

Resolving the Constitutional Silence in Ethiopia Concerning the Power to Investigate and Prosecute Crimes that violate International Human Rights

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Abstract

Ethiopia's Constitution does not specify which level of government is responsible for investigating and prosecuting crimes that violate international human rights (CVIHR) within the regional states. The need to resolve this constitutional silence had not arisen until recently, as the regional states had been carrying out these tasks despite not being expressly required to do so. Regional states were unlikely to contest this arrangement, even if they were not constitutionally obligated to undertake these tasks, given that government power at both federal and regional state levels was controlled by a single party –the Ethiopian People's Revolutionary Democratic Front (EPRDF). However, following the end of the EPRDF's one-party rule in 2018, some regional states promptly declined to investigate and prosecute CVIHR. The situation demonstrated the relevance of determining whether regional states are responsible under the Constitution for carrying out these functions. The constitutional silence, if left unresolved, has far-reaching ramifications. Among others, it creates difficulties in ensuring accountability for failures to address human rights violations. It also leads to violations of individuals' right to an effective remedy, which, in turn, engages Ethiopia's international responsibility. Based on doctrinal research to analyse primary and secondary sources, this article assesses which level of government is responsible for investigating and prosecuting CVIHR within the regional states. It also examines the rationale and mechanisms available to resolve the constitutional silence and identifies the most appropriate approach to pursue.

Keywords:

Constitutional intent, criminalise, investigate and prosecute, delegation, federal matters

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1. Introduction

Ethiopia has ratified most of the core international human rights treaties adopted under the auspices of the UN such as the ICCPR and CEDAW.¹ Besides, Ethiopia is a state party to international treaties that address specific forms of human rights violations such as genocide, torture, and human trafficking.² Among the key obligations that Ethiopia assumed upon ratifying

Frequently used acronyms

CAT	Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment
CVIHR	Crimes that violate international human rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
FDRE	Federal Democratic Republic of Ethiopia
ICCPR	International Covenant on Civil and Political Rights

¹ International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 19 December 1966, Ethiopia ratified the ICCPR on 11 June 1993;

Convention on the Elimination of All Forms of Discrimination against Women, Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 34/180 of 18 December 1979, Ethiopia ratified the CEDAW on 10 September 1981.

² Convention on the Prevention and Punishment of the Crime of Genocide, Ethiopia ratified the Genocide Convention on July 1, 1949. The Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT) (General Assembly Resolution 39/46 of 10 December 1984), Ethiopia ratified the CAT on 14 March 1994; Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and

the treaties are to criminalise human rights violations and to investigate and prosecute perpetrators. These obligations are explicitly stated in some of the treaties that address specific forms of human rights violations – such as the Genocide Convention and the CAT.³ In other universal human rights treaties, including the ICCPR, on the other hand, the obligations are derived from the elaborations of treaty bodies.⁴

The Constitution of the Federal Democratic Republic of Ethiopia (hereafter, ‘the FDRE Constitution’ or ‘the Constitution’) grants the federal government exclusive authority to legislate for the implementation of international treaties, including those requiring the enactment of criminal legislation.⁵ The federal government relied on the 2004 Criminal Code to fulfill its international obligations to criminalise human rights violations, as required by treaties such as the Genocide Convention, the CAT, and the CEDAW.⁶ In other cases, it enacted separate legislation to implement international treaties such as the UN Protocol for human trafficking (The UN Trafficking Protocol). Proclamation No. 1178/2020 (hereafter referred to as ‘the Anti-Trafficking and Smuggling Proclamation’) was enacted by the federal government to meet its international obligations under the UN Trafficking Protocol, among others.⁷

Articles 51 and 52 of the FDRE Constitution outline matters that fall under the federal and regional state jurisdictions, respectively, while Article 50(2) requires the levels of government to have legislative, executive and judicial powers. Read together, the provisions imply that the federal government and the regional states have exclusive authority to execute laws enacted by their respective legislatures within their administrative boundaries. It follows, therefore, that the responsibility to investigate and prosecute the crimes

Children, Supplementing the United Nations Convention against Transnational Organized Crime, Ethiopia ratified this instrument on 22 June 2012.

³ Convention on the Prevention and Punishment of the Crime of Genocide (*supra* note 2) Articles III, IV, V; *The CAT* (*supra* note 2) Articles 4, 7.

⁴ Human Rights Committee, ‘General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant Adopted on 29 March 2004 (2187th Meeting)’ para 8
<<https://linkinghub.elsevier.com/retrieve/pii/B9780444879110500854>> accessed 20 April 2024.

⁵ Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No.1/1995 Articles 51(8), 55(1), 55(5), and 55(12).

⁶ The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No.414/2004 See Preamble, para 1, and Articles 269, 424, and 620.

⁷ Prevention and Suppression of Trafficking in Persons and Smuggling of Persons Proclamation No. 1178/2020.

incorporated into federal laws implementing international treaties, referred to in this article as crimes that violate international human rights (CVIHR), within federal territories, Addis Ababa and Dire Dawa, lies within the federal government.⁸

However, the Constitution does not explicitly specify which level of government is responsible for investigating and prosecuting CVIHR within the regional states. It does not contain express provisions allocating responsibility for the execution of federal laws criminalising human rights violations in general.⁹ One may not easily ascertain whether (as in the constitutions of primarily dualist federations such as the USA, Canada, and Australia) the responsibility for investigating and prosecuting CVIHR (incorporated in federal laws) rests with the federal government.¹⁰ Nor is it clear (under the FDRE Constitution) whether, the responsibility for investigating and prosecuting CVIHR established by federal laws lies in the regional states as is the case in mainly integrated federations, exemplified by Germany.¹¹

⁸ In this article, CVIHR refers to crimes listed under the Criminal Code or separate federal legislation that the federal government has relied on to implement ratified international human rights treaties. CVIHR listed under the Criminal Code include *Crimes against life, person, and Health* (Articles 538-560), such as homicide and infanticide; *Crimes Committed against Life, Person and Health through Harmful Traditional Practices* (Articles 561-570), such as female circumcision; and *crimes against honest and reputation* (Articles 607-619), such as defamation and calumny. As explained by the federal government, these crimes are intended to protect substantive rights guaranteed under international human rights treaties, such as CRC, CEDAW and ICCPR) (See Committee on the Rights of the Child, Initial Reports of States Parties due in 1993, Addendum, Ethiopia, para 223, Criminal Code of Ethiopia, Preamble, para 3, Human Rights Committee, First Periodic Report of States Parties: Ethiopia, para 171, respectively). Besides, genocide (Article 269) and use of improper method (Article 424) are used by the federal government to give effect to the Genocide Convention and the CAT, respectively. CVIHR listed under separate federal legislation include human trafficking as established by the Anti-Trafficking and Smuggling Proclamation enacted to implement the UN Trafficking Protocol.

⁹ Assefa Fiseha (2009), *Federalism: Teaching Material* (Prepared under the Sponsorship of the Justice and Legal System Research Institute) 352; Abdi G Amenu (2014), 'Criminal Jurisdiction of State Courts under the Constitution of the Federal Democratic Republic of Ethiopia' (LLM Thesis, Addis Ababa University) 119.

¹⁰ Thomas O. Hueglin and Alan Fenna (2015), *Comparative Federalism: A Systematic Inquiry* (University of Toronto Press) 136; George Anderson, *Federalism: An Introduction* (Oxford University Press 2008) 21.

¹¹ Thomas O. Hueglin & Alan Fenna, id., 137; Anderson. Id., 22. This article uses the terms 'responsibility' and 'powers' interchangeably, as the FDRE Constitution also

This article assesses which level of government, according to the constitutional text and intent, is responsible for investigating and prosecuting CVIHR within the regional states. It also examines the rationale and the mechanisms for, filling the constitutional silence. The article employs a doctrinal research method and analyses constitutional provisions, particularly those outlining the powers of the levels of government, as well as the preparatory works of the Constitution, relevant legislation, and other scholarly literature.

The article proceeds as follows. In the next section, it explores how the responsibility for investigating and prosecuting CVIHR is allocated in practice, despite the Constitution's lack of an express provision on the issue, and considers the potential consequences of this constitutional silence. It then examines the key provisions of federal legislation that have shaped the division of power to investigate and prosecute CVIHR in practice. Next, it assesses the mode of division of power followed in practice and analyses which level of government holds responsibility for investigating and prosecuting CVIHR. Thereafter, it explores the underlying reasons and mechanisms for addressing the constitutional silence concerning responsibility for carrying out these functions. Finally, it concludes by summarising key findings and arguments.

2. Overview of the Gaps and Potential Consequences

In the absence of a clear constitutional mandate, regional states (in practice) investigate and prosecute most of the CVIHR when they occur within their administrative jurisdictions as matters of their own concern.¹² The only crimes that fall beyond their jurisdiction are crimes that are widely recognised as international crimes, such as genocide and torture (Articles 269 and 424 of the Criminal Code, respectively), as well as those regulated by separate legislation, including human trafficking.¹³ The federal government investigates and prosecutes all CVIHR committed within federal territories – Addis Ababa and Dire Dawa – and addresses the serious crimes mentioned

uses them in a similar manner (See, for example, Articles 51, 52, and 94 of the FDRE Constitution).

¹² Simeneh Kiros Assefa (2009), *Criminal Procedure Law: Principles, Rules, and Practices* (Xlibris Corporation,) 285–289; Gedion T. Hessebon and Abduletif K. Idris, 'The Supreme Court of Ethiopia: Federalism's Bystander' in Nicholas Theodore Aroney and John Kincaid (eds), *Courts in Federal Countries* (University of Toronto Press, 2017) 165, 176; Amenu (*supra* note 9) 120.

¹³ SK Assefa, *id.*, 285–289; Wondwossen D Kassa (2012), *Ethiopian Criminal Procedure: A Textbook* (Addis Ababa University) 285.

above, such as genocide and torture, by delegating authority to the regional states when they occur within their jurisdictions.¹⁴

Until recently, the need to address the constitutional silence regarding the power to investigate and prosecute CVIHR did not arise, since regional states had never resisted addressing human rights violations. In fact, such resistance was unlikely to emerge, given that government power at both the federal and regional state levels was controlled by a single party, the EPRDF. The democratic centralism principle which the EPRDF implemented required decisions made by high-ranking federal officials to be fully implemented at the regional state level through the party's chain of command.¹⁵ As a result, it was highly unlikely that the regional states would challenge the constitutionality of the arrangement requiring them to enforce federal laws. The strict application of this principle, and the resulting federal influence over regional states, largely explains the absence of intergovernmental constitutional disputes during the nearly three-decade-long rule of the EPRDF regime.¹⁶

The situation, however, significantly changed in 2018 following the wide anti-government public protest, which ultimately led to the end of EPRDF and the merger of its constituent members into the newly organised Prosperity Party (PP).¹⁷ Soon after the post-2018 changes, there were leaderships in regional states (ruled by political parties that were members or affiliates of the EPRDF) that attempted to challenge the reform and resist the enforcement of federal laws. An example in this regard is the former president of the Regional State of Somali, who declined to investigate and prosecute the serious human rights violations that ravaged the region in August 2018, including killings,

¹⁴ SK Assefa (*supra* note 12) 285–289.

¹⁵ Gedion T. Hessebon and Abduletif K. Idris (*supra* note 12) 189; Yonatan T Fessha (2022), 'A Federation Without Federal Credentials: When Politics Trumps Law' in Abadir Ibrahim and Kokebe Wolde (eds), *Proceedings of a Convening of Scholars on Ethiopia's Constitutional Future* (Northwestern Roberta Buffett Institute for Global Affairs and Northwestern University Libraries, Evanston,) 145.

¹⁶ Zemelak Ayitenew Ayele, 'Ethiopia's "Unusual Constitutional Umpire": Revisiting the Role of the House of Federation' (*50 Shades of Federalism*, 20 July 2020) <<https://50shadesoffederalism.com/case-studies/ethiopias-unusual-constitutional-umpire-revisiting-the-role-of-the-house-of-federation/>> accessed 21 April 2024.

¹⁷ 'Ethiopia: Freedom in the World 2020 Country Report' (*Freedom House*) <<https://freedomhouse.org/country/ethiopia/freedom-world/2020>> accessed 13 November 2024; 'Ethiopia's Ruling Coalition Parties Merge to Form "Prosperity Party"' | *Africanews* <<https://www.africanews.com/2019/11/21/ethiopia-s-ruling-coalition-parties-merge-to-form-prosperity-party/>> accessed 13 November 2024.

torture, and rape.¹⁸ The incident finally resulted in the federal government's military intervention and the arrest of prominent officials, including Abdi Illey, who was then the president of the regional state.¹⁹

It is worth noting that the Prosperity Party, which replaced the EPRDF, currently controls government power at both the federal and state levels. The constitutional silence remains unresolved, and regional states have continued to investigate and prosecute CVIHR as matters of their own concern. However, the case of the Somali Regional State (in 2018) noted above lends credence to the assumption that this practice may persist only when both levels of government are controlled by a single party. Once one-party dominance ends, regional states may decline enforcing federal criminal laws on a range of grounds, including, for example, challenging the constitutionality of the arrangement. This, in turn, demonstrates the need to resolve the constitutional silence concerning the power to investigate and prosecute CVIHR.

If left unresolved, the constitutional silence has the potential to generate serious and interrelated consequences for the protection of human rights. Under such circumstances, as indicated above, regional states may fail to investigate and prosecute CVIHR when one-party dominance is no longer in place. This will foster an environment where impunity may prevail, as neither the federal government nor the regional states can be held accountable for their failure to investigate and prosecute human rights violations. Furthermore, where the Constitution does not clearly identify which level of government is responsible for investigating and prosecuting human rights violations, victims may be left without effective avenues to seek remedies for

¹⁸ Salem Solomon, 'Upheaval in Somali Region Tests Ethiopian PM's Ability to Unify' (VOA) <<https://www.voanews.com/a/upheaval-in-somali-region-tests-ethiopian-prime-minister-ability-to-unify/4523343.html>> accessed 10 October 2022; AfricaNews, 'President of Ethiopia's Somali Region Resigns, Federal Forces Deployed' (*Africanews*, 6 August 2018) <<https://www.africanews.com/2018/08/06/ethiopia-s-somali-region-president-resigns-federal-security-deployed/>> accessed 10 October 2022.

¹⁹ Yonatan Fessha (2018). 'Secessionism, Federalism and Constitutionalism in Ethiopia'. *VerfBlog*, 2018/8/15 .https://intrechtdok.de/receive/mir_mods_00003952
DOI: <https://doi.org/10.17176/20180815-104744-0>
Salem Solomon, 'Upheaval in Somali Region Tests Ethiopian PM's Ability to Unify' <<https://www.voanews.com/a/upheaval-in-somali-region-tests-ethiopian-prime-minister-ability-to-unify/4523343.html>>;
AfricaNews, 'President of Ethiopia's Somali Region Resigns, Federal Forces Deployed' (*Africanews*, 6 August 2018) <<https://www.africanews.com/2018/08/06/ethiopia-s-somali-region-president-resigns-federal-security-deployed/>> accessed 2 October 2024.

the human rights violations they have suffered. This entails a breach of Ethiopia's international obligations to uphold the right to an effective remedy, as outlined in ratified international human rights treaties, such as the ICCPR and the CAT.²⁰

Ethiopia is bound under international law to give effect to the provisions of ratified treaties at both the federal and regional state levels. This obligation is expressly affirmed in the ICCPR, which provides that its provisions apply to all parts of a federal state without any limitation or exception. As the Human Rights Committee has explained, this flows from the principle contained in Article 27 of the Vienna Convention on the Law of Treaties, according to which a state party's domestic law may not be invoked as justification for failure to perform a treaty obligation (Human Rights Committee, 'General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant Adopted on 29 March 2004 (2187th Meeting)' Para 4.). Accordingly, the federal government of Ethiopia may not attribute its failure to investigate and prosecute CVIHR (at the regional state level) to the silence of the FDRE Constitution regarding which level of government is responsible for carrying out these tasks.

3. The Division of Power to Investigate and Prosecute CVIHR in Practice

Essentially, the current framework under which states assume responsibility for investigating and prosecuting most CVIHR originates from the Transitional Period (1991–1995), which followed the removal of the Derg regime from power. During this period, subject matters were allocated between the tiers of government established at the time – the Central Transitional Government and the self-governing units (National/Regional Transitional Self-Governments). Crimes such as homicide, assault, and abduction listed in the Penal Code (later amended in 2004 by the Criminal Code), which the Central Transitional Government relied on to implement international human rights treaties,²¹ were investigated and prosecuted by the self-governing units. On the other hand, some grave crimes provided under the Penal Code, including treason, espionage, and hijacking, as well as international crimes such as genocide and torture, fell under the exclusive

²⁰ ICCPR, Art. 2(3); The CAT Art. 14(1).

²¹ See, for example, Committee on the Rights of the Child, 'Initial Reports of States Parties Due in 1993, Addendum, Ethiopia' para 223.

jurisdiction of the Central Transitional Government.²² The self-governing units could investigate and prosecute these crimes only when they were delegated to do so by the Central Transitional Government.²³

With the end of the Transitional Period and entry into force of the FDRE Constitution in 1995, the investigation and prosecution of CVIHR (previously carried out by the self-governing units) have become the responsibilities of the regional states established under the federal system. There is no doubt that this approach was adopted based on lessons drawn from the arrangement during the Transitional Period. The preparatory works of the Constitution also indicate that the Constitutional Commission, which drafted the Constitution, highlighted that its provisions should be framed with reference to the design set out in the Transitional Charter.²⁴

In fact, the number of CVIHR that regional states investigate and prosecute, either as a matter of their own concern or by federal delegation, has increased since then. This is due to (i) the enactment of the Criminal Code in 2004 – which repealed the Penal Code of 1957 and introduced new offences, including crimes committed through harmful traditional practices (Articles 561–570) – and (ii) the enactment of separate legislation criminalising human rights violations, such as the Anti-Trafficking and Smuggling Proclamation.

The key constitutional provision that shaped the current arrangement concerning the division of power to address CVIHR is Article 55(1) (which grants the federal government authority to legislate on matters within federal jurisdiction). The allocation of such power between the levels of government is based on the interpretation of laws enacted by the federal parliament in accordance with the authority conferred on it by this provision. These laws define the powers of the law enforcement institutions (the Federal Police and the Ministry of Justice) which are responsible for the investigation and prosecution of crimes outlined in federal legislation, respectively, and federal courts.²⁵

²² A Proclamation to Provide for the Establishment of the Office of the Central Attorney General of the Transitional Government of Ethiopia, Proclamation No. 39/1993 Art.10; Read also, Marshet Tadesse Tessema (2018), *Prosecution of Politicide in Ethiopia: The Red Terror Trials*, Vol 18 (TMC Asser Press) 159.

²³ Id., Proclamation No. 39/1993, Art. 22

²⁴ ‘Minutes of the Constitutional Commission, Vol 2 (November 1, 1993–April 5, 1994)’ 155.

²⁵ The laws are, respectively, *Ethiopian Federal Police Commission Establishment Proclamation No. 720/2011* (‘Proclamation No. 720/2011’); *A Proclamation to Provide for the Establishment of the Attorney General of the Federal Democratic Republic of Ethiopia, Proclamation No. 943/2016* (‘Proclamation No. 943/2016’); and

The laws referred to above that define the powers of federal law enforcement institutions do not specify the crimes these institutions are responsible for investigating and prosecuting. Instead, they stipulate that the institutions have the power to investigate and prosecute crimes that fall within the jurisdiction of federal courts.²⁶ This entails that crimes outside the jurisdiction of federal courts will fall within the jurisdiction of regional state courts and will be investigated and prosecuted by regional states when they occur within their administrative boundaries. To determine which crimes can be investigated and prosecuted by federal law enforcement institutions, one must, therefore, identify the scope of the criminal jurisdiction of federal courts.

3.1 Three grounds of federal jurisdiction under Proclamation No. 1234/2021

The legislation defining the jurisdiction of federal courts (Proclamation No. 1234/2021), hereafter ‘the Proclamation’), under Article 3(1), entrusts federal courts with both civil and criminal jurisdiction over (i) cases arising under the FDRE Constitution, federal laws, and international treaties ratified by Ethiopia; (ii) parties specified in federal laws; and (iii) places specified in the Constitution or by federal law.²⁷ Hence, as examined below, federal jurisdiction is determined based three grounds: i.e., the identity of the parties involved, and the places where the cases originate, and the substantive laws from which cases arise.

Parties specified in federal laws

Proclamation No. 1234/2021 provides that if either the accused or the victim is a foreign national, federal courts will have jurisdiction over the case.²⁸ However, this cannot be considered as the only ground because federal jurisdiction will be exercised subject to international diplomatic laws and customs as well as other international agreements to which Ethiopia is a party.²⁹ Moreover, federal courts exercise jurisdiction over criminal cases

Federal Courts Proclamation No. 1234/2021 (‘Proclamation No. 1234/2021’). It is stated in the preambles of these laws that they were enacted in accordance with Article 55(1) of the FDRE Constitution.

²⁶ Proclamation No. 720/2011 Art.6(4); Proclamation No. 943/2016 Art.6(3).

²⁷ The provision does not specify whether the three grounds establishing federal jurisdiction apply to both civil and criminal matters. However, the separate listing of criminal and civil jurisdictions under Articles 4 and 5, respectively, suggests that the provision encompasses both.

²⁸ Proclamation No. 1234/2021, Articles 13 and 14.

²⁹ *Id.*, Art. 4(6).

committed by officials or employees of the federal government in connection with their official responsibilities.³⁰

Places specified in the Constitution or federal laws

The places specified in the federal laws are Addis Ababa and Dire Dawa.³¹ Accordingly, federal courts will exercise jurisdiction over criminal cases arising under federal laws that are committed in these places.³²

Cases arising under the FDRE Constitution, federal laws, and international treaties ratified by Ethiopia

According to Article 3(1)(i), federal courts have jurisdiction over cases that arise under the FDRE Constitution, federal laws, or the ratified international treaties. Cases arising under the Constitution refer to cases that involve violations of the Constitution.³³ Accordingly, if a crime violates the FDRE Constitution, it falls within the jurisdiction of federal courts.³⁴ However, this provision seems redundant in establishing federal jurisdiction over cases arising under the Constitution since acts that violate the Constitution are already criminalised under federal laws, including the Criminal Code.³⁵ Cases arising under federal laws, including the Criminal Code, as mentioned in the same provision fall within the jurisdiction of federal courts.

Exercising jurisdiction over cases arising under ‘federal laws’ means that federal courts have the authority to adjudicate criminal cases arising under all federal laws, including the Criminal Code and specific legislation enacted by the federal government to implement international treaties such as the UN Trafficking Protocol.³⁶ Hence, the provision entrusts federal courts to exercise jurisdiction over CVIHR listed under federal laws.

As indicated above, federal courts have jurisdiction over cases arising under international treaties based on Article 3(1)(i). One issue this provision raises is whether provisions relating to crimes under international human rights treaties can be applied by courts, regardless of whether they have been incorporated into domestic law. For example, the Committee against Torture,

³⁰ Id., Art. 4(14).

³¹ Id., Articles 12(2), and 15(2).

³² SK Assefa (*supra* note 12) 285.

³³ Ibid.

³⁴ Ibid.

³⁵ The Criminal Code has a special section that deals with "Crimes against the Constitutional Order and the Internal Security of the State (Articles 238-243), which criminalises, for example, armed rising or civil war (Article 240) and attacks on the political or territorial integrity of the state (Article 241).

³⁶ Proclamation No. 1234/2021 Art. 2(2).

in reviewing Ethiopia's progress in implementing the CAT, expressed concern over the definition of torture used in the Criminal Code. In the Committee's assessment, the definition of torture in Article 424 of the Criminal Code is more limited in scope than the definition of torture in Article 1 of the CAT.

Under the Criminal Code, torture applies only to acts committed by public servants who are in charge of specific tasks connected to law enforcement, such as arrest, custody, and supervision, whereas in the CAT, torture applies to acts inflicted by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity.³⁷ The concern calls into question whether federal courts can apply the above definition of the CAT directly in criminal cases involving torture. To answer the question, it is essential to analyse the constitutional provisions regarding the incorporation and application of ratified international treaties in the domestic laws of Ethiopia.

Article 9(4) of the FDRE Constitution provides that ratified international treaties are integral parts of the laws of Ethiopia. This resembles the monist system of incorporating international law into the domestic legal system. In such systems, international treaties may take automatic effect in domestic law without the need for legislative implementation.³⁸ France, Germany, Switzerland, Netherlands, Brazil, and United States can be cited as examples that exhibit monist traditions.³⁹ The constitution of the United States provides that all treaties made, or which shall be made, are the supreme law of the land, and judges in all the States are bound by the treaties made.⁴⁰

Monist systems are contrasted with dualist systems, in which treaties do not have direct effect within the domestic legal order unless they are incorporated through legislation.⁴¹ In states that primarily follow the dualist

³⁷ Committee against Torture, 'Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Concluding Observations of the Committee against Torture' Para 9 <<https://www.refworld.org/policy/polrec/cat/2011/en/77794>>.

³⁸ Cheryl Saunders (2020), *Constitutions and International Law* (IDEA) 4; Brian R Opeskin (1996), 'Federal States in the International Legal Order' 43 *Netherlands International Law Review* 353, 353.

³⁹ Christopher Harland (2000), 'The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State Parties: An Initial Global Survey Through UN Human Rights Committee Documents' 22 *Human Rights Quarterly* 187, 207–236.

⁴⁰ The Constitution of the United States Article VI.

⁴¹ Saunders (*supra* note 38) 4; Opeskin (*supra* note 38) 353; Stefan Oeter, 'International Human Rights and National Sovereignty in Federal Systems: The German Experience' (2001) 47 *Wayne Law Review* 877; Aparna Chandra, 'India and International Law: Formal Dualism, Functional Monism' (2017) 57 *Indian Journal of International Law*

model, such as the United Kingdom, Australia, Canada, and India, ratified treaties have no binding force in domestic courts unless they are transformed into domestic law through an act of Parliament.⁴²

However, the direct application of international treaties in the monist states typically occurs when their provisions are self-executing. As Jeffrey L Friesen elaborated, the above constitutional rule of the United States applies to self-executing treaties.⁴³ Likewise, a treaty will not be regarded as part of domestic law in Switzerland unless the rules it establishes are precise and directly applicable to citizens.⁴⁴ In Germany, international treaties can be invoked in court by litigants if the treaties in question are self-executing in nature.⁴⁵ When the treaty provisions are not self-executing, i.e., if the direct application of the treaties proves difficult because, for example, the provisions of the treaty have become too general or vague, these states implement the treaties through legislation.⁴⁶

In Ethiopia, ratified international treaties are rarely applied directly in court cases.⁴⁷ The criminal provisions of international treaties, such as the CAT, are rarely cited in criminal cases decided by federal courts. The courts seem to have held the position that international treaties are not directly applicable unless their full text is published in the Federal Negarit Gazette.⁴⁸ So far, the

25, 30 <<http://link.springer.com/10.1007/s40901-017-0069-0>> accessed 1 October 2024.

⁴² John H Jackson (1992), 'Status of Treaties in Domestic Legal Systems: A Policy Analysis' 86 *American Journal of International Law* 310, 319; Pierre-Hugues Verdier and Mila Versteeg (2017), 'Modes of Domestic Incorporation of International Law' in Wayne Sandholtz and Christopher A Whytock (eds), *Research Handbook on the Politics of International Law* (Edward Elgar Publishing) 158.

⁴³ Jeffrey L Friesen (1994), 'The Distribution of Treaty-Implementing Powers in Constitutional Federations: Thoughts on the American and Canadian Models', 94 *Columbia Law Review* 1415.

⁴⁴ Opeskin (*supra* note 38) 356.

⁴⁵ Harland (*supra* note 39) 220.

⁴⁶ Martin F Polaschek, 'Implementation of International and Supra-National Law by Sub-National Units (Work Sessions 3 and 15)' in Raoul Blindenbacher and Arnold Koller (eds), *Federalism in a Changing World* (McGill-Queen's University Press 2003) 300.

⁴⁷ Getachew A Woldemariam, 'The Place of International Law in the Ethiopian Legal System' in Zeray Yihdego, Melaku Geboye Desta and Fikremarkos Merso (eds), *Ethiopian Yearbook of International Law 2016* (Springer International Publishing 2017) 87; Takele Soboka Bulto (2009), 'The Monist-Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia' 23 *Journal of Ethiopian Law* 149.

⁴⁸ Sisay Alemahu Yeshanew (2008), 'The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia', *African Human Rights Law Journal* 287.

federal government has never published the full texts of international treaties in the Federal Negarit Gazeta.⁴⁹

This article will not analyse the constitutionality of the courts' stance in declining to apply treaties that have not been published in the Federal Negarit Gazeta, as the issue falls outside its scope. However, it can be noted that the issue has arisen mainly because the Constitution does not clearly indicate the mode of application of ratified international treaties. As it currently stands, the Constitution does not specify whether courts can apply self-executing treaties even if they have not been incorporated into domestic law. It also remains unclear whether treaties must be incorporated into Ethiopia's domestic laws or whether they should be officially published to be enforceable by the courts.

Hence, the provision in the Proclamation granting federal courts criminal jurisdiction over cases arising under international treaties appears futile, given the ongoing ambiguity surrounding the application of such treaties. Courts apply only those provisions of international treaties that have been incorporated into domestic law through legislation.⁵⁰ As explained above, the federal parliament has so far implemented international treaties requiring criminalisation by relying on the 2004 Criminal Code, and, in other instances, by enacting separate legislation that incorporates criminal provisions – one such example being the Anti-Trafficking and Smuggling Proclamation.

3.2 Uncertainty as to whether federal court jurisdiction is exclusive

Article 3 of Proclamation No. 1234/2021 does not mention whether the jurisdiction exercised by federal courts on the three grounds highlighted above is exclusive. However, in practice, all crimes arising under federal laws, including those incorporating CVIHR, and committed within federal territories fall under the exclusive jurisdiction of federal courts.⁵¹ Federal courts also exercise exclusive jurisdiction over federal crimes committed by officials or employees of the federal government in connection with their official duties, as well as crimes involving foreign nationals. They adjudicate such cases regardless of whether the crimes are committed within federal territories or in the regional states.⁵²

⁴⁹ Woldemariam (*supra* note 47) 76.

⁵⁰ To analyse the limited instances where international treaties in general were cited in court cases, see Woldemariam (*supra* note 47) 86-89.

⁵¹ Kassa (*supra* note 13) 285; SK Assefa (*supra* note 12) 287.

⁵² Kassa, *Ibid*; SK Assefa, *Ibid*.

Moreover, federal courts exercise exclusive jurisdiction over crimes specifically listed under Article 4 of Proclamation No. 1234/2021, regardless of where they are committed.⁵³ The provision lists some serious crimes under federal laws (mainly the Criminal Code) that fall within the jurisdiction of federal courts. It reads:

Federal Courts shall have jurisdiction over the following criminal cases:

- 1) crimes against the national state,
- 2) crimes against foreign state,
- 3) crimes in violation of international laws,
- 4) crimes regarding the security and freedom of communication services operating in more than one region or at international level,
- 5) crimes against the safety of aviation...

The provision does not expressly state whether these crimes fall within the exclusive jurisdiction of federal courts. However, under the subsequent provisions, i.e., Articles 12 and 15 of the Proclamation, the Proclamation allocates these crimes to the federal High Court and the federal First Instance Courts, respectively. This, it was argued, indicates that the crimes are the exclusive powers of federal courts.⁵⁴ Yet, this argument may be questioned, as the provisions do not expressly indicate whether state courts are precluded from exercising jurisdiction over the crimes.

The listing of ‘crimes in violation of international law’ under Article 4(3) implies that federal courts have exclusive jurisdiction over certain serious CVIHR, including genocide. As defined in the Criminal Code, this category captures genocide (Article 269) and other serious violations of international law, including war crimes against the civilian population (Article 270) and crimes against humanitarian organisations (Articles 281–283).⁵⁵ Under the Criminal Code, torture is not included in the list of crimes deemed to violate international law. Instead, it is criminalised under Article 424, which, as previously noted, has been found by the CAT Committee to be inadequate in meeting the definition of torture under the CAT.

Nevertheless, in practice, the crime falls within the exclusive jurisdiction of federal courts.⁵⁶ In addition to the crimes listed under Article 4 of the Proclamation, federal courts in practice exercise exclusive jurisdiction over

⁵³ SK Assefa, id., 288; Kassa, Ibid.

⁵⁴ Kassa, Id., 283.

⁵⁵ The Criminal Code of Ethiopia Articles 269-283.

⁵⁶ Tessema (*supra* note 22) 6.

crimes regulated by separate legislation, including human trafficking. This is, for example, explicitly stated in the Anti-Trafficking and Smuggling Proclamation. This law grants the power to handle human trafficking cases solely to the federal First Instance Court.⁵⁷

Matters other than the above-mentioned criminal cases, which are under the exclusive jurisdiction of federal courts, are regarded as falling within the exclusive jurisdiction of regional state courts.⁵⁸ This has resulted in regional state courts exercising jurisdiction over the vast majority of CVIHR covered under the Criminal Code, such as crimes against life (Articles 538–544), crimes against persons and health (Articles 553–560), crimes committed against life, person, and health through harmful traditional practices (Articles 561–570), and injury to sexual liberty and chastity (Articles 620–628). Regional state courts exercise jurisdiction over these crimes when committed within their administrative boundaries as a matter of their own concern.⁵⁹ However, regional states do not exercise power over crimes that are within the exclusive jurisdiction of federal courts unless they are delegated by the federal government.⁶⁰

It is worth noting that the Proclamation, which shaped the division of judicial power between the levels of government, was enacted by the federal government pursuant to its authority under Article 55(1) of the Constitution to legislate on federal matters.⁶¹ Regional states are likewise conferred with similar authority; they have the power to enact legislation defining the judicial powers of state courts over state matters.⁶² As considered above, the Proclamation enacted by the federal government has been interpreted to confer judicial power on regional state courts over CVIHR listed under federal laws (i.e., federal criminal matters). The constitutionality of this arrangement is assessed in Section 4.

A conflict could arise between the Proclamation and a counterpart regional state law defining the jurisdiction of state courts if the latter were, for instance, to deny those courts the authority to exercise jurisdiction over CVIHR listed under federal laws. Such a scenario is conceivable, given that the Constitution does not explicitly empower regional states to adjudicate criminal cases arising under federal laws. Nevertheless, this has not occurred, as state laws

⁵⁷ The Anti-Trafficking and Smuggling Proclamation Art. 42.

⁵⁸ Kassa (*supra* note 13) 285; Fiseha (*supra* note 9) 447; Menberetshai Tadesse (2010), *Judicial Reform in Ethiopia* (PhD Dissertation, University of Birmingham) 49.

⁵⁹ Kassa, *Ibid*; Fiseha *Ibid*; Tadesse, *Ibid*.

⁶⁰ SK Assefa (*supra* note 12) 88; Kassa, *Ibid*.

⁶¹ Proclamation No. 1234/2021, Preamble, para 7.

⁶² FDRE Constitution Art. 50(5).

have thus far adhered to the allocation of judicial power established by the Proclamation. Under the laws of most regional states that define the jurisdiction of courts, it is provided that these courts have inherent jurisdiction to adjudicate crimes arising under the Criminal Code.⁶³ Regional state laws regard crimes falling under Article 4 of the Proclamation as matters within the exclusive jurisdiction of federal courts, allowing regional state courts to exercise jurisdiction over such crimes only when delegated by the federal government – thereby, in effect, complying with the division of powers established by the Proclamation.⁶⁴

3.3 The jurisdiction of federal and state law enforcement authorities over CVIHR

The division of power to investigate and prosecute CVIHR between the federal government and the regional states has followed the mode of power division between federal and regional state courts noted above that has developed in practice. Accordingly, the CVIHR that occur within federal territories are regarded as the exclusive domain of the federal government and are investigated and prosecuted by federal law enforcement institutions. CVIHR that are committed outside federal territories (within regional states) lie within the exclusive jurisdiction of the federal government if they relate to any of the serious crimes covered under Article 4 of the Proclamation, or are regulated by separate legislation, such as human trafficking. Regional states will not have the power to deal with these crimes unless they are delegated by the federal government.⁶⁵ However, if the crimes committed do not fall under Article 4 of the Proclamation or are not regulated by separate legislation, they will be investigated and prosecuted by the regional states concerned as matters of their own concern.⁶⁶

The law enforcement institutions of the federal government, the Federal Police and the Ministry of Justice, carry out the tasks of criminal investigation and prosecution, respectively, in a closely coordinated manner. When investigating crimes, the Federal Police is required to collaborate with the Ministry of Justice, which has the authority to initiate a criminal

⁶³ See, for example, *A Proclamation to Redefine the Structure, Powers and Functions of the Oromia Regional State Courts Proclamation No. 216/2018* Articles 30(2) & 31(3), and *The Amhara National Regional State Courts' Establishment (Re-Amendment) Proclamation No 169/2002*, Art.17.

⁶⁴ SK Assefa (*supra* note 12) 288–289.

⁶⁵ *Id.*, 288; Nigussie Afesha (2016), 'The Practice of Informal Changes to the Ethiopian Constitution in the Course of Application', 10 *Mizan Law Review* 395–396.

⁶⁶ SK Assefa (*supra* note 12) 288.

investigation.⁶⁷ Upon completing an investigation, the Federal Police submits the investigation report to the Ministry of Justice.⁶⁸ Based on the report, the Ministry of Justice files criminal charges with the competent court.⁶⁹

There have been cases in which the federal government investigated and prosecuted crimes falling within its exclusive authority, using its own institutions, without exercising the option to delegate the task to the regional states. The criminal charge against Abdi Illey serves as an example in this regard. In that case, the accused – Abdi Illey, former president of the Somali Regional State – was arrested for allegedly inciting ethnic-based violence that led to serious human rights violations, including the killing of several individuals in 2018.⁷⁰ He was charged with various crimes, including torture⁷¹ – a crime that, as discussed above, falls within the exclusive jurisdiction of the federal government. The incitement of ethnic-based violence, in which he was allegedly involved, is classified under the Criminal Code as a crime against the national state (Articles 238–260) and is also listed under Article 4(1) of Proclamation No. 1234/2021. The criminal case was investigated and prosecuted by federal authorities, and the charges were filed before the Federal High Court in Addis Ababa.⁷²

The federal government also did not use a delegation arrangement when pursuing the criminal case involving Demeke Zewdu, who was allegedly involved in collaborating with a terrorist group in North Gondar, in the Amhara Regional State, in 2016. The charge brought against him included terrorism, over which the federal government has exclusive authority to investigate and prosecute.⁷³ This case, too, was investigated and prosecuted

⁶⁷ Proclamation No. 720/2011 Art.6(2); Proclamation No. 943/2016 Art.6(3).

⁶⁸ Proclamation No. 943/2016 Art.6(3)(c).

⁶⁹ Id., Art. 6(3)(e).

⁷⁰ ‘Attorney General Office Says Investigations into August Jigjiga Violence Complete, Reveals Discovery of Mass Grave’ *Addis Standard* (25 January 2019) <<https://addisstandard.com/news-attorney-generals-office-says-investigations-into-august-jigjiga-violence-complete-reveals-discovery-of-mass-grave/>> accessed 31 October 2024.

⁷¹ Committee against Torture, ‘Second Periodic Report Submitted by Ethiopia Under Article 19 of the Convention, Due in 2014, CAT/C/ETH/2’ para 64.

⁷² ‘Ethiopia Charges Ex-Somali Region President, 46 Others with Inciting Violence’ *Addis Standard* (30 January 2019) <<https://addisstandard.com/news-ethiopia-charges-ex-somali-region-president-46-others-with-inciting-violence/>> accessed 25 March 2025.

⁷³ Prevention and Suppression of Terrorism Crimes Proclamation No.1176/2020 Articles 36 and 38.

by federal authorities and filed before the Federal High Court in Addis Ababa.⁷⁴

The option of delegation was not pursued by the federal government in the above cases. This seems to be due to the prevailing circumstances in the regional states of Somali and Amhara at the time. In the case of the Somali Regional State, it was likely difficult to rely on the regional state's law enforcement institutions, given the fragile security and political situation following the turmoil that led to the arrest of Abdi Illey and the appointment of an interim leader after federal forces intervened.⁷⁵

Similarly, the situation in the Amhara Regional State was not conducive to pursuing the case, as the area where the accused, Demeke Zewdu, was arrested was experiencing anti-government protests, and the regional state's security forces resisted the arrest.⁷⁶ This resistance escalated to the point where the public, with the support of the Amhara police, prevented the handover of the accused to federal authorities, resulting in the accused remaining in a regional state prison while the court hearing was conducted in Addis Ababa.⁷⁷

4. Assessing the Practice in Light of the Constitutional Text

Under Article 51(8) of the FDRE Constitution (which outlines the 'Powers and Functions of the Federal Government') the federal government is entrusted with broad authority concerning international treaties. The provision grants the federal government the power to 'formulate and implement foreign policy' as well as to 'negotiate and ratify international agreements.' As outlined above, the federal government has exclusive authority to legislate on federal matters outlined under Article 51, including those related to international treaties as specified in Article 51(8).

A careful reading of Article 51(8) also reveals that the federal government has the authority to exercise legislative, executive, and judicial powers with respect to international treaties. The power to implement foreign policy in the above provision is defined to include the negotiation and ratification of

⁷⁴ 'Ethiopia: Prosecutors File Terrorism Charges against Col.Demeke, Et Al' *ESAT* (28 December 2016) <<https://tesfanews.com/ethiopia-prosecutors-file-terrorism-charges-demeke-zewdu/>>.

⁷⁵ Yohannes Gedamu, 'What Ethiopia Needs Is a New Federal Arrangement' *Aljazeera* <https://www.aljazeera.com/opinions/2018/8/14/what-ethiopia-needs-is-a-new-federal-arrangement?utm_source=chatgpt.com> accessed 15 March 2025.

⁷⁶ 'Ethiopia: Prosecutors File Terrorism Charges against Col.Demeke, Et Al', *supra* note 74.

⁷⁷ *Ibid.*

international treaties. Since the term ‘foreign policy’ is widely understood as a concept encompassing matters associated with international treaties,⁷⁸ it is reasonable to conclude that the federal government’s duty to implement foreign policy includes accomplishing matters necessary for carrying out the obligations of the ratified treaties.

International treaties to which Ethiopia is a party, such as the Genocide Convention, the CAT, and the UN Trafficking Protocol, obligate Ethiopia to criminalise, investigate, and prosecute human rights violations.⁷⁹ Hence, the federal government’s power to implement foreign policy involves not only the legislative aspects but also its executive and judicial dimensions. This implies that the federal government, by virtue of Article 51(8), is entrusted with the exclusive power to execute federal legislation incorporating CVIHR, since its authority over matters listed under Article 51 is exclusive. In other words, Article 51(8) grants the federal government exclusive authority to investigate and prosecute CVIHR at both the federal and state levels.

It is apparent that the drafters of the Constitution derived insights from the arrangement in place during the Transitional Period when the above-noted division of powers concerning international treaties was designed.⁸⁰ Under Proclamation No. 7/1992, the self-governing units were granted legislative, executive, and judicial powers over all matters within their respective geographic areas, except those specifically reserved for the Central Transitional Government.⁸¹ This implied that the Central Transitional Government was vested with exclusive legislative, executive, and judicial authority over the matters explicitly reserved to it. Among these matters were international treaties, indicating that the Central Transitional Government, like the federal government that succeeded it, held exclusive authority to legislate and execute laws implementing such treaties.⁸²

Accordingly, the current arrangement which assigns to the regional states the responsibility to investigate and prosecute CVIHR is unconstitutional. As the above discussion has unveiled, the main source of the problem with the division of power in the current practice stems from the way the jurisdiction of federal courts has been interpreted under the provisions of the legislation

⁷⁸ Ahmad Ghouri (2021), ‘Democratizing Foreign Policy: Parliamentary Oversight of Treaty Ratification in Pakistan’. 42 *Statute Law Review* 137, 138.

⁷⁹ Convention on the Prevention and Punishment of the Crime of Genocide Art. V; The CAT Art.4; The UN Trafficking Protocol Art. 5.

⁸⁰ As highlighted earlier, the drafters of the Constitution took the position that its drafting should be informed by the experiences of the Transitional Period.

⁸¹ National/Regional Self-Governments Establishment Proclamation No.7/1992 Art. 9(1).

⁸² Transitional Period Charter of Ethiopia Art. 9(h).

(Proclamation) enacted by the federal government to determine the jurisdiction of federal courts.⁸³ As mentioned earlier, the federal government enacted the Proclamation to elaborate on its judicial authority over federal matters. The Proclamation assumes that crimes falling outside the jurisdiction of federal courts are non-federal matters. This has led the majority of CVIHR – except those listed under Article 4 of the Proclamation and separate legislation – to be regarded as falling within this category.

However, there is no convincing ground to consider only those crimes outlined under Article 4 of the Proclamation as federal matters. Article 55(1) of the Constitution vests the federal government with the power to legislate over federal matters. This implies that issues addressed by federal laws enacted pursuant to Article 55(1) are considered federal matters. In this context, CVIHR, which are incorporated into laws enacted by the federal government in accordance with Article 55(1), are also federal matters. Thus, the federal government lacks constitutional grounds to assume responsibility for investigating and prosecuting only certain crimes established under the Criminal Code (such as genocide and torture) by treating them as federal matters while leaving the majority of CVIHR to be handled by the regional states. The provisions of the Proclamation cannot be interpreted as allocating authority over the investigation and prosecution of CVIHR in this manner.

In this regard, a question may arise as to whether the constitutional obligation assumed by the levels of government under Article 13(1) extends to the investigation and prosecution of CVIHR. This provision reads: “All Federal and State legislative, executive, and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this Chapter (Chapter 3).” The FDRE Constitution does not elaborate on the scope of the obligations that the duty to respect and enforce human rights entails. However, Article 13(2) permits reference to international human rights instruments for the purpose of determining the content of the provisions in the human rights chapter of the FDRE Constitution, including Article 13(1).⁸⁴ The contents of the duties to respect and enforce human rights, as a result, can be interpreted by referring to international human rights instruments, such as the ICCPR.

⁸³ As previously discussed, the jurisdiction of federal law enforcement institutions and federal courts is interconnected, as federal law enforcement institutions are authorised to investigate and prosecute crimes that fall under the jurisdiction of federal courts.

⁸⁴ Article 13(2) provides: “The fundamental rights and freedoms specified in this chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights, and international instruments adopted by Ethiopia.”

It is established under international human rights law that *the duty to respect* requires states to refrain from interfering with the enjoyment of human rights.⁸⁵ *Enforcement*, on the other hand, encompasses measures to address violations, including investigating and prosecuting human rights violations.⁸⁶ Arguably, CVIHR incorporated under the Criminal Code are also intended to protect constitutionally guaranteed human rights.⁸⁷ Accordingly, the duty to enforce human rights, as outlined in Article 13(1) of the FDRE Constitution, encompasses the investigation and prosecution of CVIHR listed in the Criminal Code. As it has been argued above, however, the responsibility for investigating and prosecuting CVIHR is exclusively entrusted to the federal government. Hence, the duty to enforce human rights under Article 13(1) of the FDRE Constitution should not be interpreted as requiring regional states to investigate and prosecute CVIHR as matters of their own responsibility. Regional States should be obligated to carry out these tasks *only when they are delegated* to do so by the federal government.

Under the FDRE Constitution, regional states are entrusted with the power to establish and administer police forces and to maintain public order and peace within their administrative boundaries.⁸⁸ This suggests that, when regional states investigate and prosecute CVIHR under federal delegation, the power to define the administrative structures of law enforcement institutions lies with them. Basically, regional states do not carry out criminal investigations and prosecutions solely under federal delegation. They also have the authority to enforce criminal legislation enacted by the state legislature in respect of state matters.⁸⁹

⁸⁵ Human Rights Committee, 'General Comment No.36, Article 6: Right to Life' para 7 <<https://docs.un.org/en/ccpr/c/gc/36>>.

⁸⁶ 'Human Rights in the Administration of Justice' <https://hrlibrary.umn.edu/monitoring/adminchap15.html?utm_source=chatgpt.com> accessed 6 February 2026.

⁸⁷ CVIHR listed under the Criminal Code, as indicated in the preamble part of the Criminal Code, are also intended to protect constitutionally protected human rights. See, The Criminal Code of Ethiopia Preamble, para 1.

⁸⁸ FDRE Constitution Art. 52(2)(g).

⁸⁹ Under Article 55(5) of the FDRE Constitution, regional states are vested with the power to enact criminal laws on matters not specifically covered by federal criminal laws. This enables them to enact criminal laws with respect to state matters.

5. Assessing the Practice in Light of the Constitutional Intent

The preparatory works of the FDRE Constitution reveal that the issues concerning the division of power to execute federal laws in general, and federal laws incorporating CVIHR in particular, were explicitly discussed neither by the Constitutional Commission that drafted the Constitution nor by the Constituent Assembly that finally approved it. However, a critical examination of the constitutional provisions setting out the delegation of federal authority to regional states (Article 50(9) and Article 80), and other aspects of the FDRE Constitution, such as those defining the powers of the House of the Federation, along with their drafting histories, reveals the Constitution's intention to allocate the power of executing federal laws, including those incorporating CVIHR, exclusively to the federal government (as discussed in the following sub-sections).

5.1 The delegation of federal authority to regional states

The inclusion of Article 50(9) in the Constitution, which allows the federal government to delegate its authority to the regional states reinforces the earlier argument that the federal government has exclusive power to investigate and prosecute CVIHR. The constitutional provision authorises the federal government to delegate regional states to exercise the powers vested in it under Article 51 on its behalf. It reads: "The federal government may, when necessary, delegate to the states powers and functions granted to it by Article 51 of this Constitution."

Among the federal matters outlined in Article 51 that may be subject to delegation is the federal government's authority concerning international treaties provided under Article 51(8). I have argued in the earlier section that, under Article 51(8), the federal government is entrusted not only with the power to legislate for the implementation of treaties but also with the authority to exercise executive and judicial power over the laws implementing those treaties. This implies that, under Article 50(9), the federal government has the authority to delegate to the regional states the power to investigate and prosecute CVIHR arising from federal laws implementing international treaties, as well as to exercise judicial power over these crimes.

Under Article 78(2), the Constitution has specifically dealt with the delegation of federal judicial power over federal matters listed under Article 51 to the states.⁹⁰ The provision authorises the lower house of the federal

⁹⁰ Hence, one should observe that the delegation of federal judicial authority to the states concerning subject matters under Article 51 is addressed in Articles 50(9) and 78(2) of

parliament to establish the Federal High Court and Federal First Instance Courts nationwide or in some parts of the country only, as it deems necessary. It further stipulates that until decided in this manner, the jurisdictions of the Federal High Court and Federal First Instance Courts are delegated to the Regional State Supreme and High Courts, respectively. With this setup, regional state courts will exercise judicial power over cases arising under federal laws incorporating CVIHR through delegation since federal courts have jurisdiction over these cases under Article 51(8) of the Constitution.

The preparatory works of the Constitution reveal that, during the early stages of the drafting process, a proposal to establish a dual system of federal courts at both the federal and regional state levels was discussed by the Constitutional Commission.⁹¹ When they proposed this framework, the drafters were apparently influenced by the judicial arrangement introduced by Proclamation No. 40/1993, enacted by the Transitional Government, which was established immediately after the removal of the Derg regime in 1991.⁹² The law determined the jurisdictions of the three levels of courts of the Central Transitional Government: the Central Supreme Court, the Central High Court, and the Central First Instance Court.⁹³ To each of these levels of courts, there existed parallel courts of the self-governing units – the National/Regional Self-governments.⁹⁴

The proposal was ultimately rejected by the drafters since most members were sceptical of the federal government's ability to implement the arrangement given its limited resources. The secretary of the Constitutional Commission, Mr. Dawit Yohannes, for example, reminded the members that the Transitional Government could not establish central courts in all parts of the country due to resource constraints, though it was required by law to do so. He argued that the federal government to be established by the Constitution may face a similar challenge unless regional states are involved in adjudicating federal matters.⁹⁵ In the end, the Commission reached a

the Constitution. However, the latter cannot be regarded as redundant, as it provides specific details concerning the federal government's power of delegation.

⁹¹ 'Minutes of the Constitutional Commission, Vol 2 (November 1, 1993-April 5, 1994)', (supra note 24) 147–155.

⁹² KI Vibhute (2013), 'The Judicial System of Ethiopia: From Empire and Military Junta to Federal Democratic Republic'. 7 *Malawi Law Journal* 109.

⁹³ Central Government Courts Establishment Proclamation. No.40/1993.

⁹⁴ United States Institute of Peace, 'Ethiopia: Report of the Office of the Special Prosecutor' (1994) 14.

⁹⁵ 'Minutes of the Constitutional Commission, Vol 2 (November 1, 1993-April 5, 1994)', (supra note 24) 53.

consensus on inserting Article 78(2), which provides for the delegation of federal judicial authority to regional states.⁹⁶

In general, the drafters established a delegation arrangement under the Constitution (Articles 50(9) and 78(2)) primarily analysing the difficulties the federal government might face in setting up its own institutions nationwide to discharge its responsibilities under Article 51 – including the investigation and prosecution of CVIHR under Article 51(8), given the limited financial and human resources at its disposal.⁹⁷ The drafters' uncertainty about the federal government's capacity is understandable, especially given the far-reaching consequences the country endured during the nearly two decades of civil war prior to the EPRDF coming to power. The arrangement relieves the federal government of the substantial costs it would otherwise incur in executing its laws nationwide. This is because, in fulfilling its responsibilities under Article 51 through this arrangement, the federal government is not necessarily required to establish its own institutions across the country.

Clearly, the drafters' decision to include provisions in the Constitution allowing the delegation of federal authority to the regional states suggests that they envisioned the federal government as having exclusive power over matters outlined in Article 51, including the investigation and prosecution of CVIHR. They likely would not have devoted significant attention to providing this option to the federal government – out of concern for its capacity to establish institutions nationwide to carry out the above responsibilities – if they had viewed the regional states as responsible for discharging the above matters within their administrative boundaries.

On the other hand, Article 50(2) of the Constitution provides that the federal government and the regional states shall have legislative, executive, and judicial powers. This provision is widely understood within academic circles in Ethiopia to envisage the establishment of a dual system of institutions – legislative, executive, and judicial, at both the federal and regional state levels.⁹⁸ However, it is submitted that the provision should be read in line with Article 50(9). As indicated above, the federal government,

⁹⁶ Id., 154.

⁹⁷ Id., 153, 154; 'Minutes of the Constituent Assembly of Ethiopia, Vol 4 (November 1994)' 111.

⁹⁸ See, for example, Nigussie Afesha (2016), 'The Federal-State Intergovernmental Relationship in Ethiopia: Institutional Framework and Its Implication on State Autonomy', 9 *Mizan Law Review* 341, 343; Ayana Simachew Bekele (2019), 'The Enforcement of Federal Laws in States in Ethiopian Ethnic Federalism: The Deadlock between the Federal Government and the Tigray Regional State on the New Law of Boundaries and Identity Issues', 15 *European Scientific Journal* ESJ 24.

must (according to the constitutional intent) fulfil the responsibilities concerning matters under Article 51, such as the execution of federal laws incorporating CVIHR, exclusively through its own institutions. But this would be put into effect only when the federal government establishes institutions nationwide, overcoming the resource constraints that necessitated the inclusion of the delegation arrangement in the Constitution.

In connection with delegation, a key question that arises is whether regional states can decline requests from the federal government to deal with CVIHR on its behalf. Although Article 50(9) of the FDRE Constitution, as noted earlier, allows the federal government to resort to this option when it deems it necessary, the wording of the provision does not indicate whether regional states are obligated to accept such delegation or may decline it. This did not create difficulties in ensuring the execution of federal criminal laws in regional states during the EPRDF regime, presumably because government power at both the federal and regional state levels was controlled by a single party. However, this ambiguity may pose challenges when one-party dominance no longer exists.

Considering the rationale behind including a provision that authorises the federal government to delegate its constitutional responsibilities to the regional states, Article 50(9) of the Constitution can reasonably be interpreted as requiring regional states to accept federal requests to handle CVIHR on its behalf. As shown above, the drafters of the Constitution introduced the arrangement in recognition of resource constraints that the federal government might face when discharging its responsibilities nationwide using its institutions. Hence, interpreting the above constitutional provision as allowing regional states to decline federal delegation would defeat the very purpose for which the delegation arrangement was introduced. However, regional states should not be bound to accept federal delegation if the factors that led the drafters of the Constitution to introduce the arrangement no longer exists. Stated differently, once the federal government has set up its own institutions across the country to fulfill its responsibilities, regional states should be granted the discretion to accept or decline federal delegation.

The duty of a regional state to adjudicate cases involving CVIHR through federal delegation is unambiguous. This may be inferred from the wordings of Article 78(2) of the Constitution noted above which reads “...the jurisdictions of the Federal High Court and the First-Instance Courts are hereby delegated to the State courts.” This provision does not embody the discretion to reject federal delegation, and regional states are thus bound to accept such delegation and adjudicate CVIHR that fall within the jurisdiction of the Federal High Court and First-Instance Courts.

The authority of regional states to exercise judicial power on behalf of the federal government derives from Article 78(2) of the Constitution. This allows regional state courts to decide criminal cases concerning CVIHR on behalf of federal courts without establishing an agency relationship with the federal government. This differs from the exercise of delegated authority by regional states to investigate and prosecute CVIHR under Article 50(9), in which case the regional states' power derives from the agency relationship they established with the federal government. In such cases, regional states may not automatically exercise authority over CVIHR unless they receive a request from the federal government by way of delegation.

Moreover, it is implicit in Article 78(2) that the regional state courts will not be bound to exercise the jurisdiction of federal courts once such courts are established within their administrative boundaries. The same holds true for the delegation of federal power to investigate and prosecute CVIHR. As argued above, regional states have the discretion to either continue or terminate the agency relationship once federal law enforcement institutions are set up within their administrative boundaries. However, the decision to establish the institutions in such cases rests with the federal government. Unlike the case under Article 78(2) concerning the judiciary, the federal parliament is not involved in making this decision.

The FDRE Constitution has provided details regarding the delegation of the federal government's judicial power, in the sense that it has distinguished the specific jurisdictions which the regional state Supreme and High Courts can exercise through delegation.⁹⁹ This is not the case in so far as the delegation of the executive powers of the federal government is concerned. It has not, for example, specified how the federal government should delegate (to the regional states) the power to execute federal laws.

Although the FDRE Constitution has set out (in a general manner) the powers of the executive branch of the federal government, it has left details relating to the organisational structure and functions of the ministries to be determined by the laws of the federal parliament.¹⁰⁰ It thus appears that the mode of federal delegation to regional states for investigating and prosecuting CVIHR is left to be regulated by such laws.¹⁰¹ In practice, the Ministry of

⁹⁹ As has been already noted, the State High Courts and Supreme Courts will, through delegation, exercise the jurisdictions of the federal first Instance Court, and the federal High Court respectively.

¹⁰⁰ The federal Parliament approves the bill presented by the Council of Ministers incorporating the organisational structure and functions of Ministries (Read Article 77(2) and 77(11)) of the FDRE Constitution.

¹⁰¹ Afesha (*supra* note 65) 395.

Justice delegates its counterpart organ in the regional states to prosecute crimes on its behalf through a letter.¹⁰² This formality was followed despite the absence of a clear provision in the legislation that established the Ministry of Justice to guide how the delegation should be made.

The drafters of the FDRE Constitution emulated the approach followed during the transitional period in choosing to make matters concerning the organisation and functions of the law enforcement institutions of the federal government a non-constitutional matter. The organisation of the public prosecution department during the transitional period was not regulated by the Transitional Charter. It was, instead, explained under Proclamation No. 39/1993 of the Central Government. The law established the Office of the Central Attorney General, which was designed to operate both at the central and constituent unit levels.¹⁰³

At the centre, the prosecution task was to be handled by the Central Office of the Attorney General, headed by the Attorney General and the Deputy Attorney General.¹⁰⁴ At the constituent level, the Office was to pursue criminal cases through the Central Regional Attorney and Central Zonal Attorney.¹⁰⁵ Yet, as noted above, this arrangement was not fully put into practice due to the acute shortage of resources. The FDRE Constitution has moved a step forward in terms of clearly providing a provision that deals with delegation.

In this regard, it should also be noted that, as Article 50(9) clearly indicates, delegation applies only in respect of subject matters listed under Article 51. Consequently, while the federal government may delegate the regional states to exercise its legislative power listed in Article 51(21) (that refers to the possession and bearing of arms), it cannot delegate to them the exercise of its legislative power regarding issues such as labour law stated in Article 55(3). This appears to be unreasonable, as it is difficult to understand the rationale behind putting such limits on the federal government's power of delegation. The drafters of the Constitution also did not justify the purpose of such restriction.

¹⁰² *Id.*, 396.

¹⁰³ Proclamation No. 39/1993, Art. 4(1).

¹⁰⁴ *Id.*, Art. 9.

¹⁰⁵ *Id.*, Art. 13.

5.2 The powers of the House of the Federation in the law-making process

The other aspect of the Constitution that signals the drafters' intention to entrust the federal government with exclusive authority to investigate and prosecute CVIHR relates to the provisions outlining the powers of the House of the Federation, the Second Chamber of the federal parliament. As observed above, the House of the Federation does not involve in the legislative process. In many federal States where constituent units assume the obligation to execute the central legislation, the Constitutions entitle the second chambers, comprising the representatives of the constituent units, to participate in the central legislative process. In states such as Germany and South Africa, for example, the consent of the second chamber is decisive for bringing legislation with federal implications into existence.¹⁰⁶ Getting the input of the constituent units by involving them in the central law-making process is desirable as they are the ultimate implementers of the laws.¹⁰⁷

The drafters of the FDRE Constitution did not aim to achieve this end while establishing the House of the Federation. The House's main responsibility, as it stands now, is to safeguard the interests of the nations, nationalities, and peoples that it represents. The drafters believed that the lower house may encroach on the interests of ethnic groups unless its activities are checked by an entity that represents the ethnic groups.¹⁰⁸ They did not, however, consider that the House of the Federation could play this role by scrutinising and revising legislation proposed by the lower house. A bill may be passed into law without getting the approval of the House of the Federation. In the opinion of the drafters, the interests of the ethnic groups could be best protected if the House of the Federation wielded powers such as acting as the ultimate arbiter of claims of the ethnic groups to self-determination, constitutional issues, and disputes between the federal government and regional states.¹⁰⁹

¹⁰⁶ Johanne Poirier and Cheryl Saunders, 'Conclusion: Comparative Experiences of Intergovernmental Relations in Federal Systems' in Johanne Poirier, Cheryl Saunders and John Kincaid (eds), *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (Oxford University Press, 2015) 440.

¹⁰⁷ Thomas O. Hueglin and Alan Fenna (2015), *Comparative Federalism: A Systematic Inquiry* (University of Toronto Press) 136.

¹⁰⁸ The drafters, in fact, did not discuss how such encroachment may occur.

¹⁰⁹ 'Minutes of the Constituent Assembly of Ethiopia, Vol 5 (November 1994)' 5.

6. Addressing the Constitutional Silence

As mentioned earlier, the Constitution's silence regarding the responsibility for investigating and prosecuting CVIHR presents challenges in protecting human rights. The situation makes it difficult to hold regional states accountable for failing to investigate and prosecute the human rights violations sustained by individuals. This in turn leads to a breach of the right to effective remedy guaranteed to individuals under international human rights treaties ratified by Ethiopia such as the ICCPR.

Thus, the Constitutional silence should be addressed through constitutional change. As I argued in the preceding discussions, the federal government has exclusive responsibility to investigate and prosecute CVIHR. Accordingly, constitutional change should reflect this mode of division of power. That is, the constitutional change should be undertaken to vest exclusive responsibility in the federal government to investigate and prosecute CVIHR.

There are two methods through which the Constitution may be altered: constitutional *amendment* and constitutional *interpretation*. To determine which modality can be used to address the constitutional silence, it is essential to examine the provisions of the Constitution outlining these methods. Moreover, given that the federal government has exclusive responsibility under the Constitution to give effect to international treaties, it is submitted that it should take the lead in initiating the constitutional change. This aligns with the views of the Human Rights Committee, which has held that federal authorities must take all necessary measures to ensure that the provisions of the ICCPR are fully applicable throughout their territory.¹¹⁰

Under the amendment procedures of the FDRE Constitution, a proposal for a constitutional amendment is first presented for approval to either of the two houses of the federal parliament – the House of People's Representatives or the House of the Federation, or state legislatures.¹¹¹ The Constitution does not place restrictions on who may submit proposals for constitutional amendment. This suggests that a proposal by the federal government to amend the Constitution, aimed at addressing the constitutional silence concerning the power to investigate and prosecute CVIHR, may be examined by either the federal or regional state legislatures. If such proposal is “supported by a two-thirds majority vote in the House of Peoples' Representatives, or by a two-thirds majority vote in the House of the Federation” or when one-third of the regional state legislatures, by a majority vote, support it, “it shall be submitted

¹¹⁰ The Human Rights Committee, ‘Fact Sheet No. 15 (Rev.1)’ 9.

¹¹¹ FDRE Constitution Read, Articles 104 and 105.

for discussion and decision to the public and to those whom the amendment of the constitution concerns.”¹¹²

The amendment proposed by the federal government will be voted on by the two houses of the federal parliament and the state legislatures. The number of votes needed for an amendment differs if the proposed amendment relates to Chapter 3 (human rights) and other provisions. The amendment of any provision under Chapter 3 needs the approval of each House of the federal parliament with a two-thirds majority vote and by all state legislatures with a majority vote.¹¹³ In other cases, such as those proposing changes to the constitutional division of power concerning CVIHR, an amendment can occur if the two houses of the federal parliament, in a joint session, approve the proposed amendment by a two-thirds majority vote, and two-thirds of the regional state legislatures support it with a majority vote.¹¹⁴

Unlike a constitutional amendment, which involves both houses of the federal parliament, regional state legislatures, and the public, constitutional interpretation is carried out solely by the House of the Federation. Constitutional interpretation, which is equated in the Constitution with the resolution of constitutional disputes, is concerned with the determination of the constitutionality of laws passed by the legislative branches of the federal government or regional states (which is commonly referred to as "constitutional review").¹¹⁵

The Constitution provides that requests for constitutional interpretation may be submitted by courts or interested parties.¹¹⁶ The law passed by the federal government that elaborates the powers of the FDRE Council of

¹¹² Id., Art.104.

This provision has left several questions unanswered. It is not clear in the provision, for example, whether the word 'public' refers to the Ethiopian people as a whole or those residing within federal territories. Besides, how does the public decide? What number of votes are needed if, for example, the public must decide on a referendum? Who determines which section of the society is affected by the constitutional amendment regarding the power to investigate and prosecute CVIHR? These and other related issues have not been clarified through practice, as the Constitution has never undergone formal amendment. It remains to be seen whether these issues will be resolved through legislation.

¹¹³ Id., Art. 105(1).

¹¹⁴ Id., Art. 105(2).

¹¹⁵ Id., Art.83, Art.84(2); Tom Ginsburg and Mila Versteeg, 'Models of Constitutional Review' in Lee Epstein and others (eds), *The Oxford Handbook of Comparative Judicial Behaviour* (1st edn, Oxford University Press, 2024) 46.

¹¹⁶ FDRE Constitution Art.84(2). As the Amharic version of Article 84(2) suggests, interested parties, at the very least, include the disputing parties in the case.

Constitutional Inquiry (CCI) has further expanded the jurisdiction of the House of the Federation. According to the said law, the House may, in addition to cases referred to it by courts or interested parties, consider non-justiciable matters that do not involve disputing parties.¹¹⁷ However, the legal standing to submit such types of applications is reserved for members of the federal and regional state legislatures and executive organs.¹¹⁸ Accordingly, the federal government (the federal executive) may request the House of the Federation to clarify, through constitutional interpretation, which level of government is responsible under the Constitution for investigating and prosecuting CVIHR within the states.

But a question may arise as to whether the constitutional silence regarding the issue under consideration may be resolved through constitutional interpretation. It is unclear under the Constitution whether constitutional interpretation, in addition to constitutional review, includes the determination of the meaning, content, and scope of constitutional provisions.¹¹⁹ The Constitution also does not indicate whether the process involves resolving an issue not expressly regulated by the Constitution, such as the division of power to investigate and prosecute CVIHR. In practice, however, issues of the latter type are dealt with by the House of the Federation. In COVID-19-related case, for example, the House was requested to determine how government power could be exercised after the expiry of the term of office of the members of the federal and state parliaments in September 2020.¹²⁰ The question arose because the sixth national election, scheduled for August 2020, was postponed by the

¹¹⁷ Council of Constitutional Inquiry Proclamation No.798/2013 Art.3(2)(c).

¹¹⁸ Ibid.

¹¹⁹ Some scholars, including Yonatan Fessha, argued that within the meaning of Article 84, the House's power of constitutional interpretation comprises the power to determine the meaning, content, and scope of constitutional provisions. Read, Yonatan Tesfaye Fessha, 'Whose Power Is It Anyway: The Courts and Constitutional Interpretation in Ethiopia' 134

<<http://ejol.aau.edu.et/index.php/JEL/article/view/7982>>.

For further analysis of the issue, see, Getachew Assefa (2010), 'All about Words: Discovering the Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation', 24 *Journal of Ethiopian Law*.

¹²⁰ Council of Constitutional Inquiry of the FDRE, 'Recommendation on the Request of the FDRE House of Peoples' Representatives for Constitutional Interpretation Submitted to the Council of Constitutional Inquiry Regarding the Impact of the COVID-19 Pandemic on the 6th General National Election'.

National Election Board until the pandemic was controlled.¹²¹ The House extended the term of office of the members of the parliaments despite the absence of an explicit constitutional provision that regulates the issue.¹²²

The foregoing analysis generally indicates that both mechanisms of constitutional change established by the FDRE Constitution – constitutional amendment and constitutional interpretation – may be used to address the Constitution’s silence regarding the division of power over CVIHR. However, the federal government should use constitutional amendment rather than constitutional interpretation, as the likelihood of achieving the intended change is greater through amendment because it enables altering the Constitution to assign to the federal government the exclusive power to investigate and prosecute CVIHR.

As observed above, the decision to approve the proposed constitutional amendment rests on the federal and regional state legislatures. The federal government’s influence on the decision will be significant, as political power is held by a political party or coalition with a majority in parliament. This influence is particularly strong when a single party assumes government power at both the federal and regional state levels. During constitutional interpretation, however, the federal government’s influence on the outcome is lower, as the process is handled by the House of the Federation, an institution composed, at least in theory, of representatives of ethnic groups rather than political parties.

7. Conclusion

The FDRE Constitution lacks an express provision allocating responsibility for the investigation and prosecution of CVIHR between the federal government and the regional states. This article has assessed which level of government, according to the constitutional text and intent, bears the responsibility to carry out these tasks and has explored the mechanisms under the Constitution for addressing this constitutional silence. The assessment is essential, as regional states may question whether they are required under the

¹²¹ ‘Ethiopia Postpones August Election Due to Coronavirus | Reuters’
<<https://www.reuters.com/article/us-ethiopia-election-idUSKBN21I2QU/>> accessed 28 January 2025.

¹²² ‘Ethiopia Extends PM and Lawmakers’ Terms after Elections Postponed’
<<https://news.cgtn.com/news/2020-06-11/Ethiopia-extends-PM-and-lawmakers-terms-after-elections-postponed-RewOTIWsx2/index.html>> accessed 28 January 2025.

Constitution to perform these tasks under contexts where one-party dominance does not exist.

As it has been argued, the failure to resolve constitutional silence may hinder the protection of human rights, as it entails the denial of remedies for violations suffered by individuals thereby contributing to the persistence of impunity. This, in turn, places Ethiopia in breach of the right to an effective remedy guaranteed under the ratified international human rights treaties. Besides, the constitutional silence makes it challenging for individuals or other stakeholders to hold either the federal government or regional states accountable when the human rights violations committed within the regional states are not investigated and prosecuted.

It has been argued that the existing framework, which assigns regional states the responsibility to execute federal laws comprising CVIHR, is unconstitutional. The argument developed in practice asserts that only the crimes specified in Article 4 of the Proclamation, as well as those outlined in separate legislation such as the Anti-Trafficking and Smuggling Proclamation, are federal matters. The federal government exercises exclusive power to investigate and prosecute these crimes. The remaining crimes, which constitute the majority of CVIHR incorporated under the Criminal Code, are regarded as non-federal matters (regional state matters). Regional states investigate and prosecute such crimes as matters of their own concern when they occur within their jurisdiction.

This contradicts the delineation of federal matters under the Constitution. As argued above, all CVIHR incorporated under the Criminal Code and other federal legislation implementing international treaties are federal matters. Critical reading of Article 51(8) of the Constitution reveals that the federal government exercises exclusive power (to investigate and prosecute) over these matters.

The drafters' intention to assign the power to investigate and prosecute CVIHR exclusively to the federal government is reflected in the provisions of the FDRE Constitution that deal with the delegation of federal authority to regional states, as well as those that outline the powers of the House of the Federation. The issue concerning delegation was tabled for discussion during the deliberations as the drafters thought that, given its limited financial and human resources, the federal government may face difficulties in dealing with matters laid down in Article 51, which include the responsibility to execute federal laws incorporating CVIHR. Ostensibly, the concept of delegation of federal authority to regional states would not have appeared in the FDRE Constitution had the drafters assumed that regional states have the authority

to execute federal laws incorporating CVIHR within their administrative boundaries.

The drafters' stance on the division of power over CVIHR was further clarified when they restricted the House of the Federation from participating in the central legislative process. In many jurisdictions where constituent units are responsible for enforcing central legislation, such as Germany and South Africa, the second chambers participate in the law-making process as they are the ultimate implementers of the laws. I have argued that the drafters of the FDRE Constitution found such participation of the House of the Federation irrelevant as they had already determined that regional states are not responsible for executing the laws of the federal government.

As indicated above, the constitutional silence may be addressed by altering the Constitution to clearly specify that the responsibility to investigate and prosecute CVIHR lies with the federal government. To achieve this, the federal government, which should take the lead, may pursue either a constitutional amendment or constitutional *interpretation*. However, it has been argued that a *constitutional amendment* is the preferable option, as the federal government is likely to exert greater influence over the process through this method than through constitutional interpretation. —————■

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