of employment, or assignment, or election, or appointment is made for sometime (temporarily) or is for an unlimited period of time (permanently) is also immaterial. Moreover, this provision does not provide any qualification based on conditions or terms of employment, or assignment, or appointment or election. Whether a person is assigned, or appointed, or elected to serve in such a public office or public enterprise with or without consideration (payment) is not considered as a qualifying element.

However, it is to be noted that this provision only applies to persons employed, or assigned, or appointed, or elected to work only in *public offices* or *public enterprises*. Art 402(2) and Art 402(3) of the Criminal Code provide definitions for the terms “public office” and “public enterprise”, respectively. According to Art 402(2), *public office* refers to “any office fully or partially financed by government budget, and which performs the functions of the Federal or Regional Governments.”⁹⁴ Art 402(3) defines *public enterprise* as “a Federal, or Regional Government enterprise or share company, in which the Government has total or partial share as an owner.”⁹⁵

As the law now stands, persons working in institutions or other offices that are not at least partly funded by the federal or regional state governments are not within the scope of ‘persons of interest’. Thus, persons working in charities, societies, mass-based societies, religious organizations, private business organizations, *Idir*, *Ekub*, or other cultural organizations etc., fall outside the scope of ‘persons of interest’.⁹⁶

⁹³ The Amharic equivalent reads: ‘የመንግሥት ሠራተኛ ማለት በመንግሥት መሥሪያ ቤት ወይም በመንግሥት ልማት ድርጅት ውስጥ ተቀጥሮ፣ ተሹሞ፣ ተመደበ፣ ወይም በሕዝብ ተመርጦ በቋሚነት ወይም በጊዜያዊነት ሥራን የሚያከናውን ማንኛውም ሰው ነው።’

⁹⁴ The Amharic equivalent reads: ‘የመንግሥት መሥሪያ ቤት ማለት ሙሉ በሙሉ ወይም በክፍል በመንግሥት በጀት የሚተዳደርና የፌደራል ወይም የክልል መንግሥት ሥራዎች የሚከናወኑበት ማናቸውም መሥሪያ ቤት ነው።’

⁹⁵ The Amharic equivalent reads: ‘የመንግሥት ልማት ድርጅት ማለት የመንግሥት ባለቤትነት ድርሻ በሙሉ ወይም በክፍል ያለበት የፌደራል ወይም የክልል መንግሥት የልማት ድርጅት ወይም የአክሲዮን ማኅበር ነው።’

⁹⁶ For the definitions, scopes, types and other related issues pertaining to societies, charities, mass-based societies, and, to some extent, religious organizations *see* the Charities and Societies Proclamation No.621/2009, *Federal Negarit Gazeta*, 15th Year No.25. It appears that if any of these entities obtain some funding from the

Public servants as defined under Art 402 (1) are the potential perpetrators of this crime and are thus the primary targets of Art 419 of the Criminal Code. Under exceptional circumstances, this provision may extend to non-public servants if they participate in the commission of this crime by a public servant. A non-public servant may commit an offence of possession of unexplained property if he associates or participates with a public servant in the manner provided under Art 33 of the Criminal Code. Such a non-public servant can be held liable, if by his/her acts, he/she fully participated with *knowledge* and *intent* in the commission of an offence of possession of unexplained property.⁹⁷ This is not confined to close relatives and friends of accused public officials, but includes anyone who participates with *full knowledge* and *intent*. From this perspective, one may say that the scope of ‘persons of interest’ under Ethiopian Criminal Code is somehow broad.

b) Period of Interest

The period during which a person can be held liable for the offence is indicated under Art 419(1). The expression “*being or having been in a public office*”⁹⁸ qualifies the time element (period of interest/check). According to this provision, an offence of possession of unexplained property is said to be committed, if it is found that the offence was committed *sometime in the past while the accused was in public office* (during his tenure as a public servant) or if it is established that the offence is committed *presently while the accused is still in public office*. This shows that Ethiopia has endorsed an *open-ended approach*. There is no time limit even after the termination of one’s term of office or employment unless it is barred by an applicable period of limitation.

While the threshold time for investigation, prosecution and adjudication appears to be the beginning of performing in a public office or in a public enterprise, this period of performance could not include the time before the entry into force of the 2004 Criminal Code, i.e., before 9th of May 2005 (Ginbot 1, 1997 E.C). By virtue of Art 5(2) of the Criminal Code, “[a]n act declared to

government and an alleged illicit enrichment is linked to such funding, the scope of ‘persons of interest’ seem to go to include those persons suspected in that context (see Art 88 (2) of the above proclamation providing a possibility to extend some incentives by the government to those charities or institutions that allocate more than 80% of their income to their stated purposes or to those which demonstrate outstanding performance).

⁹⁷ It reads: Article 33.- Participation in Cases of Special Crimes

“An accused person may be prosecuted as a principal criminal when, by his acts, he fully participated with knowledge and intent in the commission of a crime which can be committed only by certain specified persons, in particular [...] by a public servant in respect of crimes against public office [...]”

⁹⁸ See the Amharic equivalent “የመንግሥት ሠራተኛ የሆነ ወይም የነበረ”.

be a crime under [the 2004 Criminal] Code but not under the repealed law and committed prior to the coming into force of this Code is not punishable.” As the Cassation Division of the Federal Supreme Court rightly observed in *Tesfaye Tumiro* case, to extend the period of check to the time before 9th of May 2005 is against the principle of non-retroactive applicability of the criminal law.⁹⁹

Establishing this *temporal link* between the moment of acquisition of disproportionate wealth and the time when an alleged crime of corruption is believed to have been committed by a public servant is crucial. Investigators, prosecutors and judges should always bear in mind that it is only an illicit accumulation of wealth by public servants since the 9th of May 2005 that is within the purview of Art 419 of the Criminal Code. This author fully understands the difficulty that is faced in trying to fix the particular period in which a corrupt public servant might have committed an illicit or illegal activity that is an element in the possession of unexplained property. It may be too difficult to obtain evidence that helps fix this particular period. Yet, the principle of legality and the principle of non-retroactive application of the criminal law will be violated if this period of check is stretched to the time before the criminalization of such conduct. The benefit of doubt in such cases has to go to accused persons.

It is necessary to pay particular attention to the expression “*being or having been in a public office*” (የመንግሥት ሠራተኛ የሆነ ወይም የነበረ) under Art 419 of the Code. It determines the period of interest for investigation, prosecution,

⁹⁹ See Art 22 (1) of the FDRE Constitution, Art 15(1) of the ICCPR, Art 7(2) of the African Charter, and Arts 2 (2) & 5 (2) of the Criminal Code. In *FEACC v. Tesfaye Tumiro* case, the accused was accused of committing an offence of possession of unexplained property while he served as a public servant in various public offices between 1992 E. C and 1996 E. C (i.e., before the criminalization of such conduct and before the entry into force of the Criminal Code). The Federal High Court at Addis Ababa had wrongly convicted the defendant under Art 419 (1)(b) of the Criminal Code and imposed two years and three months of rigorous imprisonment and a fine of Birr 66, 660 and further ordered for the confiscation of the defendant’s car as well as his bank deposit of Birr 27, 330. This decision was confirmed by the regular division of the Federal Supreme Court on appeal. The Cassation Division of the Federal Supreme Court quashed these erroneous decisions by invoking the non-retroactive application of the Criminal Code in its decision rendered on Hidar 6, 2005 E.C. The Cassation Division’s analysis of the law and its holding in this case are in line with the explicit stipulations of the FDRE Constitution, the ICCPR, the African Charter and the Criminal Code. It has rightly invoked and applied the principle of *nullum crimen sine lege*. Regrettably, this Division made no similar observations in other cases such as the *Workineh Kenbato & Amelework Dalie* case, the *Hanqara Harqa* case, and the *Tarekegn Tekilu et al* case where the period of check stretched back to 1984 E. C, 1985 E.C, and 1986 E.C., respectively.

adjudication, conviction and punishment. The increase in asset must be proved to have taken place *during the term of office of the public servant* or it must be shown that it occurred *from the date on which the public servant took office and/or thereafter, after he left office*. The expression “having been in a public office” (የመንግሥት ሠራተኛ የነበረ) is referring to the maximum future period of check (which is left open-ended) after having left public office.

c) Disproportionate Asset

As highlighted in Section 2, the element of disproportionate asset is one of the manifestations of overt conduct that constitutes an *actus reus* element of the offence of illicit enrichment. The expressions: “*above* that which is commensurate with the official income [...] or other means”, or “control of pecuniary resources or property *disproportionate* to the official income [...] or other means” under Art 419 of the Criminal Code indicate the recognition of this element. These expressions imply *significant increase* in the assets of the accused person. It is inconceivable to think, initiate and lead such a prosecution against a public servant without some visible manifestation of significant increase in the standard of living he or his family exhibits or in the money or other property he possesses at a given point of time or throughout.

The increase must be disproportionate to a reasonable saving of one’s official income such as salary and related benefits (transport/house/telephone allowance, per diem, part-time payments, bonus, other incentives) or from other means of earnings such as income from inheritance, prize, lawful gifts, income from hiring of house or car, or gains from agricultural activities, or husbandry, or poultry, or income from other investment or trading activities, etc. It must be noted that Art 419 of the Criminal Code does not confine the means of living and earnings of a public servant to official income only. The expression: “[...] income from [...] other means”¹⁰⁰ is broad enough to include other *lawful*¹⁰¹ sources of income.

In some cases, the calculation and determination of incomes and expenditures could be too complex for investigative authorities. In a country that has a poor tradition in recording and the preservation of incomes and expenditures, this could be a daunting task. As the court cases consulted by this author demonstrate, most prosecutions confine themselves to the collection of

¹⁰⁰ See the expression “በሌላ መንገድ ከሚያገኘው ወይም ሲያገኝ ከነበረው ሕጋዊ ገቢ.” under sub-(a) and sub-(b).

¹⁰¹ The Amharic version puts this qualification while the English version simply states “other means”. Whether courts should base the assessment of the assets of the accused solely taking the official income and incomes from other lawful means or whether they can consider incomes obtained from other lawful and (unrelated) illegal means such as from tax evasions, etc., is yet to be seen in practice.

records of salary payments (payrolls). Accused persons are often required to provide evidence of sources of income such as overtime payments and other income from lawful sources. Whether such practice is in line with what is provided in the Criminal Code or in line with applicable or accepted procedural and evidentiary rules is addressed in the context of allocation of burdens of proof.¹⁰²

The particular money or property that is to be part of the assessment of the wealth or asset of a public servant is another area where prosecuting authorities and accused persons in Ethiopia often disagree. In most of the cases consulted by this author, accused persons claim that some parts of the money found in their name or in the name of their spouses are obtained from other persons in the form of loan, or in lawful gift from some family members; some defendants claim that a certain amount of money deposited in the bank is another person's money put in bailment, etc.¹⁰³ Public prosecutors often object such claims. Judges however allow accused persons to introduce supporting evidence and trial judges often assess and give credit to the adduced evidence in that regard.¹⁰⁴ But judges in the higher tiers of courts, particularly at the level of cassation benches often reverse such holdings.¹⁰⁵

Another point of controversy in such prosecutions relates to the evaluation of immovable property alleged to be part of the illicit enrichment. In some the cases, accused persons objected the estimation of the price of the immovable that was made an object of assessment. Some argued that the purchase or construction price, and not the current market-price, should be the basis the assessment.¹⁰⁶ It is submitted that considering the current market-price of an immovable, what should be considered is what an accused person actually obtained at the time of commission of the crime. The appreciation or

¹⁰² For details read this author's Article on burdens and standards of proof which is published in this issue of *Mizan Law Review*, pp. 1-44.

¹⁰³ See, for example, the *Workineh Kenbato & Amelework Dalie* case, the *SNNP EACC v. Hanqara Harqa & Hirpitu Hanqamo* case. The accused persons alleged that the bank deposits of Birr 1,120, 500 in the first case, and the Birr 500, 000 belonged to two private limited companies (in the first case), and to a church (in the second case). See also the *Mulugeta Yayeh* case, the *FEACC v. Seyfe Desta et al* (on 6th count against 2nd defendant, *Ahmed Seid Ebrahim*), the *FEACC v. Yared Getaneh* case, and the *ANRS EACC v. Dagim Dessalegn* case.

¹⁰⁴ *Ibid.*

¹⁰⁵ Revising cases based on an alleged error of assessment of evidence is beyond the power of cassation divisions. But, this is not our immediate concern here.

¹⁰⁶ See for example such an argument raised in the *Workineh Kenbato & Amelework Dalie* case and in the *ANRS EACC v. Dagim Dessalegn* case.

depreciation of money or property obtained from an illicit or illegal activity should not be the basis of calculation to determine if there is significant increase in the wealth of a public servant. But this does not imply that such offenders can be beneficiaries of the increase from incomes or gains generated from misuse or abuse of their positions.

The last issue that needs to be considered is whether Art 419 of the Criminal Code envisages future promise of payments, cancellation of debts, intellectual or labor services, provision of real or personal securities etc., in the assessment of the wealth of a public servant as income and/or expenditure. While this may be arguable, a reading of this provision together with Art 402(4) & (5) seem to support the propriety of considering these into the assessment.

d) *Mens Rea*

Article 419 of the Criminal Code does not state whether this crime entails liability when it is intentionally or negligently committed. Art 57(2), provides that no person “can be convicted under criminal law for an act penalized by the law *if it was performed or occurred without there being any guilt on his part.*” Mere violation of any criminal law provision that establishes an offence cannot entail punishment unless there is *guilt* on the part of the accused. Establishment of culpability or guilt is a necessary ingredient of criminal liability under the Ethiopian Criminal Code. The maxim *nulla poena sine culpa* (without fault there is no criminal liability to punishment) holds full sway in Ethiopia.¹⁰⁷

The principle of contemporaneity is also applicable under the Ethiopian criminal justice system.¹⁰⁸ To entail conviction, this principle requires that the *actus reus* and *mens rea* elements of an offence must co-exist at the same time.¹⁰⁹ In the absence of moral guilt, acts performed in a state accident do not entail criminal liability. Moreover, Art 58(3) stipulates that “[n]o person shall be convicted for what he neither knew of or intended, nor for what goes beyond what he intended either directly or as a possibility, subject to the provisions governing negligence.”

Guilt is established by proving the criminal intention or criminal negligence of an accused. As provided under Art 58(2), intentional commission of a crime is always punishable except in cases of justification or excuse expressly

¹⁰⁷ See Philippe Graven (1965), *An Introduction to Ethiopian Penal Law*, (Addis Ababa: Haile Selassie I University Faculty of Law) Arts 1- 84 Penal Code), at 152.

¹⁰⁸ For the details of these two principles see, Ashworth, *supra* note 77, at 94.

¹⁰⁹ Only exceptionally will the other modern doctrine of criminal law that is *the doctrine of prior fault* work under the Ethiopian criminal justice system. According to this doctrine, an accused that deliberately put himself in an exculpatory condition would not be allowed to rely on a defense of exculpatory conditions. The doctrine of prior fault can be invoked to hold him liable (Ibid). See Art 50 of the Criminal Code.

provided by law. Art 59(2) provides that crimes committed “by negligence are liable to punishment *only if the law so expressly provides ...*” (Emphasis added). Art 419 of the Code does not expressly provide that possession of unexplained property shall be punishable if committed through negligence. It is clear, then, that this offence is punishable only if it is committed *intentionally*. In light of these provisions, therefore, a public servant cannot be punished for committing an offence of possession of unexplained property or money if, by accident or by a mistake committed by another person, such as a bank clerk, or an individual sender/transferor, a big amount of money is transferred to his/her bank account during the period of interest.

e) Absence of Justification

As is the case in other criminal proceedings, the material facts that need to be established in possession of unexplained property criminal proceedings involve, *inter alia*, an assessment of whether there exists a criminal conduct of the accused and a consideration of whether such conduct constitutes a criminal offence as stipulated under Art 419 of the Criminal Code. A close reading of Art 419 together with Arts 23, 57- 59 of the Criminal Code would help determine another element (other than the maintenance of a standard of living or possession of property above lawful sources of income) that constitutes the offence of possession of unexplained property under the Code. It would be absurd to condemn anyone for merely leading a standard of living above one’s official income (or for merely possessing a significant amount of money or property). Art 419(1) thus embodies another essential material element (*actus reus*). This is: *failure or being unable*, on the part of the accused, to give a *satisfactory explanation* to the Court as to how he was able to maintain such a standard of living or how such a pecuniary resource or property came under his control. This is what is shortly referred to as ‘*absence of justifications*’.

Failure to give *satisfactory explanation* about the extra money or property triggers a *presumption* of the accused person’s illicit or illegal activity committed *while he was in public office or after he left public office*. As has been mentioned earlier, this legal presumption is meant to address the difficulties encountered in the investigation, prosecution and adjudication of corruption-related offences. It must be underlined here that failure on the part of a public servant *to give explanation* about the extra amount of money or other property under his control or ownership is considered as an *evidential fact*¹¹⁰ of some corrupt activity on the part of the public servant.

¹¹⁰ Black’s Law dictionary defines ‘evidentiary fact’ or ‘evidential fact’ as “a fact that is necessary for or leads to the determination of an ultimate fact” or it is taken as a “fact that furnishes evidence [proof] of the existence of some other fact.”

Concluding Remarks

There is a trend towards the criminalization of illicit enrichment, particularly in developing countries. Such measure is believed to foster the fight against public corruption and to recover plundered public assets. The proper enforcement of such law presupposes clarity on the notion of the offence and the reasons that justify its punishment. It is also necessary to identify the constitutive elements of the offence and the circumstances that give rise to such suspicion of its commission.

There is the need to give due attention to the unique features of this crime and to identify the various *actus reus* and *mens rea* elements as well as other related constitutive elements of the crime. In this regard, one has to give special attention to the requirements of ‘persons of interest’, ‘period of interest’, ‘disproportionate assets’, requisite *mens rea* and ‘absence of justification’ elements as are provided under the UNCAC, AUCPCC and the Criminal Code. The experience in Ethiopia demonstrates serious shortcomings in respect of identifying ‘persons of interest’ that should be subjected to such prosecutions. There are also serious limitations regarding the determination of the ‘period of interest’ and the establishment of ‘disproportionate assets’. In particular, investigative and prosecuting authorities need to pay particular attention to the temporal link between the moment of acquisition of disproportionate assets and the alleged time when such criminal offence could have been committed.

In the course of the investigation, prosecution and adjudication of illicit enrichment, due attention is expected to be given to the primary and secondary targets of the law and the goals intended to be achieved by such prosecutions. It is also necessary to keep in mind the potential concerns and threats that such prosecutions pose and the likely unintended consequences that may follow. The requisite care should thus be taken not to jeopardize innocent persons, their families and their legitimate properties. This necessitates thorough investigation and inquiry before convicting an accused person of illicit enrichment and imposing punishment. The effective and functional implementation of the Assets Disclosure and Registration System across Ethiopia is indeed expedient and in conformity with the intention of the legislature. Apart from its preventive role and its contribution to the enhancement of the fight against public corruption, it facilitates the pursuits of securing and preserving reliable evidence that can lead to the conviction of actual offenders along with the minimization of erroneous conviction, punishment and confiscation. ■
