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Articles:

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Summary Notes: Notes that shed light on a topic of study and which target at student needs.

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BETWEEN 'LAND GRABS' AND AGRICULTURAL INVESTMENT:

LAND RENT CONTRACTS WITH FOREIGN INVESTORS AND ETHIOPIA'S NORMATIVE SETTING IN FOCUS

Elias N. Stebek ♣

Abstract

This article examines whether the land rent contracts and the Ethiopian legal framework on rural land use rights can assure win-win mutual benefits expected from large-scale land transfers to foreign investors. The article further examines the challenges in the realization of the *Seven Principles* for Responsible Agricultural Investments prepared by FAO, IFAD, UNCTAD and the World Bank Group as a framework of standards for the current global dialogue on large-scale farmland acquisitions. I argue that land-use insecurity in the Ethiopian context results from the extensive powers of executive offices that are empowered to dispossess holders and reallocate land to investors. These powers can be even more discretionary where land transfers are made without prior mapping and demarcation of protected forests and wildlife, and where registration and the issuance of land-holding certificates to smallholder farmers and pastoralists have not yet been made. The article suggests the need to rectify the gaps in the land transfer contracts and most importantly, the need to render the government a *custodian* (and not *owner*) of land in conformity with the FDRE Constitution and to ensure that the termination of land use rights is decided by courts so that executive offices would not perform the dual functions of revoking and reallocating rural land use rights.

Key words:

Land grabs, responsible agricultural investment, land rights, farmland acquisition, Ethiopia

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Introduction

Green revolutions that depend on unsustainable intensive agri-business rather than broad based modernization of sustainable agriculture usually show an initial period of boom in production. This is followed by an interim period of stagnation and then the ultimate tragedy of a steady rise in fertilizer needs per

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hectare at a magnitude that is greater than the rise in agricultural production. Project documents are usually optimistic and laden with a long menu of promises. Unfortunately, however, many elements factor in as the agricultural investment projects unfold towards production and marketing. The downsides of unsustainable green revolutions and large scale agricultural activities include the *pesticide treadmill* as pests become resistant to pesticides. This leads to the continuous spiral challenges of using stronger pesticide. Meanwhile, the pests that survive pass on their genes (that are resistant to a particular pesticide) to their offspring. In the process, organisms that are useful are killed to the detriment of the fertility of the soil.

Normative and institutional factors can indeed reduce the environmental and health risks involved in green revolutions and can also enhance their economic benefits. That is why large-scale modern farming is required to balance economic returns with social responsibility and environmental sustainability. This can indeed rectify the downsides that are inherent in hasty large-scale agri-business. In due course, such responsible agricultural investments (which can be small-scale, medium or large) have the potential to gradually bring about relief to a significant portion of Ethiopia's highly fragmented subsistence farms and overgrazed lands. This process, *inter alia*, further envisages agro-ecological technology with a view to gradually encourage smallholder farming towards consolidation rather than fragmentation.

Modern farming in Ethiopia had initially blossomed in the 1960s and early 1970s during which professionals in agriculture and other entrepreneurs joined hands and started a significant number of small-scale and medium sized modern farms. This was followed by the experience of post-1975, during which state-owned farms were largely unsuccessful. Ethiopia's experience to date and the lessons gained from other green revolutions thus necessitate the examination of Ethiopia's normative setting as an institutional tool in regulating large-scale farming towards responsible agriculture. Moreover, the contracts concluded with foreign investors in large-scale farms in Ethiopia need to be assessed in light of the elements of responsible agricultural investment.

Massive farmland acquisitions in Ethiopia involve multinational enterprises (MNEs) from India and other countries. As indicated in the various sections of this article, the farmland acquisitions primarily aim at agricultural production for their home markets. The identity of the companies, the amount of land allocation, the benefits of agricultural investments, the need to distinguish agricultural investment from land grabs and the risks in large-scale farmland transfers have attracted discourse among academics, researchers, policy makers and activist critics. The article touches upon these issues in the course of addressing its core themes. It discusses the rural land use rights regime in Ethiopia that has made farmland susceptible to extensive acquisition by foreign MNEs. It also briefly examines some contractual provisions in light of the need

for the embodiment of the potential benefits and promises into binding obligations.

The first section highlights the magnitude of large-scale farmland acquisition in Ethiopia based on recent research. Section 2 presents official statements in support of the land transfers and critical views thereof. The third section examines the challenges in relation to the Ethiopian land law regime and their impact in the implementation of the *Seven Principles* for Responsible Agricultural Investment[1] that are recommended by FAO, IFAD and UNCTAD. Sections 4 to 7 deal with the core features of fairly negotiated contracts, the profile of twenty-four land rent contracts concluded by the Ministry of Agriculture and Rural Development (currently Ministry of Agriculture), and the problems and gaps in the contracts. Finally, the conclusion, *inter alia*, highlights the need for checks and balances in the adjudicative and executive functions of the State in relation with land use rights. It further reflects upon the factors for and the adverse impacts of rising consumerism and FDI-centered statistical 'growth' that misinform the notion of 'development' pursuits.

1. The Magnitude of Large-scale Land Acquisition in Ethiopia

1.1- Land available for allocation

The area of land that can be allocated for agricultural investment projects was (in 2008) stated as 10 million hectares.[2] In 2009 and 2010, lesser figures between 3 to 3.5 million hectares were stated by "senior officials of [the Ministry of Agriculture and Rural Development (MoARD)]", currently Ministry of Agriculture (MoA), and the figure was at times stated as 5 million hectares."[3] At present, land lease of 5000 hectares (or above) can only be done at the federal level by the Ministry of Agriculture (MoA).

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[1] FAO, IFAD, UNCTAD and the World Bank Group, *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources*, A discussion note prepared to contribute to an ongoing global dialogue. January 25, 2010

[2] "(MoARD, 2008). This and other documents, available in <www.moard.gov.et> in 2009 and mid-2010, have since been removed." [in Dessalegn Rahmato *infra* note 3, p. 10]

[3] Dessalegn Rahmato (2011), *Land to Investors:* Large-Scale Land Transfers in Ethiopia (FSS Policy Debates Series), June 2011, p. 10

Dessalegn states that ambitious figures were also stated in "the Ministry of Mines and Energy's (MME)'s bio-fuel strategy document" which assumes the availability of "24 million hectares of unutilized land suitable for growing bioethanol and bio-diesel crops" The document states that leasing out these lands will not interfere with the production of food crops and [does] not jeopardize the country's plans for food security."

The Ministry has established the Agricultural Investment Support Directorate which is in charge of administering the allocation of land above 5000 hectares for investment purposes. Imeru Tamrat notes two issues in this regard. His first observation is that although the Federal Constitution allows the federal government to delegate "the mandates given to it under the Constitution to regional states," no specific provision in the Constitution "specifically provides for upward delegation of the mandates given to the regional states." He thus notes that "the current upward delegation by regional states of their mandates to administer land to the federal government stands on a shaky constitutional basis."[4] Imeru's second point relates to the need to clarify "the relative responsibilities of the concerned federal and regional agencies" in the allocation, follow-up and monitoring of the investments.[5]

One can argue that Article 51 (1) of the Federal Constitution entrusts the federal government with the task of enacting laws "for the utilization and conservation of land", and that Article 52(2)(d) merely gives regional states the powers and functions "to administer land and other natural resources in accordance with Federal laws." The issue that can be raised is whether allocation of extensive areas of land (e.g. 300,000 hectares) can be regarded an "administrative' function. According to this line of argument, the federal government is clearly entrusted with wider powers regarding land (including enacting laws for its utilization and conservation) thereby rendering its power to allocate land constitutional, while the powers of regional states is confined to the function of administering "land and other natural resources in accordance with Federal laws." The easier option for the federal government could thus have been enacting laws regarding the allocation of land beyond a certain threshold rather than resorting to an upward delegation.

It is to be noted that the mere decentralization of the power to allocate land to regional entities does not guarantee appropriate land allocation for agricultural investment and does not necessarily control land grabs. For example, the land acquisition of Karuturi in Gambella was 300,000 hectares (at a lease rate of Birr. 20, i.e. USD 1.16 per hectare at the average exchange rate for the months of November and December 2011) in the land deal made with the regional offices while the revised contract concluded at the federal level has reduced the area to 100,000 hectares as highlighted in Section 4, a figure which still shows massive land transfer. The following amount of land has been reported by the regional states as land that is available since 2009.

[4] Article 50(9), Constitution of the Federal Democratic Republic of Ethiopia.

[5] Imeru Tamrat (2010), "Governance of Large Scale Agricultural Investments in Africa", (Paper presented at World Bank Conference on Land Policy and Administration, Washington DC, April 26-27 2010), p. 9.

Investment Land under Federal Land Bank[6]

Regions	Land in Hectares
Amhara	420,000 (not yet confirmed)
Afar	409,678
BeniShangul	691,984
Gambella	829,199
Oromia	1,057,866
SNNP	180,625
Total	**3,589,678**

Source: [The following sources are stated in D. Rahmato]:

- MoARD (2009), Planned System for Administration of Investment Land [Amharic]. Addis Ababa, June, 2009. MoARD (2010), General Brochure [sic]. Addis Ababa, March <www.moard.gov.et>. Interviews made by Dessalegn Rahmato with Oromia land and environment bureau[7]

In a statement issued by the Ministry of Foreign Affairs (in January 2010), the area of land that can be made available for investors is more than 7 million acres [i.e. about 3 million hectares]. It states that the Agricultural Investment Support Directorate "has identified more than 7 million acres available now for lease. … Ethiopia has 74 million hectares of land suitable for agriculture out of its total 115 million hectares, but less than 15 million hectares is currently in use agriculturally."[8] It is to be noted that this figure of 74 million hectares constitutes about 64% of Ethiopia's total land.

[6] Table 1, D. Rahmato, *supra* note 3, p. 11.

[7] *Ibid.*

> "The new five-year Growth and Transformation Plan (GTP), which is to run from 2011 to 2015, and which was launched in the last quarter of 2010, envisages agriculture to grow at the rate of 14.9 % annually, and expects to double farm output by the year 2015. The Plan predicts that the country will meet all the MDG targets in 2015, and by 2028 Ethiopia will become what it calls a "middle income" country. One of the strategies for rapid agricultural growth is to be private investment in large scale farms for which the government will provide support and encouragement. The land expected to be transferred to large-scale investors in the Plan period (not including land already allotted) is expected to increase from 0.5 million hectares in 2011, to 2.8 million in 2013 and 3.3 million in 2015 (see MOFED 2010 a,c)." [*Ibid*]

[8] FDRE Ministry of Foreign Affairs, "Politically motivated opposition to agricultural investment" *A Week in the Horn*, 22 January 2010. <http://www.mfa.gov.et/Press_Section/Week_Horn_Africa_January_22_2010.htm#4> Last visited: 5 August 2011.

1.2- Land transferred to investors

According to the World Bank (2010), "the total land transferred to investors in Ethiopia between 2004 and 2008 [is] 1.2 million hectares." [9] The Growth and Transformation Plan (GTP) for the years 2011-2015 envisages that "by the end of the GTP period in 2015, the total land transferred to investors will measure nearly 7 million hectares." [10] Dessalegn Rahmato's study states his findings from field visits, MoARD, MELCA Mahiber 2008, and local press reports. Annexes 1 and 2 of his study indicate that 28 large-scale land transfers (670,000 hectares) are made in the various regions other than the transfer made in Gambella, and there are 15 large-scale land transfers (535,000 hectares) in the Gambella Regional State. This only provides a "partial list of some of the larger land acquisitions" and shows only large-scale land allocations of 2000 hectares or more. "In terms of absolute numbers, small-scale land transfers, i.e. lands measuring below 5000 hectares are much more numerous."[11]

The study shows a total large-scale land transfer of (670,000 + 535,000 =) 1,205,000 hectares. Out of the 1,205,000 hectares of land, 49,000 hectares are domestic investments while the remaining 1,156,000 hectares which constitutes about 96 percent of the large-scale farms (i.e. farms with 2000 hectares or more) are allocated to foreign investors. It is also to be noted that Indian investors have acquired 700,000 hectares out of the 1,156,000 hectares thereby constituting about 61 percent of the total land allocated to the foreign investors stated in the tables.

2- The Discourse on the Merits of and Challenges in Land Transfers: An Overview

Official statements have been given in support of the large-scale farmland allocations to which there are criticisms mainly from activists (on environmental protection and human rights), academics and researchers. The issues of concern, *inter alia*, include the impact of such allocations on food security, water resources and the well-being of smallholder farmers and pastoralists. On the positive front, it is expected to have benefits such as enhancing job opportunities, economic development, public revenue and technological spillovers. [12]

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[9] D. Rahmato, *supra* note 3, p. 12.

[10] *Ibid*.

[11] *Ibid*.

[12] The issues of concern in the overall discourse of land transfers include the following:

- The prime target of the investors: exports *versus* local market;
- Whether it has a positive impact on food security in Ethiopia;

2.1- Official statements

Ethiopia's Ambassador to the UK[13] expresses Ethiopia's prime concerns in "ensuring food self-sufficiency at both national and household levels" and he believes that the first concern i.e. food security at the national level "has already been attained" and that current efforts target at the second concern, namely food security at the household level. To this end, he states the need to "develop large mechanised agriculture to increase food production and enable the agricultural sector the crucial role it is expected to play in the implementation of our five-year Growth and Transformation Plan." With regard to safeguards, he notes that "commercial farming is supplementary to farming by small-holders" and "[e]nvironmental impact studies are carried out by [the] Environmental Protection Authority."

Moreover, the Ambassador states that the "land allocated is not currently under cultivation by small-scale farmers and has, until now, been inaccessible for agricultural use, especially in the lowland areas." Expected benefits include "new social and physical infrastructure", the sale of "some of their production in Ethiopia, helping to close the food shortage gap, and exporting the rest", the creation of job opportunities, knowledge transfer, tax revenue, market access and other benefits.

The Ministry of Foreign Affairs[14] considers the criticisms against the land transfers as politically motivated. It states that "[t]he current wave of agricultural investment began a year or two ago as international food prices

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- The issue of increased need for water resources;
- The issue of the rights of farmers and herders;
- Land rights of displaced smallholder farmers and herders;
- The revenue to be obtained: taxes, lease revenue, export earnings;
- The magnitude of the positive impact in enhancing economic growth, employment opportunities, technology transfer;
- Impact on communities, farmers, herders;
- Impact on the environment;
- Concerns regarding the lease rate per hectare;
- Whether the contracts are well-negotiated in a win-win context;
- The misconception of considering forests, community grazing lands and wetlands and land that is not under cultivation as 'unused', 'idle' and 'unoccupied'.

[13] Berhanu Kebede, Ethiopia's ambassador to the UK, The Guardian, 4 April, 2010.

[14] FDRE Ministry of Foreign Affairs, "Politically motivated opposition to agricultural investment" *A Week in the Horn*, 22 January 2010.
<http://www.mfa.gov.et/Press_Section/Week_Horn_Africa_January_22_2010.htm#4>

began to rise sharply, particularly in 2008" and that "[i]nstead of buying expensive food on the world market" foreign investors opted to "lease unused land abroad and grow the food there to provide their own food security." The Ministry is optimistic that this provides "new seeds and new techniques" to developing countries and that the "deals also allow for major overall investment, including improved marketing as well as better jobs, and related infrastructural developments, including schools, clinics and roads." The statement underlines that "some of the deals will cover land that has not been used before", and points out that "there has been much less criticism about foreign investments made in agriculture in Russia or Ukraine"… " or in South East Asia or even in Brazil, all of which have also been targeted by external agricultural investors." The statement further makes a distinction between land "that is being given away" and land that is being leased because "the investment will remain when the lease [ends]." The statement cites FAO's Representative in Ethiopia, Mafa Chipeta, who says 'If these deals are negotiated well, it will change the dynamics of the food economy in this country'."

BBC news cites Ethiopia's Deputy Prime Minister[15] as having said that most of the land is not currently being used effectively and this foreign investment will benefit local communities. The statement includes the payment of compensation **"**to people living on the land they plan to acquire" and the benefits that include employment opportunities and the enhancement of "more efficient and productive farming processes." The statement indicates that the amount being sold is only 3% of the total arable area and it **"**is lowland where farmers are not willing to go and plough" as it is **"**often infested with malaria and the climate makes it unsuitable for small holder farmers."

2.2- Critical views on the land transfers

Various civil societies, researchers, academics and environmental and human rights activists have expressed their concerns regarding the adverse impact of large-scale farmland acquisitions by foreign investors that primarily target at the food and energy security of their home markets. Fikre Tolossa[16] states that "these fertile lands will lose their trees, topsoil, natural habitats and rivers, to be rendered barren as a result of exposition to chemicals latent in the fertilizers, insecticides and pesticides" and that the rivers and lakes that survive "are likely to be poisoned by toxic materials and become undrinkable and health hazard." He argues that government "should protect its national reserve bearing in mind future generations" and that lands that are not utilized at present will inevitably

[15] 10 June 2011, <http://www.bbc.co.uk/news/business-13725431>

[16] A speech delivered at the Commonwealth Club of California on March 1, 2011, <http://nazret.com/blog/index.php/2011/03/03/land-grab-in-africa-the-case-of-ethiopia?blog=15> (Accessed: 18 March 2011).

be used "due to population explosion and scarcity of arable lands." He further raises the question as to why native farmers are dislocated if the allocations are made on unused lands.

Oakland Institute's report titled "*Understanding Land Investment Deals in Africa, Country Report: Ethiopia*"[17] states the benefits of the large-scale farmland investments and also addresses their impact on food security, socioeconomic and cultural impacts, the impact of dispossession and displacement, environmental impacts, and water use and water management. It further discusses the issue whether land certification makes any difference. [18]

With regard to *transfer of technology*, the Oakland Institute Report underlines that the current realities are not yet promising and "it is too early to tell if these advantages will accrue to Ethiopia." According to the report, effective strategies should be developed "for enabling such technology transfer."[19] The report appreciates the efforts of the Ethiopian government in *infrastructure development* and it states the likelihood that investors can enhance this development "through various partnership schemes, or as part of wider country-to-country development assistance efforts".[20] However, the report forwards the caveat that "it remains to be seen"[21] whether investors will contribute to infrastructure commensurate with their potential and promises.

The positive contribution of these investments in *job creation* is stated in the report along with the problem of low wages that is likely to arise particularly during the initial stages unless the Ethiopian government addresses its "failure to improve minimum labor and pay standards."[22] The report critically states the gap between pledged and actually realized *capital investments*, and observes that as a result, "capital expenditure quoted by Ethiopian federal departments are misleading". It further notes that "using the widely-accepted UNCTAD methods

[17] Felix Horne (2011), "Understanding Land Investment Deals in Africa, Country Report: Ethiopia", *the Oakland Institute*.

[18] The report, *inter alia*, provides data such as the one attached as Appendix III. As stated in Appendix B of the Report, "the figures stated under *Federal* and *Multiregional* are numbers provided by the federal government (200,000 ha)" which might overlap with region-specific numbers. "In addition, multi-regional figures (500,020 ha) may include land investments that are also included in the federal figure (200,000 ha)."[18] Nevertheless the figures indicate the overall magnitude of the land allocation despite inconsistencies in data that are available from various sources.

[19] *Ibid*. p. 34

[20] *Ibid*, p. 35

[21] *Ibid*.

[22] *Ibid*.

shows a steady decrease in FDI since 2006, as UNCTAD's numbers do not include pre-implementation investments".[23]

The Okland Institute Report further points out various adverse impacts of the large-scale land acquisitions in the realms of food security.[24] Other impacts include socioeconomic and cultural impacts such as the risk of increased conflicts (as a result of population growth accompanied by dwindling farmland for smallholder farmers and herders), loss of cultural identity, the need to enforce mandatory standards in labour conditions, and loss of livelihoods upon displacement. The report further discusses the impact of dispossession and displacement and the adverse potential impact of the projects on the environment. It also deals with the issues of water resource management and land registration.[25]

Dessalegn Rahmato[26] notes three perspectives in the current land grab debate. The *first* category includes the "more polemical version" which "speaks of a new form of agricultural neo-colonialism, and accuses the international financial institutions of promoting aggressive land grabs in poor countries through support to investors and host governments."[27] The *second* 'liberal and pragmatic' opinion, adopted by FAO and others "sees immense dangers in the global rush for land" and it "recognizes that there are considerable opportunities that could benefit host governments and their populations" through "responsible decision-making and equally responsible investment" which can minimize "the costs and damages assumed to be inherent in land grabbing" thereby "leading to a situation where both host countries and investors could benefit in equal measure."[28]

The *third* approach is pursued by Borras and Franco (2010) and others who "are critical of the liberal approach and contend that the debate should examine what they call the political dynamics of land property relations and changes in these relations, and give particular attention to class analysis."[29] This perspective "looks at the structural changes that large-scale land transfers will

[23] *Ibid*.

[24] *Ibid*, pp. 35-37.

[25] *Ibid*, pp. 36-447.

[26] D. Rahmato, *supra* note 3.

[27] *Ibid*, p. 3. Footnote 4 classifies Oakland Institute and GRAIN into this category and it reads as follows: See article by the Oakland Institute and GRAIN: www.oaklandinstitute.org , www.grain.org Short pieces on agricultural neo-colonialism have appeared on GRAIN web pages. A recent international conference on land grabbing held in the Netherlands was titled "Africa for Sale".

[28] *Ibid*.

[29] *Ibid*. pp. 3,4

bring about in host countries, especially in the agricultural sector and the direction these changes will take in terms of class divisions and social polarization." They argue that the global land grab will lead to "changes in land property relations favoring the (re)concentration of wealth and power" and thus give "rise to the dispossession and displacement of smallholders, indigenous peoples and the poor in general."[30]

Against this backdrop Dessalegn Rahmato aims at drawing attention to what he considers "a gap in the debate":

> [S]ufficient attention has not been given to the issue of land rights of communities and the state-power dynamics that are intertwined with such rights in host countries. In some cases, the urge for greater state power centralization appears to have been the driving force for the commercialization of land and the open door policy African governments have extended to investment capital, both domestic and foreign. From this perspective the global land grab will have had the effect of enhancing the dominance of the state at the expense of citizens and grassroots communities.[31]

Dessalegn[32] further recalls the benefits that are frequently mentioned in the documents of the Ministry of Agriculture. They include enhanced foreign earnings, "production of crops needed for agro-industry such as cotton and sugar cane", employment opportunities, infrastructure, technology transfer, and enhanced energy security. " He observes that "[s]o far there is no evidence that many of these objectives have been met" while on the contrary, the evidence gathered during his study "indicates that the damage done at present by the projects outweighs the benefits gained.[33]

3- The Legal Framework and Challenges in the Realization of *Responsible Agricultural Investment (RAI)*

There is no disagreement on the factors that caused the global rush for extensive land acquisition in various African countries including Ethiopia. As Cotula states, "the food price hikes of 2008 and the biofuels boom are key drivers, but other factors are also at play - such as business opportunities linked to expectations of rising food prices, agricultural commodity demand for industry, and policy reforms in recipient countries."[34] The interest of foreign investors is

[30] *Ibid*, p. 4

[31] *Ibid*, p. 4

[32] Ethiopians use first names even in formal communication.

[33] D. Rahmato, *supra* note 3, p. 13

[34] Lorenzo Cotula (2009), "Perspectives on topical foreign direct investment issues by the Vale Columbia Center on Sustainable International Investment", *FDI Perspectives***,** No. 8, June 22, 2009.

thus obvious. Moreover, host countries are attracted by the potential opportunities, which need to be balanced with the economic, social and environmental risks involved. One of the risks relates to the inadequate mechanisms in the legal regime "to protect local rights and take account of local interests, livelihoods and welfare."[35]

3.1- The vulnerability of insecure individual leaseholds and un-demarcated state holdings

Gaps in legal regimes include "[i]nsecure resource rights, inaccessible registration procedures, compensation limited to loss of improvements like crops and trees, and legislative gaps often undermine the position of local people."[36] Imeru observes the problems with regard to the normative and implementation framework of land registration in Ethiopia:

> To date… only four regional states constituting around 70% of the rural population of the country, namely, the Amhara, Oromia, Tigray and Southern Nations, Nationalities and Peoples (SNNP) regional states have issued implementation legislation and proceeded with issuing land holding certificates to peasant households formally giving recognition to the rights provided for under the Constitution. … In the absence of detailed land administration laws in the other five regional states, it is not clear how the land holding rights given to peasants and pastoralists under the Constitution is being implemented within these regional states.[37]

Imeru notes the problems that can be encountered by pastoralist communities predominantly residing in the regions which have not yet enacted implementation legislation and that have not started issuing landholding certificates.[38] These communities "constitute around 12 per cent of the total population of the country (or around 15 percent of the rural population". [39] Moreover, he indicates the gaps in the mapping and demarcating of protected forests and wildlife: [40]

> Some protected forests and national parks have already been designated and demarcated by law[41] but other major state forests and national parks such as the Bale Mountains, Gambella, Nechisar and Yangudi Rassa have yet to be

[35] *Ibid*.

[36] *Ibid*.

[37] I. Tamrat , *supra* note 5, pp. 5-6

[38] *Ibid*. p. 6

[39] *Ibid.*

[40] *Ibid*, pp. 7-8.

[41] E.g. Awash, Semien Mountains, Omo and Mago national parks.

> designated and demarcated by law.[42] To date, there is a lack of a comprehensive formal initiative to demarcate state owned forest lands and the mapping, designation and formal registration of such rights is absent. The lack of mapping and registration of rights over state forests has reportedly resulted in drastically reduced size of state forests and wildlife areas due to encroachment by local communities living around the area. Similarly, the on-going land registration in the regions which have started the exercise have not yet included the survey and mapping of forest lands, although there are some on-going efforts in this direction recently.[43]

3.2- The vulnerability of customary landholdings

Leasehold systems in different African countries have been found to be less vulnerable to land grabs as compared to customary holdings. In countries where there is clarity as to the scope of rural land use rights and, most important, where independent courts are the only organs that determine the termination of land use rights, leaseholds are not substantially inferior to private ownership with regard to the security and tenure against eviction. In fact, private ownership can also be exposed to arbitrary expropriation in the absence of effective judicial protection.

In African legal regimes where the predominant landholding system is legally recognized customary landholding without clear modalities of title deeds and land transfer procedures, extensive areas of land can be susceptible to grabs as a result of deals of MNEs with traditional chiefs. A case in point is the experience in Kusawgu, Northern Ghana where a biofuel company had managed to grab 38,000 hectares of forestland by convincing a local chief.[44] The community later realized that "the promised jobs and incomes were unlikely to materialize" and that "the plantation would mean extensive deforestation and the loss of incomes from gathering forest products, such as sheanuts." Eventually, the community terminated the contract "but not before 2,600 hectares of land had been deforested."[45] Such grabs and community disempowerment occur through a promise of "a 'better future' under the guise of jobs, with the argument that they are currently only just surviving from the 'unproductive

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[42] The Food and Agricultural Organization: Global Forest Resources Assessment, 2005.

[43] I. Tamrat, *supra* note 5. *Footnote 16* reads: "Interviews made with land administration experts in Amhara, Oromia, SNNP and Benishangul-Gumuz regional states."

[44] Bakari Nyari, in Matondi and Mutopo (2011), "Attracting foreign investment in Africa in the context of land grabbing for biofuels and food security", *Biofues, Land Grabbing and Food Security in Africa*, Matondi *et al*, Editors (London/New York: Zed Books), p. 84.

[45] *Ibid.*

land' and that they stand to earn a regular income if they give up the land for development."[46]

> This argument fails to appreciate African view of the meaning of land to the community. While initial temptation to give up the land to earn a wage is great, it portends an ominous future, where the community's sovereignty, identity and sense of self is lost because of the fragmentation that it will suffer.[47]

Under such settings, members of a community cannot be regarded as secure because the normative and traditional framework renders their land vulnerable to grabbing. The methods used by MNEs in these situations is to capture "[t]he imagination of a few influential leaders in the community" who are then "told of the prospects for the community held out by the project, and are swayed with promises of positions in the company or monetary inducements."[48]

3.3- The need for agricultural investment and the caution against land grabs

Continued subsistence farming in Ethiopia's current context apparently leads to graver poverty and farmland fragmentation unless it eventually evolves onto modern farming which enables a smaller percentage of the population to produce beyond subsistence by mainly targeting at local food supply. Distinction should thus be made between agricultural investment and massive land acquisition by foreign investors for their home market. It is also to be noted that hasty steps towards large-scale mechanized agriculture in topographic settings where there is much dependence on rhythmic seasonal rainfall rather than surface freshwaters suitable for irrigation cannot bring about the success obtained in agricultural modernization in settings where surface freshwater resources are abundant and where the watershed in the basin is well-managed.

Caution and prudence are thus crucial. If, for example, land is allocated to an investor who undertakes an agricultural activity, the farm may incrementally increase the area of cultivation that can gradually enhance commercial farming by incorporating adjacent small-holders through win-win schemes. The schemes may be shareholding plus job options to smallholder farmers or introducing contract farming in which the modern farm can provide mechanized farming services in neighbouring farms for consideration (in the forms of payment or sharecropping), and/or outsource certain farming activities to be done by smallholder farmers. There are lessons that can be learnt from the success, efficiency and dynamism of modern farms that were emerging during the late

[46] *Ibid*, p. 85.

[47] *Ibid*.

[48] *Ibid.*

1960s and the early 1970s, vis-à-vis the poor performance of the same farms after their post-1975 nationalization. One of the core lessons to be drawn is the advantage in modest takeoffs and incremental scaling up in the context of integration with the local communities in which commercial farming takes place.

In contrast to win-win agricultural investments, land grabs target at short-term benefits. They are indifferent to local needs and seek massive land acquisitions. Cotula underlines the need for enhancing efforts "to secure local land rights, including customary rights, using collective land registration where appropriate" and he further notes the necessity of ensuring "free, prior and informed consent, robust compensation regimes, the provision of legal aid, and good governance in land tenure and administration." In the absence of such rights, land transfers run the risk of abuse under discretionary decisions by various regulatory offices thereby leaving the doors wide to speculative land acquisitions, displacement and environmental harm.

The "*Declaration on land issues and challenges in Africa*" adopted in July 2009 by the Heads of State of the African Union (AU) stresses "the urgency of building a solid institutional framework for investment in agriculture" and also states the need for "strong systems of land governance that recognize the diversity and complexity of the systems under which land and related resources are held, managed and used."[49] In particular, the *Seven Principles* of Responsible Agricultural Investments (RAI Principles) prepared by FAO, IFAD, UNCTAD and the World Bank Group (January 25, 2010) are meant to serve as a framework of standards for the current global dialogue on large-scale farmland acquisitions. However, the principles are embodied as a discussion note and are meant to be voluntarily ascribed to in fair farmland deals and project implementation. This presupposes a legal regime and an institutional framework which can facilitate the implementation of the thresholds embodied in the principles.

3.4- First Principle: The recognition and respect for existing land and resource rights

The realization of the *first principle* presupposes secure land rights in favour of smallholder farmers, herders, and communities. The first principle thus becomes ineffective without the prior existence of secure land and resource rights. Article 40(3) of the FDRE Constitution provides that "The right to ownership of rural and urban land, as well as natural resources is exclusively vested in the State and in the peoples of Ethiopia." It further stipulates that "Land is a common

[49] OECD, Freedom of Investment Process, Responsible Investment in Agriculture, May 2010, p. 9.

property of the Nations, Nationalities and Peoples of Ethiopia, and shall not be subject to sale or to other means of exchange."

The subsequent provisions, i.e. Articles 40(4) and 40(5) recognize the use rights of peasants and pastoralists over the land that will be allocated to them without payment, and the provisions also state their rights against eviction from their possession. Although the Constitution stipulates that rural and urban land is owned by "the State" and "the peoples of Ethiopia", Proclamation No. 456/2005[50] states that "government [is] the owner of land."[51] Moreover, the Proclamation indicates that the rights of individuals and communities are '*holding rights*'. The phrase that considers the government as owner of land is inconsistent with Article 40(3) of the FDRE Constitution which vests ownership of [land] … (not in the government, but) in "the State and in the peoples of Ethiopia."[52]

The discretion of the government in the reallocation of land is, for example, embodied in Article 5(3) of Proclamation No. 456/2005 which reads "Government being the owner of land, communal rural land holdings can be changed to private holdings as may be necessary." Indeed, this clearly "shows that the recognition given to communal rural holdings can at any time (when deemed necessary) be withdrawn in favour of private holdings. This raises the issue whether communal holding has a merely partial recognition on a temporary basis."[53]

According to Article 40(7) of the Constitution, "Every Ethiopian shall have the right to the immovable property he builds and to the permanent improvements he brings about on the land by his labour and capital …" In the context of rural Ethiopia, this mainly refers to modest houses (usually grass-roofed huts) built on the land, trees planted or crops that have not yet been harvested, and not the farm plots nor the grazing fields. Moreover, property rights on immovables recognized in the Constitution and the holding rights (of peasants[54] pastoralists[55] and communities[56]) are subject to expropriation for 'public purposes' as stipulated under a constitutional provision which provides the following:

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[50] Rural Land Administration and Land Use Proclamation No. 456/2005.

[51] Proclamation No. 456/2005, Art. 5(3).

[52] Elias N. Stebek (2011), Conceptual Foundations of Property Rights: Rethinking Rural Open Access in Common-pool Resources in Ethiopia", *Mizan Law Review*, Vol. 5, No. 1, p. 35.

[53] *Ibid*, p. 36.

[54] Proclamation No. 456/2005, Article 2(7).

[55] *Ibid*, Art. 2(8).

[56] *Ibid*, Art. 2(11).

> Without prejudice to the right to private property, the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property. [57]

The key elements of the provision are 'private property', 'public purposes' and 'compensation commensurate to the value of the property'. The provision which allows the expropriation of 'private property' *a fortiori* applies for land holdings (by smallholders, pastoralists and communities) even if the literal reading cited above refers to 'private property'. The difference in this regard relates to whether there is the entitlement to compensation for expropriated land holdings.

Proclamation No. 455/2005[58] provides the following with regard to the power of the relevant public organs to expropriate landholdings:

> A woreda or an urban administration shall, upon payment in advance of compensation in accordance with this Proclamation, have the power to expropriate rural or urban landholdings for public purpose where it believes that it should be used for a better development project to be carried out by public entities, private investors, cooperative societies or other organs, or where such expropriation has been decided by the appropriate higher regional or federal government organ for the same purpose.[59]

The controlling elements in this provision, such as '*compensation*' and '*public purpose'* are defined under Article 2 of the Proclamation. *Compensation* is defined as "payment to be made in cash or in kind or in both to a person for his property situated in his expropriated landholding." The compensation thus only envisages the '*property situated in [the] expropriated landholding*' and not to the use right that is terminated as a result of the expropriation and that could have been transferred for consideration[60] or inherited by generations of heirs.[61]

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[57] FDRE Constitution, Art. 40(8).

[58] A Proclamation to Provide for the Expropriation of Land Holdings and Payment of Compensation (Proclamation No. 455/2005).

[59] Proclamation No. 455/2005, Art. 3(1).

[60] It is to be noted that peasants and pastoralists not only lose use rights due to expropriation but also lose the benefits that could have accrued from the transfer of their land use rights. Art. 8 of Proc. No. 456/2005 provides the following:

> "Peasant farmers, semi-pastoralists and pastoralists who are given holding certificates can lease to other farmers or investors land from their holding of a size sufficient for, the intended development in a manner that shall not displace them, for a period of time to be determined by rural land administration laws of regions based on pm1icular local conditions."

[61] Art. 8(5) of Proclamation No. 456/2005 provides that "Any holder shall have the right to transfer his rural land use right through inheritance to members of his family."

Article 2(5) of Proclamation No. 455/2005 embodies a very wide definition of '*public purposes*'. It reads:

> 'public purpose' means the use of land defined as such by the decision of the appropriate body in conformity with urban structure plan or development plan in order to ensure the interest of the peoples to acquire direct or indirect benefits from the use of the land and to consolidate sustainable socio-economic development.

As Imeru notes, the broad definition of 'public purposes' "opens the way for public authorities to consider any activity as serving the public purpose" and "[t]here is no provision in the Proclamation that requires prior declaration of the existence of public purpose or to provide landholders or other interested third parties to have the opportunity to challenge the existence of public purpose."[62] In effect, the relevant public authority is empowered to define the intended use of any rural land as "public purpose" as long as it is in conformity with a "development plan" designed to ensure the objectives stated in the provision. The same public authority is entitled to define what constitutes a 'development plan' and also determine the fulfillment of the elements of the provision, i.e.:

a) whether the plan ensures the interest of 'peoples',
b) the referent to whom the term 'peoples' applies,
c) the definition of 'direct' and 'indirect' benefits from the use of the land, and
d) whether the land transfer facilitates sustainable socio-economic development.

It is thus difficult to assure the effective implementation of the First RAI Principle, i.e., "recognition and respect for existing land and resource rights" in the absence of a stronger legal regime of secure land use rights. Equally indispensable are the institutional framework which can provide effective judicial protection and a normative setting that ensures the registration of (individual and community) landholdings and the demarcation of protected forests and wildlife.

3.5- Principles 2 to 7

The *second principle* of Responsible Agricultural Investment requires that food security be enhanced in the host state. This clearly needs case-by-case monitoring and incremental expansion rather than a rush towards extensive farmland deals with foreign commercial farm investors. The discussion in Section 2 shows the magnitude of the land deals which has reached its current level in a very short period of time. The notion of food security pays particular attention to the scope of access that people have to food rather than the volume

[62] I. Tamrat, *supra* note 5, p. 11.

of food that is produced which is inaccessible to the poor due to factors such as its shortage in local markets or rising food prices. The 2011 famine in the Horn of Africa and the retarded pace of investment implementation after land acquisition are indeed 'wake up' calls that signal the need for pragmatic, sustainable, holistic and integrated agricultural investment beyond the promises of 'investments' that involve massive land transfers.

The *third principle* of good governance and transparency assumes competence and integrity at federal, regional and local levels (in relation with each project), and this in effect, renders hasty and extensive farmland lease inappropriate. It is commendable that various contracts concluded in Ethiopia with foreign investors have been made accessible. However, the website of the Ministry of Agriculture is expected to enhance the level of transparency and offer all the necessary data and information commensurate with the need to monitor the fulfillment of the social and environmental standards stated in the contracts.

With regard to the *fourth principle* of consultation and participation, the degree of motivation of administrative authorities and investors to consult and persuade evictees is usually contingent upon various factors. These include the regime of land rights that can be invoked by the latter and be secured in courts of law and the magnitude of pressures from non-governmental entities such as social movements, civil societies and the media.

And finally, there is the need to examine and address the normative and institutional opportunities and challenges in the regulation and control of MNEs towards the realization of the *fifth, sixth and seventh principles*, which require responsible agro-enterprise investing, social responsibility and environmental sustainability. These fundamental principles require clearly defined and binding commitments, measurable thresholds, monitoring and schemes of implementation which inevitably go beyond good intentions and formal statements.

3.6- Criticism against RAI

Borras and Franco reject 'tool kits' and Codes of Practice such as RAI that target at land governance, and they suggest the concept of land sovereignty "as a potentially more inclusive and relevant conceptual, political and methodological framework".[63] To this end, they offer class analysis and underline the need for careful empirical inquiry.[64] Boras and Franco argue that "[c]lear land property

[63] Saturnino M. Borras Jr. and Jennifer Franco (2010), "Towards a Broader View of the Politics of Global Land Grab: Rethinking Land Issues, Reframing Resistance", ICS Working Paper Series, No. 001, p. 2.

[64] *Ibid*.

rights (private or otherwise) have certainly not guaranteed win-win outcomes in many of the land deals" and have not "automatically protected the rural poor from various forms of dispossession or 'adverse incorporation' into the food-fuel production enclaves."[65] They regard the Code of Conduct (CoC) "proposed by the World Bank and others [as] a dangerous diversion" because it "diverts attention away from what is wrong with the economic development model" and "from the key role of land in achieving this model." [66] They further state that this proposal "diverts our attention away from coming to terms with how rural poor people's land rights, interests and concerns can (and must) be protected and advanced into the future."[67]

> Land governance is a view and initiative 'from above'. Land sovereignty brings the 'people' back in. Its starting point is the actually existing land-based social relations 'from below', and thus is inherently political and historical in orientation, addressing power relations emanating from the social relations of land-based property and production. Without people's full control over land, the construction of food sovereignty as an alternative food system and development model will be without any solid foundation. In a way, land sovereignty is the notion of a *'people's (counter) enclosure campaign* in the midst of widespread attempts at TNC-driven and state-sponsored enclosures worldwide.[68]

This notion of *land sovereignty* is indeed the antithesis for the difficulties in the applicability of Codes of Conduct such as the RAI principles, because there is the tendency to interpret the principles without regard to the power relations and the relational injustice that permeate the normative and institutional framework. However, the magnitude of its applicability and the level of its influence in policies and legal reforms are yet to be researched and empirically tested.

4. The Need for Carefully Negotiated Contracts in Light of RAI

The terms and conditions in each contract determine "the extent to which international land deals seize opportunities and mitigate risks."[69] Well-negotiated terms and conditions take various factors into account including concerns such as the manner in which risks are assessed and mitigated. Examples in this regard are the "business models [that] are used (from plantations to contract farming through to various forms of equity participation by local people), how costs and benefits are shared (including the distribution of

[65] *Ibid*, pp. 10-11.

[66] *Ibid*, p. 12.

[67] *Ibid*.

[68] *Ibid*, p. 36.

[69] Cotula (2009), *supra* note 34.

food produced between home and host countries), and who decides on these issues and how."[70]

> … [G]overnments must ask hard questions about the investor's capacity to deliver on very ambitious projects. Sensible regulation, skillfully negotiated contracts and robust social and environmental impact assessments are key. Host governments must create incentives to promote inclusive business models that integrate rural small-holders and family farms, and ensure the respect of commitments on investment levels, job creation, infrastructure development, public revenues, environmental protection, safeguards in land takings, and other aspects. Some recipient countries are themselves food insecure, and robust arrangements must protect local food security, particularly in times of food crisis.[71]

4.1- Corporate reputation for social and environmental responsibility

The challenge in contracts of extensive agricultural investments "lies in promoting sustainable and responsible FDI" that allows "investors to enjoy a reasonable profit while also ensuring that all investment inflows benefit host populations."[72] The Principles of Responsible Agricultural Investment aim at facilitating such a balance. However, "the future success of the Principles will depend more on the support of states and international organizations than on a declaration of good intentions.[73] As Perone states, "[i]t is frequently noted that international investment agreements lack obligations on the part of the investor, instead focusing mainly on the protection of MNEs and facilitating their operations." This imbalance in the protection of mutual interests is usually addressed through voluntary guidelines and codes of conduct which, according to Perone, "constitute a deficient counterbalance because they are not legally binding and thus cannot be enforced."

The main motivation of foreign investors towards adherence to such Principles "is the improvement of their corporate reputation, as they show their social and environmental commitment to the international community, consumers and their own employees." [74] A precaution that host states (that aspire to attract foreign investors in responsible agricultural investment) should take is thus to make sure that the investors have the reputation and the goodwill

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[70] *Ibid*.

[71] *Ibid*.

[72] Nicolás Marcelo Perrone (2011), "Responsible agricultural investment: is there a significant role for the law to promote sustainability?", *Columbia FDI Perspectives*, No. 38 May 23, 2011.

[73] *Ibid*.

[74] *Ibid*.

which they aspire to maintain and enhance. This is what distinguishes responsible FDI from speculative acquisitions whose primary target is optimal profit mainly from extractive economic activities (including commercial farming) with minimal levels of social and environmental compliance. Such acquisitions purely target at optimal short-term profits and pay minimal attention to the sustainability of production after the lease period and the ecosystem. Some might even fail to start the investment project after having sold the trees that are 'cleared' in the name of 'earthwork'.

The first *caveat* that needs attention is thus to examine the track record of the investor in light of its capacity and corporate responsibility to meet its promises. This is because '*good faith*' is the cornerstone in the interpretation of contracts and the performance of contractual obligations as it is expressly stated in Article 1732 of the Ethiopian Civil Code [75] which provides that "Contracts shall be interpreted in accordance with good faith, having regard to the loyalty and confidence which should exist between the parties according to business practice."

4.2- Elements of fairly negotiated contracts

Carefully negotiated contracts make sure that the promises expressed by foreign investors, i.e. job opportunities, technological transfer, managerial skill transfer, infrastructure, capital investments, socially and environmentally responsible processes of production, waste disposal and marketing, etc. are embedded in the contracts with the necessary level of precision, clarity, measurability and schemes of implementation. "This might include precise local content requirements (employment, inputs) that evolve over project duration to increase local percentages and extend them to higher-value content (e.g. skilled labour)."[76] Such contracts can also embody provisions on capacity building, safeguards against environmental harm, project revenue sharing and "efforts to improve transparency in contracts and revenue management, including through open tendering and civil society oversight".[77] Moreover, the promise that the investments would enhance local food supply should be articulated in the form of obligations to sell a clearly defined percentage of the production in local markets.

Even though fairly negotiated contracts do not envisage new benefits to host countries, they transpose the promises that are expressed into binding obligations. Such formulations can also be informed by various obligations

[75] By virtue of Article 12 of the contracts Ethiopian law governs the implementation of the contracts.

[76] *Ibid*.

[77] *Ibid*.

embodied in laws, instruments and declarations. For example "OECD Guidelines for Multinational Enterprises (the MNE Guidelines) provide recommendations for responsible business conduct in many areas (labour, environment, combating bribery, etc.)."[78]

In a report titled "Land deals in Africa: What is in the Contracts?" Cotula examines twelve land deals and he also analyzes their legal frameworks with the objective of discussing "the contractual issues for which public scrutiny is most needed and to promote informed public debate about them."[79]

> Key issues relate to the contracting process, to economic fairness between investor and host country, to the distribution of risks, costs and benefits within the host country, to the degree of integration of social and environmental concerns, and to the extent to which the balance between economic, social and environmental considerations can evolve over often long contract durations.[80]

As Cotula observes, some of the contracts that are covered in his study "are short, unspecific documents that grant enforceable, long-term and largely transferable rights to extensive areas of land, and in some cases priority rights over water, in exchange for little public revenue and apparently vague and potentially unenforceable promises of investment and/or jobs."[81] He further notes that the safeguards of local interests are weak in a number of deals and some contracts do not properly address social and environmental issues" as a result of which "there is a substantial risk that local people internalise costs without adequately participating in benefits, and major environmental issues are not properly factored in."[82]

Cotula appreciates three contracts from Liberia because of their "more flexible duration, their clearer identification of the land being transacted, their more specific investor commitments on jobs, training, local procurement and local processing, their greater attention to local food security, and their tighter social and environmental safeguards."[83] These contracts "have been ratified by parliament and are available online." The factors that he observes in the good practices of fairly negotiated contracts in Liberia are "determined political

[78] OECD, Freedom of Investment Process, Responsible Investment in Agriculture, May 2010, p. 5

[79] Lorenzo Cotula (2011) ""Land deals in Africa: What is in the Contracts?", International Institute for Environment and Development (IIED), London, p. 1

[80] *Ibid*.

[81] *Ibid*.

[82] *Ibid*.

[83] *Ibid*, p. 2.

leadership, a strong government negotiating team, world-class legal assistance, effective use of financial analysis, and simultaneous (re)negotiation".[84]

> Some of the deals reviewed, namely the Liberian contracts and Mali-2, are quite complex and sophisticated. Liberia-1 and -3 are respectively 40 and 56 pages long. On the other hand, Mali-1 is quite short (6 pages) and unspecific – despite the considerable scale of the deal (100,000 hectares). Subsequent contracts would need to be concluded to actually transfer the land, and they may contain more detail. But at that later stage, the host government is under a legal obligation to provide land – so a poor definition of the investor's obligations in the first contract may have implications for what can be achieved through later negotiations ….[85]

4.3- Sample massive land acquisition: Karuturi

The area of land that was allocated by the Gambella Regional State to Karuturi Global Ltd. was 300,000 hectares (i.e. 741,000 acres).[86] The federal government has taken a commendable measure in reducing the land acquisition to 100,000 hectares, even if this figure still shows a very large farmland acquisition. Article 1.1 of the contract[87] reads:

> The scope of this Lease Agreement is to establish a long-term land leas of rural land for [the] development [of] palm, cereals and pulses farm on the land measuring *100,000* hectares (Itang 42,088 hectares and Jikao 57,912 hectares), located in *Gambela* Regional State, *Nuer Zone, Jikao District and Itang Special District* together with the lease certificate serial No. EIA-IP 14584/07 with all rights of easement of amenities, fittings, fixtures, structures, installations, property or other improvements standing thereon, to the company incorporated for the purposes hereinafter mentioned by the lessee in the Federal Democratic Republic of Ethiopia.

Article 4.1 of the contract states that the lessee shall "get additional 200,000 hectares upon accomplishing the 100,000 hectares within two years as specified under Article 4.4" which sets forth timelines for the development of the leased plot of land. The reduction of the land transfer was preceded by some controversy. According to Esayas Kebede, Head of the Agriculture Ministry's Land Investment Support Directorate, "Three hundred thousand hectares is a

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[84] *Ibid*.

[85] *Ibid*, p. 20.

[86] Various publications including the tables shown in Appendix II cite this figure (with some explanation about the inconsistency in what was actually allocated and the figures in the regional government's records).

[87] Land Rent Contractual Agreement Made between Ministry of Agriculture and Rural Development and Karuturi Agro Products PLC, 25 October 2010.

huge area of land. Nobody can manage it,"[88] He added that "Karuturi should get a rational and manageable plot of land based on its own capacity and our monitoring and evaluation capacity."[89] As Esayas stated, "[t]he boundary of Karuturi's land was not accurately mapped when it was first leased by the Gambella Regional Government in 2009" and he further noted that "[p]art of the reason for the amendment to the concession was to create an 8,000-hectare corridor through Karuturi's land for a one-million strong migration of white-eared kob, a type of antelope."[90] This clearly shows the risks involved in land leases prior to land mapping and clear demarcation of protected forests and wildlife.

A brief look at the date written on the contract, i.e. October 25, 2010 and the response of Karaturi Global by denying the amendment of the contractual terms evokes some doubts about the credibility in Karuturi's statements. The following were the statements given by two key officials in Karuturi Global's top management on May 4th 2011:

> "We have not received any recent updates on the Karuturi agricultural business in Ethiopia," said Archit Singh, an analyst at Globe Capital Market Ltd., which has a "strong buy" rating on the company's stock. "I am not aware of any change in the lease size," he said by phone from New Delhi yesterday.
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> …
>
> Karuturi Chief Executive Officer Sai Ramakrishna Karuturi said reports claiming the government reduced the concession "are completely baseless." The company is developing 111,700 hectares of agricultural land, while 200,000 hectares "continues to be with us as part of the concession and will be developed in a phased manner"...[91]

4.4- Sample eco-tragedy: Verdanta

There are certain natural resources whose value cannot be monetized. For example, the fact that the air we breathe is not a commodity does not render it

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[88] Interview on April 29th 2011 , Capital, [in Business Week, May 4, 2011]. <http://www.businessweek.com/news/2011-05-04/ethiopian-government-slashes-karuturi-global-land-concession.html> Last visited: 7 July 2011.

[89] *Ibid*.

[90] *Ibid*. The news further states the following: "The annual movement from Southern Sudan into an area that includes Gambella National Park, which was given a new boundary in March, is [next to Serengetti] the second-largest mammal migration in Africa, Cherie Enawgaw, an ecologist at the Ethiopian Wildlife Conservation Authority, said in a phone interview from Arba Minch in southern Ethiopia on May 2."

[91] Bloomberg, May 4, 2011, <http://www.businessweek.com/news/2011-05-04/ethiopian-government-slashes-karuturi-global-land-concession.html>, Last accessed: 7 August 2011

less valuable than cargoes of diamonds. Likewise, in a country where only a small percentage of its land mass is covered with forests, the allocation of natural forests for commercial farms cannot be justified by the potential benefits and promises that accompany farming because the corresponding risks and cost are apparent. In this regard, the land lease of 3012 hectares in Gambella region, Mezhenger zone has attracted much attention. It involves natural forests that are considered as sacred by the indigenous communities in addition to the significance of the forests as the basis of their livelihood.

A letter[92] dated 10 December 2010, was sent to the Minister of Agriculture and Rural Development by FDRE's President Girma Woldegiorigis. The letter states that "the administrator of Gumare Kebele in Godere Woreda, Mezhenger

[92] The letter (translated from Amharic by the author) is dated Tahsas 1, 2003 Eth. Cal. (10 December, 2010), Reference No. …/ 216/2003.

It reads:

To: Your Excellency Ato Tefera Deribew
Minister of Agriculture
Addis Ababa

In a letter dated 9 December 2010, the administrator of Gumare Kebele in Godere Woreda, Mezhenger Zone has requested that the land transfer of 3012 hectares to the Indian company Verdanta Harvests PLC be stopped because it is covered with natural forests; The forest is preserved and protected by Pact Ethiopia and Sustainable Land Management Project. Moreover, the request states that the land transfer has not been approved by forestry professionals from regional to federal levels.

It is to be recalled that a similar request was made by the inhabitants of the woreda and I had notified the Federal Environmental Protection Authority, subsequent to which the Authority had sent a letter, dated 6 May, 2010, Ref. No. 818-4/1124, to the Ministry of Agriculture and Rural Development. The Environmental Authority's letter notes Ethiopia's role in representing Africa in international negotiations and requests that the natural forest be preserved stating that the benefits that we can obtain from carbon trading outweighs the gains from farming it.

I thus recall our recent discussion on such issues. At a time when our Prime Minister is representing Africa in international negotiations [related with climate change], I request that no land that is covered with forests be allocated for farming. I ask your Excellency that forest land be allocated only to persons who would like to develop forests or to the community's participatory development pursuits.

Girma Wolde Giorgis
President, Ethiopian Federal Democratic Republic

Cc. Ato Tamru Anbelo,
Gumari Kebele

Zone has requested that the land transfer of 3012 hectares to the Indian company Verdanta Harvests PLC be stopped because it is covered with natural forests." The letter also notes that "the land transfer has not been approved by forestry professionals." The letter further underlines that land covered with forests should not be allocated for farming and that forestland should "be allocated only to persons who would like to develop forests or to the community's participatory development pursuits".[93] In spite of such efforts from the President and other pertinent offices, the contract with Verdanta Harvests PLC is still in force.

As the table in Section 5 indicates, the 3012 hectares acquired by Verdanta Harvests PLC are leased at an annual lease rate of USD 6.48 per hectare (i.e., a total of about nineteen thousand US dollars). Even if other promises are taken into account, this amount clearly stands far below the risks and cost of displacement of communities and the deforestation of natural forests. This is signals the magnitude of the risk that Ethiopia's natural forests are in.

5. Profile of Twenty-four Contracts

Fairly negotiated contracts are necessary because "from a legal point of view, a weak contract means that mechanisms to hold the investor to account are ineffective. Conversely, even well negotiated contracts may be poorly implemented and produce disappointing results."[94] In contracts that are not fairly and carefully negotiated "the balance of the parties' rights and obligations" which lawyers refer to as "the 'economic equilibrium' of the contract" tends to give investors "enforceable, long-term and largely transferable rights to extensive areas of land, while host country benefits appear to be often limited or ill-defined."[95]

Twenty four contracts are rendered accessible through the website of the Ministry of Agriculture. Eight of the contracts are with Ethiopian investors and six with Diaspora investors. The land transfers for the eight Ethiopian investors range from 3,000 to 18,516 hectares. The size of the six land transfers to Ethiopian born investors that have foreign nationality ranges from 431 to 5,000 hectares. It is to be noted that the list only shows the contracts that are made available at the Ministry's website and it is not an exhaustive list of all the land transfers that are made to date. Ten out of the twenty four contracts are concluded with foreign investors. The total area stated in the contracts with foreign investors is 285,012 hectares while the contracts with Ethiopian investors and diaspora investors indicate total land transfers of 48,519 and

[93] *Ibid*.

[94] Cotula (2011), *supra* note 79, p. 10.

[95] *Ibid*, p. 20.

16,568 hectares respectively. The following table shows the profile of the ten contracts made with foreign investors:

Lessee	Nationality	Date of the contract	Area of land in hectares	Annual lease rate per hectare		Years [96]	Region
				Birr[97]	US D		
BHO Bio Products PLC	Indian	11 May 2010	27,000	111	6.48	25	Gambella
CLC (Spentex)	Indian	26 Dec. 2009	25,000	665.85	38.9	50	B/Gum.& Amhara
Hunan Dafegyuan Agr. Co.	China	25 Nov. 2010	25,000	158	9.22	40	Gambella
Karuturi Agr. Products Plc[98]	Indian	25 Oct. 2010	100,000	20	1.16	50	Gambella
Rucci Agri PLC	Indian	5 Apr 2010	25,000	111	6.48	25	Gambella
Sannati Agro Farm Ent.	Indian	1 Oct. 2010	10,000	158	9.22	25	Gambella
Saudi Star Agri. Devpt [99]	Saudi	25 Oct 2010	10,000	30	1.75	50	Gambella
SP and Energy Solutions	Indian	1 Mar. 2010	50,000	143.4	8.37	50	Benishangul
Verdanta Harvests PLC	Indian	20 Apr 2010	3.012	111	6.48	50	Gambella
Whitefield Cotton Farm Plc	Indian	01 Jul 2010	10,000	158	9.22	25	SNNPR[100]
			285,012				

The English version of each contract is nine pages long and the contracts have an almost identical content with minor variation regarding the identity of the

[96] The period of lease "can be renewed for another additional years" based on the mutual agreement between the parties .

[97] Art. 2.2.4 of the lease contracts allows the lessor "to revise the lease payment rate as the need may arise".

[98] Article 19 of the contract states that this contract replaces the earlier contract made with the regional government on 4 August 2008.

[99] Article 19 states that this contract replaces the earlier contract made with the regional government on 29 September 2009.

[100] Southern Nations, Nationalities and Peoples Regional State.

lessee, the location of the land, lease rent, etc. On the positive front, this shows that the terms and conditions are possibly designed in the host state. However, lack of some diversity and particularity depending upon the location of the land, variation in the social and environmental setting, the duration and area involved, purpose of the farm, etc. indicate inadequate scrutiny and the absence of detailed negotiation on a case-by-case basis.[101] The model contract that is used has a preamble and 19 (or 20) articles. The titles and core themes of the provisions below give a general profile of the contracts:

Articles 1 & 2: The provisions deal with the *scope of agreement*, i.e., the area and location of the land and the "period of the land lease and payment rule of the land lease."

Article 3- *Rights of the lessee:* The issues addressed include the rights of the lessee to develop the land, build infrastructure, use water from rivers and ground water for irrigation, administer the land personally or through agency, use mechanization that the lessee deems fit, and terminate the contract with at least six months of prior notice.

Article 4- *Obligations of the lessee*: The lessee's obligations to take good care of the land, and to observe the timelines for taking over and developing the land as stated in the provision, conditions of transfer and other obligations.

Article 5- *Rights of the lessor*: This provision embodies the lessor's right to monitor and establish the performance of the lessee's obligations, restore land that has not been developed according to the timeline agreed upon, termination of the contact under the conditions stated in Article 5.4 with a prior notice of six months, amend land rent as the need may arise.

Article 6- *Obligations of the lessor*: It deals with the issues of handing over vacant possession of the land, provides special investment privileges "such as exemption from taxation and import duties of capital goods and repatriation of capital goods and profits, granted under the investment laws of Ethiopia", assures the absence of impediments during the lessee's activities of "clearing the land and using the same," and ensures that the "lessee shall enjoy peaceful and trouble free possession" and provide adequate security free of cost.

[101] Even certain typing errors and spots that seem to need some editing stand uncorrected in the contracts reviewed.

Articles 7-10: Delivery of the land, Contract amendment and renewal, Grounds for contract termination, Consequences of contract termination procedure.

Articles 11- 15: Registration, Governing law, Force majeure, Covenant of peaceful possession, Controlling calendar.

Articles 16-19/20: Annexes to the agreement, Settlement of disputes, Language, Office and notices.

6. Problematic Provisions in the Contracts

The level of mutual benefits, detail, enforceability and clarity of the terms and conditions embodied in the contracts determine the extent to which win-win benefits can be secured in the course of the contract's implementation. The following provisions of the contracts listed in Section 5 seem to be problematic:

a) *Lease rates* per hectare (Art. 2.2.1):
The variation in the lease rates needs clarification as to why the rates in the contracts with Karuturi and Saudi Star are only Birr 20 (USD 1.16) and Birr 30 (USD 1.75). This can be contrasted against the annual lease rates per hectare in the Contract with CLC (Spentex) shown in Section 5 above (i.e. Birr 665.85/ USD 38.9) and with the rates in various countries.[102]

b) *Revision of rates* (Art. 2.2.3):
The provision could have benefited from a list of illustrative factors that can justify revision of rates. Factors such as change in foreign exchange rates, changing conditions in lease rates in other countries, rising prices of the agricultural products, increasing demand for commercial farm land lease, etc. … are among the factors that can lead to change in the rates.

c) *Infrastructure* (Art. 3.2):
The provision states the *lessee's rights* "to build infrastructure such as dams, water boreholes, power houses, irrigation system, roads, bridges, offices, residential buildings, fuel/power supply stations, outlets/ health hospitals/dispensaries, educational facilities at the *discretion of the lessee* upon consultation and submission of permit request with concerned offices subject to the type and size of the investment project *whenever it deems so appropriate.*" (Emphasis added). The italicized phrases (i.e., "the lessee's rights to build infrastructure", "discretion of the lessee" and whenever it deems so appropriate") evoke doubts regarding the level of emphasis given to infrastructure which is one of the benefits of such projects.

[102] The ranges stated in Oakland Institute's Report are: "Sudan: USD 3-20; Mali: USD 6-12; African average: USD 350-800; Brazil/Argentina: USD 5,000-6,000; Germany: USD 22,000,"Horne, Oakland Institute, *supra* note 17., p. 29.

d) The right to use water for irrigation:

According to Article 3.3 of the contracts, the lessee has the right to use "irrigation water from rivers or ground water respecting present and future environmental and water laws and regulations without any disturbance to the environment with prior permission from responsible federal and regional institutions." It is not clear whether the land rent has taken the water resources into account. Nor is it clear whether the provision has carefully considered the water resource impact of extensive groundwater pumping and/or extensive irrigation from rivers whose flows, in the Ethiopian context, are being adversely affected by poor watershed management.

e) *Administration of farm:*

Article 3.4 embodies the right of the lessee to "[d]evelop or administer the leased land on his own or through a legally delegated person/ agency." The terms 'delegated person' or 'agency' seem to have the potential to be misconstrued. A case in point is the recent news about "MOU" (*Minutes of Understanding*) signed between Karuturi Global and farmers from Punjab. Thus the words 'delegated person' or 'agency' need to be carefully interpreted. Can Karuturi sub-lease its possession in units of 2000, 3000 etc. hectares to Indian farmers in the name of "Minutes of Understanding"? The following news[103] requires caution:

> … If everything goes as planned, the enterprising farmers of Punjab would be seen managing large farms in Ethiopia in near future. Karuturi Global Ltd, the largest rose producer in the world, has acquired about 770,000 acres of land in Ethiopia for cultivation of cereal crops, palm oil plants, sugar cane, etc and is offering work to the farmers of Punjab.
>
> … Paving way for others, Punjab-based farmer Puneet Singh Thind has signed a memorandum of understanding (MoU) with the company as a consultant and would manage about 2,500 acres of land initially.

The words 'consultant', 'managing farms' etc ought to be carefully interpreted and utmost attention need to be made against subleasing pieces

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[103] Punjab farmers to grow multiple crops in Ethiopia, Business Standard, <http://www.business-standard.com/india/news/punjab-farmers-to-grow-multiple-crops-in-ethiopia/444507/ > Vijay C Roy / New Delhi/ Chandigarh August 2, 2011. Accessed: 7 Aug. 2011.

> "Speaking to Business Standard, Puneet Singh Thind said, "I have visited Ethiopia a couple of times and was really keen to start farming there. So I have signed an MoU with the Karuturi Global Ltd. They are going to provide all kind of infrastructural support to me. Very soon, I would float a company for managing the farms. Initially, I would be managing 2,500 acres of land. As far as revenue sharing is concerned, it would be in the ratio of 65:35." Business Standard, *Ibid*.

of land. Such indirect sub-leasing seems to be inconsistent with Sub-Articles 10, 11 and 12 of Article 4 of the contract which embody the requirement that the lessee ought to develop at least 75% of the project before it is (upon the permit of the lessor[104]) allowed to transfer the land or properties developed on the land in favour of any other company or individual."[105] In the absence of prudence on the part of the regulatory authorities, such schemes would *de facto* lead to resettlement projects.

f) *Environmental responsibility*:

Article 4.1 stipulates that the lessee "shall bear the obligation to provide good care and conservation of the leased land and natural resources thereon, with particular obligations to" the following:

- "Conserve tree plantation that have not been cleared for earth works";
- "Apply appropriate working methods to prevent soil erosion in slopping areas";
- "Observe and implement the entire provision of legislations providing for natural resource preservation"; and
- "Conduct environmental impact assessment and deliver the report within three months of execution of this agreement."

The obligations of the lessee stated in this provision need to be supplemented by detailed standards of compliance because terms such as "good care and conservation", "appropriate working methods" are too general and imprecise. The illustrative standards embodied in the provision also involve policy choices. For example, would a farm be allowed to clear most of the trees in the name of 'earth works'? What is the sanction against a lessee's failure to develop the land after having cleared and sold a significant portion of the trees on the land? Who owns the standing trees during the period of the lease? Is it possible to determine the level of tree conservation and retain the ownership of the trees conserved as a disincentive for the lessee's inclination towards cutting them and only allow ownership over the trees the lessee has planted?

The timing of impact assessment is also an issue of concern. Proclamation No. 299/2002 envisages impact assessment "prior to issuing an investment permit or a trade or an operating license" [106] where the project requires environmental impact assessment. As noted by Mellese Damtie and

[104] Art. 4(11) of the contract.

[105] Art. (4(1) of the contract.

[106] Art. 3(3) of the Environment Impact Assessment Proclamation (Proclamation No. 299/2002).

Mesfin Bayou, Proclamation № 375/2003 does not include the requirement of Environmental Impact Assessment in effect repealing "Article 22(2) of the Commercial Registration and Business Licensing Proclamation № 67/1997, which makes presentation of authorization from environmental agencies a requirement for issuance of business license."[107]

In the context of land transfers, the economic activity of farming according to the project document follows immediately after the conclusion of the contract, and whatever is done thereafter by way of 'environmental impact assessment' is a *post facto* procedure which does not lead to the cessation of the agricultural activity. Indeed, this renders post-land allocation impact assessment merely justificatory. As Imeru notes:

> "…[I]nvestors have in large part not been required to conduct EIA during the licensing of such investments or prior to the allocation of land. Equally, although the EIA laws and guidelines require conducting a social impact assessment of projects, they have not been set as a requirement for approval of large scale agricultural investment projects. Interviews with experts at both the Federal and Regional levels have also confirmed that EIA and social impact assessment are not a routine requirement for large-scale agricultural investments."[108]

g) *Incentives*:

The incentives stated in Art. 6.2 include the ones embodied in Ethiopia's investment laws. It is to be noted that 'safe' investment stations with far lesser tax and import duty concession schemes attract more Foreign Direct Investment which is socially and environmentally responsible owing to the factors that rank higher than these incentives. These factors, *inter alia*, include the level of political stability, peace and order, human capital, low level of corruption, culture of trust in business relations, labour cost, local market, access to (and relatively low cost of) export markets, efficient and predictable contract enforcements, predictable and stable property regime. The prevalence of these core factors in a given economic system is inversely proportional to the concession in taxes and the '*race to the bottom*' in social and environmental compliance standards.

h) *Peaceful possession*:

Article 6.6 requires the lessor to:

> "ensure during the period of lease [that] the lessee shall enjoy peaceful and trouble-free possession of the premises and it shall be provided adequate security, free of cost, for carrying out the entire activities in the

[107] Mellese Damtie and Mesfin Bayou (2008), "Overview of Environmental Impact Assessment in Ethiopia", *Melca Mahber*, January 2008, p. 25.

[108] I. Tamrat, *supra* note 5, p. 19.

said premises, against any riot, disturbance or any other turbulent time other than force majeure, as and when requested by the Lessee."

This contractual clause mixes up the function of the lessor (MoA) -which is merely a civil contracting party in this contract- with the function of an organ of criminal justice. Had the lessor been a private land owner, such provision would not have been included. The criminal justice system will inevitably ensure that law and order are respected. The theme addressed in this contractual clause thus mainly falls into criminal law and not contracts. Such guarantees in the domains of contracts are invariably limited to guarantee against dispossession and third party claims.

i) *Registration of the contract*:

Article 11 of the contract provides that the land lease agreement "shall not be subject to registration and approval by a notary office." It further reads "However, the lessor as a representative and the highest authority of the Federal Democratic Republic of Ethiopia's government with respect to this lease agreement shall guarantee the validity of this Agreement despite absence of registration. …"

All entities including the state[109] and its organs[110] are juridical persons under Ethiopian law, and are governed by the law in the context of equality before the law. Under Ethiopian law, contracts which, for example, create or assign the right of usufruct in immovables are required to be registered in court or notary.[111] Contracts concluded with organs of public administration[112] have three options of location for registration, i.e. at court, notary or public administration. The provision of the Civil Code that deals with the registration of lease of immovables in general[113] provides that leases "made for a period exceeding five years shall not affect third parties until they are entered in the registers of immovable property at the place where the immovable is situate." Likewise, Proclamation No. 456/2005[114] states the required procedures applicable to rural land lease agreements including registration at the competent authority.

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[109] Article 394(1) of the Ethiopian Civil Code stipulates that "The State is regarded by law as a person".

[110] Article 394(2) reads: "As such [the State] can have and exercise, through their organs, all the rights which are vested in them by the administrative laws."

[111] Art. 1723(1), Civil Code.

[112] Art. 1724, Civil Code.

[113] Art. 2899, Civil Code.

[114] Art. 8(3), Federal Democratic Republic of Ethiopia Rural Land Administration and Use Proclamation (Proclamation No. 456/2005).

The issue that can arise is thus whether the 'registration' in the contracts under discussion should necessarily be made at court or notary. Aside from such issues of location of registration, the Ministry of Agriculture cannot, in a contract it concludes with a lessee, waive the legal requirements of registration *per se*. Any guarantee made by the lessor towards the validity of the contract "despite absence of registration" cannot be tenable under the Ethiopian Civil Code which allows the contracting parties to freely determine the object and terms of contract, but "subject to such restrictions and prohibitions as are provided by law."[115]

7. Issues Not Addressed in the Contracts

Promises that are made by investors and the expectations of host states cannot merely rely on good intentions. Contracts of land transfers are thus expected to articulate the benefits that are expected by the lessor and the lessee and the obligations that are required to be performed by both parties. The following gaps in the contracts show that promises such as job opportunities, food security, seed varieties, benefits to local communities, transparent and monitored financial transactions and putting in place benefit sharing schemes are left to the credibility and discretion of the lessee.

a) *Job opportunities*:
As Cotula notes, "specific provisions [are] contained in the Liberian contracts, which for instance require unskilled positions to be filled by nationals."[116] These contracts "establish sliding scales to progressively increase recruitment of nationals in skilled positions over specified timeframes, and explicitly require compliance with national labour law (e.g. Liberia-3)" even if "precise figures for how many skilled and unskilled jobs will be created are not available."[117]

b) *Food security*:
As Daniel notes "[i]ncreased food supply does not automatically mean increased food security for all" and he states that "[w]hat is important is who produces the food, who has access to the technology and knowledge to produce it, and who has the purchasing power to acquire it."[118] He further underlines that "in order to double food supply, we need to redouble efforts

[115] Art. 1711, Civil Code.

[116] Cotula (2011), *supra* note 79, p. 25.

[117] *Ibid*, pp. 25-26.

[118] Shepard Daniel (2011), *Land grabbing and potential implications for world food security*, in Sustainable Agricultural Development: Recent Approaches in Resource Management and Environmentally-Balanced Production Enhancement. Behnassi *et al*, Editors (Springer), p. 40.

to modernize agriculture"[119] in a manner that raises productivity along with the enhancement of access to food.

The contracts do not embody commitment of the lessee to sell a specific percentage of its production in local markets. In fact, this is left to the capacity of the local consumers to buy the products from the MNEs. In response to a question from *Deutche Welle* whether there exists a stipulation in the contracts that obliges multinationals [such as Karuturi] to increase local food supply by at least selling part of the product in Ethiopia, the reply from Esayas Kebede, Director of the Agricultural Investment Directorate was the following:

> "It's not our task to take revenue away from investors. … [W]e want to increase the purchasing power of our people so that they can afford to buy corn from Karuturi. If the investors can get a good price here in this country, they will sell here."[120]

c) *Royalty* to *seed varieties*:
One of the aspects in the disempowerment of rural communities is the MNE biopower manifested in spheres such as royalty to seed varieties and the control of the supply, production and marketing value chains. Although the accessibility of improved seeds is stated as one of the benefits of the land transfers, concrete modalities of securing this benefit and the guarantee against biopower in seeds are not addressed in the contracts.

d) *Local content provisions*:
The contracts further lack "local content provisions" that "require the investor to collaborate with local farmers or to procure goods and services from local producers.[121] In the context of biofuels, for example, Atakilte Beyene indicates the dangers in extensive land transfers for biofuels owing to the high population density and limited land availability in Ethiopia and he notes the positive aspects in contract farming[122] which enables small-hold farmers to undertake the tasks of the production for biofuels.

Contractual provisions can thus require the collaboration of investors to enter into contract farming with local smallholders with the *caveat* that the

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[119] *Ibid*.

[120] <http://www.ethiopiainvestor.com/index.php?option=com_content&task=view&id=2389&Itemid=88>, Last visited 6 September 2011.

[121] *Ibid*, p. 26. Cotula appreciates Liberian contracts in which "the contracts contain provisions on local procurement which apply to the investors and their subcontractors (e.g. Liberia-2), or requirements for the investor to establish outgrower programmes (e.g. Liberia-1).

[122] Atakilte Beyene (2011), "Smallholder-led transformation towards biofuel production in Ethiopia", in Prosper B. Matondi *et al*, editors,' *supra* note 44, p. 90.

latter are not handcuffed by top-down value chain and the strings of biopower such as seed royalties. Because most farm products (other than floriculture in particular and horticulture in general) are not perishable, smallholder farmers in contract farming can have fallback market opportunities while at the same time benefitting from the technological spillovers.

e) *Independent audits and financial monitoring schemes*:
The contracts do not address the issues of "independent audits and the government's oversight of investor's financial accounts", that are necessary as "safeguards against 'transfer pricing'; –the practice whereby the project company's taxable profits are decreased through input purchases from, or product sales to, related companies at inflated or discounted prices, respectively."[123]

f) *Benefit sharing schemes*:
As Imeru observes, "there are no laws, regulations or directives in place that are clearly articulated to ensure benefit-sharing between the investor and the public" and he further notes that the regional contracts that he has examined do not include these schemes.[124] The contracts examined in this study do not also include such schemes. "Investors are thus under no legal obligation to share the benefits accruing from their investments."[125]

The safeguards stated above and other schemes on binding commitments are necessary to ensure that the promises that are expressed by investors can be enforceable. One may wonder whether the embodiments of such commitments in contracts can scare away FDI in agriculture. If any foreign investor shies away from such contracts that are fair, clear and specific, it must be a party that does not provide the promises expressed in such investments. Any reluctance or hesitation of socially and environmentally responsible multinational enterprises to invest in a certain location does not emanate from such contractual terms but is caused by their attraction to other destinations that have a relatively better level of performance with regard to the prime factors that attract investment.

Concluding Remarks

There are push factors towards leasing out extensive areas of land under the assumption that they can bring about socio-economic rewards that offset the social and environmental risks involved in the transactions. On the other hand, however, there is the risk of irreversibility of the social and environmental harm.

[123] *Ibid*, p. 27.

[124] I. Tamrat, *supra* note 5, p. 16.

[125] *Ibid*.

As highlighted under Section 3, laws such as Proclamation No. 455/2005 and No. 456/2005 reduce the scope and security of land use rights of smallholder farmers, pastoralists and communities. In the Ethiopian context, the problem of land-use insecurity emanates from the extensive powers that these proclamations confer upon executive entities that are empowered to dispossess holders and reallocate land to 'investors'. In various African countries, for instance, rural land that is held under customary tenure is exposed to land grabbing, while on the contrary, land under lease-hold is relatively secure because only courts are allowed to give the final decision over the termination of lease holds.[126] In customary landholdings, however, local chiefs, as indicated in Section 3.2 are at times maneuvered by MNEs towards land deals.

Both individual and community holdings in Ethiopia can be susceptible to land grabbing whose ultimate rewards may not offset the risks and harm. The lessons that can be learnt from the extensive land transfer of 300,000 hectares to Karuturi (Section 4.3) which was later reduced to 100,000 hectares and from the eco-tragedies such as the land transfer made to Verdanta in Mezhenger clearly show the need for:

a) the mapping and demarcation of natural forests and wild life,
b) the registration of the holdings of smallholder framers, pastoralists, semi-pastoralist and community holdings in all regions that have not yet done (or finalized) such registration;
c) the issuance of land-holding certificates, and
d) restraint from land transfers in all areas where mapping, demarcation, registration and the issuance of land-holding certificates are not yet made or finalized.

In addition to these measures, addressing the problems and gaps in the contracts discussed in Sections 5 to 7, and securing the use rights of smallholder farmers, pastoralists and communities seem to be *sine qua non* conditions to control speculative land grabbing, and meanwhile enhance responsible agricultural investment. Effective solutions beyond such short-term caveats require the amendment of Proclamations 455/2005 and 456/2005 to expressly render the government a *custodian* (and not *owner*) of land with a view to securing the sovereignty of the State, Nations, Nationalities and Peoples over urban and rural land as enshrined in the Constitution,

In the realm of implementation, this presupposes checks and balances in the legislative, judicial and executive functions of the state. The State, in its legislative function, is expected to address the problems in the normative regime of land rights. Secondly, the termination of land use rights should invariably be

[126] Zambia can be cited as an example.

decided by the State's judicial organ in such a manner that entities entitled to allocate farmland would not perform the dual functions of dispossessing occupants and reallocating land to investors. In the absence of such pragmatism, caution, checks and balances, the use rights of landholders can easily be violated, and the promises made by 'investors' would in essence become mere public relation statements that rather enhance the global rush to land grabs which is drastically different from binding commitments in win-win agricultural investment.

Matondi *et al* recall three core questions raised by other authors[127] regarding the "starting point for understanding land grabs", namely: "who owns what? Who does what? Who gets what? And what they do with the surplus wealth?" [128] They further state what Anuradha Mittal adds: "What is grown? For whom? And How?"[129] There is yet another question that deserves attention, i.e. why do host countries act the way they do?

The core foundation in the rush of Sub-Saharan African countries, including Ethiopia, towards large-scale farmland transfers seems to be related with the concept of 'economic growth' which was, until recently, highly influenced by the GDP, GNP and per capita income paradigm. At present, this paradigm is replaced by another statistical tool kit of HDI (Human Development Index) which again is usually misinterpreted and affiliated with numbers and statistics rather that actual social facts and real *well-being* at grass roots.

The global economic system which seems to be addicted to statistical 'achievements' and bubble figures in the areas that are regarded as elements of HDI and GDP seems to have caused the quest in developing countries (and by extension in administrative and regulatory units within a country) for aspiring towards and reporting steadily rising figures of economic achievements to the detriment of integrated and sustainable development. Needless to say, the achievability and sustenance of development presupposes a pragmatic and incremental progress that synthesizes the economic, social and environmental dimensions of development. Moreover, the rush to copy and paste the values of consumerism, atomistic individualism and the lifestyles of 'modernity' is steadily rising without a proportionate increase in the production and supply side of goods and services, and faster than the demographic transition towards a lower pace in population growth. It is under such settings and in the midst of

[127] Borras *et al* (2010), "The politics of biofuels, land and agrarian change: editors' introduction), *Journal of Peasant Studies*, 37(4), 575-92.

[128] Prosper B. Matondi, Kjell Havnevick and Atakilte Beyene, editors' introduction (2011), *Biofuels, land grabbing and food security in Africa* (London/NY: Zed Books) p. 4.

[129] *Ibid*.

the disequilibrium and the relational injustice in the global economic system that governments in developing countries perform their administrative and regulatory functions.

We can borrow four words (i.e. ruthless, voiceless, rootless and futureless) used by UNDP and A. Kennedy in 2007[130] to state the features of FDI-dependent growth in the absence of a prudent and effective balance between rewards and risk. FDI-dependence and passive adherence to the dictates of mono-route economic globalization can be '*ruthless*' due to the wide gap it creates between mass poverty and elite affluence. *Secondly*, economic growth can be '*voiceless*' where it undermines rule of law and the freedom of expression in the guise of priority to the economy. *Third*, cultural 'globalization' and the resultant cultural confusion (rather than cosmopolitan cultural synthesis) may accompany foreign-triggered 'growth' thereby rendering the growth '*rootless*' owing to the "cultural decay" it brings about and due to the crisis it entails in the "identity" of the *self* and in the "meaning" of wellbeing, purpose in life and happiness. And *fourthly*, the conception of 'growth' that over-exploits, degrades and depletes "resources needed for future generations" and the ecosystem at large is "*futureless*."

These precautions should not, however be equated with eco-centrism that focuses on ecological systems for their sake, because problems in economic, social and political development and the corresponding mismatch between population explosion and limited resources are in fact the prime sources of threats to the environment in the context of Sub-Saharan Africa. Nor should simplistic aspirations of equating development with statistical growth be allowed to push us towards the risks that accompany land grabs.

The conceptions of economic 'growth' that misinform policies and decisions (such as the current wave of massive land transfers to foreign 'investors') may continue until inevitable lessons are learnt the hard way. Unfortunately, however, such lessons are usually preceded by bitter losses with irreversible opportunity cost and environmental harm. Meanwhile, the bandwagon not only involves the academics and policy makers that are trapped in the macroeconomic prescription of statistical 'growth,' but also an elite of 'beneficiaries'(including some MNEs) that grab the opportunities to speculative land deals. ■

[130] Cited in Matondi and Mutopo (2011), "Attracting foreign investment in Africa in the context of land grabbing for biofuels and food security", *Ibid*, p. 72.

ETHIOPIAN LAW OF INTERNATIONAL CARRIAGE BY AIR: AN OVERVIEW

Hailegabriel G. Feyissa ♣

Abstract

Ethiopia's aviation history goes back to the late 1920s. And, carriage of goods and passengers by air dates at least as far back as the 1940s – the decade which witnessed the establishment of Ethiopian Air Lines Corporation (now Ethiopian Airlines). Despite Ethiopia's relative success in commercial aviation, domestic literature on commercial air law has been scanty. Court decisions involving air carriage are rare, and one can seldom find a course on air law in the curricula of Ethiopian law schools. This article is an attempt to briefly address the gap in literature and encourage further academic discourse on Ethiopian law of air carriage with particular attention to the law and practice regarding international carriage by air.

Key words:

Air law, international carriage by air, the 1929 Warsaw Convention, liability of the carrier, documents of carriage, limitation of liability of the carrier

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Introduction

The law on carriage by air forms part of air law (civil aviation law).[1] It is that part of air law governing the liability of air carrier under contract of air carriage.[2] Historically, it dates only as far back as the early 20th century when aerial navigation began the transition from myth to reality.[3] Though domestic

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[1] Air law may be defined "part of law relating to civil aviation." It deals with range of aviation matters including, but not limited to, registration of aircraft, aviation safety, movement of aircraft across airspace, provision of aeronautical services, aviation crime, and carriage by air. Air law can be interchangeably used with aviation law; see Benyam T. & Hailegabriel G. (2010), *International Air & Space Law Module*. Bahir Dar, Bahir Dar University, p. 3.

[2] Accordingly, it determines the basis of the carrier's liability, the limits of liability, and other related matters such as contents and forms of travel documents, jurisdiction and limitation of liability.

[3] See, e.g., Hudson, M. (1930) "Aviation and International Law," *The American Journal of International Law*, (24), p.229-230 [hereinafter Hudson]; In contrast, the law on sea

legislations on private and public air law had already existed even before the 20th century,[4] discussions regarding carriage by air began[5] since the 1900s – the decade which saw the Wright Brothers (Orville and Wilbur Right) successfully carry out "the first controlled powered flight of airplane."[6]

Air law in general and the law on carriage by air in particular developed mainly within an international context.[7] The initial efforts to codify the law on international carriage by air were facilitated by *Comité Juridique International de l'Aviation* which in 1911 drafted a code of air law.[8] Further, it conducted two diplomatic conferences the second of which was held in Warsaw, Poland where numerous states gathered to consider a draft convention prepared by a committee of experts drawn from different countries. Agreement was eventually reached over a convention which became the Convention for the Unification of Certain Rules relating to International Carriage by Air (the 1929 Warsaw Convention).

Ethiopia was not among the original signatories to the Warsaw Convention. Ethiopia started its aviation history a few years after the Warsaw Convention was signed.[9] However, it took steps in ratifying and subsequently giving effect

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carriage dates as far back as 900 B.C; see, e.g. Hailegabriel, G. (2008) *Maritime Law Teaching Material*. Addis Ababa, JLSRI, p.12.

[4] Laws regulating balloon flights were in place in, for example, France during the 18th century; see Diederiks–Verschoor, I. (2001) *An Introduction to Air Law*. The Hague, Kluwer Law International, p.2 [hereinafter Diederiks –Verschoor]

[5] See, e.g., Kuhn, A. (1910) "The Beginnings of An Aerial Law," *American Journal of International Law*, (4), p.109 *et seq*.; Baldwin, S. (1910) "The Law of the Airship," *American Journal of International Law*, (4), 95 *et seq*.

[6] Jordan, T. (1953-1954) "Aviation, Past and Present," *The Wisconsin Magazine of History*, (37), p.79 [hereinafter Jordan]; Tuan, K. (1965) "Aviation Insurance in America," *The Journal of Risk and Insurance*, (32), pp. 1-2[hereinafter Tuan]; within less than two decades of the 1903 Wright Brothers' attempted flight, airplanes began to be used for passenger and cargo transportation. By late 1910s and early 1920s, there had already been some commercial flights in the US and Europe. Historical records show Ethiopia did not wait long before joining the aviation world. Before the Italian Occupation (1936-1941), domestic routes were opened to, for instance, to Bishoftu (see note 9 *infra*)*;* see, e.g. Jordan, p.80; Tuan, p.2; Diederiks–Verschoor, *supra* note 4, p.2.

[7] In this regard, the role of the Institute of International Law, which was engaged in the study of the law governing aviation since 1900, is worth considering; see generally Hudson, pp. 228-240; Diederiks–Verschoor, *supra* note 4, p.2-8; Philipson, G. & et al. (2001) *Carriage by Air*. London, Butterworths, § 1.1 – 1.54 [hereinafter Philipson].

[8] *Ibid*, Philipson, § 1.4 –1.5.

[9] The year 1929 witnessed the arrival in Ethiopia of a French aircraft. Interestingly, the years preceding the Italian Occupation showed developments in the use of civil

to the Convention in 1950, some four years after the incorporation of Ethiopian Air Lines as subsidiary of TWA (Trans World Airlines).[10] This makes Ethiopia the first African[11] state to join the Convention.

In 1960, Ethiopia enacted a Commercial Code. Book III, Title II of the 1960 Commercial Code[12] contains rules applicable to air carriage. These rules show huge resemblance to the 1929 Warsaw Convention.[13] Since 1960, Ethiopia has thus had two separate laws for carriage by air. While the Warsaw Convention applied to "international carriage", the Commercial Code must have applied in the domain of domestic carriage.[14] As of 2008, however, the Ethiopian law on carriage by air has basically been consolidated. At present, the Civil Aviation Proclamation[15] provides that "the liability of *any* air carrier to passengers and cargo is governed by the rules and limitations contained in the international legal instruments to which Ethiopia is a party."[16] It can now be argued that the provisions of the Commercial Code on carriage by air are superseded by their counterpart provisions embodied under international legal instruments to which Ethiopia is a party.

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aviation. Aircrafts were purchased; domestic routes and aviation schools were opened (see "The History of Aviation in Ethiopia" at <www.ecaa.gov.et> [last accessed December 23, 2010]); see also Bahiru, Zewde (2011) "Ethiopia's Entry into the Jet Age," *Selamata*, (28), p.54.

[10] Jandy, E. (1956) "Ethiopia Today: A Review of Its Changes and Problems," *Annals of the American Academy of Political and Social Science*, (306), p. 115.

[11] Though the Republic of South Africa signed the Convention in 1929, it was only in 1954 that it took steps in ratifying the Convention. In contrast, Ethiopia signed and ratified the Convention in 1950, making it the first African nation to give force to the Convention; see <http://www.icao.int/icao/en/leb/wc-hp.pdf>.

[12] Commercial Code of Ethiopia, 1960, *Negarit Gazeta*, Proclamation No. 166/1960, 19th Year, No.3 [hereinafter Commercial Code].

[13] Yet, the Commercial Code benefited from amendments to the original Warsaw Convention. For instance, Article 609(2) Commercial does not, unlike Article 4(3) of Warsaw Convention, sanction the delivery of baggage check that does not contain the number of passenger ticket and the number and weight of the packages. See note 92 *infra*.

[14] See, for example, *Negist Makonnen et al. v Ethiopian Airlines et al*. (Addis Ababa High Court Civil Case No. 701/55 E.C [reported in Journal of Ethiopian Law Vo. 3(1), pp. 68-74]) where the Addis Ababa High Court maintained that the Warsaw Convention cannot apply to domestic carriage with respect to which the Commercial Code applied; see also further discussions under 2.1.

[15] Civil Aviation Proclamation, 2008, *Federal Negarit Gazeta*, Proclamation No. 616, Year 15, No. 23 [hereinafter CAP].

[16] Article 69, CAP.

Consistent with international legal instruments to which Ethiopia is a party, international air carriage is seen here as the carriage of goods and passengers between places in different jurisdictions.[17] Moreover, carriage between places within Ethiopia may be international if it involves an agreed stopping point outside Ethiopia.[18]

The Ethiopian law for international air carriage is mainly contained in the 1929 Warsaw Convention. The Convention, *inter alia*, contains rules on documents of carriage, the liability of the carrier, limitation of liability, and jurisdiction. The contents of some of these rules have been updated through series of protocols.[19] Ethiopia, like many other states, is not a party to various

[17] Article 2(30), CAP; Article 1(2), the 1929 Convention for the Unification of Certain Rules relating to International Carriage by Air [hereinafter Warsaw Convention].

[18] *Ibid*.

[19] These protocols/conventions include the 1955 Hague Protocol (formally known as the Hague Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air) [hereinafter Hague Protocol], the 1961 Guadalajara Convention (formally known as Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed at Guadalajara on 18th September 1961), the 1971 Guatemala Protocol (Protocol To Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed At Warsaw On 12 October 1929 As Amended by the Protocol Done At The Hague on 28 September 1955 Signed At Guatemala City on 8 March 1971), and the four 1975 Montreal Additional Protocols (a.k.a Additional Protocol No.1 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Signed at Montreal, on 25 September 1975; Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955, Signed at Montreal on 25 September 1975; Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971, Signed at Montreal on 25 September 1975; Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955, Signed at Montreal on 25 September 1975)[hereinafter Montreal Protocol No. 1, Montreal Protocol No. 2, Montreal Protocol No. 3, Montreal Protocol No. 4, respectively]. Though they are not formal amendments to the 1929 Warsaw Convention, the IATA 1966 Montreal Agreement (formally known as Agreement Between Carriers of the "International Air Transport Association" (IATA) and the "Civil Aeronautics Board" (CAB) of the United States, Montreal 4/5/1966)

amending protocols of the 1929 Warsaw Convention, and this limits unification and convergence in private international air law.[20]

This article overviews the Ethiopian law on international[21] carriage by air. It does not as such deal with Ethiopian civil aviation law. It only focuses on the body of law governing the liability of the carrier in international air carriage. Section 1 highlights the historical evolution of the Warsaw system from an Ethiopian perspective. And, this is followed by a closer look at the substantive and procedural aspects of the Ethiopian law relating to international air carriage. Finally, a concluding remark along with suggestions for future actions is provided. It must be noted that the Commercial Code's rules on carriage by air, the Civil Aviation Proclamation's rules on civil aviation, and other Ethiopian transport legislations are not considered in this article. This is because these laws do not contain the Ethiopian law on international carriage by air.

1. The Evolution of the Law on International Carriage by Air: An Ethiopian Perspective

The 1929 Warsaw Convention which came into force in 1933 represents the first successful attempt to unify the law on international carriage by air. The Convention has, for example, succeeded in establishing the first universal system of documentation, carrier's liability, limitation of liability, period of limitation and jurisdiction. These in turn helped avoid some of the major conflicts and problems related to international air travel.[22] Yet, dissatisfaction began to surface as time went by. For instance, leading aviation powers like the USA felt that the maximum limit of liability set in the Convention was

[hereinafter Montreal Agreement] and the 1995 Intercarrier Agreement (IATA Intercarrier Agreement on Passenger Liability of 31st October 1995) are also important in influencing developments regarding the Warsaw rules on limitation of liability.

[20] See the signature, ratification and entry into force of the instruments listed in the preceding footnote from the ICAO webpage: <http://www.icao.int/eshop/conventions_list.htm>

[21] Given however that the liability of any carrier is now governed by international instruments to which Ethiopia is a party, the article may as well be taken as an overview of the Ethiopian law on carriage by air in general.

[22] Philipson, *supra* note 7, § 1.2 –1.6; see also Cheng, B. (2004) "A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)," *The International and Comparative Law Quarterly* (53), p. 834 [hereinafter Cheng].

insufficient.[23] Moreover, some provisions of the Convention were practically given inconsistent meanings in different jurisdictions.[24]

In 1955, attempts to improve the Warsaw Convention led to the adoption of the Hague Protocol.[25] Among other things, the protocol addressed concerns regarding the limitation of carrier's liability and the concept of "wilful misconduct". It doubled the limit of liability contained in the Warsaw Convention[26] and replaced the controversial "wilful misconduct" with that of "intentional or reckless conduct"[27]

The Warsaw-Hague Convention did not, however, attract the membership of some Warsaw states. For example, the USA refused to join the Hague Protocol as it was not still satisfied with the improved limitation cap. The USA maintained that advancements in technology and aviation insurance undermine the rationale behind according special protection to air carrier through limitation of liability.[28] Interestingly, the USA even threatened to withdraw from the Warsaw system unless the limitation cap is significantly raised.[29]

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[23] It must be noted that in the US and other western nations damages for personal injury were higher than the Warsaw Convention afforded; see, e.g., Cheng, *supra* note 22, pp. 835-836 and Philipson, *supra* note 7, § 1.11 -1.14.

[24] For an interesting review of judicial application of the supposedly uniform rules of Warsaw Convention, see Mankiewicz, R. (1972) "The Judicial Diversification of Uniform Private Law Conventions: The Warsaw Convention's Days in Court," *The International and Comparative Law Quarterly* (21), p. 718-757 [hereinafter Mankiewicz].

[25] For the full title of the Protocol, see note 19 *supra*.

[26] Under the Warsaw Convention as amended at The Hague, 1955, the limit of, for example, liability for personal injury is 250,000 gold francs – double the 125,000 gold francs limit under the unamended Warsaw Convention.

[27] For further discussion on the concept of wilful misconduct and the problems associated with it, see notes 161-177 *infra* and the accompanying texts. Incidentally, other amendments include the simplification of rules regarding documents of carriage and extension of the protection accorded to the carrier to his servants and agents.

[28] Traditionally, limitation of liability afforded protection to carriers who invested in the then new and risky aviation business. This legal protection was necessary as both the aviation technology and insurance had not developed well. Nonetheless, technological advancements greatly reduced the risks of air transportation. It is now said the risks of air transport are by far lower than the risks in other modes of transport. Also, insurers have gradually begun to provide additional protection to various participants in the air carriage business. Despite this, developments in private international air law remained slower than the Americans and some other developed nations wanted. Particularly, the law remained favourable to carriers – presumably at the expense of passengers and cargo interests; see, e.g. Philipson, *supra* note 7, § 1.11; Cheng, *supra* note 22, p. 836; Gesell, L. & Dempsey (2005) *Aviation and the Law*. Chandler, Coast Aire Publications, p. 847 [hereinafter Gesell & Dempsey];

As a response to the demands of USA that the liability limits be raised, a number of carriers from different countries came together to agree, with Civil Aeronautics Board of the United States, to a package of measures which would apply to all flights to, from or with an agreed stopping point in the USA. This accord is formally known as Agreement between Carriers of the International Air Transport Association (IATA) and the Civil Aeronautics Board (CAB) of the United States.[30] Under the accord, the carrier is obliged to deliver to the passenger a ticket with a prescribed notice informing the passenger in clear terms that liability (to personal injury) in most cases is limited to $ 75,000.00.

This agreement, which has a force of law in the USA,[31] does not operate as an amendment of the Warsaw Convention.[32] This is because the 1966 Montreal Agreement is not a treaty among state parties to the Warsaw Convention. It is rather a private agreement between members of IATA[33] and the Civil Aeronautics Board of the United States.

Another set of attempts to improve the Warsaw Convention include the 1961 Guadalajara Convention[34] and the 1971 Guatemala Protocol.[35] While the Guadalajara Convention extends the Warsaw system to charter flights, which were arguably uncovered before,[36] the Guatemala Protocol sought – albeit unsuccessfully – to revise the Warsaw-Hague rules on limitation of carrier's liability.[37]

Ethiopia is not a party to any of the amending conventions/protocols so far discussed. Yet, Ethiopian Airlines is a member of IATA and a party to the 1966 Montreal Agreement. The air ticket issued by Ethiopian Airlines thus states the following:

Lowenfeld, A. & Mendelsohn, A. (1967) "The United States and the Warsaw Convention," *Harvard Law Review* (80), pp. 504 -516 [hereinafter Lowenfeld & Mendelsohn].

[29] Cheng, *supra* note 22, p. 836; Philipson, *supra* note 7, § 1.18.

[30] It is also known as the 1966 Montreal Agreement.

[31] Philipson, *supra* note 7, § 1.25.

[32] Gesell & Dempsey, *supra* note 28, pp. 849 -850; Diederiks–Verschoor, *supra* note 4, pp. 105-104.

[33] IATA stands for the International Air Transport Association which is a private organisation of commercial airline companies.

[34] For the full title of the Convention, see note 19 *supra*.

[35] For the full title of the Protocol, see note 19 *supra*.

[36] See note 69 *infra*.

[37] To date, only few countries ratified the Protocol. Hence, it is not yet in force. (See the list of members from <http://www.icao.int/icao/en/leb/Guatemala.pdf>). Even more, with the advent of the 1999 Montreal Convention, the Protocol is unlikely to attract new membership in the future.

> "...For such passengers on a journey to, from, or with an agreed stopping place in the United States of America... the liability of certain carrier parties to such special contracts, for death and personal injury to passengers is limited in most cases to proven damages not to exceed US $ 75,000.00 per passenger."[38]

The Warsaw Convention once again witnessed another improvement in 1975 when the four Montreal Additional Protocols were adopted. First, Second, and Third Protocols modernised the units of calculation used for computing the limits of liability under the 1929 Warsaw Convention, the 1955 Hague Protocol, and the 1971 Guatemala Protocol, respectively. The Special Drawing Rights (SDR)[39] is introduced in place of the Poincaré or Convention franc used in previous instruments. Apart from introducing SDR in the calculation of damages involving cargo claims, the Fourth Protocol changed the liability rules relating to carriage of goods. Subject to some defences, the Protocol imposes a system of strict liability on a carrier.[40] Ethiopia is signatory to the four Montreal Protocols, and all of them are in force since the last decade of the 20th century.[41]

Despite efforts over decades to improve the Warsaw system, compensation limits have still remained low for many developed countries. Interestingly, courts in some states started bypassing the limits set under the Warsaw Convention.[42] In 1985, the Italian Constitutional Court declared the limitation of international air carriers' liability unconstitutional, eventually leading to the introduction (in Italy) of a new level of limit, i.e. 100,000 SDR.[43] The move has affected air carriers flying to and from Italy. Ethiopian Airlines which runs

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[38] See the *Advice to International Passengers on Limitation of Liability* section on passenger ticket issued by Ethiopian Airlines.

[39] An SDR is a unit of account defined by the International Monetary Fund (IMF) which is converted into the appropriate national currency according to the rules of IMF and not by what the state determines. The rate on December 6th 2011, for example, shows that 1 SDR equals 26.88 Ethiopian Birr.

[40] See Articles IV-VI, Montreal Protocol No.4.

[41] See the list of ratifications by Ethiopia from the following link on the official website of ICAO:
<http://www2.icao.int/en/leb/Status%20of%20individual%20States/ethiopia_en.pdf>
Note however that Montreal Protocols No. 2 and 3 are of meagre significance as Ethiopia is not a party to the initial versions of the instruments which the Protocols try to update.

[42] In the US, where there has always been dissatisfaction with the Warsaw limitation of liability, the concept of wilful misconduct [discussed in detail below] has sometimes been interpreted broad enough to break the limit on carrier's liability; see, e.g., Milde, M. (1996) "Warsaw Requiem or Unfinished symphony?" *Lloyd's Aviation Quarterly* (Part One), p. 37-51.

[43] Diederiks–Verschoor, *supra* note 4, p. 110.

scheduled flights to and from the Italian capital Rome, for example, maintains a separate liability undertaking regarding claims brought before Italian courts.[44]

A similar effort to raise the limits of liability was initiated by Japanese airlines in early 1990s. Japanese airlines did not only opted to raise the limit of liability but also showed willingness to waive the defences under Article 20 (1), Warsaw Convention, so long as the claims involved do not exceed 100,000 SDR.[45] Meanwhile, IATA sponsored the 1995 Intercarrier Agreement on Passenger Liability. An important aspect of the 1995 Intercarrier Agreement is that the limitation of liability and recoverable damages in Article 22(1) of the Warsaw Convention as to claims for death, wounding or other bodily injury of a passenger is waived and determined by reference to the law of the domicile of the passenger.[46]

In 1997, the European Union passed a regulation that applies to all European carriers, including airlines operating charter flights. This regulation – EC Regulation No. 2027/97 – imposes unlimited liability on carriers and requires them not to invoke defences for an amount up to 100,000 SDR.[47] It is, however, to be noted that non-European carriers that serve EU destinations (including Ethiopian Airlines) would not be affected by the regulation.[48]

Further attempts to improve and consolidate the highly fragmented private international air law resulted in the 1999 Montreal Convention.[49] The Convention's liability regime is comparable with the 1995 IATA Intercarrier Agreement and the EC Regulation No. 2027/97 in that it provides for absolute

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[44] Within the ticket Ethiopian Airlines issues, one finds a notice stating that "for all international carriage to which the Warsaw Convention applies...in any action brought before an Italian court, the limit of liability shall be 100,000 SDRs..."

[45] Cheng, *supra* note 22, p.842; Diederiks–Verschoor, *supra* note 4, p. 111; Philipson, *supra* note 7, § 1-40.

[46] Consequently, passengers domiciling in countries where compensations for personal injury actions are higher than the Warsaw limits would benefit. Incidentally, air carriers which are members to this agreement were taken to have withdrawn from the comparable Montreal Agreement of 1966 (Philipson, *supra* note 7, § 1-43). Ethiopian Airlines is not a party to 1995 Intercarrier Agreement and hence remains committed to the 1966 Montreal Agreement.

[47] See ¶ 2 of Annex, EC Regulation 2027/97, "on air carrier liability in respect of the carriage of passengers and their baggage by air" *Official Journal of the European Union*.

[48] Diederiks–Verschoor, *supra* note 4, p. 112; nonetheless, some provisions of the Regulation proved inconsistent with "the treaty obligations owed by EU states to non-EU states under the Warsaw Convention;" see, e.g., Philipson, *supra* note 7, § 1-46.

[49] Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, 28 May 1999 [hereinafter Montreal Convention].

carrier liability up to 100,000 SDRs.[50] Moreover, it obliges carriers to maintain adequate insurance to cover their liability.[51] It also introduces a "fifth jurisdiction"[52] for personal injury or death actions. The Montreal Convention came into force in 2003 and enjoys membership of some 100 states as of December 2011.[53] The Convention is expected to gradually replace the whole Warsaw system (as amended by different protocols). Ethiopia is not a party to this new international instrument on carriage by air.

In sum, the Warsaw Convention along with the 1975 Montreal Additional Protocols forms the Ethiopian law on international air carriage. Neither domestic law (e.g. the Commercial Code or the Civil Aviation Proclamation) nor international instruments[54] other than the Warsaw Convention as amended by the 1975 Montreal Protocols governs the liability of an international air carrier. Other laws would apply only when the Warsaw Convention (as amended by the Montreal Protocols) does not apply. Moreover, contractual stipulations[55] may govern the liability of the carrier. Nonetheless, such contractual stipulations are, as would be seen later,[56] subject to the mandatory provisions of the Warsaw Convention.

2. The Coverage of the Warsaw Convention

2.1- Scope of Application of the Warsaw Convention

The Warsaw Convention applies to "international carriage".[57] International carriage, for the purpose of Warsaw Convention, represents carriage whose place of departure and place of destination are situated within the territories of two High Contracting States.[58] Flights within the territory of a single

[50] See Articles 17 and 21 of Montreal Convention.
[51] Article 50, Montreal Convention.
[52] *Ibid*, Article 33(2); See note 85 *infra* and the accompanying texts.
[53] See list of ratifications from <http://www.icao.int/icao/en/leb/mtl99.pdf>.
[54] But see notes 96 *et seq*., *infra* and the accompanying texts.
[55] Ethiopian Airlines – the sole Ethiopian participant in international air business – is committed to the 1966 Montreal Agreement that in most cases guarantee passengers carried to and from the United States proven damages of $ 75,000.00 for death and personal injury. The same carrier undertakes that the limit of liability be 100,000.00 SDRs should actions (involving international carriage to which the Warsaw Convention applies) be brought before an Italian Court. Such contractual stipulations bind the carrier; hence, contractual terms may also govern the liability of the carrier in carriage by air.
[56] See, e.g., note 78 *infra* and the accompanying text.
[57] Article 1(2), Warsaw Convention.
[58] *Ibid.*

Contracting State would also be international if they involve an agreed stopping place outside the territory of the concerned Contracting State.[59] The Convention does not thus apply to "non-international carriage". Nonetheless, some countries extend the application of the Warsaw regime to domestic carriage.[60]

The Warsaw Convention "does not apply to experimental air carriage undertaken with a view to establish a regular line of air navigation."[61] It does not also apply to carriage "undertaken in extraordinary circumstances outside the normal scope of an air carrier's business."[62] Yet, it applies to carriage directly performed by the State[63] unless a reservation excluding this type of international carriage from the scope of applicability of the Convention is made.[64] Ethiopia has made a reservation with regard to Article 2(1) of the Convention.[65] Accordingly, the Convention shall not apply to international air transport carried out directly by the State or legally constituted public bodies.

Definitions given to "aircraft", "passenger" and "carrier" may also determine the scope of application of the Convention. It is argued that carriage by, for example, hovercraft[66] is excluded from the ambit of the Convention.[67] Similarly, an airline employee cannot claim compensation under the Warsaw Convention as she is not "passenger"[68] for the purpose of the Convention. In numerous civilian jurisdictions, the Warsaw Convention does not govern the liability of the actual carrier in charterparty or interchange situations. The scope of application of the Convention, in these jurisdictions, is thus limited to cases

[59] *Ibid.*

[60] Diederiks–Verschoor, *supra* note 4, p. 60; Ethiopia is also one of those countries that extend the application of the Convention to non-international flights (see note 16 *supra*.).

[61] Article 34, Warsaw Convention.

[62] *Ibid.*

[63] *Ibid*, Article 2.

[64] See the Additional Protocol to the Warsaw Convention, Done at Warsaw on the 12th October, 1929.

[65] See <http://www2.icao.int/en/leb/Status%20of%20individual%20States/ethiopia_en.pdf>

[66] Hovercraft is a type of vehicle that travels in the air using a strong current of air forced out beneath it.

[67] Diederiks–Verschoor, *supra* note 4, p. 63.

[68] The Warsaw Convention presupposes the contractual relationship of air passengers/shippers and the air carrier. It does not for example govern damage sustained by third parties on ground as a result of air crash. This is because such parties are not related to the air carrier through contract of air carriage; see also Diederiks–Verschoor, *Ibid*.

where the carrier is a party to the carriage contract, i.e., a contracting carrier.[69] In contrast, Anglo-American jurisdictions maintain that "carrier", for the purpose of Articles 17-19 of the Convention, refers to "actual carrier"[70] as well.

Subject to the limitations on the scope of application discussed above, Ethiopian courts must always apply the Warsaw Convention should countries connected by an international carriage belong to the Warsaw Convention.[71] Article 24 excludes the application of other national and international laws in claims involving the liability of the carrier.[72] However, Ethiopian courts have

[69] This appears to be the case in Ethiopia as well; see *Negist Mekonnen et al v Ethiopian Airlines, Inc et al.*, note 14 *supra*.

[70] In a contract of carriage, actual carrier is the one who actually undertakes the carriage though it is not the carrier who has contracted with the passenger or shipper. In some jurisdictions, contracting carrier and actual carrier are treated differently. For an excellent appraisal of the disagreement between civilian and common lawyers as to the exact definition of carrier under Articles 17-19 of Warsaw Convention, see Mankiewicz, R. (1961) "Charter and Interchange of Aircraft and the Warsaw Convention: A Study of Problems Arising from the National Application of Conventions for the Unification of Private Law" *International and Comparative Law Quarterly* (10), pp. 707-725; See also Philipson, *supra* note 7, § 1-15. Incidentally, note that the ambiguity with the exact scope of the Warsaw Convention vis-à-vis air charterparty is one of the reasons for the introduction of the 1961 Guadalajara Convention which, as discussed earlier, expressly addresses the issue of the liability of the actual carrier.

[71] Incidentally, Ethiopian courts may decline to apply the Warsaw Convention if one of the countries connected by the international air carriage does not belong to the convention. As a matter of public international law, states are not obliged to give effect to Warsaw Convention unless the later forms a common treaty in force between the states of places connected in international carriage. For the application of this principle, see the *Chubb and Son v Asiana Airlines* 214 F. 3d 301(2nd Cir. 2000) where the U.S. Court of Appeals for the Second Circuit, applying rules of international treaty interpretation, held that US courts could not assume jurisdiction as there was no common treaty in force between the US and South Korea [the case involved a South Korean air carrier who was sued for lost cargos]. At the time, USA was a party to the Warsaw Convention while South Korea was a party to the Hague Protocol, but did not separately adhere to the original Warsaw Convention.

Finally, note that the wider applicability (in Ethiopia) of this principle of public international law is weighed down by Article 69 of the Civil Aviation Proclamation which anyway requires the application of international legal instruments in determining the liability of *any* carrier.

[72] Note however that Article 24 does not exclude the application of domestic laws to, for example, questions as to who are the persons who have the right to bring suit under Article 17 and what are their respective rights (see Article 24(2), Warsaw Convention). Also, negotiability of airway bills is determined by domestic law, rather

had a poor track record of enforcing international instruments including the Warsaw Convention. In one case[73] involving damage to cargo carried from Rome (Italy) to Addis Ababa, the High Court of Addis Ababa and, on appeal, the Ethiopian Supreme Court applied the Commercial Code instead of the Warsaw Convention. The courts did this without being justified by any of the limitations discussed above.[74] Such practice goes against the very purpose of the Warsaw Convention, particularly Article 24.[75] The inaccessibility of the Warsaw Convention in the working language of Ethiopian courts limits the practical applicability of the Convention. Ethiopia should thus publish international instruments it ratifies in local languages so as to facilitate its application in real cases. Nonetheless, the non-publication of the Convention in Amharic (or any other local language) does not seem to justify failure to apply international instruments ratified by Ethiopia which constitute "integral parts of the law of the land" by virtue of Article 9(4) of the 1995 Constitution of the Federal Democratic Republic of Ethiopia.

2.2- Jurisdiction

The Federal High Court assumes material jurisdiction over issues of international air carriage.[76] This court must not however determine matters of judicial jurisdiction based on the unwritten and arguably unknown Ethiopian

than Warsaw Convention. In sum, the exclusivity of the Warsaw Convention is limited to matters pertaining to the liability of the carrier.

[73] *Mengistu G. v Ethiopian Airlines and Customs & Excise Tax Administration*, Supreme Court of Ethiopia, Civil Appeal File No. 825/81 [reported in Yohannes H. & et al. (eds.), *Selected Judgements*. Addis Ababa, Commercial Printing Press, Vol. 1, pp. 37-45].

[74] The facts of the case reveal that the goods damaged are carried from Rome, Italy to Addis Ababa, Ethiopia by a commercial carrier in an ordinary circumstance. Also, Ethiopia and Italy were in a Warsaw Convention relationship by the time the carriage was undertaken. Hence, Warsaw Convention should have applied.

[75] The Warsaw Convention aims at brining uniformity to the law relating to international air carrier's liability. In so doing, it requires the exclusive applicability of Convention rules in actions for damages based on Articles 17-19. Moreover, the jurisprudence in some jurisdictions is that carriers may not be sued under municipal law where the suit is based on accidents and occurrences covered under Articles 17-18. Interestingly, it is also held that carriers are not subject to municipal laws where they are not liable under the Convention. See Philipson, *supra* note 7, § 7-9 – 7.19.

[76] International air carriage is a matter of private international law. Of course, a narrow definition of private international law associates it to what otherwise is known as conflict of laws. If we agree on a broader definition of private international law, cases regarding international air carriage belong to the first instance civil jurisdiction of the Federal High Court; see Article 11(2) (a) of Federal Courts Proclamation, 1996, *Federal Negarit Gazeta*, Proclamation No. 25, Year 2, No. 13.

law of private international law. Judicial jurisdiction in matters that involve international air carriage is determined according to Article 28 of the Warsaw Convention. The rules on jurisdiction are exclusive.[77] Parties may not contract out Article 28.[78] But, there are authorities according to which parties may, *after* the occurrence of the damage, contract on a more appropriate jurisdiction.[79]

The Warsaw Convention establishes "the four jurisdiction fora". A plaintiff may bring her actions for damage in one of the following forums which in anyway has to be a court of one of the Contracting Parties:

a) The court of the place where the carrier is ordinarily resident;
b) The court of the place where the carrier has his principal place of business;
c) The court of the place where the carrier has an establishment by which the contract has been made; or
d) The court of the place of destination.

Often, the court of the place where the carrier is ordinarily resident is the same as the court of principal place of business.[80] Jurisprudence from some Warsaw nations reveals that plaintiffs relying on these grounds of jurisdictions need to show that the carrier maintains headquarters – where the main part of the executive and management work of the business is conducted.[81]

The ever increasing involvement of travel and shipping agents in intermediating contracts of carriage evoke questions as to whether the court of the place where such intermediaries reside can assume jurisdiction. In other words, should one take travel agents as establishments for the purpose of Article 28? The answer seems in the negative as courts in some jurisdictions are not yet prepared to accord agencies the status of establishment. In particular, French courts appear to assume jurisdiction based on the third ground only when the carrier has its own establishment, e.g. a directly owned ticket office. [82]

The court of the place of destination may assume jurisdiction. For this purpose, courts often take as the place of destination the one indicated as such in the ticket.[83]

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[77] Article 32, Warsaw Convention.
[78] *Ibid*.
[79] Philipson, *supra* note 7, § 11-37; Diederiks–Verschoor, *supra* note 4, p. 93.
[80] Philipson, *supra* note 4, § 11-27.
[81] See, e.g., *Winsor v United Airlines*, US District Court, Eastern District of New York (25 June 1957) cited in Diederiks–Verschoor, *supra* note 4, p. 92.
[82] See, e.g., cases cited and discussed in Philipson, *supra* note 7, § 11-31 and Diederiks–Verschoor, *supra* note 4, pp. 92-93.
[83] Philipson, *supra* note 7, § 11-33.

Finally, the non-inclusion of the places where (1) the damage has occurred, (2) the offense or tort occurred, and (3) the victim resides as the basis of judicial jurisdiction dissatisfied some Warsaw members, mainly the USA.[84] The 1999 Montreal Convention partially, if not completely, has improved the rules by recognising a fifth jurisdiction based on the domicile of the victim.[85] As Ethiopia is not a party to the Montreal Convention, its courts cannot assume jurisdiction based on the domicile of the victim.

3. Documents in International Carriage by Air

Chapter Two of the Warsaw Convention prescribes rules regarding documents of carriage. The documents are passenger ticket, luggage ticket (baggage check) and air consignment note (air waybill). The Convention requires, under the pain of penalty, the carrier to deliver documents of carriage containing specific details.

If the carrier accepts a passenger without a passenger ticket having been delivered it is not entitled to avail himself of the defences and limits to his liability.[86] Practically, carriers have also been exposed to unlimited liability where defective tickets (e.g. where the issued ticket fails to provide the passenger adequate notice on the conditions of contract) were issued.[87] This rule, which was meant to protect the interest of the passenger,[88] has been challenged in the advent of ticketless travel.[89] Experience has shown that the rule is rather detrimental to passengers because carriers who spend big money to

[84] On this point see, e.g., Luongo, N. (2009) "The Fifth Jurisdiction: The American Dream" *Annals of Air and Space Law*, (34), 437 *et seq*.; Lownefeld & Mandelsohn, *supra* note 28, pp. 522-526.

[85] Article 33(2), Montreal Convention allows actions to be brought before the court of the State Party in which at the time of the accident the passenger has his domicile.

[86] Article 3(2), Warsaw Convention.

[87] This is however incompatible with the literal texts of the original Warsaw Convention which sanctions only the failure of the carrier to issue tickets; it does not as such sanction the delivery of tickets which, for example, does not provide adequate liability notice. The rule "defective ticket is no ticket" has however been incorporated in Article 3 of the 1955 Hague Protocol which provides "the carrier shall not be entitled to avail himself of the provisions which limit his liability if the ticket issued does not include the notice required by the Warsaw-Hague Convention". Note however that Ethiopia is not a party to the 1955 Hague Protocol and hence the rule "defective ticket is no ticket" is not applicable. But see Article 607(2), Commercial Code which contains a provision comparable with Article 3(2), Hague Protocol.

[88] The rule is predicated on the theory that passengers are aware of the limitation on the carrier's liability only if ticket is delivered to them prior to boarding; see. e.g., Philipson, *supra* note 7, § 5-13.

[89] Diederiks–Verschoor, *supra* note 4, p. 66; Philipson, *supra* note 7, § 5-11.

comply with the documentation requirements shift the cost to consumers.[90] Besides, simpler procedures of booking (e.g. telephone booking and online booking) – which do not necessarily meet the terms of Article 3 and other provisions of the Convention – may in fact benefit passengers.[91]

Apart from passenger ticket, luggage ticket (baggage check) containing the particulars listed under Article 3(4) must be issued by the carrier. The carrier cannot carry baggage without issuing a luggage ticket. In the absence of this ticket, the carrier cannot avail itself of the provisions of the Convention which exclude or limit liability. Similarly, a carrier cannot exclude or limit liability should it issue a baggage check that does not contain the particulars set out at Articles 3(4)(d), (f) and (h).[92]

As a matter of practice, airlines do not issue a separate luggage ticket. Instead, a passenger ticket combining a baggage check or a baggage check that does not contain the mandatorily required particulars is what commercial airlines, including Ethiopian, issue to passengers.[93] Such practices may expose carriers to penalties.[94]

With regard to the rules regarding air waybill [95] (a document acknowledging the receipt of goods by the carrier), the original rules are contained in Articles 5-

[90] Diederiks–Verschoor, *supra* note 4, p. 66.

[91] For an excellent review of the benefits and limitations of simpler procedure of ticketing such as electronic tickets, see, e.g., Rueda, A. (2002) "The Warsaw Convention and Electronic Ticketing," *Journal of Air Law and Commerce*, (67), pp. 401-464.

[92] Article 4(3), Warsaw Convention.

[93] See, e.g., Diederiks–Verschoor, *supra* note 4, p. 67-68; Note that documents issued by Ethiopian Airlines are named "Passenger Ticket and Baggage Check."

[94] See, e.g., Philipson, *supra* note 7, § 5-60 – 5-62 and Diederiks–Verschoor, *supra* note 4, p. 74. Incidentally, the 1955 Hague Protocol –which significantly reduced the requirements regarding form and content of passenger and luggage tickets, authorises the incorporation of baggage check in the passenger ticket. Also, the Montreal Convention – another international instrument to which Ethiopia has not subscribed for – has done away with the rules sanctioning non-compliance with baggage check requirements. Instead, it relies on the principle of absolute liability of the carrier in protecting air passengers; see, e.g., Cheng, *supra* note 22, p. 848.

[95] Once the goods have been accepted for shipment by the carrier, an air waybill covering the goods will be issued. The air waybill is made in three "original" copies each for the carrier, the consignor and the consignee (Art.6 (1)-(2), Warsaw Convention). The bill, especially the one accompanying the goods (the one marked "for the consignee"), must be signed by the carrier and the consigner himself (see Art.6 (2), Warsaw Convention). Such air consignment note is important in contract of carriage of goods by air for it performs different functions. Most importantly, it supports the underlying contract of carriage between the carrier and the consignor;

16 of the Warsaw Convention. These rules have been amended by The Hague and Montreal Protocol No.4. Although Ethiopia was not initially a party to the Hague Protocol, membership in the Montreal Protocol No.4 renders Ethiopia a party to the "Warsaw Convention as amended by the Hague (1955) and Protocol No. 4 of Montreal (1975) Protocols.[96] Thus, the Ethiopian law on international carriage of *goods* by air is to be found within the provisions of the Warsaw-Hague-Montreal system.

The function of air waybill in carriage by air is comparable with the function of bills of lading in carriage of goods by sea. Just like maritime bills of lading, air waybills do have a receipt function. As such, they are *prima facie* evidence of the receipt of goods.[97] Furthermore, air waybills are *prima facie* evidence of the conditions of carriage and the conclusion of contract for carriage of the cargo that they cover.[98]

Air waybill must contain the particulars enumerated under Article 8. If the carrier accepts cargo without a bill being made out or if a bill does not contain all the particulars set out in Article 8 (a) to (i) inclusive and (q), it cannot avail itself of the exclusion or limitation of liability under the Convention.[99] Omissions or errors in the waybill concerning particulars set out in Article 8 (j)-(p)[100] are not, however, sanctioned. Furthermore, the jurisprudence in some

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and governs the relationship between the carrier and the consignee who may not necessarily be a principal party to the contract of carriage (see Art.11, Warsaw Convention).

[96] Article XV, Montreal Protocol No. 4; note however that Ethiopia is not bound by every provisions of the Hague Protocol. Article XV, Montreal Protocol No. 4, only brings about Ethiopia's membership to the Hague rules regarding carriage of goods – but not luggage and passengers.

[97] See Article 11(1), Warsaw Convention *cum* Article 186, the Maritime Code of the Empire of Ethiopia, 1960, *Negarit Gazeta*, Proclamation No.164/1960, 19th Year, No.1 [hereinafter the Maritime Code].

[98] Article 11(1), Warsaw Convention *cum* Articles 183 and 186, Maritime Code. Apart from the evidentiary functions, air waybills serve as a control document by which constructive possession is transferred. The bill, especially the one marked "for the consignee," facilitates the relationship between the carrier and the consignee. Put in other words, an air waybill constitutes an acknowledgement by the carrier that the goods will be delivered to the holder of the bill; see generally Articles 11-13, Warsaw Convention.

[99] *Ibid*, Article 9.

[100] These particulars relate to the apparent condition of the goods and of the packing, the freight and its mode of payment, the price of the goods, the amount of the value declared in accordance with Article 22(2), the number of parts of the waybill, the documents handed to the carrier to accompany the air consignment note, the route and time fixed for the carriage.

states imply omission of particulars set out in Article 8 (a) – (i) inclusive and (q) will be sanctioned if the omission or the error was of "commercial significance" or "prejudicial to the consignee".[101]

The "no prejudice" test has influenced the Hague Protocol which has changed the Warsaw Convention's requirement that the waybill contain numerous particulars. Under the Hague Protocol, the waybill need only contain such particulars as places of departure and destination, a stopping place, if any, and a notice of liability limitation.[102] Omissions of particulars regarding departing, stopping and arrival places are not therefore sanctioned anymore. However, the carrier forfeits the privilege of limiting its liability under Article 22 of the Warsaw Convention if the waybill does not contain a notice of liability limitation.[103]

The Warsaw-Hague rules on air waybill have further been improved by the 1975 Montreal Protocol No 4. With the consent of the consignor, the carrier is now allowed to deliver any substitute such as electronic airway bills[104] (in lieu of ordinary waybills) which would preserve a record of the carriage to be performed. The carrier indeed benefits from the privilege of limitation of liability notwithstanding failure to comply with the notice requirement under Article 8 of the Warsaw-Hague system.[105] In other words, the Ethiopian law on air waybills have now been simplified in that it does not anymore sanction failure to comply with the notice requirement. In contrast, the law on passenger ticket and baggage check remains unchanged and hence it still sanctions failure to comply with the requirements of form and content under Article 3 of the Warsaw Convention.

As noted earlier, air waybill constitutes *prima facie* evidence of the condition of the goods carried. Cargo is often concealed in packaging and, in effect, carriers will have little opportunity (in the course of loading) to independently verify the statements of consignors regarding the nature, condition, and quantity of their cargos. The consignor is thus liable to the carrier for any damage that might result from the absence or insufficiency of the indications and the statements he inserts in the air waybill.[106] Incidentally, courts in various jurisdictions have held that the airway bill only serves as *prima facie* evidence

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[101] Such an approach, which is not of course in line with the literal interpretation of Article 9 of the Warsaw Convention, has been pervasive in the USA; see, e.g., Philipson, *supra* note 7, § 6.17 – 6.18; Diederiks–Verschoor, *supra* note 4, p. 69.

[102] Article III, Hague Protocol.

[103] *Ibid*.

[104] See Article III, Montreal Protocol No. 4.

[105] Article III, Montreal Protocol No. 4 deletes Warsaw-Hague rules that used to sanction the omission of particulars entered into air waybills.

[106] *Ibid*.

of the *external* condition of the packaging and have regarded the internal condition as latent.[107] Finally, it should be noted that air waybills are negotiable[108] thereby facilitating documentary sale and the combined air-sea or air-land transportation of goods.[109]

4. Liability of the International Air Carrier

4.1- Sources of Liability of the International Air Carrier

The rules on carriers' liability are embodied in Articles 17-19 of the Warsaw Convention. Article 17 stipulates the carrier's liability for injury and death of passengers, and Article 18 states the rules on carriers' liability for loss or damage to "registered luggage or any goods". Article 19 provides that the carrier is liable for damage caused by delay. These rules are predicated on the principle of fault, although the burden of proof is assumed by the carrier himself (hence "a reversed burden of proof") [110] in return for the privilege of limiting liability to the amount set out in Article 22.

Under Article 17, the carrier is liable for the "death and wounding of a passenger or any other bodily injury suffered by a passenger if the accident which caused the damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking". As "accident", "bodily injury" and "embarking/disembarking" are not defined anywhere in the Convention, uniform interpretation of Article 17 is difficult. Though there appears to be consensus in considering "accident" as "unexpected or unusual event other than the normal operation of the aircraft which is external to the passenger,"[111] there have been instances where comparable facts led to different decisions in various jurisdictions.[112] Meanwhile, the phrase "bodily injury," which appears to merely

[107] Diederiks–Verschoor, *supra* note 4, p. 70.

[108] There used to be uncertainty regarding the negotiability of air waybills (see, e.g., Diederiks–Verschoor, *supra* note 4, p. 69, and Philipson, *supra* note 7, § 6.2). It is now widely held that the Warsaw Convention does not prohibit the issuance of negotiable air waybills. See also Articles 616 of the Commercial Code which expressly allows negotiable airway bills.

[109] Diederiks–Verschoor, *supra* note 4, p. 69.

[110] *Ibid*, p. 72.

[111] *Air France v Saks*, 470 U.S. 392, 105 S. Ct. 1338 (1985); see also Philipson, *supra* note 7, § 7.32 – 7.43 and Cobbs, P. (1999) "The Shifting Meaning of "Accident" under Article 17 of the Warsaw Convention: What did the Airline know and what did it do about it?" *Air and Space Law* (24), pp. 123 *et seq*. for the jurisprudence of other jurisdictions on "accident."

[112] The issue whether "inaction" constitutes "accident" has been divisive; see, e.g., Gesell & Dempsey, *supra* note 28, pp. 869-873; International Air Transport

refer to physical injury, is constructed to include mental (emotional) injury unaccompanied by physical injury.[113] Moreover, the word "embarking" or "disembarking" which defines the duration of the accident has been interpreted differently in different jurisdictions.[114]

Association (2007) *The Liability Reporter*. New York, Condon & Forsyth LLP, pp. 33-35 and the foreword as well.

[113] See, e.g., a 1985 Israeli case *Compagnie Air France c. Consorts Teichner* [reported in RFDA or Revue Française de Droit Aérien, (39), pp. 232 *et seq.*] where the Israeli Supreme Court awarded compensation for emotional injury. But see *Eastern Airlines v Floyd*, 499 US 530 (1991) which in the USA settled the matter in favor of the carrier. As the matter was so controversial before the US Supreme Court's holding that passengers may not recover mental anguish unaccompanied by physical injury, the literature on "bodily injury" (Article 17) is relatively rich; see, e.g., Collins, L. (1994) "Pre- and Post-Impact Pain and Suffering and Mental Anguish in Aviation Accidents" *Journal of Air Law & Commerce*, (59), pp. 402 *et seq.*; Holmes, S. (1993) "Recovery for Purely Mental Injuries Under the Warsaw Convention" *Journal of Air Law & Commerce*, (58), pp. 1205 *et seq.*; Eaton, D. (1993) "Recovery for Purely Emotional Distress Under the Warsaw Convention: Narrow Construction of Lesion Corporelle in Eastern Airlines, Inc. v. Floyd " *Wisconsin Law Review*, (1993), pp. 563 *et seq.*[hereinafter Eaton]; Sisk, G. (1990) "Recovery for Emotional Distress Under the Warsaw Convention: the Elusive Search for the French Legal Meaning of Lesion Corporelle" *Texas International Law Journal*, (25), pp. 127 *et seq.*

[114] Determining whether an accident took place during "embarking" or "disembarking" is not as easy as establishing the occurrence of accident "on board aircraft". Different tests or approaches (to establish accidents occurring in the process of embarking or disembarking) have been developed in different jurisdictions. Among the civil law members of the Warsaw Convention, "the zone of aviation risk" and "the control" tests apply in determining the process of embarking and disembarking. The zone of aviation risk test limits the application of Article 17 to only accidents occurring inside airport terminals where the aviation risk is greater. On the other hand, the control test allow courts to exclude accidents, though occurring in the aviation risk zone, that cannot reasonably be attributable to the fault of the carrier as in, for example, cases where a passenger sustained injury while using the escalator in the airport entrance hall. In common law jurisdictions, notably the US, a "tripartite test" is employed in determining the process of embarking or disembarking for the purpose of Article 17. The test, predicated on the ruling of US courts in *Day* [Day v Trans World Airlines 528 F 2d 31 (2nd Circuit, 1976)] and *Evangelinos* [550 F 2d 152 (3rd Circuit, 1976)] cases, emphasises the importance of (1) the location of the accident, (2) the nature of the passenger's activity during the accident and (3) the carrier's control over the injured passenger at the time of the accident. The two tests are not however mutually exclusive. Notwithstanding the type of tests employed, one would likely reach at similar conclusions except in

To the best knowledge of the author, Ethiopian courts have not ruled on these aspects of Article 17 of the Warsaw Convention. As Ethiopian courts are now expected to widely[115] apply the Warsaw Convention, the relatively rich jurisprudence in other Warsaw jurisdictions can inform judicial interpretation in Ethiopian courts when cases require the understanding and interpretation of Article 17. It is thus submitted that courts need to apply definitions and tests of "accident", "bodily injury" and "embarking/disembarking" in light of the jurisprudence and doctrinal interpretation that have developed elsewhere.[116] In particular, courts must at least (1) distinguish "accident" from "occurrence,"[117] (2) refrain from widely interpreting "bodily injury";[118] and (3) limit the scope of the process of "embarking/disembarking" to activities undertaken in the "zone of aviation risk".[119]

A final remark on the jurisprudence of Article 17 involves the Montreal Agreement of 1966 which commits IATA members including Ethiopian Airlines to issue tickets that embody the statement which expressly indicates the limitation of liability under the conditions stated earlier in Section 1, note 38.[120] This statement of liability includes *personal injury* and it is argued[121] that "personal injury" is not synonymous with the notions of "wounding... and bodily injury" as envisaged under Article 17 of the Warsaw Convention. Accordingly, "personal injury" is believed to entitle compensation for mental

marginal cases; see Diederiks–Verschoor, *supra* note 4, p. 79-80 and Philipson, *supra* note 7, § 7.44 – 7.59.

[115] See n. 13-15 *supra* and the accompanying texts.

[116] In this regard, the jurisprudence from the USA, UK and France – where the Warsaw Convention rules have been litigated since the first half of the 20th century – would be instructive.

[117] "Occurrence" is used under Article 18(1) within the context of carrier's liability for damage to goods and luggage. And, it has rightly been distinguished from "accident" under Article 17; see, e.g., Philipson, *supra* note 7, § 7.32.

[118] This would enable courts not to depart from the literal meanings of the authentic text of the Convention as well as the intent of the drafters of the Convention; see note 110 *supra* and Philipson, *supra* note 7, § 7.25 – 7.28.

[119] Even then, the issue of control also must be taken into account so as to avoid holding the carrier liable to damages caused by accidents occurring inside the zone of aviation risk but without the carrier being in charge of the passenger; see note 114 *supra*.

[120] *Advice to International Passengers on Limitation of Liability*, note 38 *supra*.

[121] See, e.g., *Krytsal v British Overseas Airways Corp.*, US District Court, Central District of California (10 September 1975) cited in Diederiks–Verschoor, *supra* note 4, p. 106 and Eaton, p. 577; Note however that the tendency to exclude compensation to purely mental injury pervades even after the most passenger-friendly Montreal Convention of 1999 (See Philipson, *supra* note 7, § 7.31).

injury even where it is not accompanied by physical injury.[122] In employing the term "personal injury" (instead of "wounding and bodily injury") in its passenger ticket, Ethiopian Airlines is thus arguably ready to redress passengers for mental injury unaccompanied by physical injury. In the absence of any local jurisprudence on this point, it is unclear whether Ethiopian courts maintain a distinction between "bodily injury" (Article 17, Warsaw Convention) and "personal injury" (Advice to International Passengers on Limitation of Liability, Passenger Ticket and Baggage Check, Issued by Ethiopian Airlines).

Under Article 18, the international carrier is presumed liable for "destruction, loss or damage to registered[123] luggage or any goods[124] if the occurrence which caused the damage took place during the carriage by air." Occurrence has been defined more broadly than accident under Article 17. Unlike "personal injury" (Article 17), damage need not result from "unusual and unexpected event." Events such as mechanical problems, refusal to unload an aircraft, error in delivering parcels to the consignee, and loss of documentation by the carrier have been taken to constitute "occurrence".[125] Yet, occurrence must happen (1) while the carrier is in charge of the goods and (2) in an aerodrome or aboard an aircraft.[126] These two elements which define the duration of liability (i.e. "during

[122] Diederiks–Verschoor, *supra* note 4, p. 106; note however that the majority of commentators appear to be non-assertive about the argument that "personal injury" in the IATA (Montreal) Intercarrier Agreement of 1966 differs in meaning from "wounding and bodily injury" of Article 17 of the Warsaw Convention. For instance, Diederiks–Verschoor, who in her book discusses *Krytsal v British Overseas Airways Corp.,* describes the holding of the American court as "interesting" rather than authoritative. Of course, it must be noted that the Montreal Agreement does not constitute a formal amendment to the Warsaw Convention (see note 32 *supra*). Yet, other formal amendments to the Warsaw Convention, e.g. the Guatemala City Protocol and the Montreal Protocol No. 3, employ the term "personal injury" in lieu of "wounding and bodily injury". And, the use of the expression personal injury is preferred so as to "signal that [purely] mental injuries have in practice been regarded as included and compensable." (See Cheng, *supra* note 22, p. 850).

[123] The dichotomy between registered and unregistered baggage looks important. First, Article 18(1) mentions only registered baggage. Hence, the carrier is not presumed to be at fault when damage relates to unregistered baggage. Second, as the Convention does not govern the liability of the carrier in respect of destruction, loss or damage to unregistered baggage which the carrier takes charge, it is likely for domestic laws to apply in lieu of the Convention. Incidentally, it must be noted the jurisprudence on this point is diverse (See, e.g., Philipson, *supra* note 7, § 8.4 – 8.9).

[124] Goods is synonymous with the now widely used term "cargo" and includes almost anything but luggage; see, e.g., Philipson, *supra* note 7, 8.6.

[125] Diederiks–Verschoor, , *supra* note 4, p. 81; Philipson, *supra* note 7, § 8.6

[126] Article 18(2), Warsaw Convention.

the carriage by air" under Article 18(1)) must exist cumulatively.[127] This would in essence mean that the Warsaw Convention applies[128] to damages to luggage and goods occurring during "the airport-to-airport" period save exceptional situations provided in Articles 18(2) and 18(3).[129]

An interesting aspect of the jurisprudence of Article 18, as developed elsewhere, involves the phrase "in charge of the carrier." The carrier is generally understood to be in charge of the goods from the moment they are delivered to it until they are transferred to the custody of the consignee.[130] The mere absence of physical possession (actual control) does not necessarily relieve the carrier of its duty of care.[131] In particular, carriers are regarded to be in charge of goods, even if goods are in physical possession of handling agents[132] and customs officials.[133]

In *Mengistu G. v Ethiopian Airlines and Customs & Excise Tax Administration*,[134] an issue arose whether the handling of cargo to customs officials at Bole International Airport would relieve the carrier from being considered in charge of the goods for the purpose of Article 631 of the Commercial Code, which is identical to Article 18(1) of the Warsaw Convention. The High Court of Addis Ababa agreed with Ethiopian Airlines that

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[127] It is not thus enough, for example, to establish that the goods are damaged while in an aerodrome or aboard an aircraft. Claimants must also prove that the carrier was in charge when the damage occurred. See, e.g., Moens, G. & Gillies, P. (1998) *International Trade and Business: Law, Policy and Ethics*. Sydney: Cavendish, p.306 [hereinafter Moens & Gillies].

[128] Except in situations stipulated in Article 18(3), domestic law applies where the damage to goods occur outside the airport to airport period; see, e.g., Dempsey, P. (2004) "International Air Cargo & Baggage Liability and the Tower of Babel" *George Washington International Law Review*, (36), pp. 283 [hereinafter Dempsey].

[129] Should an aircraft land outside an airport, Article 18(2) extends the application of the Warsaw Convention to loss, destruction or damage sustained at "any place whatsoever". Similarly, Article 18(3) extends the period of carriage by air to any carriage performed outside an aerodrome provided "such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment." Accordingly, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

[130] Diederiks–Verschoor, *supra* note 4, p. 80.

[131] Moens & Gillies, *supra* note 127, p. 306-308.

[132] *Ibid*.

[133] Philipson, *supra* note 7, § 8 –18; but see *Hermes Assurance Company v Pan-American Airways*, cited in Diederiks–Verschoor, *supra* note 4, (p. 81) where an Argentine court held that the good was not in the charge of the carrier where the good was kept in a private storage for the purpose of customs processes.

[134] See note 73 *supra*.

the latter's duty to take care of the cargo ended upon the delivery of the goods to customs authority at the airport. On appeal, the Supreme Court confirmed the holding of the lower court on the same point, notwithstanding its simultaneous approval of the argument of *Customs & Excise Tax Administration* that "**ዕቃው በባለቤቱ እጅ እስኪገባ ድረስ በጉዞ ላይ እንዳለ ይቆጠራል**". The holding of Ethiopian courts that the carrier ceased to be in charge of cargo once it was handed over to customs authorities at the destination airport is incompatible with the contemporary jurisprudence in both civil law and common law members of the Warsaw Convention.[135]

The carrier is liable for delay of passengers, luggage or goods.[136] However, delay is not defined anywhere in the Convention. According to some authors,[137]delay "connotes the discrepancy between the time when the carrier should have delivered passengers, baggage or cargo to their destination and the time when it actually did so." As a matter of contract law, the date and time specified in the contract govern any issue involving delay in the performance of contractual obligation.[138] If no time is agreed, it shall be performed immediately.[139] Of course, the question "how immediate" poses some problem. Nonetheless, the rules on notice shade some light on the issue. Particularly, Article 1774 of the Civil Code, which entitles a creditor to fix a period of time after the expiry of which he will not accept performance of the contract, stipulates that such period shall be "reasonable having regard to the nature and circumstances of the case." For the carrier to be liable for delay, the time of performance of carriage must therefore be unreasonably late under the circumstances.[140]

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[135] Of course, there have been instances where courts elsewhere held the carrier ceased to be in charge of cargo once it was handed over to customs authorities (see note 133 *supra*). Yet, it is now argued the carrier is regarded as being in charge unless delivery to the consignee takes place. Philipson *et al*. argue that "the weight of authority in both civil law and common law jurisdictions is now" in favor of the argument that the carrier does not stop being in charge should it hand cargo to customs officials (Philipson, *supra* note 7, § 8 –18); see also Moens & Gillies, *supra* note 127, p. 308.

[136] Article 19, Warsaw Convention.

[137] Philipson, *supra* note 7, § 8 –39.

[138] Article 1756(1), the Civil Code of Ethiopia, 1960, *Negarit Gazeta*, Proclamation No. 165/1960, 19th Year, No.2 [hereinafter Civil Code]; incidentally note that neither the Commercial Code's provisions on carriage by air nor the Maritime Code's provision on carriage by sea contain a handy definition of delay that could be analogised.

[139] *Ibid*, Article 1756(2).

[140] Such construction would be compatible with the jurisprudence elsewhere [see, e.g., *Ets Peronny v Ethiopian Airlines*, Cour d'Appel de Paris (1975) RFDA 395 (cited in Philipson, *supra* note 7, § 8 –44; Diederiks–Verschoor, *supra* note 4, p. 95; Moens &

Air tickets often include stipulations that times of departure and arrival in timetables are not guaranteed. For instance, Article 9 of Ethiopian Airlines Conditions of Contract stipulates:

> "Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch. Times shown in timetables or elsewhere are not guaranteed and form no part of this contract. Carrier may...alter or omit stopping places shown on the ticket in case of necessity. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections"

Similar stipulations are common among IATA members.[141] Yet, courts in numerous jurisdictions have been reluctant to construe contractual stipulations (similar to the one reproduced above) as giving carriers complete free ride with regard to time of performance.[142] For example, in *Ets Peronny v Ethiopian Airlines*[143] the Paris Court of Appeal rendered a clause void in the general conditions of contract that exempted the Ethiopian air carrier from liability for delay.[144]

Gillies, *supra* note 127, p. 312) where a French court of appeal found the Ethiopian carrier liable for unreasonable delay in the carriage of goods] and the Ethiopian law on carriage of goods by other modes of transport. Within the context of multimodal or land carriage of goods, delay in delivery occurs when (1) the goods have not been delivered within the agreed time or (2) when the goods have not been delivered within reasonable time having regard to the circumstances of the case; see Article 24, Proclamation to Amend Carriage of Goods by Land Proclamation, 2007, *Federal Negarit Gazeta*, Proclamation No.547, Year 13, No. 58; Article 17(3), Multimodal Transport of Goods Proclamation, 2007, *Federal Negarit Gazeta*, Proclamation No.548, Year 13, No. 59.

[141] Standard conditions of contract produced by IATA are obligatory on member carriers. Yet, the status of IATA "General Conditions of Carriage" vis-à-vis Warsaw Convention and other consumer protection laws are elusive; see, e.g., Philipson, *supra* note 7, § 6 –34 – 6-35 and Diederiks–Verschoor, *supra* note 4, p. 67.

[142] Note however that conditions of contract in passenger tickets and air waybills would bind passengers in the majority of cases; see, e.g., Philipson, *supra* note 7, § 14 –29; Diederiks–Verschoor, *supra* note 4, p. 84-85.

[143] See note 139 *supra*.

[144] The first decade of the 21st century witnessed aggressive legislative efforts to protect air passengers from airline malpractices. In particular, the USA and EU (European Union) are in the driving sit in enacting consumer protection laws that strengthen passenger rights regarding, for instance, tarmac delay and cancellation of flights; see, e.g. EC Regulation 261/2004, "establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91", *Official Journal of the European Union* and US Department of Transportation's Final Rule and Summary, (available at <www.regulations.gov>, docket DOT-OST-2010-0140 (21st April, 2011). As far as Ethiopia is concerned, there is no specific legislative

4.2- Limitation of the Carrier's Liability

One of the cardinal principles of the Warsaw Convention is limitation of air carriers' liability. The principle is embodied in Article 22 and applies in the majority of cases. There are however exceptional circumstances that justify the non-observance of the limits, hence unlimited liability of the carrier. Meanwhile, the carrier may totally avoid liability under the cases provided in Articles 20-21.[145] For the sake of succinctness, however, we will only deal with Article 22 and the interesting topic of breaking the limit.

According to the original Warsaw rule on limitation of liability, the carrier's liability for death or injury of passengers is limited to the sum of 125,000 French gold francs unless a higher limit of liability is agreed by the parties.[146] Moreover, liability for damage or loss of checked baggage and of goods is limited to 250 French gold francs per kilogram.[147] As regards objects of which the passenger himself takes charge, the liability of the carrier is limited to 5,000 francs per passenger.[148]

Ever since the coming into force of the 1975 Montreal Protocols, the liability caps are expressed in Special Drawing Rights.[149] Accordingly, the liability of a carrier for death, wounding or bodily injury is restricted to 8,300 SDRs (or its equivalent in Birr at the date of the judgement).[150] As regards objects of which passengers take charge themselves, the liability cap is now 332 SDRs per passenger.[151] The Montreal Additional Protocol No. 1 limits the liability of the carrier in the carriage of baggage or cargo to 17 SDRs per kilogram.[152] The fact that Ethiopia is a member to the Montreal Additional Protocol No. 4 renders the

movement in that direction. Yet, the new Trade Practice and Consumers' Protection Proclamation would hopefully play a limited role in protecting passengers and other consumers alike from the vices of adhesion contracts and other business malpractices; see, e.g., Article 22 and 29, Trade Practice and Consumers' Protection Proclamation, 2010, *Federal Negarit Gazeta*, Proclamation No. 685, Year 16, No. 49. See also Article 1738 Civil Code.

[145] See Philipson, *supra* note 7, § 9 -01– 9-63 for a fair discussion on Articles 20-21, Warsaw Convention and the jurisprudence thereto.

[146] Article 22(1), Warsaw Convention.

[147] *Ibid*, Article 22(2).

[148] *Id*, Article 22(3).

[149] See note 39 *supra* and the accompanying texts.

[150] Article II, Montreal Protocol No. 1.

[151] *Ibid*.

[152] *Id*.

liability limit in the carriage of cargo inviolable unless the consignor opts for a higher limit by paying a supplementary sum.[153]

As seen earlier, the 1966 Montreal Intercarrier Agreement binds Ethiopian Airlines to a higher [than the Warsaw system affords] limitation cap with regard to damages sustained on a journey to, from, or with an agreed stopping place in the United States of America.[154] This higher limitation cap is U.S. $ 75,000.00 inclusive of legal fees and costs.[155]

Obviously, the limitation cap varies with the applicable convention or agreement. For instance, the claims of a passenger who flies Ethiopian from Washington DC to Addis Ababa would be subject to the US $ 75,000 limit.[156]A passenger on a flight from Addis Ababa to Dar es Salaam would have his contract of carriage subject to the 125,000.00 francs (or 8,300.00 SDRs) limit under the original Warsaw Convention.[157] On the other hand, the claims of a passenger, with a round trip to Nairobi-Addis Ababa-Nairobi ticket, would be subject to the 250,000 francs (or 16,600 SDRs) as Kenyan courts apply the Warsaw Convention as amended by the 1955 Hague Protocol.[158] Finally, the contracts of passengers in the same flight would be subject to different liability limits.[159]

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[153] Article VII, Montreal Protocol No. 4. Also, note that this protocol does away with the principle of rebuttable presumed fault with regard to carriage of cargo, save in cases of delay and contributory negligence (see Articles V –VI). Put in other words, the carrier cannot rely on the defences of "all necessary measures" or "impossibility" which were possible under the original Warsaw rules.

[154] See notes 30 and 38 *supra*.

[155] The limit is US $ 58,000.00 exclusive of legal fees and costs; see *Advice to International Passengers on Limitation of Liability*, note 38 *supra*.

[156] *Ibid*.

[157] This is because both Ethiopia and Tanzania are High Contracting Parties to the original Warsaw Convention; see the list of ratifications from <http://www.icao.int/icao/en/leb/wc-hp.pdf>.

[158] *Ibid*; note however that the liability of the carrier would be limited to the original Warsaw cap, i.e., 8,300.00 SDRs if the passenger was with a one way Nairobi – Addis Ababa or round trip Addis Ababa – Nairobi – Addis Ababa ticket. This is because Ethiopian courts would assume jurisdiction as they are the courts of the place of destination; and they would most likely apply the Warsaw Convention (unamended by the Hague Protocol) for it is the common treaty in force between Kenya and Ethiopia.

[159] See, e.g., Lowenfeld & Mendelsohn, *supra* note 28, p. 524-526; Cheng Chua, J. (2003) "Breaking Convention: When is a Carrier's Limit of Liability under the Warsaw Convention Broken? Beyond Beryl Claire Clarke & Ors v Silkair (Singapore) Pte Ltd" *Singapore Academy Law Journal,* (15), p.7.

The pro-carrier principle of limitation of liability, which may get in the way of unlimited settlement of damages, may be challenged in exceptional circumstances. One such[160] circumstance involves the concept of wilful misconduct. An international air carrier loses its right to limit or exclude liability should damage (to passenger or goods) result from its or its agent's wilful misconduct.[161] Moreover, the carrier is prohibited from relying on the provisions of the Convention limiting or excluding liability when the damage is the result of default which, in accordance with the law of the court entertaining the case, is considered to be equivalent to wilful misconduct.[162]

Wilful misconduct is an English translation of "dol" in the original and authentic French version of Article 25 of the Convention. There are however arguments that the term 'wilful misconduct' does not accurately represent the French concept of "dol." According to a leading author in international air law, "dol" refers to "the intention to inflict specific injury on another person."[163] In contrast, wilful misconduct does not necessarily imply the intention to inflict injury.[164] As a result, jurisdictions that rely on the English version of the Convention apparently apply Article 25 in a wider context than those relying on the French version.[165]

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[160] It is also possible to break the limit by establishing that (1) the carriage is not international, (2) no ticket is issued and (3) no adequate warning was given; see, e.g., Kennelly, J. (1975-76) "Aviation Law; International Air Travel – A Brief Diagnosis and Prognosis" *California Western International Law Journal*, (6), p. 105-106.

[161] Article 25, Warsaw Convention.

[162] *Ibid*.

[163] Diederiks–Verschoor, *supra* note 4, p. 96.

[164] *Ibid*; see also examples of wilful misconduct from common law jurisdictions in Moens & Gillies, *supra* note 127, p. 310-311 and Philipson, *supra* note 7, § 10-19 *et seq*.

[165] *Id*; note however that Article 25 allows courts to assimilate "dol" with "faute équivalente au dol" (default equivalent to wilful misconduct) if the later concept exists in their legal system. This for example guarantees the application in jurisdictions like France of Article 25 to cases involving gross negligence. This would presumably reduce instances of divergent interpretation of Article 25. Yet, problems still exist as the French version of "faute équivalente au dol" may not always be equivalent with wilful misconduct as developed in Anglo-American jurisdictions. Besides, it should also be noted that the jurisprudence of wilful misconduct has not always been consistent in jurisdictions which use identical versions of the Warsaw Convention; see also Mankiewicz, *supra* note 24,p. 738; Moens & Gillies, *supra* note 127, p. 311; Philipson, *supra* note 7, § 10-10; Guerreri, G. (1959-1960) "Wilful Misconduct in the Warsaw Convention: A Stumbling Block" *McGill Law Journal*, (6), p. 267 *et seq*.

To avoid the divergent interpretation of Article 25 and hence the instance of forum shopping, Article 25 was amended in the 1955 Hague Protocol. Accordingly, Article 25 (as amended) reads: "the limits of liability specified in Article 22 shall not apply, if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result..."[166] Apart from the fact that "omission"[167] has now been included as a ground of unlimited liability, the new Article 25 is different from its predecessor in its simultaneous use of both "dol" and "wilful misconduct".[168]

Articles XV *cum* IX of the Montreal Protocol No. 4 imply that the concept of wilful misconduct has given way to the principle of absolute carrier liability for cargo claims. Yet, Article 25 of the Warsaw Convention still forms part of the Ethiopian law on international air carriage of *passengers* and *baggage*. As a result, Ethiopian courts could still be dragged to the question involving the exact scope of the original Article 25. It is however the opinion of this author that Ethiopian courts would (and should) prefer the English concept of wilful misconduct over the French concept of "dol" as the English version of the Convention along with the accompanying literature are easily accessible than the official French version.

As seen above, Article 25 applies when the carrier inflicts damage either intentionally or recklessly (acting with knowledge but without regard for the consequences).[169] Courts in English speaking countries found wilful misconduct when for example the pilot descended to a level below the flight altitude he had been instructed to maintain[170]; the pilot failed to climb to the level he had been instructed and as a result the aircraft crashed into a mountain[171]; the aircraft is

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[166] Article XIII, Hague Protocol.

[167] See note 112 *supra* and the accompanying text for a related controversial issue of whether inaction constitutes accident for the purpose of Article 17.

[168] Despite this, the Hague Protocol has not completely solved the problems of interpreting Article 25. According to Moens & Gillies, "the amended Article 25 has produced as many problems of interpretation as its predecessor." (See Moens & Gillies, *supra* note 127, p.310). The problems of interpretation of the amended Article 25 are however beyond the scope of this article as Ethiopia is not a party to the Hague Protocol.

[169] Diederiks–Verschoor, *supra* note 4, p. 96; *In Re Korean Airlines Disaster*, 704 F. Supp. 1135 (D.D.C. 1988) cited in Gesell & Dempsey, *supra* note 28, p. 861-862; *Horobin v BOAC*, 2 All English Report 1016(1952) cited in Philipson, *supra* note 7, § 10-23.

[170] *Berner v British Commonwealth Pacific Airlines Ltd*, 346 F2d 532 (1963) cited in Philipson, *Ibid*, § 10-34.

[171] *Ritts v American Overseas Airlines* (1949) US Av 65cited in Philipson, *Ibid*, § 10-34.

inadequately equipped;[172] and when the pilot decided to navigate notwithstanding unreliable INS (Inertia Navigation System).[173]

The establishment of wilful misconduct prohibits the carrier from availing itself of provisions limiting or excluding liability.[174] These provisions certainly include Articles 20 and 22.[175] It is not, however, a matter of consensus whether a carrier, guilty of wilful misconduct, is excluded from relying on, for example, Article 26(4).[176] It is to be noted that the importance of wilful misconduct is declining in modern private international air law where the principle of absolute liability reigns.[177]

Concluding Remarks

Despite its long history, the Ethiopian law on international air carriage appears to have been neglected and has not attracted the attention of practicing and academic lawyers for decades. It is also sad that Ethiopian courts apply the inappropriate law (in the examples mentioned above) when dealing with matters of international air carriage. It is, however, hoped that the Civil Aviation Proclamation, which lays the ground for wider utility of the Warsaw Convention (and some of its amendments), will not remain unnoticed. The author is of the opinion that Ethiopian courts would benefit from foreign jurisprudence and local literature in their attempt to interpret and apply the 1929 Warsaw Convention and its Montreal Additional Protocols – which are now the main source of Ethiopian law on carriage by air.

This short introduction to the Ethiopian law on carriage by air reveals that the Warsaw Convention governs the liability of *any* air carrier. The carrier assumes fault based liability for injury and death of passengers, loss or damage to luggage and goods, and delay. The carrier may escape liability in cases provided under Articles 20-21. Otherwise, the liability of the carrier is limited to the amount indicated under Article 22 of the Warsaw Convention save in exceptional circumstances involving, for example, wilful misconduct. Claims related to carriage by air may be brought before an Ethiopian court where the

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[172] Philipson, *Ibid*, § 10-35.

[173] *In Re Korean Airlines Disaster*, note 169 *supra*.

[174] Article 25(1), Warsaw Convention.

[175] Article 22 limits the carrier's liability; whereas, Article 20 relieves the carrier from liability subject to proof of "all necessary measures" and "contributory negligence."

[176] Philipson, *supra* note 7, § 10-16.

[177] The Montreal Protocol No. 4 as well as the Montreal Convention represent modern international laws on carriage by air that do away with the concept of wilful misconduct. Within the context of Montreal Convention, the concept of wilful misconduct, rather "negligence or other wrongful act or omission", now plays a reduced role; see Article 21, Montreal Convention.

carrier keeps its residence, principal place of business or establishment. Ethiopian courts may also entertain air carriage cases where Ethiopia is the place of destination.

That said, legislative response to contemporary developments in the air business is desirable. In particular, the drawbacks of the Warsaw Convention ought to be addressed with a view to updating the various stipulations with current needs, events and realities. A case in point is the need to balance the elements of the pro-carrier regime with pro-passenger or pro-cargo-owner principles. Of course, due care should also be taken not to seriously undermine the Ethiopian aviation sector. Yet, there is the need to raise the limitation cap for personal and cargo damages instead of introducing absolute carrier liability. Secondly, rules on the form and content of passenger and luggage tickets must be simplified to accommodate developments in the air business. And thirdly rules of jurisdiction must be updated so that Ethiopian residents may bring actions against foreign air carriers before Ethiopian courts. Admittedly, however, there is no easy way to do this. Should Ethiopia join either the 1955 Hague Protocol or the 1999 Montreal Convention, at least two of the three courses of action can materialize in a manner that strikes a balance between the interests of passengers, cargo owners and air carriers. ■

THE POLITICS UNDERPINNING THE NON-REALISATION OF THE RIGHT TO DEVELOPMENT

Belachew Mekuria Fikre ♣

Abstract

The right to development stands out as one of the controversial rights ever since its articulation in the 1970s. The adoption of the 1986 United Nations Declaration on the Right to Development underlines the importance of international cooperation for it to be realised. I argue that the emphasis on 'development aid' rather than the broader 'development cooperation' has contributed a great deal to the politicisation of the right and consequently undermined its materialisation. Indeed, there is the need for semantic and conceptual clarity in the use of the term 'international assistance and cooperation' that has deceptively supplanted 'international cooperation.' While the former is a term used under Article 2(1) of the International Covenant on Economic, Social and Cultural Rights with a view to laying down the broader States Parties' obligations, the latter is what the Declaration on the Right to Development exclusively employs. I argue that even if development assistance is indispensable, taking it as the sole approach to the realisation of the right to development is both wrong and unhelpful.

Key words:

Right to development; international assistance and cooperation; the New International Economic Order; the Declaration on the Right to Development

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Introduction

The right to development has been on the agenda during the last decades; but we are still far behind *any meaningful move* and we are rather engaged in counting votes[1] as to who are in favour, against, or indifferent to the various global initiatives concerning this right. As gross an assertion as the phrase '*any meaningful move*' might appear, there is sufficient evidence that one can put forward to prove even bigger generalisations.

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[1] To borrow Laure-Helene's words in her report to the DFID, voting is a 'public acknowledgment of the lack of consensus.' See *The Right to Development: A Review of the Current State of the Debate for the Department of International Development*, April 2002, p 16.

Differences exist among world states concerning this right that range from challenging its very existence to the peripheral issues of identifying who may be regarded as the right and/or duty holders. Beginning from its early periods of recognition, the right to development has been thought as the resurrection of the 'New International Economic Order,'[2] in which the developing countries insisted on improved terms of trade, heightened development assistance and tariff reductions by the developed world. These demands necessitated the 'reordering' of the dominant international economic arrangements that were characterised by:

> [t]he division of the world into exporters of primary products and exporters of manufactures; the adverse factoral terms of trade for the products of the developing countries; the dependence of the developing countries on the developed for finance; the dependence of the developing countries on the developed for their engine of growth.[3]

There was thus skepticism on the part of various countries in the Global North that the Right to Development was meant to bring back the notion of the New International Economic Order through the back-door. The 'north' block had thus to be given assurances through the delegates in the drafting Committee of the Declaration on the Right to Development that this would not be so.[4] Stephen Marks had explained this fact as follows:

> Key Western delegations made it clear to the other members of the drafting group that they would ensure that the declaration on the right to development was not used as a means of resuscitating New International Economic Order. Nor would they allow the declaration to create any entitlement to a transfer of resources; aid was a matter of sovereign decision of donor countries and could not be subject to binding rules under guise of advancing every human being's right to development.[5]

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[2] There have always been strong opponents to the so called New International Economic Order who even argued that 'it is not New; it is not International; it is not Economic; and it is not Order' thereby challenging its basic content and relevance. See, for example, the lecture by J G., Harry, 'The New International Economic Order,' 5,Oct. 1976, the *Woodward Court Lecture at the University of Chicago, Selected Papers No. 49* page 3; see also generally Grunel, Herbert G., 'The case against the New International Economic Order,' *Review of World Economics*, Vol. 113, No. 2, pp 284-307.

[3] See, W. Arthur Lewis (1977), 'The evolution of the International Economic Order,' *Discussion Paper 74*, (Woodrow Wilson School, Princeton University: New Jersey), p 1.

[4] See, Stephen Marks (2003), 'Obstacles to the Right to Development,' *Working Paper*, Harvard University.

[5] *Ibid*, p 2.

At least two messages can be discerned from the perceived concerns on resource transfer and the caveats against the reincarnation of the New International Economic Order through the right to development. One of these messages is a fact and the other is a misconception. To begin with the latter, there always persisted a daunting misconception on the meaning of the right to development, even more daunting than the challenge regarding its very existence. For instance, a quick look at Dr. Michael Novak's statement, the then US Representative to the UN Human Rights Commission, tells us that development may easily be equated with pure profit-loss analysis. I quote:

> …Development…is a form of profit - a reasonable return on investments made, a reasonable growth, and a reasonable surge forward. We recognize that both profits and losses can be judged by a rule of reason…On the whole, an economy without profit is an economy without development.[6]

Apart from this misconception, there is a second important fact that one may discern. This pertains to international assistance and cooperation which had been the underlying element of the New International Economic Order, and concerning which the vote counting has shown the most consistent trend, so much so that one can easily tell the outcomes even before the votes were cast.[7] This same fact, I would argue, has politicized the right to development and thereby hampered its realization.

On the one hand, for those influential world states[8] their being impervious to the idea of international duty to assist has made them unable to have a positive conception for this right, the primary holders of which are individual human persons. This same misconception also stems from certain advocates of the Global South who consider international assistance and cooperation as a panacea to all their development-related problems. On the other hand, and as a continuum to this tangled conception, the right to development seems to have remained more of a dream as most of the southern states have persistently and exclusively chosen to rely on and/or use international assistance and cooperation as an escape-hatch for their failure to even try.

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[6] See Michael Novak, quoted in M., Stephen, (2004) 'The Human Right to Development: Between Rhetoric and Reality,' *Harvard Human Rights Journal*, Vol. 17, pp 137-145, at p 144.

[7] At least the 'South's' stance in favour of most of the RTD-related UN initiatives, the US' 'persistent objection' and the UK's abstinence can easily be foretold if one knows what is on the table for votes' cast.

[8] By 'influential' it is meant the all-round influence that countries of the North have on most decision making processes, be it at international, regional or at times domestic issues.

This article thus interrogates these two misconceptions and briefly forwards some critical insights to the present development aid agenda from the perspectives of the recipient and the provider. This can give some light regarding the roots of the politicization of the right to development which has indeed undermined its realization. In its first section, the article presents the various characterizations of the right to development and examines them with a view to suggest the appropriate way of looking at the concept. International development aid as an element of the right to development will be briefly addressed in the second section by highlighting on the challenges that this duty has posed and is posing to the development agenda. In the third section, a critical overview on alternative approaches to development aid is forwarded which shall then be followed by concluding remarks.

1. The meaning of the right to development

Sengupta describes the right to development as the right to a particular process of development in which "all human rights and fundamental freedoms can be fully realized".[9] This understanding of the concept goes beyond the 'profit-loss' analysis which has been used to describe the right.[10] However, it is not possible to attain the acceleration of this process in isolation from the material conditions of the particular society.[11] As development takes place in this 'material world' of ours by transforming our immaterial needs and desires, 'individual human progress and changes in the material conditions and the other natural forces of immaterial nature' are inseparably intertwined.[12]

Therefore, the process of realizing all the rights and freedoms recognized as human rights (i.e., civil and political rights, and economic, social and cultural rights) must be coupled with the material capabilities of the subjects of the right to development. Amartya Sen puts these two aspects of the right to development into two categories of '*the process aspect*' and '*the opportunity aspect*' of freedom.[13] For him, development must combine these two and thus where there are 'inadequate processes such as the violation of voting privileges or other rights' it signifies absence of freedom and in effect development.[14] The same

[9] See 4th Report of the Independent Expert, Arjun Sengupta, the UN Economic and Social Council, E/CN.4/2002/WG.18/2, 20 Dec. 2001, Para 2.

[10] Michael Novak, *supra* note 6.

[11] See 'The legal nature of the right to Development,' UN Economic and Social Council, UN doc. E/CN.4/Sub. 2/2004/16, 1 June 2004, Para 3.

[12] *Ibid*.

[13] Amartya Sen (1999), *Development as Freedom*, (Oxford: Oxford University Press), at p 17.

[14] *Ibid*.

holds true for lack of opportunities such as 'absence of elementary opportunities such as the capability to escape premature mortality or preventable morbidity or involuntary starvation.'[15]

Two semantically identical and thematically asymmetrical discourses abound our contemporary development literature. What makes the problem seemingly intractable is that both approaches are championed by different syndicates of the same global inter-governmental organization -the UN. The United Nations Development Programme (UNDP) as the UN's principal custodian of development-related engagements advocates an approach that measures development through the lens of the Human Development Index (HDI) and the Millennium Development Goals. On the other hand, the human rights departments within the same organization pursue their discursive human rights agenda relating to development.

The HDI that the UNDP introduced to replace the pre-1990s' GDP/GNP[16] as a tool of measuring development essentially embodies the *opportunity aspect* of this process through its tripartite tools. These are long and healthy life captured by the results of *life expectancy*; education as measured by *adult literacy and enrolment* at the three levels of education-primary, secondary and tertiary; and having a decent *standard of living* that the Purchasing Power Parity is expected to reveal. However, these indices do not provide a space for measuring human rights, freedoms and democratic values, which are described by Sen as the '*process aspects*' of development.

Apart from this weak link that characterizes the tools, the fundamental flaw of most statistical analyses relates to their focus on the 'averages.' Where figures are established showing a numerical rise, a report could well be used to gauge a nation as being in perfectly 'healthy' condition. As has already been criticized, the HDI averaging approach overlooks, among others, 'the degree of

[15] *Ibid*.

[16] When the 1990 Human Development Report made that shift, the previous tool of measuring mere GDP trends was criticised as 'supplanting a focus on ends by an obsession with merely the means.' See the 1990 Human Development Report, UNDP, 1990, Chapter I, p 9. This was again modified by the 1997 report that employed Human Poverty Index. While again describing the rationale for the adoption of the new indices the report said that this new approach, rather than measuring poverty by income, the use of indicators that capture the most basic dimensions of deprivation are needed such as; a short life, lack of basic education and lack of access to public and private resources. See Human Development Report, UNDP, 1997, p 5.

economic and social cohesion.'[17] According to Javier Bilbao-Ubillos, the absence or presence of economic and social cohesion is noticeable based on such indices as income gap, the ease or difficulty of access to education and health services, and the level of popular participation in politics, the economy and social initiatives.[18] The 2010 Development Report also admits this glitch stating that 'countries may have a high HDI and be undemocratic, unequitable and unsustainable -just as they may have a low HDI and be relatively democratic, equitable and sustainable'[19] and then concludes on the impossibility of getting it all right at once.

The quest for the objective measurability of development has steadily continued with its ever unrelenting innovative approaches to measure poverty, and has now culminated in the adoption of the Multidimensional Poverty Index (MPI). The previous tools have now been considered as unfulfilling in answering the question 'who is poor'? The MPI thus begins with the usual narrative that poverty is multidimensional which cannot be captured just by the reductionist one dollar per-day calculation of the World Bank. By the latter's standard, for instance, 39% of the Ethiopian population would be considered poor while based on the MPI, this figure rises to 90%.[20] In contrast, '46% of Uzbekistan's population would be classified as poor using the $1.25-a-day measure, but only 2% meet the criteria under the MPI.'[21] The recent report that introduced these indices to assess 104 countries of the world has stated the following by way of describing what it means and its novelties compared to the previous measurement tools:

> This new measure replaces the Human Poverty Index (HPI), published since 1997. Pioneering in its day, the HPI used country averages to reflect aggregate deprivations in health, education and standard of living. It could not identify specific individuals, households or larger groups of people as jointly deprived. The MPI addresses this shortcoming by capturing how many people experience overlapping deprivations and how many deprivations they face on average…The MPI is the product of multidimensional poverty headcount (the share of people who are multidimensionally poor) and the average number of deprivations each multidimensionally poor household experiences (the intensity of their poverty).[22]

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[17] See Javier Bilbao-Ubillos (2011), 'The limits of the Human Development Index: The complementary role of economic and social cohesion, development strategies and sustainability,' *Sustainable Development*, DOI:10.1002/SD, at p 5.

[18] *Ibid*, p 6.

[19] See Human Development Report 2010, UNDP, p 65.

[20] See Dan Morrell 'Who is Poor,' *Harvard Magazine 9*, (Jan-Feb 2011).

[21] *Ibid*.

[22] See Human development Report, 2010, *supra* note19, p 95.

By focusing on those three aspects of human needs-health, education and standard of living-and using 10 different indicators[23] that further detail these three cross-cutting themes, the MPI still fails short of providing the clear notion of development. The multidimensionality of poverty notwithstanding, measuring it only by those symptoms leaves no room for depicting the processes, and underlying structures of vulnerability that led to those symptoms. The MPI may reveal, for instance, high child mortality which could eventually trigger aid money to flow to reduce those numbers. In other words, the MPI runs the risk of merely 'describing' poverty thereby 'obscuring the dynamics and the processes involved.'[24] This consistent pattern in failure to get it right evinces at the minimum that development as a fact of billions of lives is misunderstood, and those tools and figures are merely self-serving to the producers' institutional politics.

This is partly explainable by the shortcomings associated with the dominant narrative on the meaning and conceptual foundations of development. The primary and most pressing reason for this is the world community's desistance in acknowledging development as one fundamental right with its associated right-holders and duty-bearers. The decoupling of the human rights and development actors for so many decades is as regrettably fresh today as it was back in the 1970s and 1980s when movements for the recognition of the human right to development had got their highest tempo resulting, however, in a mere UN Declaration. Alston observed this dissociation as '*ships passing in the night*' and he vividly portrayed how the human rights agenda distanced itself from developmental goals, and *vice versa*.[25]

Four decades back, the Senegalese jurist, M'Baye had imbued the meaning of development with a wider perspective:

> To comprehend true development, the idea of 'a real improvement in living standards' must be taken into account; it is not a longer life for every person that matters but a better life. The civilization that is based on ever greater production and ever increasing consumption is, without a shadow of a doubt, as we are

[23] Health being measured by child mortality and nutrition; education measured by the number of children enrolled and years of schooling; and living standards by assets, floor, electricity, water, toilet and cooking fuel.

[24] See, Brendan J. Whelan &, Christopher T Whelan, 'In what sense is poverty multidimensional?, in Room, Traham, (1995), *Beyond the threshold: the measurement and analysis of social exclusion,* (Bristol: The Policy Press).

[25] See Philip Alston (2005), 'Ships passing in the night: The current state of the human rights and development debate seen through the lens of the millennium development goals,' *Human Rights Quarterly*, Vol. 27, No 3, pp 755-829.

> beginning to acknowledge it today, a civilization condemned to fatal contradictions and chaos.[26]

M'Baye then went on listing what he called factors that help assess improvements in living standards. The nine factors he identified were more or less summaries of the rights enshrined under the International Covenant on Economic, Social and Cultural Rights except one-individual human freedom.[27] And until as recently as the 1990s, we have not been able to unpack what M'Baye had meant by 'a better life', and 'individual human freedom', which has been explained by the works of Amartya Sen particularly in his work 'Development as Freedom.'

Turning now to the human rights to development discourse, as noted above, the insistence to regard the right to development as a human right to a process of realizing all fundamental rights has not been taken that seriously. The Declaration on the Right to Development is proof that the world countries, particularly the affluent ones, remain less enthused in setting a binding norm relating to individual and peoples' right to development.[28] During its adoption as a mere Declaration, the United States did not hesitate to cast the single dissenting vote followed by several abstentions.[29] The Declaration has five core

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[26] See Keba M'Baye (1978), 'Emergence of the 'Right to Development' as a human rights in the context of a New International Economic Order,' Paper presented at *a Meeting of experts on human rights, human needs and the establishment of a New International Economic Order*, Paris, UNESCO, 19-23 June 1978, at p 3.

[27] His complete lists were health, food consumption and nutrition, education, employment and working conditions, housing, social security, clothing, leisure activities and individual human freedom. M'Baye, *Ibid.*

[28] The Open Ended Working Group on the right to development was established with a view to take appropriate steps so as to make the declaration evolve into 'an international legal standard of a binding nature.' That in effect meant to have it as a binding convention and little has been achieved in meeting this mandate over the last one decade. See the Resolution that extended the Working Group's mandate which was originally established in 1998; Human Rights Council, Res 4/4, adopted without a vote, during its 31st meeting, 30 March 2007, para 2(d).

[29] Germany, Iceland, Israel, Japan, Norway, Sweden and the United Kingdom were the countries that abstained. One of the differences that existed related to who the subjects of the rights-holders could be and this created three clear categories: i) Those supporting the notion of making individuals, peoples and states as the ones entitled to the right to development; ii) those that strictly singled out individuals to be the rights-holders thereby restricting the duty-bearers to domestic level; and iii) the ones that assumed a middle-ground. For further elaboration see generally Kiwanuka, R.N., (1988), 'Developing rights: The UN Declaration on the Right to Development,' *Netherlands International Law Review*, Vol. 35, pp 257-272.

components that underline the duty of States (both at national and international level)[30], the centrality of the human person as the subject and beneficiary of the right to development[31], the essentiality of all human rights as ends and means of development[32], the vitality of participation[33] and the part that emphasizes the obligation of governmental, inter-governmental and non-governmental development organizations.[34]

Professor Arjun Sengupta has amply elaborated on these points in his reports as an Independent Expert on the right to development. He defined the right to development as a right to a process:

> The right to development refers to a process of development which leads to the realization of each human right and of all of them together and which has to be carried out in a manner known as rights-based, in accordance with the international human rights standards, as a participatory, non-discriminatory, accountable and transparent process with equity decision-making and sharing of the fruits of the process.[35]

This understanding of development as an entitlement to 'a process', as much as an abstract conception as it might seem, is vital in many ways. Primarily, it reminds both the duty-bearers and right-holders alike about the complex task involved in the full realization of the right which requires a duration that is relatively longer. It involves, as spelt out under the Declaration, 'comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.'[36] Accordingly, understanding the development agenda as a process is vital and that would serve as a constant reminder to the actors involved to remain relentless and resilient. Secondly, and most importantly, the emphasis to an all-round process of realizing human rights dispels the age-old narrative of portraying civil and

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[30] See United Nations General Assembly, *Declaration on the Right to development*, U.N. GAOR., 41st Sess. 4 Dec. 1986, U.N. Doc. A/Res/41/28, Article 2(3) (cited as DRTD hereinafter).

[31] DRTD, Article 3.

[32] DRTD, Article 2(1).

[33] DRTD, Article 1(1).

[34] See Article 10 of the Declaration and generally Paul, James C.N., (1992), 'The human right to development: Its meaning and importance,' *John Marshall Law Review*, Vol. 25, pp 235-265.

[35] Arjun Sengupta (2002), 'On the theory and practice of the right to development,' *Human Rights Quarterly*, Vol. 24, No 4, pp 837-889, at p 846.

[36] DRTD, Preamble para 2.

political rights as luxury goods that only the affluent few may afford and/or enjoy.[37]

Conceptually, therefore, approaching development as mainstream human right is the key to bring the misconceived agenda of the poor back into the forefront. With this significant shift in understanding, one may consider the essential tools as reflected in the MDGs that have handy-to-measure and monitor goals, targets and indicators. Such detailed articulation would have a sound legal basis only if development is properly placed as a human rights agenda. While the MGDs are merely consensus-based goals[38], the human rights norms are binding international obligations in spite of weak monitoring mechanisms.

The idea enunciated by Sengupta that the bits and pieces of all human rights must, as of necessity, be made to move forward forming 'a vector of human right'[39] is ingenious. However, even the best of circumstances would require some form of priority setting that necessarily affects the vector. In the course of handling these conditions, what has been suggested is to remain vigilant in at least not regressing in any one of the rights while prioritizing:

> When the right to development is taken as a process where all the rights are progressively realized, such prioritization would mean that some rights could be

[37] It had for long been suggested countries need to make tradeoffs temporarily, which Jack Donnelly summarises them under the headings of *needs trade-off, equality trade-off* and *liberty trade-off*. Particularly the latter is suggestive of the temporary suspension on 'the exercise of civil and political rights' because they 'may disrupt or threaten to destroy even the best-laid development plan' which according to Donnelly is a 'tragically misguided conception.' See Donnelly, Jack, (1984), 'Human rights and development: Complementary or competing concerns?' *World Politics*, Vol. 36, No 2, pp 255-283, at pp255-258.

[38] However it is to be noted that because of their consensus-based adoption process, some attribute the character of customary international obligations to the MDGs' first seven Goals. Philip Alston, then goes on to state 'it would follow in many respects that the eighth Goal is also a strong candidate, especially in light of the existence of an international duty to cooperate as enshrined in the UN Charter and elsewhere.' See Alston, Philip, (2004), 'A human rights perspective on the Millennium Development Goals,' paper prepared as a contribution to the work of the Millennium Project Task Force on Poverty and Economic Development.

[39] The Independent Expert has articulated the concept of 'vector' right employing his expertise on econometrics to explain what it means by a process of realizing all human rights. He had stated that 'the concept of development as freedom is […] a vector consisting of a large number of elements such as income, employment, health, education or opportunities in general which includes all forms of freedoms.' See Arjun Sengupta, Study on the current state of progress in the implementation of the right to development, E/N.4/1999/WG.18/2, 27 July 1999, para 67.

> realized earlier than the others, without violating or retrogressing on the fulfillment of any right. The comparison could be then between the incremental changes in the realization of the right rather than between giving up some in exchange of a gain in others.[40]

This is meant to confirm to the Maastricht Guidelines that stipulate the indivisibility, interdependence, interrelatedness and of equal importance for human dignity of all human rights.[41] Unfortunately, setting and meeting priorities under the circumstances where millions of children are left to the plight of hunger is barely carried out by stringent considerations of such abstract concepts. Usually, expenditures speed up at an accelerated pace even before they are mobilized, and many developing countries rely on an anticipated foreign aid for their annual budget. Moreover, the complex analyses and design of all those tools of implementation are real luxuries that the 'Bottom Billion'[42] ill-affords. While we recognize the right to development as a process, identifying the exact place of international cooperation within this process is relevant if that process is to be carried out to its logical and proper destination. The following section examines the place of this duty within the international human rights frame.

2. Normative bases for international cooperation

To begin with, the Declaration explicitly places the duty for the realization of the right to development on all human beings, individually and collectively.[43] However, as it is the case for all human rights, the primary responsibility lies on states which, according to Article 3 of the Declaration, are responsible 'for the creation of national and international conditions favorable to the realization of the right to development.' In so doing, the Declaration establishes two-tiered structures whereby at national and international level, states are enjoined to

[40] Sengupta (2002), *supra* note 35, p 867.

[41] See Maastricht Guidelines on violations of economic, social and cultural rights, Maastricht, Jan 22-26, 1997, para 4.

[42] The 'Bottom Billion' is used to describe by the Oxford Professor Paul Collier the currently impoverished countries of the South. With the significant turn of events in Brazil, China and India, the formerly five billion estimates of the poor are shifting according to him, leaving only 'an impoverished ghetto of one billion people' who are 'not just falling behind [but] are falling apart.' See Collier, Paul (2008), *The bottom billion: Why the poorest countries are failing and what can be done about it*, (Oxford: Oxford University Press), p xi.

[43] DRTD Article 2(2).

discharge their responsibility as they relate to this right.[44] The international dimension of the duty emerging from the right to development emphasizes the indispensability of international cooperation. In this context, it constitutes a duty 'to cooperate with each other in ensuring development and eliminating obstacles to development.'[45]

The provision further explains what is meant by the duty of international cooperation as a duty 'to promote a new international economic order based on sovereign equality, interdependence [and] mutual interest.' A more emphatic statement is contained under Article 4 of the Declaration in that it explicates the duty vis-à-vis the developing and developed world states. The duty of international cooperation for development must thus serve as a complement to the efforts of developing countries [by] providing these countries with the means and facilities to foster their comprehensive development.'[46]

The terminologies enshrined in the Declaration reiterate the importance of measures that do not merely aim at handing out development aid, but rather envisage the need for a more radical approach in addressing the social evil of underdevelopment. The terms such as '*promotes new international economic order*', '*eliminating obstacles to development*', '*based on interdependence and mutual interest'*, '*effective cooperation'*, and '*appropriate means and facilities to foster their comprehensive development*' clearly transcend the conventional approach in development aid. The Vienna Declaration has also reaffirmed the necessity of creating a favorable as well as equitable economic environment at the international level for the realization of the right to development.[47] Unfortunately, however, the stark difference in what has been achieved in mobilizing funds by way of development assistance and emergency food aid on the one hand and what has been carried out with regard to the comprehensive approach in development cooperation reveals the resistance involved in taking matters of development seriously.

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[44] DRTD Articles 2(3), 6 and 8 further elaborate the nature of this duty owed by national governments. These basically relate to formulating appropriate national development policies through the process of active, free and meaningful participation and that further ensures fair distribution of benefits. The Declaration also imposes on national governments the duty to take appropriate steps to eliminate obstacles to development by observing all the human rights and encourage popular participation in all spheres.

[45] DRTD Article 3(3).

[46] DRTD Article 4(2).

[47] See Vienna Declaration and Programme of Action, U.N. GAOR, World Conference on Human Rights, 48th Session 22nd Plenary Meeting, U.N. Doc. A/CONF.157/23, 1993, para 10.

3. The duty to international 'cooperation': Commitment beyond assistance out of 'charity'

One key element of the human right to development is the duty to international cooperation. The terminologies 'assistance' and 'cooperation' are regrettably used without caution, at times as mere synonyms. Nonetheless, while cooperation signifies a mutual give-and-take type of relationship, assistance completely shifts the concept to some form of dependency, with a pure receiver at one end while the other party stands as a sole provider. It is interesting to observe that the Declaration on the Right to Development never uses the term 'assistance' and rather alludes thrice to the duty of 'cooperation.'[48]

In the course of explaining the contents of the Declaration on the Right to Development as well as the Covenant on Economic, Social and Cultural Rights, there is a widespread tendency to use the words 'international assistance' and 'cooperation' in a manner that amply explains the politicization of the right to development.[49] This is so because the moment 'assistance' is linked to the development agenda, it is conceived by various wealthy states as being obliged to provide for the wellbeing of the Global South in return for nothing. The negotiations are also handled at the political level under a setting in which the subjects of the right are barely taken into account. There is thus the need to deal with the correct meaning and content of the duty for international cooperation as an indispensable element of the right to development.

One may trace the roots of this duty to Article 1(3) of the UN Charter that articulates one of the purposes of the organization to be the achievement of 'international cooperation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all.'[50] The Universal

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[48] See DRTD 3(2); 3(3); and 6(2).

[49] For instance, in their extended discussion of the nature and scope of states' parties obligations under the covenant on economic, social and cultural rights, Alston and Quinn use a number of expressions rendering the whole meaning of international cooperation more dubious than it already is. They use the following terms as if they are inter-changeable: Economic and technical assistance; international assistance and technical cooperation; international cooperation; international assistance and cooperation; international development assistance; international assistance; economic and technical assistance; and international development cooperation. See generally Philip Alston & Gerard Quinn (1987), 'The nature and scope of states' parties obligations under the International Covenant on Economic, Social and Cultural Rights,' *Human Rights Quarterly*, Vol. 9, No 2, pp 156-229

[50] See the UN Charter Article 1(3). The DRTD duplicates this as an opening statement in its preamble paragraph 1.

Declaration of Human Rights also adopts that caution and refers to the duty of international cooperation under Article 22.[51]

Only the International Covenant on Economic, Social and Cultural Rights employs the term 'international assistance and cooperation' albeit only once while laying down the nature of the duties of States Parties.[52] Even if references are made in subsequent provisions, it is either just international cooperation that is used or 'technical assistance.' The latter is a term used to refer to assistances needed on non-substantive matters under Articles 22 and 23 which Craven calls 'primarily procedural provisions.'[53] This choice of wordings is relevant, as mentioned above, to exactly capture the meaning and breadth of the duty of international cooperation as it specifically relates to the human right to development.

The role that international cooperation could play in development endeavors had been observed in the aftermath of World War II. The period was not only marred by the destructive effects of war, but also by the Great Depression of the 1930s that led to the Bretton Woods Conference. The impetus that brought together the Conference participants was 'to restructure international finance, establish a multilateral trading system and construct a framework for economic cooperation that would avoid a repeat of the Great Depression.'[54] By then, the realization of these structural goals was considered possible only if Europe was pulled out of its damaged socio-economic conditions by injecting large amount of aid into its economy.[55] That was exactly what was done and in consequence

[51] 'Everyone, as a member of society…is entitled to the realisation, through national and international cooperation and in accordance with the organisation and resources of each state, of the economic, social and cultural rights.' See Universal Declaration of Human Rights, adopted 10th Dec 1948, G.A.Res 217A(III), U.N. GAOR. 3rd Sess. U.N. Doc. A/810 (1948), Article 22

[52] The International Covenant on Economic, Social and Cultural Rights, adopted 16th Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966); see Article 2(1); Article 11(1) and (2) cautiously refer only to 'international cooperation' and not 'assistance.'

[53] Mathew Craven (1995), *The international covenant on economic, social and cultural rights: A perspective on its development*, (Oxford: Clarendon Press), p 108

[54] See Dambisa Moyo (2009), *Dead aid: Why aid is not working and how there is another way for Africa*, (London: Penguin Books Ltd.), p 10

[55] That was how the Marshall Plan was conceived and implemented rendering today's developed countries beneficiaries of a substantial amount of aid money throughout the five-year timeline of the Plan. Accordingly, the top recipients of the aid were Great Britain (24%); France (20%); Italy (11%) and Germany (10%). Moyo, *Ibid*.

what was achieved.[56] As Kunz wrote, 'by providing the seed money for the recovery of Western Europe, the Marshall Plan transformed its beneficiaries from poverty cases into partners.'[57] That 'economic miracle'[58] happened because of the swift, sharp and effective cooperation for development the world has ever experienced in the long history of the aid industry.[59]

Even if international cooperation has its normative basis both within the UN Charter and later on within the binding human rights Covenants, its essence and application has been frequently politicized. While at some level it is considered as a global gesture of generosity that puts the two sides in a relationship of donor and recipient, it has never grown to its height of maturity by which there are only relations of development partnerships based on genuine mutual interests and the recognition of the principle of sovereign equality of nations.

As alluded to above, the UN Charter stands out as the primary global instrument that normativises international cooperation as one of the rationales for the existence of the organization. The principle was further embodied in the Universal Declaration of Human Rights and it ultimately gained a binding normative basis under the Covenant on Economic, Social and Cultural Rights. Providing a normative meaning to the idea of international cooperation aims at transforming it from being a mere moral commitment to legally claimable right by the rights holders from the duty bearers. There is, however, no doubt that it remains entangled with the ineffective enforcement and monitoring mechanisms of the international human rights law regime.

As observed by Sakiko Fukuda-Parr, 'conceptually, development cooperation is still rooted in the logic of charity rather than the logic of shared responsibilities in a global economy.'[60] Her analysis on the principal factors impending on international cooperation explains why this duty is far greater than and different from mere 'claim to a hand out.' One of the factors particularly relate to the obstacles emanating from the international economic environment triggered by the dependence of developing countries on primary

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[56] There is no doubt that there were and still are critics that view the US action as self-serving, See generally, Diane B. Kunz (1997), 'The Marshall Plan reconsidered: A complex of motives,' *Foreign Affairs*, Vol. 76, pp 162-170.

[57] Kunz, *Ibid*, p 162.

[58] As the German's recorded economic growth as a result of the Plan was came to be known. Kunz, *Ibid.*

[59] It is traced as far back as the 1896 US overseas assistance carried out in the form of food aid. Moyo, *supra* note 54.

[60] See Sakiko Fukuda-Parr (2006), Millennium Development Goal 8: Indicators for human rights obligations?' *Human Rights Quarterly*, Vol. 28, No. 4, pp. 966-997, at p 968.

commodities for their exchange earnings and the unpredictable fluctuation in prices, 'tariff escalation, or development tax, where developed countries impose higher tariffs on processed goods than on unprocessed goods.'[61]

The second and most significant obstacle is what she calls 'systemic asymmetry in global governance.' When it comes to global economic agendas and development policies, the significance of the roles played by the International Financial Institutions is less contested. However, the persistence in excluding the developing countries from decision-making processes at the level of these institutions and the importance that international cooperation has for the realization of development cooperation are not taken seriously.

While describing the corrective measures needed for these shortcomings in the international economic system, Arjun Sengupta underlines:

> International cooperation will have to take many different forms as to tackle the problems, such as solving the debt problem, decreasing the instability of commodity prices and export earnings, reducing the protectionism in developed countries and dealing with the inadequacies of the international financial system.[62]

Alston and Quinn also note the 'notoriously imprecise' nature of the obligation of international cooperation and suggest the reinterpretation of the meaning to be attributed today to this duty. By quoting the Draft Declaration on the progressive development of principles of international law relating to a new international economic order, they pointed out that all states, and particularly those:

> whose economic, monetary and financial policies have a substantial impact on other States, should conduct their economic policies in a manner which takes into account the interests of other countries by appropriate procedures of consultation; in the legitimate exercise of their economic sovereignty, they should seek to avoid any measure which causes substantial injury to other States, in particular to those interests of developing States and their peoples.[63]

Therefore, the duty for international cooperation deserves serious attention commensurate with the transformative impact it can have towards the realization of the right to development. Unfortunately, however, more emphasis is given to the aid agenda, both in the form of 'band aid' and 'Official Development Assistance.' Countries crave for and report their achievement in reaching the 0.7% of GDP that they are required to hand out to the least developed, the unfortunate, the Highly Indebted Poor Countries, and to the countries entitled to the Multilateral Debt Relief Initiative. The best the Official Development

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[61] Sakiko Fukuda-Parr, *Ibid*, p 977

[62] Sengupta, *supra*, at note 35, p 877

[63] See Alston and Quinn, *supra* note 49, p. 191.

Assistance could do seems to be parenting those states at the receiving end and creating a 'vicious cycle', which as Moyo would prefer to call it, is a 'cycle that chokes off desperately needed investment [and] instills a culture of dependency.'[64]

Good-intentioned measures based the donor's discretion that aim at assisting countries in need have the effect of aggravating their conditions in the poverty trap unless we turn the wheel and enable it to roll towards cooperation in bilateral and multilateral trade, reforming the International Financial Institutions, guaranteeing market access, lifting agricultural subsidies, and putting in place other equitable schemes. Such measures would indeed transform the relations between the North and the South from the bond of parenting to that of partnering.

Concluding remarks

Since its emergence as an agenda that seized the international community's attention, the right to development has remained in a constant state of controversy, marred by pretense as well as rejection. It is highly politicized both at the local and global levels. While various national governments dump the reasons for their failure to the inability of the international community to 'assist', the latter on its part has distanced itself from embracing the much needed aspects of the duty to international cooperation. Reporting on progresses of the MDGs, for instance, the Ethiopian government has categorically stated all the Goals as achievable but one, which is Goal 8. That in a way is shifting the responsibility back to the international assistance paradigm that would eventually be used to justify failure to attain an MDG goal by 2015. This also reveals the politics involved on the part of the primarily responsible national states for the realization of the right to development.

The international community, specifically the ones that are 'donor countries' would not also escape from this verdict as they have chosen to pursue the sub-optimal and reductionist approach with regard to their duty of international cooperation. As long as the duty is taken as an act of charity and as mere supply of financial aid, a wide range of politicization becomes inevitable with regard to the serious choices of whom to "assist" and whom not to.

The geopolitics of most aid policies are grounded on the so called 'strategic interests.' Censoring 'assistance' through this lens would naturally lead to the position that 'Sub-Saharan Africa is too far away and too negligible a market to

[64] Moyo, *supra* note 54, p. 49.

elicit a priority concern.'[65] At the same time, this sub-region is home to more than 70% of the world's poor.

Based on their strategic interest or the lack of it in Africa, the leading world powers have their hold in the continent where the realization of the right to development is a dream far away from reality. Richard Dowden rightfully observes, '[a]s British aid agencies scurry around Africa trying to save it from poverty, and the Chinese businessmen and workers seek their fortunes there, the Americans are sending in the army.'[66] The establishment of AFRICOM is but one symbolic expression of how the US looks at Africa (whose subjects are deprived of their capabilities) as more of a security threat than a development partner. The preoccupation of the UK and many other European countries on aid as their primary approach to tackle those incapabilities also offers minimal optimism for success. Aid fundamentally cripples agency of those at the receiving end, breeds dependency and accountability deficits.

To use Dowden's remarks, 'aid agencies, western celebrities, rock stars and politicians cannot save Africa. Only Africans can develop Africa.'[67] In other words, the attainment of the right to development is an *endogenous* pursuit, while at the same time it requires the conducive exogenous (i.e, regional and global) setting anchored on cooperation and partnership rather than the cyclic addiction to charitable 'aid' and 'assistance." In the absence of the capability to strike the appropriate balance between endogenous pursuits and exogenous cooperation, the politicization of the right to development is bound to continue both at the 'receiving' and 'providing' ends of the political game. ■

[65] See Jeffrey Sachs *et al* (2004), 'Ending Africa's poverty trap,' *Brookings Papers on Economic Activity*, Vol. 1, pp. 117-240, (see p. 137).

[66] Richard Dowden (2009), *Africa: Altered states, ordinary miracles*, (London: Portobello Books Ltd.), p. 508.

[67] Dowden, *Ibid*, pp. 6-7.

TO TAX OR NOT TO TAX: IS THAT REALLY THE QUESTION?

VAT, BANK FORECLOSURE SALES, AND THE SCOPE OF EXEMPTIONS FOR FINANCIAL SERVICES IN ETHIOPIA

Taddese Lencho ♣

"To tax and to please, no more than to love
and to be wise, is not given to men."
Edmund Burke

Abstract

The Ethiopian Value Added Tax of 2002 follows the standard approach of exempting financial services from VAT. Not all 'financial services' are, however, exempted from VAT. A number of services provided by the financial institutions are made taxable by the VAT laws of Ethiopia. No subject in this regard has probably attracted as much attention and controversy as that of sale by foreclosure of property held as security by banks. Both sides (i.e., members of the financial industry and the tax authorities) seemed locked in their conviction over the treatment of foreclosure sales in VAT. Members of the financial industry (in particular banks) are convinced that foreclosure sales enjoy the privilege of exemption in VAT while some within the Tax Authorities are equally convinced that foreclosure sales should be chargeable with VAT. These controversies have played out in the courtrooms, the press and a number of communications between the Tax Authorities and the members of the financial industry. This article examines these controversies and analyzes the scope of exemptions for financial institutions under Ethiopian VAT laws.

Key words:

VAT, exemptions, zero-rating, foreclosure sales, financial services, taxable transactions, taxable activity

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Introduction

Ethiopia joined what is now a large chorus of nations in the world by introducing the value added tax (VAT) in 2002 (effective January 2003). [1] The

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VAT laws of 2002 replaced the then general sales tax law (in force since 1993), which was a single-stage sales tax whose application was limited to manufacturers or producers and/or importers.[2] The VAT which replaced this tax is a multiple-stage sales tax with the ability to reach all levels of economic distribution (manufacture, wholesale and retail). Although VAT has the potential to reach all levels of economic distribution, the reach of VAT in Ethiopia was limited for administrative reasons to those businesses whose annual volume of trade exceeded half a million Ethiopian Birr (ETB). For those businesses whose annual volume of trade did not reach the half – a – million ETB, another tax was introduced along with the VAT, namely the turnover tax. [3] The novelty as well as structural complexity of the VAT is such that small and medium-sized businesses could not be immediately brought within the fold of the VAT system.

Although VAT is generally recognized as a broad-based general sales tax, the VAT laws of Ethiopia issued in 2002 (the Proclamation and Regulations) came out with a fairly long list of exemptions for certain transactions in goods and services. The public policies (to the extent public policies could be inferred from the laws) that produced the exemptions vary from one exemption to another. We may, however, generalize the policies into two.

There are, on the one hand, lists of exemptions which seem to be motivated by the desire on the part of the government to encourage consumption of certain goods and services. Many of the exemptions fall in this category. The social policy of the government to encourage consumption drives the exemption for

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[1] The value added tax has become one of the most remarkable fiscal phenomena of the modern times. All but one (i.e., the USA) of the industrial nations have adopted the VAT as one major source of government revenue, and more than 150 nations have now adopted VAT as their favorite indirect tax. In Africa, Ethiopia was the 36th African nation to catch the VAT-bug; see Alan Schenk and Oliver Oldman (2001), *Value Added Tax: A Comparative Approach, with Materials and Cases*, Transnational Publishers, Inc, New York, at 1; Richard Krever (ed., 2008), *VAT in Africa, Pretoria University Law Publications* (PULP), at 3; even in the United States, there are serious debates about the possible introduction of VAT to the United States; see Michael J. Graetz, "100 Million Unnecessary Returns", *Yale Law Journal*, vol. 112, No. 2 (Nov. 2002); N. Gregory Mankew, "Much to Love, and Hate, in a VAT", *the New York Times*, May 1, 2010; Lori Montgomery, "Once Considered Unthinkable, U.S. Sales Tax Gets Fresh Look", *the Washington Post*, May 27, 2009.

[2] See Sales and Excise Tax Proclamation No. 62/1993, *Negarit Gazeta*, 52nd year, No. 61.

[3] See Turnover Tax Proclamation No. 308/2002, *Federal Negarit Gazeta*, 9th year, No. 21.

merit goods like education, health and medical services, as well as those for books and transportation.

There are also exemptions in VAT which are not really motivated by the desire of the government to encourage consumption. Certain types of transactions in goods and services have proved difficult for conventional VATs to apply because of the technical challenges involved in levying VAT on these transactions. In this category of exemptions, we place the exemptions granted for the supply of residential houses, investment instruments like shares and bonds and the supplies of financial services.[4]

Whatever the motivations for exemptions may have been, exemptions for various types of goods and services are mainly to be found in the VAT Proclamation (hereinafter VATP) and VAT Regulations (hereinafter VATRs) – both issued in 2002.[5] The Ministry of Finance is empowered by the VATP to grant exemptions to additional lists of goods and services not listed in the VATP and VATRs. [6] The Ministry has since then added its own list of exemptions to the catalogue of exempted goods and services under the Ethiopian VAT regime. The exemptions for supplies of bread, *injera*, milk and agricultural inputs are some of the lists of goods added by the Ministry.[7]

The existence of exemptions in any tax law often leads to disputes over the nature and extent of the exemptions, and VAT is not an exception in this regard. Of the long list of exemptions, nothing has so far attracted as much attention from the Ethiopian tax authorities as the exemption of financial institutions.[8] This is hardly surprising. Financial institutions, in particular banks, generate huge sums of revenue and it might at first be galling to think that these services

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[4] See Value Added Tax Proclamation No. 285/2002, *Federal Negarit Gazeta*, 8th year, No. 33, Article 8(2)(a) (b) (c); and Council of Ministers Value Added Tax Regulations No. 79/2002, *Federal Negarit Gazeta*, 9th year, No. 19, Articles 19, 20, and 21.

[5] See VAT Proclamation 2002, *supra* note 4; VAT Regulations 2002, *supra* note 4.

[6] See VAT Proclamation 2002, *supra* note 4, Article 8 (4).

[7] See FDRE, Ministry of Finance and Economic Development, 1995 E.C., in Amharic, unpublished; see also T. Lencho, The Ethiopian Tax System, Michigan State Journal of International Law (upcoming).

[8] See Getahun Worku, "Do Banks really need to Register for VAT for Collection of Loans?" *Reporter*, Vol. 16, No. 22/1126, *Yekatit* 6, 2003 E.C. in Amharic (translation mine); see also Kirubel Tadesse, "Unpredictable Tax Measures will Hurt Investments", *Capital*, Vol. 13. No. 626, Sunday December 12, 2010; Mahlet Mesfin, "Financial Institutions, Tax Authority Disagree Over VAT", *Addis Fortune*, Vol. 11, No. 552, November 28, 2010; Shimelis Abebe, "The Application of VAT on Sales Upon Foreclosure," Addis Ababa University, Faculty of Law Library Archives, unpublished, May, 2009; ጥላሁን አክሊሉ "ባንኮች ወደ ታክስ መረቡ ካልገቡ እርምጃ እንወስዳለን" - ንግል ጋዜጣ ታህሳስ 29 ቀን 2003 ዓ.ም. ገፅ 10-11 ይመልከቱ።

are not affected by VAT when the tax has reached cafeterias and restaurants and small consumption items like tea and coffee.

The first sign of interest in taxation of financial institutions came in a case involving the sale through foreclosure of a debtor's property (collaterals) by Abyssinia Bank S.C. In *Abyssinia Bank S.C. vs FIRA.*,[9] a dispute arose over whether the sale of collaterals in a foreclosure by the Bank constituted a taxable transaction for VAT purposes. Abyssinia Bank S.C. (lender) took tires from Tana International Trading PLC (the borrower – hereinafter simply Tana International) as security for the payment of loans it extended to the latter. Tana International defaulted on its payment, and Abyssinia Bank sold the tires (collaterals) in a foreclosure sale for a total price of 4 million ETB. The Tax Authority assessed that VAT was due on the sales, to which the Bank objected. Abyssinia Bank argued that the sale was exempted from VAT as Abyssinia Bank is a financial institution. Federal Inland Revenue Authority (FIRA - the predecessor of ERCA) argued that the sale was not an exempt transaction although the Bank was a financial institution.

Abyssinia Bank appealed against the decision of the Tax Authority to the Tax Appeal Commission. The Commission decided by a majority opinion that the sales of tires by Abyssinia Bank S. C. constituted taxable transactions. The case went to the High Court on appeal, which reversed the decision of the Tax Appeal Commission. The High Court ruled that the sale did not constitute a taxable transaction as the sale by the Bank was not a continuous or regular activity of the Bank. Both the parties and the Tax Appeal Commission as well as the High Court dwelt on whether foreclosure constituted 'a continuous or regular activity' of the Bank because it seemed to them that the attachment of VAT on the sales turned on whether this requirement is met in the case or not.

Although the results went against the Tax Authority in the Abyssinia Bank case, the issue has since then lingered with some in the Tax Authority convinced that VAT should be payable upon foreclosure sales. As early as 2005, the Ministry of Revenues issued a Directive regarding the imposition of VAT upon some 'difficult-to-tax' transactions like the provision of lottery and gambling, travel agency services and purchase of used goods by used-goods-dealers.[10] This rather generic 'directive' has a provision which states that 'the scope of exemptions for financial services does not cover the sale by foreclosure

[9] See *Abyssinia Bank vs. Federal Inland Revenue Authority, Federal Tax Appeal Commission*, File No. 543, in Amharic, unpublished; *Abyssinia Bank S.C. vs. Federal Inland Revenue Authority,* Federal High Court, File No. 31952, in Amharic, unpublished.

[10] See Federal Democratic Republic of Ethiopia, Ministry of Revenues, Directive No. 23/1997 (In Amharic, unpublished).

of goods held as security by financial institutions'. The 'directive' goes on to instruct banks to charge foreclosure sales with VAT. [11] However, it appears that the said 'directive' was not properly communicated to all the parties involved (it certainly was not implemented) as banks and the Tax Authorities are still arguing over the taxability (or otherwise) of foreclosure sales. [12]

Banks seemed convinced that their foreclosure sales were insulated from any form of tax claims.[13] In a letter written in 1994 E.C (2002), the Ministry of Finance and Economic Development seemed to have given them assurance against the threat of taxes.[14] The letter relieved banks from any duty to obtain tax clearance in respect of any property the banks took as security for loans – with the obvious view to facilitating foreclosure sales by banks. And more importantly, the letter conceded the priority of secured claims of banks over the collaterals against the competing tax claims of the government.[15] Banks referred to this letter in support of their position that the sales of collaterals in foreclosure sales are exempted from the payment of VAT.

Well those were perhaps different times! Although the Tax Authority suffered a setback in the courts as shown in the Abyssinian Bank case, recent developments within the Authorities show that they are determined to collect VAT on foreclosure sales by banks. In 2010, Ethiopian Revenues and Customs Authority (ERCA – hereinafter simply the Tax Authority) – sent a circular letter to Banks reminding them of their duty to register for VAT for their services which are taxable under the VAT laws.[16] The Authority bases its position on a provision in the VATR which mentions 'debt collection services' by financial

[11] See *id*, Article 16(1) and (2).

[12] See Mahlet Mesfin, *supra* note 8.

[13] Even in their latest communications with the Tax Authority, Banks were quick to draw the attention of the Authority to the much favorable circular letter written by the Ministry of Finance and Economic Development; see Ethiopian Bankers Association, *Hidar* 8, 2003 E.C., in Amharic, unpublished.

[14] See Ministry of Finance and Economic Development, Circular Letter, *Sene* 1994 E.C., in Amharic (unpublished).

[15] The priority rights of banks and all other secured creditors was already asserted in the tax laws that came out in 2002 – see Income Tax Proclamation No. 286/2002, *Federal Negarit Gazeta*, 8th year, No. 34, Article 82; VAT Proclamation 2002, *supra* note 4, Article 32; the Turnover Tax Proclamation, *supra* note 3, Article 14; the Excise Tax Proclamation No. 307/2008, *Federal Negarit Gazeta*, 9th year, No.20, Article 11.

[16] See Ethiopian Revenues and Customs Authority, *Tikimt* 3/2003 EC, in Amharic, unpublished.

institutions as taxable services[17] and Directive No. 23/1997, which declares that foreclosure sales are chargeable with VAT.[18]

The Banks were predictably opposed to the idea of registration for VAT and expressed their objection to the move through their association – Ethiopian Bankers' Association. They expressed their concerns by a letter written to the Tax Authority urging the latter to reconsider its position on this matter. The Tax Authority wrote a reply essentially insisting that they register for VAT for collection of the tax from foreclosure sales.[19] In its reply, the Tax Authority drew the attention of banks to the taxation of debt collection services again, which is clearly indicated in the VATRs as a taxable service.[20]

Recent developments have in general signaled the hardening of stance on the part of the government in its position on the payment of taxes on property held as security. The most recent income tax amendment law, for example, included a provision that requires banks to verify if borrowers have any outstanding tax claims against them before taking their property as security for loan – in effect reversing the policy of the government in place since 1994 E.C.[21]

The status of foreclosure sales under the VAT laws in particular and the scope of exemptions for financial services in general has divided opinions ever since. We have, on the one hand, people (mostly from the Tax Authority) who argue that foreclosure sales should be subject to VAT and there are, on the other hand, people who have argued that foreclosure sales are financial services and should not become subjects of VAT.

This article will explore the controversies surrounding the status of foreclosure sales in VAT and will use the controversies to examine the nature and scope of exemption for financial services under Ethiopian VAT laws. The article is not confined to finding answers to the question of whether VAT should attach to foreclosure sales, although it is inspired by it.

This article only addresses bank foreclosure sales. The debate over taxation of foreclosure sales need not, however, be confined to bank foreclosure sales, although the Tax Authorities have so far focused on this type of sale, presumably because of the sheer volume of the sales in this regard. Courts are also involved in foreclosure sales during execution of judgments (judicial foreclosure) and there is no reason why attention may not be drawn to these

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[17] See *id*, citing VAT Regulations 2002, *supra* note 4, Article 20 (8).

[18] See *id*, citing Article 16(1) and (2) of Directive No. 23/1997.

[19] See Ethiopian Bankers Association, Hidar 8, 2003 E.C., in Amharic, unpublished.

[20] See VAT Regulations 2002, s *supra* note 4, Article 20(8).

[21] See Article 2(3) of Income Tax (Amendment) Proclamation No. 693/2010, *Federal Negarit Gazeta*, 17th year, No. 3.

sales as well. The situation may even come home to roost, as the tax authorities are also empowered by various tax laws to enforce taxes, if need be, by foreclosing upon the property of defaulting taxpayers. It is important to note at the outset that the insights developed in this article may be extended with equal force to all the other forms of foreclosure sales.

1. The Nature of Financial Institutions and Services: A Brief Overview

It is impossible to capture the essence of all financial services that financial institutions offer, so bewilderingly diverse and complex these services have become. The financial crisis of 2008 amply demonstrated how complex and protean financial services have become. The aim here is to grasp the general features of financial services that have made them something of a challenge for VAT systems in the world. For our purposes, we shall confine ourselves to the two well-known financial institutions: banks and insurance companies.

The banking industry offers various types of services. Many of us are familiar with commercial banks that perform the classic function of accepting deposits and making loans.[22] Depending on the degree of financial freedom in a given country, banks may also perform other functions in the economy, like that of investment banking.[23] Financial institutions – those that provide intermediation services, among others – vary from country to country. The major ones may include commercial banks (of course), what Meir Kohn calls 'near banks' (saving institutions, credit unions and finance companies), insurance companies (life and non-life), investment intermediaries (pension funds, mutual funds), securities' firms (e.g. brokerage firms), government intermediaries (national/central banks) and non-financial companies that supply financial services.[24] The Ethiopian Banking Business Proclamation lists as financial institutions 'insurance companies, banks, micro-finance institutions, postal saving institutions, money transfer institutions and 'other similar institutions to be determined by the National Bank'.[25]

One of the core functions of a financial institution (in particular banks) is the provision of indirect lending.[26] This function is probably the best illustration (for

[22] Stephen Valdez (5th edition, 2007), An Introduction to Global Financial Market, (Palgrave Macmillan), at 65.

[23] *Ibid*.

[24] Meir Kohn (2004), Financial Institutions and Markets, (Oxford University Press), at 124.

[25] See Banking Business Proclamation 592/2008, Federal Negarit Gazeta, 14th year, No. 57, Article 2(9).

[26] Meir Kohn, *supra* note 24, at 28.

our purposes) of what a financial intermediary like a bank does. The existence of a financial intermediary removes most of the barriers to lending in the market. The depositor's worry of 'default' by borrowers is greatly reduced by the bank's intercession as a party obligated to pay the depositor on demand.[27] Since the financial intermediary specializes in the lending, it has the capacity to cut down the risks of default by collecting a wealth of information about its customers – something which is not available to the depositor as such.[28] The financial intermediary also takes advantage of the benefits of pooling (to make large loans), specialization, continuing relationships, diversity and liquidity to supply financial services at a much lower cost than would be available otherwise.[29]

Meir Kohn has captured the core functions of a financial institution in four words: delegation, credit substitution, pooling and netting.[30] Through the devices of 'delegation', a depositor delegates to an intermediary the works of making a loan (thereby reducing the transaction costs associated with lending).[31] Through the devices of 'credit substitution', the financial intermediary substitutes its own credit for the credit of the borrower; depositors lend to the bank rather than to the ultimate borrower.[32] An insurance company substitutes its own credit for that of members of an insurance pool.[33] The device of pooling makes the financial intermediary safer and more liquid.[34] And finally netting makes it possible for the financial intermediary to offset one transaction against another.[35] These operations of a financial intermediary all involve intermediation of borrowers and depositors (in the case of banks) or insurance policy holders and insurance claimants (in the case of insurance companies).

The Banking Business Proclamation places the intermediate services banks perform in the first order in its definition of 'banking business'.[36] Article 3(2) of the Banking Business Proclamation emphasizes the intermediate nature of 'banking business' when it states:

> "banking business" means any business that consists of [among others]:

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[27] *Ibid*.

[28] *Ibid*.

[29] See *id*, at 28-30.

[30] *Id*, at 37-40.

[31] *Id d*, at 38.

[32] *Id*, at 38.

[33] *Id*, at 38-39.

[34] *Id*, at 39.

[35] *Id*, at 39-40.

[36] See Banking Business Proclamation, *supra* note 25.

a) receiving funds from the public through means that the National Bank has declared to be an authorized manner of receiving funds;
b) using the funds referred to under paragraph (a) … in whole or in part, for the account and at the risk of the person undertaking banking business, for loans or investments in a manner acceptable by the National Bank;

We have sufficient authority from the Banking Business Proclamation to place the accent of banking business on 'intermediation'. It is, however, well-known that while the primary functions of many financial institutions is financial intermediation, most financial institutions are not confined to just providing intermediation services. This is what complicates the application or otherwise of VAT upon financial institutions and other institutions that provide financial services. In addition to intermediation, financial institutions (in particular banks) are involved in the provision of a range of so-called 'direct services'. Some banking services are offered in exchange for the payment of direct fees (*for more on these direct services by Ethiopian banks, see below*). One of these is custody services. Customers who wish to deposit some high-value goods (e.g., precious metals) or burglar-prone goods like negotiable securities (e.g. shares and bonds) may do so with banks upon payment of some fees for safe keeping and related services of banks.[37] Like all consultancy firms, banks may also be involved in consultancy and/or advisory functions in exchange for the payment of fees.

Whatever these other services may be, the great challenge in VAT is one of distinguishing them from intermediation services, for on that depends whether to impose VAT on the services or not. We shall have occasion to deal with some of these services later under the section on the scope of exemptions for financial services.

2. Why Financial Services are Exempted from VAT

Most VAT systems in the world exempt financial services from VAT primarily because of the technical difficulties involved in identifying and isolating the service charges in financial services like the provision of loans, insurance services, sale of stocks, bonds and foreign currency exchanges.[38] The technical difficulty involved, as Yolanda Henderson noted, is that 'financial intermediaries provide a service by channeling funds of persons with certain preferences regarding risk and liquidity [i.e., depositors] to other persons with different preferences'.[39] For most of their intermediation services, financial

[37] Stephen Valdez, *supra* note 22, at 71.

[38] Yolanda Henderson, *'Financial Intermediaries Under Value-Added Taxation',* (2001), in Schenk and Oldman, *supra* note 1, at 372ff.

[39] *Id*, at 372.

institutions make profits by spreading the service charges between or among their various customers, thus concealing the value added from the reach of VAT. Banks spread the value added in loans between borrowers and depositors, by charging the former higher interest rates and paying a lower interest rate to the latter. The value added is spread between borrowers and depositors. Similarly, insurance companies spread the risk of insurance coverage among thousands, sometimes millions of policy holders and pay out insurance compensation when the risk materializes with some of their customers. The value added by insurance companies is more than the premiums they charge policy holders.[40]

Harry Huizinga drew the differences between most other supplies and financial services when he wrote:

> The value added created by a business is the value of its sales minus the value of its purchased capital and intermediate inputs. For most businesses, calculating total sale and purchases is straightforward. The problem with financial services… is that a major input is financial capital, and pricing such capital is difficult.
>
> Banks, for example, do not 'buy' capital, so it is difficult for them to document how much they paid for this particular input. …banks raise capital by taking in deposits or by accessing the capital markets. This difference implies many problems for value-added calculations. First, determining the price that banks pay for capital is difficult. The interest rate banks pay to depositors, for example, understates the cost since a whole array of services are tied to bank deposits and these are typically 'paid' for by offering depositors a lower interest rate. But even if it were possible to determine the price banks paid for the capital they use in providing financial services, this would not be enough. The loan interest rate charged to any particular business accounts for some default risk. And while banks surely evaluate such risks, their evaluations are not verifiable. Consequently, the amount of value added created by any given loan is very hard to calculate. *The crux of the problems is that it is virtually impossible for tax authorities to determine whether a high rate of interest on a loan represents big profits, which constitutes value added and thus should be taxed, or a big risk premium, which constitutes a cost and thus should not be taxed. Analogous difficulties arise for a wide range of financial services, including foreign exchange transactions and insurance*.[41] (Italics mine)

Related to the difficulty of figuring out the value added in financial services is the difficulty in identifying the customers of intermediation services.[42] Because borrowers pay interest in exchange for the extension of loans to them, we may

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[40] Alan Schenk (Rep, 1989), Value Added Tax: A Model Statute and Commentary, American Bar Association Section of Taxation, at 170-171.

[41] Harry Huizinga, (Oct., 2002), Economic Policy, vol. 17, No. 35, 497-534, at 500.

[42] Yolanda Henderson, *supra* note 38, at 374.

be inclined to believe that borrowers are the customers of banks.[43] But the interest paid by the borrowers does not reflect the price charged by financial institutions. Banks connect their relationships with borrowers with their relationships with depositors in ways that make it impossible to know how much value they have added in their services to individual borrowers and depositors.

While technical difficulties stand as the primary reason for exemption of financial intermediation services, it must be remembered that other reasons have also been cited to strengthen the exemption of financial services. These 'ancillary' justifications or ratiocinations are offered in resignation over the inevitable arising from the difficulty of taxing financial intermediation services. Some have argued that the nature of financial services justifies their exemption from VAT –or at least makes the exemption more acceptable than otherwise. Financial services (in particular loans) are often provided as inputs to investments, which are relieved from VAT anyway through the tax credit mechanism of the value added tax.[44]

It is argued that even if financial services were to be subject to VAT, the recipient of the services would obtain full credit for the VAT paid on the financial services. The borrowers who obtain loans from banks will use the proceeds for investments and, in an ideal world, they should receive tax credits for their inputs, including taxes paid on financial services. The depositors who obtain interest on their loans may use the money to consume goods and services in the market, by which time they should pay VAT on their consumption. The borrowers of loans will use the proceeds either for investment or consumption. Their spending on consumption goods is subject to VAT when they purchase goods and services from the market (assuming the universal coverage of VAT). If they use the proceeds for investment, they will pay VAT for inputs of their business and these will also be chargeable with VAT, subject to the regular rules of input tax crediting. Hence, the argument runs, little is lost by exemption of financial services from VAT. But these arguments have been developed after it is realized that conventional VAT systems have insurmountable technical challenges in reaching intermediation services. If the technical problems did not exist in the first place, few governments would extend exemptions to provision of financial services.

3. Approaches to VAT treatment of Financial Institutions

Many different approaches have been proposed to the conundrum of financial services, some of which have been put in place in actual legislations.[45] The most

[43] *Ibid*.

[44] *Id*, at 374-375.

[45] See Schenk and Oldman, *supra* note 1, at 361-372.

dominant approach has been that of the European Union, which is followed by many countries in the world.[46] The EU Directive on the Harmonization of VAT (also known as the VAT Directive) requires member states to exempt a wide range of financial services, such as those relating to the provision of loans, credit, credit guarantees, and transactions involving money, deposit, saving and current accounts.[47] The EU Directive is not of peremptory character as it authorizes member states to allow taxpayers to treat most of the 'exempted' financial services as taxable.[48] In general, the EU approach is one of exempting financial services and zero-rating[49] those financial services connected with zero-rated supplies (e.g., financial services rendered in connection with export of goods are zero-rated).[50]

The consequence of exemption for financial services in the EU approach is that input tax credits are denied to exempt financial services. Under the EU Directive, input taxes attributable to exempt financial services are as a rule not entitled to credit.[51] Where input taxes relate to both taxable and exempt financial services, the EU VAT Directive employs an allocation formula, the numerator of which is the VAT exclusive turnover for the year attributable to taxable (including zero-rated) transactions, and the denominator of which is the VAT exclusive turnover for the year attributable to taxable and exempt supplies.[52]

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[46] *Id*, at 361.

[47] See Alan Schenk, '*Financial Services'*, in Richard Krever, *supra* note 1, at 37.

[48] *Id*, Schenk quoting VAT Directive, Article 137(1)(a), footnote 12, at 37.

[49] VAT has a list of technical terms and jargons which baffle novice readers of VAT literature. One of these technical lingoes is the term 'zero-rated'. Often used along with 'exemptions' –which is more familiar – zero-rated treatment is perhaps the most exalted and beneficial treatment in VAT. Zero-rated transactions enjoy a zero-rated treatment, which means that not only is no VAT chargeable on the output (sale), all the VAT paid on the inputs is fully creditable as well. Exemptions in VAT are often misleading. They convey the impression that VAT is not chargeable on exempted goods and services. That is not really the case. Exempted goods and services are exempted from the output VAT due on sales only. Exempted goods and services are not entitled to a tax credit for the VAT paid on inputs (a privilege reserved for zero-rated transactions) – which means that exempted goods and services carry a hidden VAT, i.e., VAT paid on inputs; see Michael Keen and Stephen Smith (2007), VAT Fraud and Evasion: What Do We Know and What Can be Done? IMF Working Paper WP/07/31, International Monetary Fund.

[50] Schenk, supra note…, foot note 13, at 37, quoting S Cnossen 'VAT Treatment of Financial Services' in Lindocrona et al (eds.) International Studies in Taxation: Law and Economics (1999) 91.

[51] Schenk, *supra* note 47, at 37.

[52] *Ibid*; foot note 16, quoting EU Directive, Article 174.

Other approaches have also emerged, which, while resembling the EU approach in essential features, also depart in some respects. The Indonesian and Australian Goods and Services Taxes (GST)[53] – analogous to VAT – are, for example, distinguished for allowing some input taxes attributable to exempt financial services, in effect zero-rating some financial services even when these services are destined for the domestic market.[54] Somewhat similar to these approaches is that of New Zealand Goods and Services Tax (GST). New Zealand's GST has an elective scheme that zero-rates financial intermediation services rendered to certain qualified registered persons.[55] A recipient is deemed qualified if its taxable supplies amount to 75% or more of its total supplies.[56]

South Africa has emerged as another model country for expanding the tax base for financial services beyond the conventional approach of the EU.[57] South Africa has adopted a VAT regime which imposes tax on financial services rendered for explicit fees.[58] South Africa has gone farther than many countries in expanding the reach of VAT on financial services,[59] and the South African approach is spilling over to the neighboring countries of Namibia and Botswana.[60] South Africa imposes VAT on currency exchange transactions, transactions involving cheques, letters of credit, debt, equity or participatory securities and some credit transactions.[61] South Africa also imposes VAT upon fee-based services on checking and saving accounts, money transfers, off-site or electronic banking, credit and debit cards, foreign exchange transactions, mortgage loans, rental agreements, documentation and similar motor finance services, brokerage and underwriting transactions, registration of shares,

[53] GST – like VAT- is a multi-stage consumption tax on each point of supply in a production chain, with suppliers entitled to refunds of GST incurred on inputs; see P R Hill et al (2006,), Australian GST Handbook: 2006-2007, (Thomson), at 4; some countries have used other names to designate taxes analogous to VAT. VAT is known simply as a 'consumption tax' in Japan, and GST (Goods and Services Tax) in Canada, New Zealand and Australia; the acronyms for VAT obviously vary across languages: TVA in France, IVA in Spanish, NDS in Russian, and DRG in Georgian, see Victor Thuronyi (2003), Comparative Tax Law, Kluwer Law International, at 305.

[54] Schenk, *supra* note 47, at 38-39; see also P R Hill et al, *supra* note 53.

[55] Schenk, *supra* note 47, at 40.

[56] *Ibid*.

[57] *Id*, at 41.

[58] Schenk & Oldman, *supra* note 1, at 361.

[59] Schenk, *supra* note 47, at 41.

[60] *Id*, at 42.

[61] *Id*, at 41.

custody of securities, investment advice, and safety deposit boxes.[62] The tax authorities in South Africa have developed a list of taxable, exempt and zero-rated financial services after consultation with representatives of the financial sector.[63]

Upon closer examination, we notice that the South African approach is a variant of the EU approach, with the important difference that South Africa has developed a long list of fee-based financial services as taxable financial services. The South African VAT limits exemption to interest charges or discounts that serve as interest charges or interest penalties.[64]

A country that has truly departed from the EU approach both in form and content is Israel. It taxes intermediation services through the addition method VAT,[65] and taxes their inputs through the regular VAT.[66] In effect, Israel imposes VAT on financial institutions in two ways. First, it charges VAT on inputs purchased by banks and these input VATs are not creditable (this is incidentally the case in all those countries which exempt financial services from VAT). In addition, Israel imposes VAT on the total of profits of financial institutions and wages paid by financial institutions to their employees.[67] The second VAT, for which Israel claims exception, is administered along with the income tax – in fact, the information collected for income tax purposes is used for application of VAT on banks.[68]

The Ethiopian VAT law falls squarely within the EU approach, as aptly conceded by the drafter of Ethiopian VAT laws.[69] The VATP of 2002 curtly states that financial services are exempted from VAT, without going into details of what these services might be. The VATRs, issued along with the VATP, however, deal with this issue in some details. The VATRs list a number of financial services that are exempted from VAT (whether rendered for explicit

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[62] Schenk & Oldman, *supra* note 1, at 364.

[63] Schenk, *supra* note 47, at 41-42.

[64] Schenk & Oldman, *supra* note 1, at 364.

[65] The addition method VAT adds the components of value added, namely, interest on loans, rent paid, wages and salaries, and net profit to calculate the VAT due; see Schenk & Oldman, *supra* note 1, at 39-40.

[66] Schenk & Oldman, *supra* note 1, at 361.

[67] *Id*, at 362.

[68] Ibid; the Israeli VAT system is not without its critics; some argue that this form of tax imposes double taxation on financial services as no input tax credit is available to business borrowers; the tax is imposed after the fact; see ibid.

[69] See Schenk, *supra* note 47, at 34.

fees or not).[70] The VATRs also list the services that are taxable even when they are provided by financial institutions.[71] We shall analyze the scope of VAT exemptions under Ethiopian law below.

4. The Scope of Exemptions for Financial Services and Taxable Financial Services

Exemptions of whatever nature inevitably lead to disputes over the scope and nature of exemptions. The VATP of 2002 lists financial services as one of the services exempted from VAT but neither defines nor describes what these services are.[72] It was left to the VATRs to list (if not define) the types of financial services that are exempted and those that are taxable.[73] The Regulations give a fairly extensive list of financial services that are exempted from VAT 'whether provided for explicit or implicit fees'.[74] The Regulations give an equally extensive list of financial services that are taxable 'whether or not they are rendered in connection with an exempt financial service'.[75]

The list of 'exempt financial services', which incidentally does not seem to be exhaustive, includes in its ranks the familiar list of financial services provided by, among others, banks and insurance companies. Provision of loans or credits and foreign exchange transactions by banks is, for example, exempted from VAT.[76] Similarly, provision of insurance and reinsurance by insurance companies is exempted from VAT.[77] In addition, provision of provident funds, pension or retirement annuity funds by mutual fund companies, is also exempted from VAT.[78]

Contrary to what some financial institutions (in particular banks) have come to believe, the exemptions are not granted because of what the institutions are but because of the nature of the services. VAT exemption for financial services is not to be interpreted as a privilege of the financial industry but of certain services provided by the industry. There are a number of provisions which emphasize this. First of all, the financial services that are granted exemption are

[70] See VAT Regulations 2002, *supra* note 4, Article 20(2); see also Schenk, supra note 47, at 35.

[71] See VAT Regulations 2002, *supra* note 4, Article 20(6).

[72] See *id*, Article 8(2)(b).

[73] See *id*, Article 20.

[74] See *id*, Article 20(1).

[75] See *id*, Article 20(6).

[76] See *id*, Article 20(2) (a) and (b).

[77] See *id*, Article 20(2)(d).

[78] See *id*, Article 20 (2)(e).

exempted even when the services are rendered in connection with supplies of goods.[79] For example, banks enjoy exemptions for loans they extend in connection with the acquisition of goods in hire-purchase or finance lease cases, as long as the loans as well as the charges and interests for the loans are shown separately in the transactions and this is disclosed to the recipients of the goods.[80] The privilege of exemption also extends to suppliers that are not financial institutions if the suppliers provide loans with interest in connection with the acquisition of goods and services.[81] Hence, suppliers of goods or services that provide loans to customers in connection with the acquisition of goods or services in hire-purchase agreements or finance lease agreements are also covered by the privilege of exemption. Even suppliers that sell goods on installment payment arrangements are covered by the privilege of exemption as long as they are able to insulate the loan transactions from the underlying sales transactions.[82] The interest charged for installment (deferred) payments is exempted as a financial service while the underlying sales transactions are subject to VAT like all regular transactions.[83]

The lists of exempted financial services are illustrative. We have no general provision that gives the common thread that connects all exempt financial services, which is a challenge when we are faced with new types of financial services that are not mentioned in the lists. We are therefore compelled to extrapolate from the illustrative list a common thread that characterizes all exempt financial services. That common thread is 'intermediation', which, as alluded to before, makes it difficult for VAT systems throughout the world to apply conventional VAT upon these services.[84] The last item in the list of exempt financial services in the VATRs makes a reference to 'provision of intermediation services by a buy-aid society or medical aid fund', which seems to indicate the nature of financial services which compelled exemption in the first place.[85] It is intermediation that put financial services beyond the reach of conventional VAT and it is intermediation which should extend exemption to those services that are not mentioned in the list.

The VATRs also list taxable financial services.[86] The list includes 'legal, accounting, record keeping services', ' safe custody services', 'data processing

[79] See *id*, Article 20(2) (c).

[80] See *ibid.*

[81] See *id*, Article 20(5).

[82] See *id*, Article 7(4)(b) and Article 20(5).

[83] See *id*, Article 20(5).

[84] See above.

[85] See VAT Regulations 2002, *supra* note 4, Article 20(2)(g).

[86] See *id*, Article 20(6).

and payroll services', 'debt collection and factoring services', 'management services' and 'trustee, financial, advisory and estate planning services'.[87] Even a cursory reading of the list and prior knowledge of the range of services provided by financial institutions in Ethiopia will indicate that the list is forward-looking. There are many services in the list which are either entirely unknown in the lexicon of Ethiopian financial industry or not yet put in place. As in the case of exempt financial services, the list is additional evidence that the exemptions are not granted to the financial industry as such but due to the nature of certain services which happen to be commonly offered by financial institutions. While intermediation services are the core functions of financial institutions, financial institutions are not confined to providing just intermediation services.

Even in the limited range of functions provided by financial institutions in Ethiopia, some of the taxable services are well known practices. Some banks are known to provide payroll services for other businesses and the government.[88] The Tax Authorities themselves are increasingly relying upon banks for processing tax payments.[89] Many taxpayers particularly in the capital – Addis Ababa – remit taxes through banks. Banks also offer safe custody services to customers. One of the well-publicized services of banks in recent times is the sale of shares on behalf of companies that are about to be established, and banks offer these services in exchange for the payment of commissions.[90] While these services are well-known in the financial industry, other services in the list are not so well known. Banks and insurance companies in Ethiopia are seldom involved in the provision of the so-called 'legal, accounting, management, estate planning and financial advisory services'. Debt collection and factoring services are probably unknown in the Ethiopian financial industry – a factor which partly accounts for the confusion that surrounds these concepts in the VAT. The list of 'taxable' financial services, like that of exempt services, is taken from the laws of mature financial and tax systems and is not illustrative of the practice in Ethiopia.

The challenge here is distinguishing and characterizing certain transactions as 'exempt' and others as 'taxable'. While this problem is not of financial institutions and services *per se*, it is more pronounced here. There are of course clear cases on both sides. Supplies of loans and acceptance of deposits (the classic banking transactions) should remain exempted even when banks appear to charge explicit or implicit fees for these services. Similarly, the provision of

[87] See *id*, Article 20(6) (a-g).

[88] Interview with Ato Eshetu Erana, Oromia International Bank, formerly a legal advisor to the National Bank of Ethiopia, May 9, 2011.

[89] *Ibid*.

[90] *Ibid*.

insurance coverage by insurance companies (including re-insurance) should remain exempted regardless of how these services are structured between insurance companies and policy holders.

There are also clear cases on the side of 'taxable' financial services. The provision of payroll services, the collection of taxes on behalf of tax authorities, rental of safe boxes for valuable items are clearly taxable even if these services are provided by financial institutions. These services are typically provided in exchange for the payment of direct fees or commissions. There is therefore little or no difficulty in reaching these types of transactions through conventional VAT systems.

The less common practices in the list have led to mis-constructions in practice. Some within the Tax Authority have, for example, considered foreclosure sales to be 'debt-collection' services, which, as we saw above, are included in the list of taxable services. In *Abyssinia Bank* case (*supra* note 9), the counsel for the Tax Authority argued that foreclosure sales constitute 'debt collection' services in the VATRs literally understanding debt collection to mean any action of the bank to collect its own debt. This is clearly a misunderstanding. There is the need go no farther than the VATRs to understand what 'debt collection' and 'factoring services' might mean for VAT purposes. Debt collection and factoring services are described in sort of suggestive way in Article 20(8) of the VATRs as 'services related to debt recovery, litigation and the management of the recovery of the amount due from the debtors.' If the Regulations are not sufficiently suggestive, recourse may be made to the mature practices of the range of financial and other services in other countries.

We need to define and fix the meaning of 'debt collection and factoring services', which the VATRs mention among those services taxable if and when they are provided by financial or non-financial institutions. It is doubtful if any financial institution in Ethiopia provides 'debt collection' services. The VATRs refer to debt collection of a different order. Debt collection services are typically provided by financial and non-financial institutions in other countries to persons who do not want to spend time and money collecting debts from their debtors. Many companies in the developed world outsource debt collection to specialized agencies or companies in order to cut down on the administrative costs of debt collection. Debt collection agencies or companies typically charge their customers fees or commissions for their services. They pursue defaulting debtors and collect debts on behalf of their clients.

Factoring is also probably entirely unknown in Ethiopian financial practice. Factoring companies or enterprises purchase trade debts (accounts receivables)

from clients at a discount before the debts are due.[91] Factoring involves the sale of accounts receivable at a discount to factoring companies in order to improve cash flows.[92] It is one of the great devices created to increase liquidity of otherwise illiquid assets, namely accounts receivables. 'Factor' companies may be independently established to provide factoring services; or financial institutions like banks may create units or subsidiaries to provide factoring services to customers who need these services.[93] In any event, it may be seen that the 'debt collection' and 'factoring' services mentioned in the VATRs have nothing to do with foreclosure sales. Foreclosure sales may be understood colloquially as debt collection *actions,* but they are not 'debt collection' *services* in the technical language of these services.

Apart from the real problem of delimitation, there is also a problem of unbundling taxable services from exempt services when the two are provided by financial institutions in undifferentiated manner. Financial institutions may make the task of unbundling difficult by providing both services in undifferentiated fashion. Financial institutions may choose to provide taxable services along with exempt financial services without charging explicit fees, concealing the value added in the range of services they provide as a whole to a customer. If a bank provides investment advisory services to a borrower as a package of services it provides to the latter, how are we going to separate the fees for the investment advisory from the interest chargeable on the loans when the bank has not done so in its transactions?

After carefully weighing how VAT operates, financial institutions should realize that it is in their best interest to un-bundle exempt financial services from taxable services. Financial institutions obtain the right to claim input tax credit in respect of the taxable services, and they are able to claim input tax credits only if they un-bundle the taxable services from the exempt services.

5. Why Foreclosure Sales is Missing from the List

Both sides have tried to make a point out of the absence of foreclosure sales in the list of either exempted financial services or taxable financial services. Those who wished to press for the taxation of foreclosure sales pointed to the absence of foreclosure sales among the list of exempted financial services as evidence of

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[91] See Ross Cranston (2nd ed., 2002), Principles of Banking Law, (Oxford University Press), at 260.

[92] See *id*, at 354-355.

[93] Factoring services may be 'recourse' or 'non-recourse' services. In a non-recourse factoring services, the provider (called the factor) bears the risk of losses on bad debts, while in a recourse factoring, the factor reserves the right of recourse in case the factor is unable to collect the debts; *id*, at 355.

the intention of the lawmakers to exempt foreclosure sales from the payment of VAT. Those who wished to see foreclosure sales exempted pointed to the absence of foreclosure sales in the list of taxable supplies as evidence that these sales are exempted from the payment of VAT. Which begs the question: why is foreclosure sales not mentioned in the list of either exempted or taxable financial services?

The speculation that foreclosure sales did not appear in the list because these forms of sales were unknown or even uncommon banking practices must be dismissed immediately. Foreclosure sales are fairly common practices of banks even in Ethiopia where the financial sector is not as developed and certainly not as diverse and complicated as in some other countries. The Proclamation which authorizes banks to foreclose debtors' property precedes the VAT legislations by at least four years.[94] The list of exempt and taxable financial services in the VAT laws of Ethiopia includes some uncommon and even non-existent financial services in Ethiopia, no doubt in anticipation of the development and diversification of financial services in that direction in the future. How is this rather expansive and forward-looking list said to be missing foreclosure sales by banks?

There is one plausible explanation which may at first sound counter-intuitive but true in retrospect. Foreclosure sales by banks are not services in the strict sense of the term 'services' under the VAT laws. They are self-help actions by banks. Banks resort to foreclosure sales to enforce the payment of loans in the event of the loans remaining unpaid by debtors upon the expiry of due dates. When loans are paid on time by borrowers, the security agreement is terminated and the collaterals are redeemed to the borrowers. The payment of the loan by borrowers occasions no VAT whatsoever as there are no taxable transactions between the borrowers and the bank. As the extension of the loan was exempted from VAT, so is the payment of the loan by the borrowers.

The absence of foreclosure sales by banks from the list of either 'exempt' or 'taxable' financial services is, therefore, not a result of oversight by the drafter but a recognition that foreclosure sales are not even distinct financial services. Foreclosure sales typically occur in order to enforce the terms of a contract of loan. The bank which seeks enforcement through foreclosure is not providing any service to any person, but helping itself to repayment of the loan. While foreclosure sales appear as transactions between banks and bidders, they are in reality actions taken by banks to enforce the terms of a loan contract – in other words, self-help services. As we shall explore below, the mere fact that

[94] See Property Mortgaged or Pledged with Banks Proclamation No. 97/1998, *Federal Negarit Gazeta*, 4th year, No. 16; a Proclamation to Provide for Business Mortgage Proclamation No. 98/1998, *Federal Negarit Gazeta*, 4th year, No. 17.

foreclosure sales are self-help actions does not exempt them from VAT. While from the vantage point of the banks, foreclosure sales are self-help actions, they also conceal another layered transaction, which may make them eligible for VAT.

6. The Nature of Bank Sale Foreclosures

Foreclosure sales are not different from other conventional sales. Foreclosure sales exhibit all the attributes of a typical sales transaction. There are typically two parties involved, the seller and the buyer. There is an express price and an object of sale. The only thing peculiar about foreclosure sales is the circumstances under which the sales occur. Foreclosure sales invariably occur to enforce a payment of debt, which is expressed in a separate contract or a judgment of a court.[95] Another peculiarity (if we can call it that) of foreclosure sales is that these sales typically occur in auction sales. But that does not change the nature of foreclosures as sales.

The Civil Code of Ethiopia treats 'sale by auction' as one type of sale.[96] The Civil Code describes the peculiar circumstances in which auctions occur. One of these is the fact that the sale is made to the highest bidder.[97] Whoever participates in a public auction is bound by his offer on the terms or conditions of the sale unless a higher bid is made or his offer is not accepted immediately after the usual calls.[98] Once auction sales are consummated, they assume the conventional attributes of a typical sale, with obligations on the part of the seller to deliver the goods and of the buyer to pay the price.[99]

Since the sales transactions accompanying foreclosure procedures are nothing out of the ordinary, they are not really difficult to tax. Foreclosure sales are thoroughly accessible to VAT on technical grounds. Foreclosure sales meet the profile of 'supply of goods or services' (*for the meaning of supply of goods or services, see below*).[100] They also meet the requirement of consideration, the price at which the goods are foreclosed and sold constituting consideration for the supply of goods in foreclosure sales.[101] We do not even have to resort to one

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[95] See Property Mortgage Proclamation, supra note 94, Article 3; Business Mortgage Proclamation, supra note 94, Article 13; Civil Procedure Code of Ethiopia (1965), *Negarit Gazeta* – Extraordinary Issue No. 3 of 1965, Articles 394ff.

[96] See the Civil Code of Ethiopia (1960), *Negarit Gazeta*, Gezette Extraordinary, 19th year, No. 2, Articles 2403-2407.

[97] See *id*, Article 2404.

[98] See *id*, Article 2404(2).

[99] See *id*, Article 2403.

[100] See VAT Proclamation 2002, *supra* note 4, Article 4(1)(a).

[101] See *id*, Articles 6 and 12.

of the presumptive rules of VAT in order to figure out the value of the supplies. Those who vociferously argue for taxation of foreclosure sales can therefore be forgiven for mingling foreclosure sales with ordinary sales transactions that attract VAT. The only thing different about foreclosure sales is the circumstances in which the sales occur. Foreclosure sales occur typically to enforce a debt, whether that debt is expressed in a separate contract or in a judgment of courts.

Both the Property Mortgage and Business Mortgage Proclamations furnish all the necessary elements we need to characterize foreclosure sales for VAT purposes. Since both Proclamations are virtually identical in every respect except the underlying property subject to sale, we use the two pieces of legislation interchangeably for the purposes of this article. Both laws emphasize the agency character of foreclosure sales. Although banks are in charge of foreclosure sales, both laws emphasize that foreclosure sales are 'executed on behalf of the debtor'.[102] Banks are not regarded as owners of the property they foreclose. In fact, banks are 'liable for any damage they cause to the debtor in the process of selling the property through foreclosure procedures.[103]

Only in exceptional cases are banks authorized by law to have the debtor agree in a contract of loan for banks 'to take over the property in consideration of its estimated value as specified in the contract of loan'.[104] But the transfer of the property even then occurs from the debtor to the bank, which effectively prevents foreclosure sales from happening. In all circumstances, the transfer of property occurs from the debtor to third parties, and in exceptional circumstances, the transfer occurs from the debtor to a creditor bank. We have therefore established conclusively that banks are involved in foreclosure sales as agents of debtors, not as owners of the property foreclosed. The proper characterization of the foreclosure sales sets the stage for the next question: should VAT apply to foreclosure sales. The next section addresses this question.

7. VAT and Bank Foreclosure Sales: Setting Different Scenarios

In order to properly understand the nature of foreclosure sales and their VAT implications, there is no better place to start from than the opinions of the drafter of the Ethiopian VAT laws: Professor Alan Schenk. Professor Schenk was also a Reporter for the Committee on Value Added Tax of the American Bar

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[102] See Property Mortgage Proclamation, supra note 94, Article 5; Business Mortgage Proclamation, *supra* note 94, Article 15.

[103] See Property Mortgage Proclamation, supra note 94, Article 7; Business Mortgage Proclamation, *supra* note 94, Article 1.

[104] See Corrigendum to Property Mortgaged or Pledged with Banks Proclamation No. 97/1998 No. 1/1998, *Federal Negarit Gazeta*, 4th year, No. 17.

Association Section of Taxation.[105] As a member of the said Committee, Professor Schenk helped draft a Model Value Added Tax Statute suitable for adoption by the United States (incidentally the US is the only industrialized nation which does not have a national Value Added Tax). The Model Statute has a special section devoted to the transfer in satisfaction of debts, to which reference is here made for its instructive points on VAT and foreclosure sales.[106] Section 4039 of the Model Statute provides that 'the transfer of property or services by a debtor to a creditor in payment or reduction of debt is a sale of such property or services.' In his explanatory text to this section, Professor Schenk charts different scenarios of transfer of property or services from a debtor to a creditor.

The first scenario is where the debtor transfers ownership (title) of the property to a creditor in payment of the debt.[107] In this instance, writes Professor Schenk, a transfer occurs from the debtor to a creditor. The second scenario is where the property (collateral) is sold by or on behalf of the debtor to a third party in a foreclosure or similar sale and the proceeds are used to pay the debt.[108] In this second instance, too, the debtor is regarded as the seller of the collateral.[109] In both instances, the transfers or sales may be taxable, depending on whether the debtor is a registered VAT payer. If the debtor is not registered for VAT (for example, if the debtor is selling his/her residential property in a foreclosure), the transfer or sale is not chargeable with VAT, because the debtor (as a supplier) is not a registered person. In all instances involving dealings between debtors and creditors, the only situation where the creditor (e.g., the bank) may be required to account for the VAT is where the 'creditor has control over the remittance of the proceeds to the debtor'.[110]

If we transpose the scenarios established by professor Schenk in the abstract to the concrete situation of the *Abyssinian Bank* case, three scenarios will emerge. The *first* and most likely turn of events in these kinds of situations is that Tana International (debtor) would pay back the loan it owed to the Bank along with the interest due thereon. In so doing, Tana International redeems the collateral. The repayment of the loan as well as the interest due thereon is an exempt financial transaction. Under Ethiopian VAT laws, neither the transfer of

[105] See Alan Schenk, *supra* note 40.

[106] See Section 4039, in Alan Schenk, *supra* note 40, at 181.

[107] *Ibid*.

[108] *Ibid*.

[109] *Ibid*.

[110] *Ibid*.

the collaterals as security nor the redemption of the collaterals attracts VAT.[111] The redemption of property leads to taxation only where the original transfer of the property constitutes a supply of goods under the VAT law. This occurs in finance lease or hire-purchase (hiring sale) agreements.[112] The granting of security interest by a debtor to a creditor is a non-taxable transaction and the redemption of the collateral upon payment of the debt (the loan) does not lead to taxation either.

The *second* scenario is that Tana International (the debtor) agrees to surrender the collaterals to the Bank in payment of the loan. This is regarded as a supply of goods by Tana International to Abyssinia Bank. The fact that the supply occurs in the context or against the background of payment of the loan does not change the nature of the supply for VAT purposes. It is taxable. Tana International is required to issue VAT invoices and collect the VAT due upon the transfer of the collaterals just as it would be required to if the collaterals were sold in the market.

The *third* scenario, as actually happened in the Abyssinia Bank case, is the case of the Bank foreclosing the collaterals as it is authorized by Property Mortgage and Business Mortgage Proclamations. Here the characterization of the transaction is important. The law casts the transaction as one occurring between the debtor and a winning bidder, the Bank acting merely as an agent. In essence, therefore, the transaction is not different from the second scenario above, except that the transfer now occurs from the debtor to a third party bidder, instead of from the debtor to the bank. This transfer carries VAT as in the second scenario. It fulfills all the requirements of VAT. Since those who object to taxation of foreclosure sales doubted whether these sales are taxable transactions within the meaning of the VAT laws, it may be in order to review the notion of 'taxable transactions' and cognate VAT concepts to assess whether foreclosure sales meet this basic requirement in VAT.

8. The Notion of "Taxable Transactions"

The key to the application of VAT to domestic supplies of goods and services is the notion of 'taxable transactions.'[113] Every supply of goods or services must

[111] Article 3 (10) of VAT Regulations states that 'the provision of goods on consignment and the transfer of goods to a person in a representative capacity is not a supply'; VAT Regulations 2002, supra note 4.

[112] See *id*, Article 7(4).

[113] See VAT Proclamation 2002, supra note 4, Article 7(1)(a)); see also, Article 3 of the VAT Proclamation which prescribes the scope of application of VAT; taxable transactions, imports of goods and import of services; for imports, it is not at all necessary for the imports to be taxable transactions.

be a taxable transaction before VAT attaches to it. Article 7(3) of the VATP defines a taxable transaction as:

> … a supply of goods or a transaction of services in Ethiopia in the course or furtherance of a taxable activity other than an exempt supply…

The notion of taxable transaction is relevant to all transactions that attract VAT. We shall examine this notion for purposes of understanding 'foreclosure sales' in VAT. We can deduce from a cursory reading of the definition above that the notion of taxable transactions consists of at least three elements. A taxable transaction is:

a) a supply of goods or services;
b) that occurs in Ethiopia;
c) in the course or furtherance of a taxable activity.

Since there is little doubt that foreclosure sales that have become a matter of some debate all occur in Ethiopia, we shall easily dispense with the second element (b) and focus upon elements (a) and (c) instead.

8.1- Supply of Goods or Services

Both the VATP and the VATRs contain definitions that will help us unlock the meaning of the first element for application of VAT: supply of goods or services. Goods are defined in the VATP expansively as 'all kinds of corporeal movable or immovable property', including 'thermal, electrical energy, heat, gas, refrigeration, air conditioning and water' but excluding 'money'.[114] And services are defined as 'work done for others, which does not result in the transfer of goods'.[115] Between them, the notions of goods and services share all types of goods and services imaginable, except money, which is excluded from VAT because of its unique role in the market as a medium of exchange.[116] The meanings ascribed by the VATP and the VATRs to 'supply of goods' and 'supply of services' is a mere expansion of the meaning of goods and services. Supplies of goods or services are therefore understood as 'sale', 'grant' 'transfer' or 'rendition' of goods or services.[117]

With respect to foreclosure sales, few would doubt that foreclosure sales represent supplies of goods within the meaning given to these terms in the VAT laws. The only question over which the opposing camps have parted company is whether foreclosure sales constitute exempt supplies, which we shall examine

[114] See *id*, Article 2(7).

[115] *Id*, Article 2(16).

[116] See *id*, Article 2(8).

[117] Compare the terms used in the definitions with VAT Proclamation, Article 4(1)(a)&(b).

later in this article. Foreclosure sales represent conventional sales of goods and easily qualify as supplies of goods for purposes of VAT.

8.2- In the course or furtherance of a taxable activity

This requirement, a subject of much debate in the *Abyssinian Bank* case, actually consists of two elements: '*taxable activity*' and '*in the course or furtherance of*…'. It will be seen that a separate analysis of the two elements is necessary for proper understanding of the application of VAT upon domestic supplies of goods and services.

a) '*Taxable Activity*'

This requirement in particular has been a subject of intense debate among the opposing camps as well as in the Tax Appeal Commission and the Courts. Like the notion of 'taxable transactions', of which it is a part, the notion of taxable activity is defined in the VATP and elaborated in the VATRs. Article 6 of the VATP defines 'taxable activity' as 'an activity which is carried on continuously or regularly by any person' 'in Ethiopia or partly in Ethiopia' involving or intending to involve… the supply of goods or services to another person for consideration'.[118] The notion of 'taxable activity' consists of at least three elements, as can be readily inferred from the definition. The activity must:

i) be continuous or regular;
ii) involve or be intended to involve a supply for consideration; and
iii) be carried on in Ethiopia or partly in Ethiopia.

In connection with foreclosure sales, elements (ii) and (iii) were never contested. For whatever it is worth, it is element (i) that has become a subject of some debates. In the *Abyssinia Bank* case, the counsel for the Bank argued that foreclosure sales are not 'continuous or regular' activities of banks, their regular activity being the business of banking. For our purposes, we shall concentrate upon the issue of 'continuity' or 'regularity' in VAT and explore why it is placed as one of the requirements for application of VAT in domestic transactions.

In the *Abyssinia Bank* case, it is aptly shown that the parties as well as the tribunals have tended to confuse 'taxable activities' with 'taxable transactions'. The two expressions, while related, are not the same. The requirement of 'continuity' or 'regularity' is an attribute of a taxable activity, and not of a 'taxable transaction'. It may be helpful to remember that other countries use phrases like 'economic activity', 'enterprise' or 'business' to refer to what the

[118] For more on the notion of taxable activity, see Schenk and Oldman, *supra* note 1, at 96-98; P.R. Hill et al, *supra* note 53, at 61-64.

Ethiopian VAT law calls 'taxable activity'.[119] A taxable activity must be a continuous or regular activity to be subject to the regime of VAT. Contrary to the conventional misconception, VAT is not a transactional tax like stamp duties or even customs duties. VAT requires some regularity in the activity of the taxpayer and imposes certain 'recurrent' obligations upon taxpayers. Taxpayers in VAT must be registered for VAT.[120] Taxpayers must maintain books and records for purposes of complying with the regime of VAT.[121] Taxpayers must file returns on a regular basis, every month in Ethiopian case.[122] There are regular communications between taxpayers and the government, involving transactions such as input tax credits, refunds and payment of VAT on outputs.[123] For those taxpayers who have installed 'sales register machines', these 'communications' now occur in real time.

All these attributes of VAT indicate that the regime of VAT applies to those taxpayers who exhibit certain attributes, regularity or continuity of activity being one of them. Certain transactions may nominally meet the registration threshold (e.g., one time transactions involving millions of Birr) but they do not attract VAT because they do not meet the profile of a taxable activity as a 'continuous' or 'regular' activity. A one-time supplier of goods or services cannot become a taxpayer for VAT purposes, although that person may become a taxpayer for purposes of transactional taxes like stamp duties.

In practice, there is a tendency to confuse a taxable activity with taxable transactions, as amply shown in the *Abyssinia Bank* case. The counsel for the Bank argued that the sale of collaterals in foreclosure sales does not constitute a 'continuous' or 'regular' activity of the bank. This argument arises from the confusion of taxable transactions with taxable activities. For application of VAT, the transaction does not have to be continuous or regular to attract VAT as long as the transaction is carried in the context of a taxable activity. Setting aside for the moment the argument of whether a bank is exempted from VAT or not, transaction of foreclosure sales by the bank does not have to be continuous or regular for it to attract VAT as long as it is supplied by a continuous or regular activity, i.e., the bank. The phrase 'taxable activity' refers to the bank, and the phrase 'taxable transactions' refers to, among others, foreclosure sales

[119] The Australian GST law, for example, uses the word 'enterprise' to refer to the same thing; see P.R. Hill, *supra* note 53, at 61; Professors Schenk and Oldman use the expression 'taxable business activity' to refer to what is known in Ethiopian VAT legislation simply as 'taxable activity'; see Schenk and Oldman, supra note 1, at105.

[120] See Schenk and Oldman, *supra* note 1, at 90.

[121] See VAT Proclamation 2002, *supra* note 4, Article 16.

[122] See *id*, Articles 37-39.

[123] See *id*, Articles 20, 21, 26, 27 and 28.

of collaterals. The transaction itself may be rare or unique in the life cycle of a taxable activity, but that is of no consequence for VAT. As long as the transaction occurs in the context of a regular or continuous activity, it is chargeable with VAT no matter how rare.

This distinction was not heeded in the arguments of the parties in the *Abyssinia Bank* case, although there is sufficient authority in the VAT laws showing how the two phrases are different. The VATRs make this distinction abundantly clear. Article 4 of VATRs seems to anticipate the possible confusions that might arise between taxable activities and taxable transactions. It states that 'anything done in connection with the commencement or termination of a taxable activity' is also a taxable activity. Sales during liquidations may be rare or even unique for that business, but they constitute taxable transactions since they are carried on in connection with a taxable activity, in this case in connection with its termination. The rarity of the transactions themselves is of no consequence for VAT.

Unfortunately, the confusion is not limited to the *Abyssinia Bank* case. Apparently stung by the setback in the Abyssinia Bank case, the Tax Authorities pushed through an amendment of the provisions in this regard in a bid to do away with the requirement of 'continuity' or 'regularity' for application of VAT.[124] This, we submit, is totally unnecessary. The requirement of 'regularity' or 'continuity' is an essential, nay, indispensable attribute of a taxable activity in all VAT systems, Ethiopia unexcepted. Doing away with the requirement of 'regularity' or 'continuity' might mean in the future (if the amendments are to be taken seriously) that VAT in Ethiopia would apply to one-time transactions by consumers – turning VAT into transactional taxes like stamp duties. This is contrary to the nature of VAT. What the Tax Authorities did not realize in pushing through this amendment is the difficulties involved in bringing consumers into the network of a regular activity of VAT – registration, input tax credits, etc.

b) '*In the course or furtherance of….*'

Another requirement in VAT which might engender disputes particularly in the context of foreclosure sales is the phrase '*in the course or furtherance of….*'. The parties in the *Abyssinian Bank* case alluded to this phrase in defending their respective positions. The counsel for Abyssinia Bank suggested that foreclosure sales are not 'in the course or furtherance of' a banking activity.

The VAT laws do not furnish a general definition for the phrase 'in the course or furtherance of…'. Instead, we have several provisions in the VAT

[124] See Value Added Tax (Amendment) Proclamation No. 609/2008, Federal Negarit Gazeta, 15th year, No. 6, Article 2(3).

laws that enumerate specific instances in which supplies of goods or services might or might not constitute 'in the course or furtherance of a taxable activity'. The phrase 'in the course or furtherance of…' might at first be puzzling until we realize that the phrase is intended to capture all the multifarious forms of supplies 'in connection' with a taxable activity. In fact, some laws use a more genial phrase 'in connection with…' to refer to the same requirement.[125] Registered taxpayers may supply goods or services in various circumstances, some of which are regarded as 'in the course or furtherance of…' and others are not regarded as such. Obviously, supplies of goods or services to customers for value in arm's length transactions constitute 'in the course or furtherance of a taxable activity'. VAT laws are not limited, however, to the conventional supplies of goods or services to presume that supplies constitute 'in the course or furtherance of…'.

The provisions pertaining to the requirement of 'in the course or furtherance of…' depart from our preconceived notions of what might constitute as supplies of goods or services 'in the course or furtherance of a taxable activity'. Withdrawals of business goods for personal consumption of the taxpayers or family members are considered to be in the course or furtherance of a taxable activity although we are wont to regard these conventionally as 'not in the course or furtherance of a taxable activity'.[126] Similarly, the VAT laws presume that supplies of goods to employees at a discount or for free are supplies 'in the course or furtherance of a taxable activity'.[127] The only supplies that are not considered to be 'in the course or furtherance of a taxable activity' are those supplies that are not related to or connected with the business activity, such as sales of personal property by a taxpayer. For example, if a hotel owner sells his personal vehicle, the supply does not attract VAT even though the deal may have been struck with a customer of the hotel. Whether a supply is in the course or furtherance of a taxable activity, of course, depends on the facts and circumstances of each case.

Given the expansive meaning proffered to the phrase 'in the course or furtherance of a taxable activity', it is difficult to argue that foreclosure sales by banks are not in the course or furtherance of a taxable activity. Foreclosure sales easily meet the requirement of 'in the course or furtherance of a taxable activity' both from the vantage point of borrowers (who as we shall see later on are the

[125] See Section 4003 of the Model Act, in Alan Schenk, Reporter, *supra* note 40

[126] See VAT Proclamation 2002, *supra* note 4, Article 4(2).

[127] See id, Article 4(4); VAT Regulations 2002, supra note 4, Article 3(2); but payment by employers for goods purchased from third parties does not constitute a supply by the employer in the course or furtherance of a taxable activity; see VAT Regulations 2002, supra note 4, Article 3(3).

real suppliers of goods in foreclosure sales) and banks. VAT laws are indifferent to the purposes for which or the circumstances under which supplies are made. As we saw above, even personal consumption of business goods (called withdrawal of goods for personal consumption) constitutes a supply in the course or furtherance of a taxable activity. It is of no consequence to VAT that the supplies are made to pay debts, as foreclosure sales are. Even if we assume that foreclosure sales are supplies of goods by banks, we can argue that foreclosure sales are 'in the course or furtherance of taxable activity' of banks. But that argument is not necessary at all, for it is the result of the mis-location of the supply in foreclosure sales.

9. The Route of the Supplies in Foreclosure Sales

Apart from the common misunderstanding surrounding the notions of taxable activities and taxable transactions, we submit that the confusion surrounding foreclosure sales also arises from the mis-location of the route of the supplies. Both Abyssinia Bank and the Tax Authorities viewed the transaction as something occurring between banks and third party bidders. Surprisingly, both the Tax Appeal Commission and the High Court seemed to be in agreement with the parties in spite of the opposite conclusions they reached. They all seemed to view foreclosure sales as sales by banks to third parties. That is clearly a misunderstanding of foreclosure sales.

Although banks carry out foreclosure sales, the transactions occur between debtors and third party bidders, not between banks and third party bidders. Both the Property and Business Mortgage Proclamations cast the transactions as occurring between debtors and third party bidders, banks acting merely as agents.[128] The focus of attention for purposes of meeting the requirement of a taxable activity should therefore be not banks but the business of the debtor. If the activity of the debtor is a taxable activity, the sale of property in foreclosure sales is a taxable transaction regardless of whether banks are registered or not, exempted or not. Conversely, if the activity of the debtor is not a taxable activity, the sale of property in a foreclosure sale does not transform the sale into a taxable transaction. Both Abyssinia Bank and the Tax Authorities were led astray in their arguments because they mischaracterized and mis-located the route of the transaction as something occurring between banks and third parties. The Tax Appeal Commission and the High Court joined the chorus of confusion in characterizing the transactions as occurring between banks and third parties.

This of course does not mean that sales transactions never occur between banks and third party bidders. In some cases, banks may become direct suppliers

[128] See Property Mortgage Proclamation, supra note 94, Articles 3 and 5; Business Mortgage Proclamation, *supra* note 94, Articles 13 and 15.

(and not mere agents) of goods. Banks may take over the collaterals as payments of loans and later on sell the collaterals in public auctions. Both the Property and Business Mortgage proclamations authorize banks to take ownership of collaterals if the public auctions fail to fetch the price indicated in bids the second time around.[129] These transactions are not foreclosure sales. Banks sometimes sell their used inventory and stocks (e.g., vehicles) as well as property claimed from debtors as collaterals. These are taxable transactions too, although they are not as such related to foreclosure sales.

We recall that Professor Schenk made one exception for cases in which banks (as creditors) may be said to be suppliers in foreclosure sales (*see Section 7 above*). That exception is where banks as creditors have 'control over the remittance of the proceeds to the debtor.[130] Ethiopian laws that authorize banks to foreclose debtors' collaterals do not provide for instances where banks may control remittances of the proceeds to debtors, but they do provide for cases in which banks may take over the collaterals in payment of the loan (debt). Even then, the route of the transaction is not altered. The supply occurs from debtors to banks. The taxation of this supply, as alluded to before, depends on whether the debtor is a taxpayer under VAT. If the bank sells the collateral in a public auction, the supply will now become a supply by the bank to a third party. This sale in a public auction or for that matter any type of sale is a taxable supply. The argument that the banks are exempted for their financial services does not have much traction in such cases.

10. Banks as Agents in Foreclosure Sales and Application of VAT to Agents

We have concluded so far that in the supply of goods in foreclosure sales, banks act as agents of borrowers while they sell goods to third parties. This does not let banks completely off the hook of VAT obligations. We need to examine a few more provisions of the VAT laws of Ethiopia to check whether banks are obligated as agents to collect VAT on foreclosure sales.

Both the VATP and VATRs deal with cases of supplies of goods by agents. An agent is defined in the VATP as 'any person who acts on behalf of and on instruction from another person'.[131] Unless we argue that the agency function of banks in foreclosure sales does not square with the strict definition of agents in

[129] See Corrigendum, *supra* note 104 and Business Mortgage Proclamation, *supra* note 94, Article 13.

[130] See Alan Schenk, *supra* note 40, at 181.

[131] VAT Proclamation 2002, *supra* note 4, Article 2(2).

VAT law, we must be prepared to apply the rules of VAT pertaining to agents to banks as agents.[132]

The VATP presumes that supplies by agents are supplies made by principals except in two cases.[133] The first case involves 'services rendered by an agent to the principal'.[134] Here the VAT law presumes that the supply is made by an agent. It is not hard to imagine why that is the case. In truth, the supply is made by the agent, not qua agent but as principal. Hence, if an agent charges the principal for her service as agent, the supply is made by the agent to the principal, not qua agent but as principal.

The second exception involves an agent who supplies goods or services on behalf of a principal who is not a resident of Ethiopia.[135] Here, too, the VATP presumes that the supply is made by the agent in Ethiopia. Again, it is not difficult to imagine why there is this exception. The presumption that a supply by an agent is a supply by the principal is unworkable in such cases. Since the principal is not a resident of Ethiopia, it is pointless to stipulate that the principal is a supplier when it is known that Ethiopian tax jurisdiction cannot reach the principal. It is the agent who is accessible to Ethiopian tax jurisdiction and it is therefore the agent who should remain answerable for all obligations arising from VAT in such cases.

In any event, we have established the general rule that supplies by agents are considered to be supplies by principals. That being the case, we need to figure out what that means for both the principal and the agent, and what their respective obligations are in transactions chargeable with VAT. Whatever obligations agents may assume in VAT, we must remember that the obligations of agents are contingent upon the obligations of principals.

In general, it may be stated that where principals have no obligations, nor should agents. Where principals have obligations in VAT, however, agents qua agents have a number of obligations in VAT. One of these obligations is the obligation to issue VAT invoices for the supplies. Article 13 of VATRs authorizes (in effect obligates) agents to issue a VAT invoice to purchaser of goods where the purchaser is a registered person.[136] Since both the principal and the agent are required to issue invoices, this may lead to the issuance of double

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[132] While banks may be said to act on behalf of borrowers in foreclosure sales, they do not do so on the instructions of borrowers. Foreclosure sales typically occur against the interests or in the face of objections of borrowers.

[133] See VAT Proclamation 2002, *supra* note 4, Article 24(1).

[134] See *id*, Article 24(2).

[135] See *id*, Article 24(3).

[136] See VAT Regulations 2002, *supra* note 4, Article 13(1); the phrase 'where the purchaser is a registered person' appears to be superfluous.

VAT invoices. The VATRs anticipate this problem and prohibit the principal from issuing VAT invoices where the agent has issued one, and vice versa.[137] Where no invoice is issued for the supply either by the principal or the agent, the agent and the principal will be held liable (probably jointly and severally).

In practice, the proximity of the agent to the purchaser of the goods means that it is the agent who should issue VAT invoice for the supply. In any event, it is clear that the agent has an obligation of issuing VAT invoices for the supply that s/he makes for the principal. Foreclosure sales by banks are transactions by banks as agents on behalf of principals – borrowers. Thus, banks have all the obligations incumbent upon agents in VAT. Whether banks should register for VAT in order to account for VAT in foreclosure sales is quite another matter, and we shall explore below whether that is necessary.

11. Should Banks Register for VAT to Account for Foreclosure Sales?

Registration performs certain administrative functions in VAT. It is primarily designed to provide government with the necessary information needed to assess and collect VAT from taxpayers.[138] Registration is what brings businesses within the network of VAT administration. Those businesses that are registered for VAT are required to perform certain duties from time to time, like issuing invoices on transactions, collecting the VAT due and transmitting the proceeds to the government.[139] Those who are registered are also entitled to certain privileges not available to unregistered persons. The most important privilege is the right to obtain tax credits for VAT paid on purchases or inputs.[140]

Even if we agreed that VAT is due on foreclosure sales, it is by no means settled that banks should therefore register for VAT – despite the clamor to get the banks registered for VAT on account of the sales they conduct in foreclosures.[141] Thankfully, the answer to this question of registration is made considerably easier by the characterization of foreclosure sales as supplies of goods by debtors through the agency of banks to third party bidders (this is a typical route of foreclosure sales). As already emphasized, VAT is due if debtors are registered taxpayers or required to be registered for VAT. Conversely, VAT is not due upon foreclosure sales, if the debtor involved is not

[137] See *ibid*.

[138] See Schenk and Oldman, *supra* note 1, at 90-91.

[139] See VAT Proclamation 2002, *supra* note 4, Articles 20 and 22.

[140] See *id*, Article 21.

[141] See Mahlet Mesfin, Kirubel Tadesse, Getahun Worku and Tilahun Aklilu, *supra* note 8.

registered or required to be registered in the first place. This contains with in it the solutions we are to seek on the question of registration.

If debtors are registered for VAT, there is no reason why banks are to register for VAT to account for VAT in foreclosure sales. Banks should use the registration identity and certificate of debtors to account for VAT during foreclosure sales. They should use the VAT invoices of debtors to collect VAT and account for the proceeds to the government. We have already asserted that banks are agents in foreclosure sales. To be sure, agents may be required to have their own registration in VAT,[142] but we submit that registration is not required of banks in order for them to account for VAT during foreclosure sales. The circumstances under which banks operate in foreclosure sales make registration pointless. In foreclosure sales banks represent disparate numbers of debtors (some registered and others not), and it does not make any administrative sense to require them to register for VAT when they act as agents for multiple debtors in different foreclosure sales.

Requiring banks to register for VAT complicates the administration of VAT in foreclosure cases. As we shall examine below, the imposition of VAT upon foreclosure sales is not a simple affair of slapping the sales with the VAT rates (15% in Ethiopian case). There are additional tasks involved, such as the computation of input tax credits. Since the supplies in foreclosure sales occur from borrowers to purchasers, it makes little sense to require registration of banks, when all we need (and should care about) is the registration of borrowers by whom the supplies are made.

The tax authorities may be worried about possibilities of tax evasion or tax avoidance by banks and borrowers. But the conventional registration is not a solution to these problems. The tax authorities may use other administrative devices to hold both banks and borrowers accountable for charging VAT on foreclosure sales. We have already seen that banks and borrowers are jointly and severally liable for issuing VAT invoices on foreclosure sales. There are severe penalties in the VAT laws against those who fail to issue VAT invoices when they are required to do so.[143] If these are not deterrent enough, the Tax Authorities may use well-known administrative devices to ensure that VAT is effectively chargeable on bank foreclosure sales. One commonly used device is to require banks to furnish detailed information to tax authorities on foreclosure sales and the names of borrowers whose securities have been sold in foreclosure

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[142] See VAT Proclamation 2002, *supra* note 4, Article 2(11), where a person is defined as any natural person, sole proprietor, body, joint venture, or association of persons *(including a business representative residing and doing business in Ethiopia on behalf of the principal)* (italics mine).

[143] See VAT (Amendment) Proclamation, *supra* note 124, Article 50(b).

sales. These additional precautionary measures are in reality not necessary because banks should be motivated to charge foreclosure sales with VAT for fear of the penalties that attach in the event of their default.

In sum, the tax authorities may hold banks to account using other administrative devices, but the conventional registration should not be one of them. The clamor for registration of banks for accounting for VAT in foreclosure sales is yet again another misunderstanding of the nature of VAT, the scope of VAT exemptions for financial services and the nature of foreclosure sales.

While registration of banks is clearly neither a solution nor necessary for purposes of taxation of foreclosure sales, this should not be seen as a blanket exemption of banks and other financial institutions from the obligation of registration for VAT. As pointed out above, banks and other financial institutions may supply a number of taxable services which require registration for VAT. Banks may provide payroll, accounting, auditing, management, advisory and trust services for fees. Banks may also provide safe keeping services, again for fees. These services are taxable under the VAT laws. It is therefore paramount that banks and other financial institutions are registered for VAT in order for them to account for VAT on these services. Banks and other financial institutions may contest or resist moves for registration on the ground that the value of these services do not exceed the registration threshold (currently 500, 000 ETB). Many in the past have resisted registration on this ground before (in fact, most of the disputes between tax authorities and taxpayers have arisen from those taxpayers who believed that their annual turnovers do not reach the registration threshold).[144]

But in the case of financial institutions, this argument should have no traction whatsoever. The basic rationale for VAT registration threshold is administrative. It is generally assumed that those businesses whose annual turnovers exceed a certain threshold possess the administrative capacity to comply with the recording and accounting requirement of VAT, such as the capacity to issue VAT invoices. The threshold is set at a fairly high turnover solely on this ground. In the case of financial institutions, few would dispute that these

[144] The Tax Authorities have resorted to presumptive registration schemes in the past in part in order to forestall the arguments of some taxpayers that their annual turnovers would not cross the registration threshold. Many businesses were ordered to register for VAT based on a presumption that the volume of transactions in these types of businesses exceeds the half a million ETB threshold. These business include: jewelry stores, computer stores, flour factories, etc; see Ministry of Revenues, FDRE, Ref. No. 01/A29/306/45, Sene 17, 1995 E.C, in Amharic, unpublished; see also Mahlet Mesfin, Ambiguous VAT Registration Leaves Bitter Taste, Addis Fortune, vol. 12, No. 575, May 8, 2011.

institutions have the capacity to comply with VAT, regardless of the total volume of taxable supplies in a year. Given the high capital requirements for financial institutions in this country, it should be presumed that all financial institutions possess the capacity for complying with VAT obligations regardless of whether their core financial services are exempted from VAT.

Reluctance to registration is often the result of misapprehension of the real nature of VAT. Financial institutions should not resist calls for registration at all; in fact, they should call for it. Although they should collect VAT on their taxable supplies, they should also realize that they are entitled to tax credits on inputs attributable to their taxable supplies.[145] Financial institutions will be entitled to tax credits only if they are registered for VAT. The entitlement to tax credits should provide them with incentive enough for registration.

12. VAT Invoicing in Foreclosure Sales: VAT Exclusive or Inclusive Invoices?

As they contemplate collecting VAT on foreclosure sales, banks are confronted by twin sets of problems or challenges. The first is how to apply VAT on foreclosure sales that have already occurred without or prior to the knowledge that these sales carry VAT. The second is how to apply VAT on foreclosure sales after the knowledge that these sales carry VAT. The circular letter cited above clearly indicates the intention of the Authorities to collect VAT from foreclosure sales that have already happened (over the past eight years if we start from the beginning). It is necessary to keep the two situations apart for purposes of analyzing how VAT may be imposed on foreclosure sales. Before we examine how VAT applies to the two sets of situations, we need to review how VAT is computed in general.

VAT can be computed exclusive or inclusive of the tax itself.[146] We are accustomed to the VAT exclusive of the price, with tax invoices showing the price of the good separately from the VAT. So with a 15% VAT rate, a 100 ETB good will be sold for a total of 115 ETB, 15 ETB being exclusive of the price of the good. This method of computing VAT is (or should be) followed in all transactions where VAT is clearly known to apply and where it is easy to apply VAT this way. VAT may also be computed inclusive of the tax, which is expressed in a formula:

$$(Price\ (inclusive) \times VAT\ rate) \div (100 + VAT\ Rate) = Amount\ of\ VAT$$

Hence a price inclusive of VAT in the above example would yield the following result:

$$(115 \times 15) \div (100 + 15) = 15$$

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[145] See VAT Proclamation 2002, *supra* note 4, Article 21(2).

[146] See Schenk & Oldman, *supra* note 1, at 32.

This method ensures that the taxpayer who uses VAT exclusive method and the taxpayer who is subject to the VAT inclusive method are both subject to the same tax rate (15% in the above example) and collect the same amount of tax (15 ETB in the example).

The VAT inclusive method is not recommended on transparency grounds. However, it may become unavoidable in some cases. There are instances where a taxpayer may not have issued VAT exclusive invoices to buyers. In the above example, a taxpayer may have sold the good for 115 ETB inclusive of VAT. In that situation, it will be unfair to the taxpayer (and an over taxation) to impose 15% VAT upon the 115 ETB as if 115 ETB were exclusive of VAT.[147] Imposing a VAT 15% upon an already sold good yields in this example 17.25% ETB, requiring the supplier to remit to the government 2.25 more than he could have collected from the purchaser. The VAT inclusive method of calculation ensures that the VAT remains the same whether the goods are sold exclusive or inclusive of VAT.

There are two compelling reasons why VAT inclusive method becomes the preferred method of computation in the context of foreclosure sales. The first is for foreclosure sales that have already occurred. For these sales, it is too late to apply VAT exclusive method for the simple reason that the sales have already happened. We cannot expect banks to recall the winners of the bids in foreclosure sales and account for the VAT due on the sales. To require banks to pay the VAT as if they collected the VAT from the sales would be to assume that VAT is a direct tax obligation of the banks (which it is not). On a 100 ETB good, a 15% VAT is not 15 ETB (as the VAT exclusive method would indicate) but about 13 ETB, which comes as a result of the application of the VAT inclusive method of computation.

In the practices of the Ethiopian Tax Authorities, there is a tendency to apply the VAT exclusive method regardless of the circumstances of the case. This is clearly a misunderstanding of how VAT operates and what the tax means. In foreclosure sales that have already occurred we cannot apply (without grievous injustice) the VAT exclusive method. The VAT inclusive method is the only fair method that should apply in such instances.

Even in foreclosure sales that have occurred after banks realize that these sales carry VAT, we may need to employ the VAT inclusive method if the bidders are not informed in advance that the bid prices are exclusive of the VAT. Otherwise, slapping the sales with VAT will constitute an unwelcome surprise, something that the bidders have not bargained for. Since foreclosures typically occur in public auctions, the application of VAT upon the bid price may depress the bid market and discourage bidders from bidding up to the full

[147] If penalties are to be imposed, they should be calculated separately.

price of the goods sold. In anticipation of the VAT, bidders may be forced to underbid in public auctions. Of course, all attempts must be made to inform bidders in advance that the bid prices are exclusive of the VAT, in which case the VAT exclusive price would be appropriate.

The VAT inclusive method encourages bidders to bid without restraint in expectation that what ever price they bid for, that price includes the VAT in it. It frees the bidding process from the fear of VAT being applied after the auction has been closed. Tax invoices may still be issued in the VAT inclusive method, by putting the price separately from the VAT, with the price now lower than the whole bid price. There is nothing extraordinary about this practice. Even in the VAT exclusive world, we are accustomed to being informed the VAT inclusive price when we shop for goods and services in the market. When we eat at restaurants, the menus at the restaurants usually show the VAT inclusive price of the food even though when the invoice arrives, we are able to see the VAT exclusive price.

In sum, the VAT inclusive method of VAT computation is the only way out if banks are to be asked to pay VAT on foreclosure sales they conducted before they realized VAT was due. We cannot apply the VAT exclusive method of computation on sales that have already occurred. We cannot also, without distorting the very notion of VAT, apply the VAT exclusive method of computation in a foreclosure sale where the bidders are not in advance informed that the bid price is exclusive of VAT. The imposition of VAT after the foreclosure sales have been closed will obviously take bidders by surprise and might even derail the process of foreclosure sales in the future.

13. Input Tax Credits in Foreclosure Sales

An argument for taxation of foreclosure sales is only the beginning of the process. Even if we were to agree that foreclosure sales attract VAT (in cases where the debtor is a registered person), we must permit credits for input taxes paid on the acquisition of the goods now being sold through foreclosures. The VAT laws require full credits for input taxes paid on taxable supplies, and foreclosures sales should be no different. Even if banks are collecting VAT on the outputs (foreclosure sales), they are not under obligation to transmit the whole to the government. They are entitled (or the debtor is) to claim input tax credits for VAT paid on the acquisition of the property now being sold through foreclosures. Now that banks realize VAT may be due on foreclosure sales, they should adjust their business transactions with borrowers and insist on getting the input VAT paid on goods they hold as collaterals, for their capacity to obtain input tax credits depends on this. Let’s take an example to illustrate this point. Suppose ABC Bank foreclosed a taxable supply of goods for a bid price of 4 million ETB exclusive of VAT. The Bank, as an agent, is required to issue invoice on behalf of the debtor on the sale price. The output tax on the

foreclosure sale is 15% x 4 million ETB, which is 600,000 ETB. Suppose the debtor acquired the goods for 3 million ETB, exclusive of VAT. The input tax paid on the goods is therefore 15% of 3 million ETB, which is 450,000 ETB. The Bank is required to pay the difference to the government, which is 150, 000 ETB. [148]

In order to expedite the process of input tax crediting, banks should make it their business to require borrowers to surrender input VAT invoices along with the collateral or the title to the collateral. Otherwise, banks risk delays in their bid to obtain input tax credits upon the properties they sell in foreclosure proceedings. Or even worse, borrowers may manage to obtain input tax credits while the collateral is in the possession of banks. Once tax credits have already been claimed by borrowers, the Tax Authorities will be hard put to grant tax credits to banks upon sale of collaterals by banks.

Now that banks are aware of the VAT consequences of foreclosure sales, they should insist on surrender of VAT invoices showing evidence of payment of VAT upon collaterals now held as security.[149] Where the property involved has a separate VAT invoice when it was acquired or purchased by the borrower, the computation of VAT is a simple affair of calculating VAT upon output and deducting the input tax from the VAT due on the output. In the *Abyssinia Bank* case, for example, the input VAT invoices consisted of the input VAT paid on tires when they were imported by Tana International (the borrower). All that Abyssinia Bank could have done was to deduct the input VATs paid on the importation of tires from the output VATs due on the sale of the tires in foreclosure proceedings.

However, it is not often that separate invoices are issued for acquisition of goods. What if, for example, the borrower manufactured the collaterals, not purchased or imported them? Ordinarily, we should not be concerned about this issue in other sales because the taxpayer who sells the goods is also the taxpayer who requests the tax credits in respect of the goods. In the case of sale of goods

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[148] Sometimes, a bank may sell a business as a going concern. In VAT, the sale of a business as a going concern is zero-rated. A transaction which is zero-rated when a debtor sells his business directly is also zero-rated when the bank sells the business as a going concern. When that happens, the bank is entitled to a full refund of the input tax paid on the business being sold as a going concern. Of course, the bank charges zero on the output of the sale of the business as a going concern; see VAT Proclamation 2002, *supra* note 4, Article 7(2)(d).

[149] Of course, the sale of the collateral may be exempt because the property in question is exempted from VAT even when it is sold directly by the borrowers. In that case, banks need not worry about VAT invoices as the foreclosure sales of such collateral would also be exempted from VAT.

in foreclosure proceedings, however, we have a situation where the bank and the borrower may concurrently request input tax credits.

The difficulty of allocation should not lead to denial of the input tax credits altogether. Instead, some solutions must be sought – solutions that are acceptable to all parties involved: the Tax Authorities, borrowers and banks. One solution is the application of allocation formula that is applicable in cases where taxpayers make mixed supplies of taxable and exempt goods.[150] To the extent practicable, this solution should be pursued as it entails little or no additional administrative requirements upon the parties.

Another solution is to impose some administrative duties upon borrowers and banks to ensure that no double tax credits are obtained. Borrowers that give merchandise or any other property as security may be required to furnish the Tax Authorities with information regarding the granting of property as security so that input tax credits in respect of the collaterals are suspended until such time the collaterals are sold in bank foreclosures or redeemed to borrowers upon payment of the loan. This solution prevents the taking of input tax credits by borrowers prior to the sale of the collaterals. It also ensures that banks and not borrowers take input tax credits in respect of properties sold through foreclosure proceedings.

14. Priority Issues in Bank Foreclosure Sales

Even after taxation of foreclosure sales is settled, banks may claim priority of payment over the collaterals sold in foreclosure sales. One of the arguments the counsel for Abyssinia Bank raised was that the Bank had priority of payment even if it were conceded that foreclosure sales carried VAT. The claim of priority of payment is strictly speaking not an argument against taxation of foreclosure sales. As shown in the *Abyssinia Bank* case, banks may raise 'priority' of secured creditors in the event that the argument against taxation of foreclosure sales fails. Since the claim of priority is likely to persist in future cases, it is appropriate to address the question of priority in the context of foreclosure sales. Once the government has made a case for taxation of foreclosure sales, it is still confronted with the burden of overcoming issues of priority of tax claims vis-à-vis the claims of other creditors, particularly creditors secured by the collateral.

Before we address the issue of priorities in the context of foreclosure sales, we shall review briefly the issue of priorities of tax claims under Ethiopian laws. The priority of tax claims vis-à-vis other claims (including the claims of secured creditors) was a staple of controversy in a number of court cases pitting

[150] See VAT Proclamation 2002, *supra* note 4, Article 21(2)(c).

especially secured creditors (e.g., banks) and tax authorities.[151] The tax laws of Ethiopia issued in 2002 partly put the controversies to rest by clarifying the position of tax claims vis-à-vis secured creditors.[152]

The tax laws of Ethiopia distinguish two types of taxes for purposes of priorities. There are, on the one hand, taxes which are required to wait in line in the order of priorities among competing claims of creditors. We may call these 'priority-prone' taxes. These are taxes which are directly claimed from taxpayers in which the taxpayers stand as debtors. These taxes are mostly the so-called direct taxes. Taxes like profit taxes claimed from the income of businesses are directly claimed from businesses as debtors. The taxpayers are at once taxpayers and debtors. The government in these instances is required to stand in line and wait until creditors with superior rank are paid. The tax laws of Ethiopia accord priority to tax claims but subordinate these claims to the claims of secured creditors over their collaterals.[153]

There are, on the other hand, tax claims which taxpayers are assumed to collect from others and hold in trust for the account of the government. We may call these 'priority-immune' taxes. These are mostly indirect taxes and direct taxes collected through withholding schemes. These types of taxes are not subject to competition with the claims of other creditors of the taxpayer. In other words, the tax authorities enjoy absolute priority rights in respect of these taxes.

Ethiopian tax laws are not consistent in this regard, but at least in one respect, there is a specific reference to some of these taxes and the language of the law is emphatically for exception of 'priority-immune' taxes from the rules of priorities. The Income Tax Proclamation (of 2002) provides that taxes withheld for the account of the government by taxpayers are not subject to the rules of competition and must be paid to the government no matter how many other creditors the taxpayer might have.[154] In these instances, it is as if the tax authorities have already appropriated the tax proceeds, the only thing remaining

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[151] See Taddese Lencho, Ethiopian Bankruptcy Law: Commentary, Part II, J. Eth. L., vol. 24, No. 2, at 61-72; see also *Inland Revenue Authority vs. Fissehaye W/Gebriel, Housing and Thrift Bank and Addis Ababa Abattoirs,* (Supreme Court, Civ/App. No. 13/1984), in Supreme Court Cases, Vol. 3, in Amharic, at 595-598; *Commercial Bank of Ethiopia vs. Inland Revenue Authority,* (Supreme Court, Civ./App. No. 562/69), in Supreme Court Cases, Vol. 1, in Amharic), at 17-18.

[152] See VAT Proclamation 2002, *supra* note 4, Article 32(1); the Turnover Tax Proclamation, *supra* note 3, Article 14, and the Excise Tax Proclamation No. 307/2002, *Federal Negarit Gazeta*, 9th year, No. 20, Article 11(1).

[153] See ibid.

[154] See Income Tax Proclamation No. 286/2002, *Federal Negarit Gazeta*, 8th year, No. 34, Article 82.

being the collection of these taxes from the taxpayer. Different organizations or institutions (e.g., government bodies, NGOs, etc) are required by income tax laws to withhold taxes from payments these organizations or institutions make for purchase of goods and services.[155] Similarly, most employers are required to withhold income taxes from salaries, wages and other emoluments of employees.[156] These withholding agents hold the taxes withheld in trust and for the account of the government. The taxes are neither theirs to keep nor for other creditors to claim. They are, in other words, not subject to competition of priority by other creditors of employers or other withholding organizations.

The tax laws only make specific mention of withholding taxes, but an equally strong case can be made for indirect taxes like VAT, which are after all collected from consumers by businesses in trust and for the account of the government. Particularly with respect to VAT, there are a number of provisions which support the idea that the taxpayers in VAT are mere collection/withholding agents.[157]

The businesses that charge VAT whenever they make supplies are withholding the VAT from purchasers on behalf of and for the account of the government. In that sense, it may be argued that the VAT collected in foreclosure sales (or for that matter of any sales) should never be subject to the rules of priority no matter how anxious banks are to cast these taxes as such to obtain superior advantage over the tax claims of the government over foreclosure sales.

Unfortunately, due to careless reproduction of certain rules of the income tax in other taxes like VAT, we have rules which lump VAT with direct income taxes in this regard, contrary to the real nature of VAT. The rules which assert the priority of secured claims against tax claims are reproduced verbatim in the VATP and other indirect tax Proclamations of Ethiopia.[158] If Banks raise these arguments of priority, therefore, they cannot be blamed for the laws actually support their arguments in this regard. The income tax rules of priority are reproduced in VAT and other indirect tax laws of Ethiopia without proper understanding of the real differences between these taxes. The collection of VAT by banks from foreclosure sales should never have become a subject of priority battles. Banks, like all other sellers, hold the VAT in trust and for the

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[155] Id, Articles 52, 53, and 54; see also Council of Ministers Income Tax Regulations No. 78/2002, *Federal Negarit Gazeta*, 8th year, No. 37, Articles 24 and 25.

[156] See Income Tax Proclamation, *supra* note 156, Articles 51 and 65.

[157] See VAT Proclamation 2002, supra note 4, the preamble which states that VAT is a consumption tax; see also Articles 21(5) and 22.

[158] *Id*, Article 32; Excise Tax Proclamation, *supra* note 154, Article 11; Turnover Tax Proclamation, *supra* note 3, Article 14.

account of the government and should transmit what they collect without any question of priority.

15. Is Exemption a Good Thing for Financial Institutions?

Those who oppose taxation of foreclosure sales are convinced that the imposition of VAT upon these sales will depress the foreclosure market and even eat into the secured transactions currently protecting banks against risks of defaulting borrowers. In one newspaper article opposing the taxation of foreclosure sales, one writer suggested a number of 'negative' consequences of taxation of foreclosure sales.[159] He expressed fear that banks might not be able to recover loans from defaulting borrowers now that they have to share the proceeds (the spoils) with the government. He also feared that the taxation will force banks to let borrowers sell the property through private sale arrangements.

We submit that these fears are exaggerated and unfounded. The fears assume a static world in which banks remain indifferent to the changing situation around them. No one can or should underestimate the ability of banks to assess the risks of non-payment and default. Their core specialization consists of risk assessment and little else. It would be difficult to believe that banks will fail to assess the risk properly because some foreclosure sales are now slapped with VAT. It is likely that banks will factor the VAT into their pricing of the collaterals they accept in exchange for extension of loans to borrowers. They will probably cushion themselves against risks of under-security by requiring borrowers to give collateral with a value greater than the basic loan owed by borrowers so as to cover the additional costs of VAT. We can be certain that banks will adjust to the imposition of VAT upon foreclosure sales. Instead of VAT depressing and disrupting foreclosure markets, therefore, we must expect the markets to internalize new information and function as normally as ever before.

If banks understand the nature of VAT, they will not revert to requiring borrowers to sell collaterals through private sale arrangements, as some have suggested. This suggestion is based on a false premise that those private sale arrangements are beyond the reach of VAT. As we saw previously, regardless of how the sales are carried out – private sale or public sale, foreclosure sale or no foreclosure sale, the sales attract VAT. In fact the sales attract VAT precisely because they are carried out by borrowers, and not banks. The conclusion that private sales are beyond the reach of VAT arises from the misconception that the sales are carried out by banks.

[159] See Getahun Worku, *supra* note 8.

Since many of the negative reactions to VAT arise from the misconception about the nature of VAT exemptions, we shall examine the impact of VAT exemptions upon financial institutions in general to clear up some of the common misconceptions that persist in the debates about taxation or exemptions of financial services.

The exemption of some financial services is not as positive as it is sometimes supposed. The exemption means that banks and other financial institutions are not entitled to tax credits on their inputs (purchases of computers, etc),[160] something they could have claimed as a matter of right if their supplies were taxable supplies. As result, financial institutions provide most of their financial services loaded with un-creditable input taxes, which puts the recipients of these services at a competitive disadvantage. Businesses that purchase financial services are not entitled to tax credits for VAT embedded in financial services, as these taxes are not even allowed to be shown in the transactions. Businesses which receive their inputs from taxable sectors are entitled full tax credits for VAT paid on their inputs. That puts those businesses which use financial services as inputs at a competitive disadvantage. Banks and other financial institutions may vociferously object to applications of VAT to their services, but they should realize that exemption is not necessarily to their advantage.

The current VAT treatment of financial institutions forces financial institutions to be excluded from the benefits of VAT (input credits) while requiring them to register for VAT on their taxable supplies. The fact that some of their services are exempted from VAT has not exempted them from the requirement of registration. Financial institutions are required to register and account for VAT on their taxable supplies. Financial institutions are required to maintain detailed records on their taxable supplies. Because financial institutions are exempted on some of their supplies, they are required to maintain more detailed records than otherwise in order to be able to distinguish their taxable supplies from exempted supplies.[161] Input taxes related to the production of regularly taxed financial services are creditable while input taxes paid on exempt financial supplies are not creditable.[162] This is administratively burdensome to financial institutions. They have to determine which inputs are used for what – track the actual use of inputs in their production processes. Since most inputs are used to produce both exempt and taxable supplies, it is difficult to track them separately, making the VAT regime more of an onerous requirement to financial institutions than is normally the case.[163]

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[160] See Harry Huizinga, *supra* note 41, at 499.

[161] *Ibid*.

[162] *Id*, at 509; see also VAT Proclamation 2002, *supra* note 4, Article 21(2).

[163] See Harry Huizinga, *supra* note 41, at 509.

Another negative consequence of exemption of financial services in VAT has been litigation. The extent of the exemption has already generated considerable litigation in EU member states.[164] Some of the disputes relate to the status of services outsourced by financial institutions while others are about the proper allocation of a business input tax between taxable and exempt supplies.[165] We shall look no farther than some of the controversies outlined in this article to demonstrate that exemption of financial services and taxation of some other services of financial institutions leads to controversies. The controversies so far generated in Ethiopia regarding the scope of VAT exemption are indicative of the level of disputes that might arise in the future.

Exemption of some financial services (with the denial of input tax credits) has also been said to encourage vertical integration of operations.[166] A financial institution is denied input tax credits for taxes paid on its purchases from other businesses (including importers). If the financial institution is able to supply these purchases from its in-house operations (in other words, self-supply some of its inputs), it will not be subject to tax on its inputs. A bank may, for example, choose to hire its own security staff, instead of outsourcing (which brings with it the danger of VAT, if we can regard VAT as a danger) from the firm that provides security services. The Bank may also choose to create its own 'IT services unit' instead of outsourcing the service to an outside IT firm which will then charge VAT on its IT supplies. If the bank is able to self-supply these services, it will escape taxation of some of its inputs. This is of course not desirable as it will distract banks and other financial institutions from their core operations and force them to engage in some tax planning activities which are not productive to the economy.

Conclusion and Recommendations

Foreclosure sale constitutes a continuum of actions that a bank takes to enforce the terms of a financial contract. As a bank takes action to collect the debt directly, a bank also takes action to foreclose on collaterals. In both cases, a bank is simply enforcing the terms of the financial contract and remains within the confines of intermediation. The intermediation nature of the transaction is not changed because a bank has resorted to or has been forced to sell property in order to enforce the payment of the loan along with the interest.

All the arguments marshaled so far to find exception for taxation of foreclosure sales constitute varying levels of misunderstanding regarding the real nature of the transactions involved and their relationship with the

[164] Schenk, *supra* note 47, at 37.

[165] *Ibid*.

[166] *Id*, at 43.

underlying financial services provided by banks. The disputes, however, point to the possible escape routes by debtors from VAT when collaterals are sold through foreclosures: judicial or contractual. The Tax Authorities should watch out for these escape routes, for it is not often that people think of these transactions are supplies taxable under the VAT regimes. Many of the bank foreclosures probably involve the sale of business assets by debtors who are registered taxpayers. These must be pursued vigorously. If the businesses themselves sell these assets, they are subject to VAT. There is no reason why they should escape taxation simply because the business assets are sold through bank foreclosure.

At the same time, bank foreclosures may also involve sale of assets which are not subject to VAT under normal circumstances. Borrowers give all kinds of property as security for payment of loans, including their personal property. A bank that sells a residential property is not selling a property that is subject to VAT if the sales were made by the owner directly. There is no reason why a sale that is exempted when made by the owner should be taxable when it is made by the intermediary (the bank). A bank may also sell business assets of a borrower who is not registered or who ought not to have been registered for VAT. The sale would not have attracted VAT had the borrower herself sold the assets, and there is no reason why the mere sale of the same assets by the intermediary should attract VAT. As the Tax Authority should watch out for the possible avoidance of tax in foreclosure sales, it should also be careful not to slap a transaction with VAT otherwise non-taxable or exempted under ordinary circumstances.

In general, we must cast foreclosure sales as transactions between borrowers and winning bidders, with banks acting merely as agents. Placing the locus of the supply in that of borrowers sets the stage for whether VAT attaches at all and how VAT is to be chargeable upon foreclosure sales. If a transaction is chargeable with VAT when borrowers supply the goods, banks should ensure that VAT is charged upon foreclosure sales. The obverse is also true. If the transaction is not chargeable with VAT when borrowers supply the good (e.g., where the supply pertains to collateral by a borrower who is not or should not be registered for VAT), banks that sell the good in foreclosure sale need not charge the transactions with VAT.

As agents, banks are required to discharge certain obligations under Ethiopian VAT laws. They are required to issue VAT invoices for the foreclosure sales chargeable with VAT. Their identity as agents persists when banks perform certain obligations on behalf of borrowers in foreclosure sales. As agents, banks should issue VAT invoices in the name and on behalf of borrowers. If they are not in possession of the requisite invoices, it is incumbent upon them to get those invoices from borrowers, preferably at the time of taking possession of the collaterals as security.

Their identity as agents persists also for purposes of registration. In spite of all the clamors for registration, it must be clear by now that banks should not be required to register for VAT in order to collect VAT on foreclosure sales. Banks should use the registration identity of borrowers in the course of charging foreclosure sales with VAT. While registration is the gateway to obligating suppliers to charge their supplies with VAT, it is unnecessary for foreclosure sales. The tax authorities are understandably wary of any prescription that dispenses with registration – their way of keeping track of what registered taxpayers do. In lieu of registration of banks (which is clearly not a solution for foreclosure sales), the tax authorities may use other schemes. One solution suggested in the body of this article is requiring banks to report their foreclosure sales – including those that do not attract VAT. The tax authorities may use these reports to keep track of the activities of banks in this regard and hold them to account for VAT whenever they fail to do so.

It is, however, important to caution against reading too much into this exemption from registration. As a general matter, banks and other financial institutions should be required to register for VAT (regardless of the volume of their annual taxable transactions), but this is quite a different matter from requiring them to register for VAT in order for them to account for VAT on foreclosure sales. As suggested in the body of this article, financial institutions make a number of taxable transactions for which registration for VAT is absolutely necessary. Given the size of financial institutions in this country, it is not even necessary to establish the minimum threshold of registration in the case of financial institutions.

As the tax authorities eye foreclosure sales as objects of VAT, they should remember that all aspects of VAT are applied with full force, not just the selective arguments so far made in this regard. The full force of VAT means that banks are entitled to tax credits as are borrowers. The full force of VAT also means that for some types of supplies, the conventional VAT exclusive method of computation is a distortion of the notion of VAT. For foreclosure sales that have already occurred and for those sales in which bidders are not informed in advance about VAT, the proper method of computation of VAT is the VAT inclusive method of computation. ■

PLEDGES OF A LEGAL ACADEMIC

Tsegaye Regassa♣

As an academic, I have the burden (and the privilege) to legislate softly, persuasively, and lovingly. I have the freedom to do it with: academic freedom. I cannot do anything less.

As an academic, I have the duty to imagine, and help society imagine, a better world, a different world, a new heaven and a new earth. That is my prophetic duty. And I cannot do anything less.

As an academic, I have the privileged position of being the custodian of Truth, Beauty, and Goodness (Knowledge, Art and Virtue). I navigate the three domains of epistemology/metaphysics, aesthetics, and ethics. I am a custodian of love, hope and future. I have the duty to descript dead scripts, disavow death wishes. I need to fight hatred, despair, and cynicism. And I cannot do anything less.

As a legal academic, I have the duty to serve as a worthy custodian of a public text, a legal text, based on which we govern society. I have the responsibility to approach public texts with the ethic of reverence, care, and discipline. I have the duty to restore hermeneutical sanity (in the place of hermeneutical anarchy) and interpretive integrity (in the place of interpretive uncertainty, duplicity, and inexactitude). I have the duty to promote a hermeneutic of compassion (in the place of a hermeneutic of power and shallow political correctness). And I cannot do anything less.

As a legal academic, I live with the burden of serving as a custodian of justice. I have the duty to do exegesis of the law to uphold the integrity of the law. As such, I have the duty to counter those who do violence to the law. I take it upon myself to become a worthy legal exegete, a worthy commentator of our laws for our times, a defender of the civilization embodied in the laws of the country. And I cannot do anything less.

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As a legal academic, I note that I am part of the corps of intellectuals who, as society's paid thinkers, seek to generate, disseminate, and preserve knowledge for posterity. As such, I seek to generate both 'useful' and 'ornamental' knowledge, not just to solve problems but also to cultivate our 'finer arts'. I take the task of expanding the horizons of knowledge as my duty with a sense of awe and humility. And I cannot do anything less.

As a legal academic, I have the duty to distance myself from the politics of hegemony, and from the scholarship of power. I have the obligation to distance myself from legitimizing bad use of power to inflict injustice, to violate the inviolate, to neglect the needy, to justify greed, and to promote vanity. Needless to say, I have the responsibility to be a voice for the voiceless, the voice of memory and remembrance, the voice of *re-membering*. In my work on human rights, I seek to meet the challenge of the solemn call to be "a voice of suffering." And I cannot do anything less.

As a legal academic, I have the duty to uphold the principle of rule of law, the primacy of liberty, the centrality of equality, and the sanctity of human dignity. I have a commitment to advance the vision of a democratic and egalitarian society. As such, I have the duty to stand in favor of emancipation of all oppressed and subaltern actors. I live under the imperative of making mistakes, if at all, in favor of freedom rather than oppression. And I cannot do anything less.

As a legal academic, I serve as a custodian of reason to speak truth to power. I shall speak the words of the law to the might of force. And I cannot do anything less.

As a custodian of justice, I'll make it my utmost priority to protect the weak from the strong, the poor from the rich, and the powerless from the powerful. And I cannot do anything less.

These are the things that I should do, and these are what I shall do.

I pledge to do this. By the grace of the Almighty, this is what I shall commit myself to do in the days, weeks, months, and years to come.

COMMNET

OVERVIEW OF THE CORE CHANGES IN THE NEW ETHIOPIAN URBAN LAND LEASEHOLD LEGISLATION

Belachew Mekuria Fikre♣

He who owns the means by which I live owns my life[1]

Introduction

Rural land administration has shown a significant improvement, *inter alia*, due to the implementation of the possession certification process. Whether or not this process of certification would bring the desired goal of 'sustainably conserving and developing natural resources and pass over to the coming generation through the development and implementation of a sustainable rural land use planning'[2] is yet to be seen. This progress in the rural land administration is not matched by the urban land holding system. It is rather perplexing that the total houses in Addis Ababa without title deeds are more than the ones with title deeds. Current efforts towards the issuance of title deeds is expected to address this gap. Moreover, the urban land holding system is far from being uniform.

Amidst such murky situation exists a steadily rising 'political economy' of rent seeking behaviour that has given rise to a number of millionaires with a capacity to easily navigate through the system to their profiteering advantage. That, among other things, is what the new legislation avows to tackle. This comment is meant to highlight the main changes introduced by the amendment proclamation.

1. Uniformalisation of urban land holdings

Urban land is to be held based on a lease agreement to be concluded between individuals, private and public institutions, diplomatic establishments or others on the one hand and the appropriate government organ on the other.

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[1] See the Preparatory work on Article 1 of the first protocol to the European Convention of Human Rights, CDH (76) 36 (Strasbourg, Le 13 Acut 1976), a speech by Mr. Nally, Representative of the United Kingdom, p 16.

[2] See the Preamble of FDRE Rural Land Administration and Land Use Proclamation 456/2005, *Federal Negarit Gazeta*, 11th Year, No 44, Addis Ababa, Hamle 15, 2005, Para 2.

Uniformalising the urban land holdings under the unified leasehold system remained a long over-due project of the current government. It was anticipated under the 2002 urban land lease proclamation that aspires to make all urban land fall under the lease hold system[3] based on the time and conditions to be set by the concerned region or city government. The significant change that this newly adopted proclamation has introduced relates to the express prohibition of any other form of land holding by declaring that 'no person may acquire urban land other than in accordance with the leasehold system stipulated under this Proclamation.'[4]

However, the legislature has still provided for exceptions taking into account the difficulty that some of the regions might encounter in enforcing this strict prohibition. The exception shall only be accepted upon the particular regional cabinet's decision specifying urban centres that may be granted a transitional period of not exceeding five years for applying this proclamation.[5] After the lapse of those five years, no region in Ethiopia may be allowed to grant urban land except through the leasehold system.

The second measure that the law has introduced towards the uniformalisation process relates to *conversion* of the old possessions into the leasehold system. This is, by far, the most controversial and complex process that will undoubtedly create public discontent, to say the least. Urban land holdings in the country at their current status are primarily held through the permit system and thus, the conversion of all those holdings into the unified leasehold system requires time, caution to be exercised by the cohort of experts of the appropriate government organ. Accordingly, the Council of Ministers, based on the detailed study by the Ministry of urban Development and Construction, is expected to lay down, as it were, by regulations, the modality of converting old possessions into leasehold.[6]

At this level, the Proclamation anticipates the entry point for conversion to be the incidents of transfer of property on old possession of land to a third party through any modality other than inheritance.[7] In these transfer cases, the old possession shall be subjected to conversion to the leasehold system. Apart from transfers, the case of consolidating a leasehold land with a previously permit-

[3] See Article 3(2) of the Urban Lands Lease Holding Proclamation 272/2002, *Federal Negarit Gazeta*, 8th Year no 19, Ginbot 14, 2002, Addis Ababa (Hereinafter referred to as 'the old urban land lease proclamation')

[4] See Article 4(1) of Proclamation 721/2011, a Proclamation to Provide for Leaseholding of Urban Lands (hereinafter referred to as 'the new urban land lease proclamation).

[5] *Ibid*, Article 4(4).

[6] *Ibid*, Article 5(1).

[7] *Ibid*, Article 5(3).

based holding would also result in uniformalising the entire possession into leasehold.[8]

2. Mode of acquiring urban land leasehold and lease price

Under the previous legislation, three modalities were recognized by which lease right on urban land could be acquired. These were *auction, negotiation and allotment*.[9] Setting aside the vagueness of all these modalities, particularly negotiation has given rise to high level of abuse and corruption. This is now omitted under the new proclamation and accordingly, *auction and allotment* are the only methods by which a lease right on any urban land may be acquired.[10] The particulars on the tender process are fairly detailed in the new legislation that provides for the preconditions that an urban land must fulfill to be ready for tender, the requirements of publicity and the detailed guides on handling the bid process.[11] Considering the huge corruption and mishandlings that the law enforcement organs have uncovered in the last couple of years, this form of rule-based clarity will partly address those urban land lease-related glitches.

Allotment is the second method of acquisition of leasehold which is meant to apply only for specific urban land users. The latter are exhaustively listed by the legislature and such allotment requires the 'decisions of the cabinet of the concerned region or the city administration.' Thus, leasehold right on urban land may be allotted to the following:[12]

- Office premises for budgetary government entities,
- Social service institutions run by government or charitable organizations,
- Public residential housing construction programs and government approved self-help housing constructions,
- Places of worship,
- Manufacturing industries,
- Use of diplomatic missions and international organizations as per agreements entered into with the Government,
- Projects having special national significance and considered by the president of the region or the mayor of the city administration and referred to the cabinet,
- A person displaced due to urban renewal program,

[8] *Ibid*, Article 5(6).
[9] *Ibid*, Article 4(1).
[10] *Ibid*, Article 6(2).
[11] See *Ibid*, Articles 7-10.
[12] *Ibid*, Article 11(1), (2) & (3).

- A lawful tenant of government or kebele owned residential house in a region or Dire Dawa who has been displaced due to urban renewal program and who could not be provided with access to substitute housing.[13]

According to the previous lease proclamation, the regional authorities and city governments had the right to permit urban land for a lease price down to nil for a development activity, social service rendering institutions, low cost housing, private dwelling houses and similar undertakings that they purport to encourage.[14] This in a way was meant to ensure access to urban land for those, among others, who do not have the adequate means of paying for the land lease price and thus it was envisaged to be an equity provision. It also was meant to encourage and provide support through land access to those institutions and development actors that would in turn bring socio-economic benefits to the urban community.

However, this discretion is no more embodied under the revised law which declares that 'objective conditions of each urban centre' shall alone determine the method of valuation to establish the urban land benchmark price. And every plot of urban land, irrespective of the purpose for which it is put into use, and by whatever establishment it is being held, shall have a lease benchmark price[15] which needs to be updated at least every two years to reflect the fluctuating market conditions.[16] The new law provides for two important exceptions from the requirement of all urban land holding to be with a lease price. These relate to urban land holdings granted by allotment to a budgetary government entity and in the cases of religious institution.[17] In these two cases of allotment of urban land the only payment that is required is an amount that offsets the compensation paid in clearing the land.[18]

One other detour the new legislation has taken pertains to the rise to 10% of the minimum down payment from its previous 5% that a lessee will have to

[13] If an Addis Ababa resident of a government or kebele owned residential house is displaced for similar reasons, s/he shall instead be entitled to 'facilitated purchase of condominium housing unit' and not allotment of substitute land. This presumes that Addis Ababa will have enough condominium housing units reserved for such events of displacements. See Article 11(4) of the new urban land lease proclamation.

[14] Article 8(2) of Proclamation 272/2002, i.e. the old urban land lease proclamation.

[15] A lease benchmark price is 'the threshold price determined by taking into account the cost of infrastructural development, demolition cost as well as compensation to be paid to displaced persons in case of built up areas, and other relevant factors.' See the definition Article 2(11) of the new urban land lease proclamation.

[16] Article 13 of the new urban land lease proclamation.

[17] *Ibid*, Article 19(7).

[18] *Ibid*.

effect upon concluding the lease agreement.[19] More significant is also the consequence of defaulting in payment of the lease instalments that this new law has introduced. It is provided, 'where a lessee has failed to make payments within the specified time limit and accumulated arrears for three years, the appropriate body shall have the power to seize and sale the property of the lessee to collect the arrears.'[20] By appropriate body the provision is referring to 'a body of a region or a city administration vested with the power to administer and develop urban land.'[21] Accordingly, this executive branch of the government will have the entitlement to dispose of the property without the need to obtain the blessings of the judiciary, just as the banks foreclose a defaulting debtor's mortgaged assets. This again is another area where a strict policy has been introduced into the urban land management architecture.

3. Transfer of urban land holding

Like it was before, leasehold right may be transferred to a third person during the life of the lease agreement. It may also be used as a collateral or capital contribution to the extent of the lease amount already paid.[22] The novelty of the new legislation lies on *the process of transfer* and the distribution of the *proceeds that accrue from the sale of the leasehold right* of the urban land. Where a lessee, with the exception of inheritance, decides to transfer his leasehold right which may happen either prior to commencement or half completion of construction, 'he shall be required to follow transparent procedures of sale to be supervised by the appropriate body.'[23] Therefore, gone are the days where an urban land leaseholder and an interested buyer hammer out their deal and then go for registering their contract for title transfer purposes. Though practice is yet to clarify as to what is meant by 'transparent procedure', it is apparent that every transfer, except inheritance, may only be done under the supervision of the appropriate body. Whether or not transparency implies an auction arrangement that need to be conducted under the supervision of the appropriate body is a matter open to doubt.

Apart from the process of transfer that must be transparent and supervised, the new legislation has also provided for a scheme on the share of the proceeds where a leasehold right of a land is transferred on which construction has not started or half completed. In this circumstance, with the objective of discouraging speculative profit making or rent seeking behaviour in general, the

[19] *Ibid*, Article 19(2).
[20] *Ibid*, Article 19(6).
[21] See *Ibid*, Article 2(6).
[22] Article 23(1) of the new urban land lease proclamation and Article 13(1) of Proclamation No. 272/2002, i.e. the old urban land lease proclamation.
[23] Article 23(1) of the new urban land lease proclamation.

lessee is not allowed to devour on the whole amount of the proceeds from the transfer. Article 23(3) provides that in the event of transfer of leasehold right, the lessee shall retain (a) the effected lease payment including interest thereon, calculated at bank deposit rate, (b) the value of the already executed construction, if any, and (c) 5% of the transfer value, and pay the remaining balance to the appropriate body.

We can illustrate this stipulation by assuming that urban land obtained for a total lease price of ETB 1 million is sold after 5 years for a value of 1.5 million with no construction being carried out on it. Further assuming that the lessee who has now transferred the land had paid only the initial down payment of the 10% of the lease price, the proceeds of the sale shall then be distributed as follows:

10% of 1,000,000+6% interest rate (a) (=106,000)

+0 construction cost (b)

+5% of 1,500,000) (c) (=75,000)

⟹ = 181,000 will be deducted from 1,500,000 of the proceeds of the sale and is retained by the lessee; and the remaining, 1,319,000 (one million three hundred nineteen) shall be paid to the appropriate authority.

In effect, the seller who transfers the leasehold without any construction on the land shall only be entitled to 5% of the profit that comes as a result of the increase in the market value of the urban land held by lease, forfeiting the remaining 95% to the original 'owner' of the urban land.

4. Criminal liability

Finally, the new law has introduced the penalty of imprisonment that ranges from 1 to 15 years, and monetary fine of 10,000 to 200,000 Birr. These penalties may be imposed on an officer or employee (in charge of implementing this proclamation and regulations and directives to be issued hereunder), or private individuals involved in unlawful acts of fencing an urban land, or carrying out construction on such land, or who are involved in a bid by using falsified documentary evidence.[24]

[24] See *Ibid*, Article 34.

NOTES ON THE PRINCIPLE "*BEST INTEREST OF THE CHILD*":

MEANING, HISTORY AND ITS PLACE UNDER ETHIOPIAN LAW

Aron Degol[♣] and Shimelis Dinku [♣]

"Give what is best for the child" (V.I. Lenin)

Introduction

The principle of *"best interest of the child"* is a key concept in the world's child rights protection movement and it mainly applies in the realm of family disputes such as custody, guardianship, maintenance, adoption of the child[1] and other issues. The overall theme of the principle is that due focus and priority should be given to the political, economic and social interests of the child whenever policies, laws and decisions are made which directly or indirectly affect children.

This principle was first expressly incorporated in the 1924 Geneva Declaration on the Rights of the Child and the 1959 United Nations (UN) Declaration on the Rights of the Child respectively.[2] It is also one of the cornerstones of the 1989 UN Convention of the Rights of the Child (UNCRC) [3] and the 1990 African Charter on the Rights and Welfare of the Child (ACRWC).[4] The principle of "*the best interest of the child*" has also been

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[1] Stephen Parker (1994), "The Best Interests of the Child: Principles and Problems; The Best Interest of the Child; Reconciling Culture and Human Rights", *International Journal of Law, Policy and the Family*, Vol. 8, Issue 1, p. 27.

[2] The preamble of the Geneva Declaration of the Rights of the Child adopted on 26 September 1924 (League of Nations) and the preamble of the Declaration of the Rights of the Child adopted by the UN General Assembly Res. 1386 (XIV) of 10th of December, 1959.

[3] Art. 3 of the UN Convention on the Rights of the child (UNCRC) adopted by Resolution 44/25 of the GA of the UN on 20 November, 1989 and entered in to force 2nd of September 1990.

[4] Art. 4 of the African Charter on the Rights and Welfare of the Child (ACRWC) adopted by the Assembly of Heads of State and Government in 1990 and entered into force on November 29, 1999.

recognized in the Ethiopian legal and constitutional system from as early as the 1960's. The standard of the "*best interest of the child"* was incorporated into the Civil Code[5] and this tradition has continued with the principle having been mentioned in the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution).[6]

Despite its embodiment in international, African and domestic laws, the issue of the best interest of the child and the determination of its test remain problematic. The first two sections of this note deal with the genesis and meanings of the concept "the best interest of the child." These sections address the problems in definition and pursue the rights-based approach regarding the meaning of *the best interest of the child* mainly based on the 1924 Geneva Declaration of the Rights of the Child and the 1959 UN Declaration of the Rights of the Child. The third section briefly discusses the concept of the best interest of the child in light of international and regional human rights instruments from the 1948 Universal Declaration of Human Rights (UDHR) to the 1990 African Charter on the Rights and welfare of the Child (ACRWC). And finally, the fourth section of this note highlights the embodiment of the concept in the Ethiopian legal regime.

1. Historical genesis of the idea of "*The Best Interest of the Child*"

1.1. Evolution of the doctrine of "the best interest of the child"

The doctrine of the best interest of the child is a widely recognized principle in child right protection. This legal principle largely applies in relation to family affairs; in particular, in disputes concerning custody, guardianship, maintenance, adoption, etc of the child.[7] Originally, the doctrine of the best interest of the child had limited application. It was little more than a way of ensuring that the interests of any children involved would be taken into account in divorce and

[5] Art. 681 (1) of the Civil Code of the Empire of Ethiopia, Negarit Gazeta, Procl. 165 of 1960, 19th Year No. 2, Addis Ababa 5th May, 1960.

[6] Art. 36(2) of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE) ratified on 8th of December 1994 and entered in to force as of August 21st 1995.

[7] See for instance, Arts. 681, 231 & 234, 821 and 805 of the Civil Code of Ethiopia of 1960 and Arts 113(2), 245 & 249, 210(b), 192 (2) and 194(2) of the Revised Family Code of 2000. Relevant provisions of the Civil Code are cited to indicate that the recognition of the principle of *the best interest of the child* predates the current revised family codes that are applicable in Ethiopia.

custody cases.[8] However, as it will be discussed later, this principle is, nowadays, extended to apply not only in its original sense, but also "in relation to all actions concerning children" to quote the language of the 1989 UN Child Rights Convention.

Despite its very limited jurisprudential origins, the principle of the best interest of the child is, in one form or another, embodied in many national and legal systems and has important analogues in diversified cultural, religious and other traditions.[9] However, this apparent communality is accompanied by very diverse interpretations that may be given to the principle under different settings.

In early times, fathers were given custody of their children in case of divorce. For instance, in feudal Europe, the father used to have a paramount right to have custody of his children as children were considered to be part of his patrimony.[10] In countries like Holland, the father was given this paternal preference as he was thought to be capable of properly raising children.[11] Hence, during these periods, the father had a right to have custody of his children unless the wife proves that he is unfit.[12] The unfitness, however, was to be proved under stringent conditions. The mother, in most jurisdictions, had to show that the father was insane or for any other reason was incapable of taking care of the children.[13]

In 1839, the British parliament modified this paternal preference by the '*tender years doctrine'*.[14] This doctrine holds that children under seven years of age should not be separated from their mothers. This was based on the premise that mothers are very important for younger children due to the special natural

[8] Philip Alston (1994), "The best interest principle: towards a reconciliation of culture and Human Rights, reconciling culture and Human Rights," *International Journal of Law, Policy and the Family*, Vol. 8, Issue 1, p. 4.

[9] *Ibid*, p. 5.

[10] Melina, M.B. (1985), "Louisiana Family Law: The Visitation of the Non-custodian Parent", *Tulane Law Review*, Vol. 59, p. 489.

[11] Kidist Alemu (1997) *Post-divorce Decisions of Child Custody in Ethiopia in Light of the "Best Interest of the Child*, LLB thesis, AAU, Faculty of Law, (Unpublished), p. 6.

[12] *Id*., See also "Custody of a Minor-Best Interest of the Child Rule", *Tulane Law Review*, Vol. 32, No. 3, 1958, p. 59.

[13] *Id*.

[14] Lenore J. Weitzman (1987), *The Divorce Revolution* : The Unexpected Social and Economic Consequences for Women (The Free Press: Macmillan Publishing Group), p. 219.

bond existing between them and due to the fact that young children are often looked after by their mothers.[15]

In the 1900s, another standard was developed through case laws in the common law countries, especially in the U.S.A. This standard favors the mother as the primary care provider and it was based on the significant place mothers have in the child's mind due to their intimate interaction and the special natural bond which exists between them.[16] This standard differs from the initial paternal predominance in feudal Europe because it prefers mothers by giving due consideration to what is best for the child rather than paternal preference. In fact, the application of the best interest standard is 'gender neutral', and it has currently won recognition in both the common law as well as in the civil law systems, amongst which the U.K., U.S.A. and France may be cited.[17]

1.2. The best interest of the child in the 1924 Geneva Declaration of the Rights of the Child

The first organized effort in the process of recognizing the rights of the child came in 1924 with the adoption of the Geneva Declaration of the Rights of the Child by the League of Nations. In the context of the Declaration, the rights of children were primarily seen as measures to be taken against slavery, child labor, child trafficking and prostitution of children.

This Declaration significantly reflected the concerns related to the rights of children that were grossly violated during WWI and its aftermath. The declaration emphasized children's material needs and proclaimed that children must have the requisite means for their formal development. This included food for the hungry, nursing for the sick, due attention for the handicapped and shelter and support-both physical and emotional- for the orphans.[18]

The Geneva Declaration of the Rights of the Child was based on the principle that "mankind owes to the child the best it has to give". In fact, this principle was embodied not in the main body of the declaration, but in its preamble. It reads as follows:

> By the present declaration of the rights of the child, men and women of all nations, recognizing that mankind owe to the child the best that it has to give, declare and accept as their duty …

The phrase "mankind owes to the child the best it has to give" clearly underlines our duties towards children, and it entitles them for the best that mankind can

[15] *Id*. See also, Kidist Alemu, *supra* note 11, p. 6.
[16] Lenore J. Weitzman, *supra* note 14, p. 221.
[17] *Id*.
[18] Articles 1, 2 and 3 of the Geneva Declaration of the Rights of the Child of 1924.

give. This implies that the interest of the child should be given primary consideration in actions involving children.

1.3. The best interest of the child in the 1959 UN Declaration of the Rights of the Child

As pointed out earlier, the process of the recognition and enunciation of human rights of children was first initiated in an organized manner by the League of Nations with the adoption of the Geneva Declaration of the Rights of the Child in 1924. This step was carried further by the United Nations 1959 Declaration of the Rights of the Child and the 1989 Convention of the Rights of the Child.

The 1959 Declaration of the Rights of the Child affirmed the principle that "mankind owe to the child the best it has to give" which was the principle recognized in the 1924 Geneva Declaration of the Rights of the Child. It particularly emphasized on the need for special safeguards and care of the child. The third paragraph of the preamble of the declaration states that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." The Declaration expressly recognizes the principle of the best interest of the child. Article 2 of the declaration provides that:

> The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, *the best interest of the child* shall be the paramount considerations."

The principle of the best interest of the child is also embodied under Article 7 of the Declaration which states that "best interests of the child shall be the guiding principle of those responsible for his education and guidance …"

The text of Article 2 of the 1959 Declaration has, in particular, two important notable features. The *first* is that the principle, far from being restricted to child custody arrangements, is of very a wide-ranging application as it was intended to enable the child "to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity." The second is that the child's best interests were not to be one among several factors to be considered, but rather were to be '*the paramount consideration*'. As will be discussed later, this was relatively limited by the 1989 Convention on the Rights of the Child.

2. Meaning of "*The Best Interest of the Child*"

2.1. Problem of definition

As discussed earlier, the principle of the best interests of the child is recognized not only in different domestic laws of countries but also in many international human right instruments. Despite such universal recognition of the principle,

defining the concept is still a problem. "Just as values and social norms are not the same everywhere, so are the understanding of this notion."[19] In this regard, James R. Himes observed that:

> The challenge of interpreting 'the best interests' principle is complicated by many powerful forces at work in the world: poor and conflict-torn societies of Africa to the bewildering legal and ethical concern about the technological manipulation of human genes and the human reproductive system.[20]

Moreover, the concept is "inherently subjective and its interpretation would inevitably be left to the judgment of the person, institution or organization applying it."[21] Robert Mnookin also shares this view when he says "society in general lacks 'any clear-cut consensus' as to the values which must be used to determine what is best for the child"[22]

In fact, the most common issue of the principle of the best interests of the child revolves around the difficulty of identifying the criteria that should be used to evaluate possible alternative options to act in the child's best interests. In Mnookin's view;

> The choice of criteria is inherently value laden; all too often there is no consensus about what values should inform this choice. These problems are not unique to children's policies, but they are especially acute in this context because children themselves can't speak for their own interests.[23]

Philip Alston, on his part, raises the following instance to show the difficulty of not having a definite meaning of the principle of the best interest of the child.

> … [i]n some highly industrialized countries, the child's best interests are obviously best served by policies that emphasize autonomy and individuality to the greatest possible extent. In more traditional societies, the links to family and the local community might be considered to be of paramount importance and the principle that "the best interest of the child' shall prevail" will, therefore, be interpreted as requiring the sublimation of the individual child's preferences to the interests of the family or even the extended family.[24]

To conclude, despite the recognition of the principle of the best interest of the child in national and international instruments, there is no binding content attached to it. As a result, determining the exact content of this standard and hence what is best for the child has to be assessed on a case by case basis

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[19] Philip Alston, *supra* note 8, p. 10.
[20] *Id*., p. 12.
[21] *Id*.
[22] Robert Mnookin (1985), *In the Interest of the Child: Advocacy, Law Reform and Public Policy* (New York: W.H. Freeman & Co.), p. 17.
[23] Philip Alston, *supra* note 8, p. 9
[24] *Ibid*, p. 11.

depending on the particular realities of a given state. As David Chambers notes, "… deciding what is best for a child poses a question no less ultimate than the purpose and values of life itself" and he poses the question: "… where is the judge to look for the set of values that should inform the choice of what is best … ?" [25]

2.2. "The best interest of the child": a right based approach

To alleviate this definitional problem we stated above, some scholars suggest that the 'best interest' standard should be construed in light of the other rights of the child.[26] It can also be seen in light of the general social welfare, and the moral, religious and cultural inclinations of parents that may tend to compete with the child's best interest in some situations. There is thus the need to check the compliance of a particular set of values with the rights of the child before using it in the determination of a case at hand.

This position is further strengthened by the argument that these rights in general are part of the 'best interest' concept as they are intended to be used in its realization and to be applied with 'the best interest of the child' constantly in mind.[27] This line of interpreting 'the best interest' standard in light of the rights of the child leads to the conclusion that the standard exceeds the traditional concepts of child upbringing, which are found in any society.[28] In short, this means that the traditional conceptions may be employed only so long as they are in conformity with the other rights of the child.

The exact content of these rights is to be determined having regard to the socio-economic and other relevant factors involved.[29] The reference to these factors is called for because 'a judge is not dealing with what is ideal for the child but with what best can be done in the circumstances.'[30] This determination of the best setting for a child may involve choice as to which one entails a lesser evil depending on the relevant factors considered.[31] Therefore, the reference to the other rights of the child will be our benchmark in searching for the actual content of the principle 'best interest of the child' in a rights-based approach.

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[25] Robert Mnookin, *supra* note 22, p. 17.

[26] Michael Freeman and Philip Veerman (ed.), (1992), *The Ideology of Children's Rights*, (Dordrecht: Martinus Nijhoff Publishers), p. 24,

[27] *Ibid*, p. 129.

[28] Kidist Alemu, *supra* note 11, p. 12.

[29] *Ibid*, p. 13.

[30] P.M. Bromely and N.V. Lowe (1987), *Bromely's Family Law*, 7th ed.. (London: Butterworths), p. 317

[31] Kidist Alemu, *supra* note 11, p. 13

3. Some International and Regional Human Right instruments on the principle of "*The Best Interest of the Child*"

3.1- The 1948 Universal Declaration of Human Rights (UDHR)

The United Nations Declaration of Human Rights was drafted and adopted by the UN General Assembly not out of the intention of creating a legal obligation on states, but to set a standard of achievement. [32] Secondly, this instrument does not cover particular categories of persons, i.e. children, women, and the like. It rather addresses human rights in general, to which everyone is entitled. Yet, we can interpret some generic provisions in the context of child rights. According to Article 25(1) of the UDHR, every one (including the child) is recognized to have the right to a standard of living adequate for the health and well being of him/herself … including food, clothing, housing and medical care and other necessary social services. Under the 2nd sub-article of the same provision, children are specifically addressed by the UDHR when it says "motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."

This entitles every person the socio-economic rights that are important for his/her life and wellbeing. And in particular, children are entitled to get special care from the law and the society. For example, Art. 26 of the UDHR embodies the human right to education. According to this provision, everyone has the right to education and for the purpose of realizing this right, education shall be free and especially elementary education is made compulsory. Since education is the instrument for the full development of the human personality, parents have the right to choose the kind of education that shall be given to their children as per Sub-art 3 of the same provision. This parental right is based on the presumption that there is no one who is in a better position than parents to determine what is best for the child.

3.2. The 1966 Covenants

The two international covenants, which hold a significant status in the world human right movement, are the International Covenant on Civil and Political Rights (ICCPR) of 1966 and the International Covenant on Economic, Social and Cultural Rights (ICESCR) of the same year. Articles 23(4) and 24 of the ICCPR specifically deal with the rights of the child in the civil and political life of the society. Article 23(4) states that in situations of dissolution of the marriage, the state parties to the Covenant are responsible to take measures which are appropriate for the protection of the child. In other words, the state

[32] However, most of the elements of the Declaration have obtained a binding effect as principles of customary international law.

parties are legally obliged to design a legal as well as an institutional framework in their domestic legal and justice system to ensure what is best for the child in the settlement of issues such as custody under situations of divorce. Similarly, Article 24 clearly states that the overall obligation of the family, the society and the state towards the protection and implementation of the rights of the child in general and the best interest of the child in particular.

Under Article 10 the ICESCR of 1966, the family is recognized as the natural and fundamental unit of the society and is accorded the widest possible protection and assistance not only for its being the foundation of a society, but also for its responsibility for the care and education of children. Under the 2nd sub-article of the same provision, pregnant mothers and those who have given birth are protected through entitlements for paid leave or leave with adequate social security benefits. The same principle is adopted under the 3rd sub-article, which compels state parties to adopt special measures of protection and assistance with a view to enhancing the protection and realization of the socio-economic and socio-cultural rights of children. In the realm of education, Article 13 (3) of the ICESCR clearly provides the parental right to choose the appropriate school for their children, which seems to reaffirm a right that was already recognized under Article 26 of the UDHR.

3.3. The 1989 Convention on the Rights of the Child (CRC)

The Convention on the Rights of the Child was adopted by the UN general assembly on November 26/1989. The first draft of the convention was in the form of a proposal submitted by Poland in 1978. Poland's proposal sought to adapt the provisions of the formally non-binding 1959 Declaration of the Rights of the Child with a view to making them suitable for inclusion in a binding treaty.[33] Accordingly, the first draft of the Convention contained the principle of the best interest of the child embodied under Article 2 of the 1959 Declaration of the Rights of the Child in its full text as discussed earlier.

However, due to the opposition of some delegations, an alternative draft was submitted in 1980 to the working group of the Commission on Human Rights, which was responsible for the drafting of the Convention. Even then, there were debates on whether the "*best interest*" principle should be "*a primary*" or "*the paramount*" consideration or whether it might be better described in some other way. Some delegates in the working group expressed their concern that the use of the word "*paramount*" in the revised Polish draft was too broad, while a number of the delegates expressed their view that the draft should offer better protection to the child.

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[33] H. J. Steiner and Philip Alston (2000), *International Human Rights in Context: Law, Politics and Morals*, 2nd ed., (Oxford University Press), p. 512.

Ultimately, the proposal that '*the best interests of the child should be a primary consideration*' was adopted. The main justification given for the adoption of this weaker formulation was that there could be instances, in which the competing interests of, *inter alia*, "justice and society at large should be of at least equal, if not greater, importance than the interests of the child."[34] Hence, the objective implicit in opting for such formulation seems to be intended to ensure that there is sufficient flexibility, at least in certain extreme cases, to enable the interests of those other than the child to prevail. Nevertheless, as Philip Alston observed, such formulation would "impose a burden of proof on those seeking to achieve a non-child centered result to demonstrate that, under the circumstances, other feasible and acceptable alternatives do not exist."[35]

Moreover, the UN Committee on the Rights of the Child (established by virtue of Article 43 of the Convention) in its general comment clearly states that Article 3(1) of the Convention refers to actions undertaken by "public or private social welfare institutions, courts of law, administrative authorities or legislative bodies". The provision stipulates that "i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration." The principle thus requires active measures by all organs of the state, i.e. the executive, the legislature and the judiciary.

Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions. An example in this regard can be a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.[36] In light of this provision of the Convention, the best interests of the child should be measured against the compatibility or otherwise of any administrative, legislative or judicial measure not only in taking the interests of the child into account, but also to give it a primary consideration.

In addition to Article 3 of the Convention, which is the guiding principle of the 'best interest of the child' rule, we also have other provisions (such as Articles 18, 20, 21 and 37) in the Convention which reinforce the principle. Article 18 of the Convention states the overall responsibility of the state and the

[34] *Id*.
[35] *Id*.
[36] Committee on the Rights of the child, General comment no. 5/2003 (34th session on the general measures of implementation of the convention on the rights of the child) 19 September/2003.

family (or guardian) of the child. This specific provision imposes an international legal obligation on the state parties to make utmost effort to ensure the recognition of the principle that both parents (the husband and the wife) have common responsibility for the upbringing and development of the child. States have the obligation to establish institutional mechanisms, design policies and enact laws that render facilities and services such as child-care services for children of working parents. This can indeed create a conducive situation in the performance of obligations of working-parents to give what is best for the child.

Article 20 of the Convention deals with the situation of a child who is temporarily or permanently deprived of his/her family environment or who cannot be allowed to remain in that environment in his/her own interest. In such situations, state parties are legally obliged to look for an alternative care such as personal or institutional adoption, foster placement and the like so that the child can be protected from the adverse effects of that particular hostile environment. This requires sound policies and the enactment of laws that can provide special protection and assistance to a child under such circumstances.

Article 21 of the Convention seems to be the continuation of Article 20 and it regulates the procedural requirements in one of the alternative cares stated under Article 20 (3), i.e., adoption. The provision requires that the state should give priority to the protection of the best interest of the child and that it should, by every means possible, be able to check the protection of the child's interest before it grants permission to any one who wants to adopt the child.

Article 37 addresses the situation whereby the child comes into conflict with the law, or what is traditionally referred to as, juvenile delinquency, as defined in the UN Standard Minimum Rules for the Administration of Juvenile Justice, (or in short the Beijing Rules). Under these circumstances, the state parties should adopt what is best to protect the child, who comes into conflict with the law. Utmost care is thus required in the process of correcting and rehabilitating him/her by way of separating that child from adult prisoners and by way of prescribing a legal procedure in line with constitutional as well as international human right laws.

3.4. The African Charter on the Rights and Welfare of the Child

The basic reasons that necessitated a separate charter on the rights and welfare of the African child include the need for a "more elaborate" legal regime that can provide "better protection to the African child" and the need for "an African touch to the overall concept of child rights.[37] Some authors believe that the

[37] Tilahun Teshome (1999), *The African Charter on the Rights and Welfare of the Child*, unpublished, p. 8.

Charter adopts a similar, but slightly higher standard than what is found elsewhere, in requiring that 'in all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration'. They, arguably, say that the UNCRC only requires the best interests to be simply 'a consideration'.[38] However, as other eminent scholars in the field argue and as can be seen easily from the UNCRC and the African Charter, the latter is silent on certain issues such as the obligation of states stipulated under Article 3(3) of the Convention on the Rights of the Child which provides:

> State parties shall ensure that the institutions, services and facilities responsible for the care and protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

The African Charter on the Rights and Welfare of the Child of 1999, in addition to the above mentioned points, also deviates from the UNCRC in many respects, such as the age of conscription into the army. Article 22(2) of the Charter prohibits any act of recruitment of a child to an armed conflict, while Articles 38(2) and 38(3) of the UNCRC allow the participation of children aged 15 to take part in armed hostilities. Article 23(4) of the African Charter is also more advanced in the protection of internally displaced children, while the CRC has no provision which deals with this issue.

4. "The Best Interest of the Child" under Ethiopian Laws

Before the enactment of Ethiopia's 1960 Civil Code, there were two general patterns[39] of child custody in various parts of the country. The first was that the father was considered to have a natural right to the custody of his children after divorce. Secondly, children may be entrusted to their mothers depending on their ages. Children under the age of three were entrusted to their mothers. On the other hand, children above the age of seven were presumed to have attained the age of discernment and could be allowed to be with their mothers if this option becomes their choice.

The 1960 Civil Code embodies the principle of the best interest of the child as its guiding principle in determining cases of custody, guardianship, adoption and maintenance of children. As will be discussed later, this principle is also affirmed in the Revised Family Code and the family codes of regional states.

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[38] Rachel Murray (2004), *Human Rights in Africa: from the OAU to the African Union*, (Cambridge University Press), p. 167.

[39] See for example Gebrehiwot Aregay (1966), *Guardianship and Custody of Children Before and After the Modern Codes* (Unpublished), p. 11.

4.1- The Constitutional Regime of Child Rights in Ethiopia

There was no mention of child rights in the 1931 Constitution, and the whole concept of human rights was given a very minimal recognition. There was no clear provision in the Constitution which provided institutional guarantees for the realization of the few rights that were recognized.[40] Moreover, the 1955 Revised Constitution did not address the issue of child rights in general and the best interest of the child in particular. However, there was a provision which recognized the need to accord special protection to the family as the source of the maintenance and development of the Empire and as the primary base for education and social harmony.

The 1974 Draft Constitution incorporated some provisions on the rights of the child such as non-discrimination of children born in or out of wedlock with respect of rights and duties,[41] prohibition of child labor,[42] and parental obligation to get their children at least a primary education.[43] Although the Draft Constitution seemed relatively modern compared to its predecessors, it still lacked a specific provision concerning the detailed rights of a child in every aspect of life. Yet, Article 120 of the Draft Constitution had entrusted the Imperial Supreme Court with the power to interpret the constitution. This would have indeed given regular courts the power to interpret and elaborate the provisions (on some aspects of child rights) and develop the trend of protecting the interests of the child. The PDRE (People's Democratic Republic of Ethiopia) Constitution of 1987 only provided for the non-discrimination principle of children born in or out of wedlock[44] and compulsory primary education to children.[45] No other mention was made concerning the rights of children.

With respect to the charter of the Transitional Government of Ethiopia (TGE) of 1991, it gave the UDHR of 1948 a general effect of application in Ethiopia in its fullest sense. However, it did not mention or further elaborate the rights and freedoms of individuals (including the child) except freedom of expression, freedom of association and the right of nations, nationalities and peoples to self-determination.

Unlike the preceding, the current FDRE Constitution expressly devotes an article for the rights of children.[46] This constitutional provision not only

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[40] See for example, Chapter 3, Articles 18-29 and Chapter 6, Arts. 50-54 of the 1931Constitution).

[41] Art. 30(3) of the 1974 Draft Constitution.

[42] *Ibid*, Art. 49(1).

[43] *Ibid*, Art. 56(2).

[44] Article 37(2) of the Peoples Democratic Republic of Ethiopia Constitution, 1987.

[45] *Ibid*, 40(2).

[46] Art. 36, Federal Democratic Republic of Ethiopia Constitution, 1995.

recognizes and protects the various aspects of child rights, but it also adopts the doctrine of the best interest of the child from the 1989 Convention on the Rights of the Child and from the African Charter on the Rights and Welfare of the Child.[47]

4.2. The Civil Code and revised family laws

a) The Ethiopian Civil Code of 1960

The Ethiopian Civil Code incorporates a spectrum of stipulations that may make up the idea of "*the best interest of the child*".[48] Article 2 of the Civil Code considers a merely conceived child as born when his/her *interest* so demands. Accordingly, a conceived child will be considered as born where, *inter alia*, the interest of a conceived child is at stake.[49] Although they have now been repealed and substituted by revised family codes, the provisions of the Civil Code that deal with the custody of children in post-divorce decisions of the court stipulate that the child shall stay with his/her mother until the age of five unless there is serious reason for deciding otherwise. Moreover, Article 805 of the Code clearly states that adoption may take place only if there is good reason, which takes the child's benefits into account.

In the realm of successions, Article 842 of the Civil Code renders children of the deceased the first intestate successors and there are provisions that annul the will of a testator if a descendant is born after the making of the will (and where the descendant accepts the succession).[50] Theses laws of succession promote the best interest of the child. Moreover, the Civil Code does not allow a testator to disinherit a child or other descendant without stating (in his will) "the reason that justifies the disherison".[51] Even though the reason stated is assumed to be correct, the court shall ascertain whether the reason stated by the testator "justifies the disherison".[52] Ethiopia's Civil Code further stipulates that the succession shall remain in common between the heirs where the manner of making the partition depends on the condition of the birth of a child who is merely conceived.[53] The Code also protects the best interest of the child in the realm of contracts. Contracts concluded with minors are voidable and they can

[47] *Ibid*, Article 36(2).
[48] Tilahun Teshome (1997), "The Child and the Law in Ethiopia: the Case of the UN Convention on the Rights of the Child," *Journal of Ethiopian Law*, Vol. 18, August 1997, p. 43.
[49] *Id*.
[50] *Ibid*, Art. 904 (1) and (2). Please Read the *corrigenda* of the Civil Code with regard to Sub-article 2 of Art. 904.
[51] *Ibid*, Art. 938.
[52] *Ibid*, Art. 938(2) & (3).
[53] *Ibid*, Art. 1063(2).

be invalidated if the minor or his/her submit the application for invalidation within the prescribed limit of time."[54]

b) The Revised Family Code of 2000

The 2000 Revised Family Code has replaced the provisions of the Civil Code concerning family matters and other related issues. Unlike the Civil Code, which entrusts the child to the custody of his/her mother until the age of five, Article 113 of the Revised Family Code entitles the court to decide on the custody of children. The court shall decide the custody of the child by taking into consideration the interest of the child. However, the court may reverse or revise its decision as it thinks fit due to the change of circumstances on the custody situation of the child.[55]

The Revised Family Code (RFC) of 2000 seems to require relatively stringent procedures for the courts in assessing the necessity of adoption before approving the adoption contract. Under the Civil Code, it was enough if the consent and opinion of the adopted child and the adopter are obtained; but the RFC requires not only the opinion of the adopted child and the adopter, but also stipulates that the court shall take into consideration the capability of the adopter to raise and take care of the child.

If the adopter is a foreigner, the court shall investigate the absence of access to raise the child in Ethiopia and the availability of information about the adopter so that the court can be convinced that that the adopter will handle the adopted child as his/her own child and will not abuse him/her. Even if these requirements are met, the court will not allow adoption by a foreigner unless it gets a positive recommendation from the authority in charge of following up the wellbeing of children which shows that the adoption is for the benefit of the child.[56] These stringent procedures are meant to ensure what is best for the child.

c) Other Regional constitutions and family laws

The Constitutions of Tigray[57], Amhara,[58] Oromia and SNNP regional states have adopted the principle of the best interest of the child. This principle is also enshrined in the family codes of the national regional states. Under Article 127 of the new Revised Family Code of the Oromia National Regional State, the interest of the child is clearly protected in post-divorce custody proceedings.

[54] *Ibid*, Art. 1808(1).
[55] Art. 113 (3) of the Revised Family Code, 2000.
[56] *Ibid*, Articles 193 and 194.
[57] Art. 37(2) of the Constitution of the Regional State of Tigray.
[58] Article 36 (2) of the Constitution of the Amhara National Regional State.

The only difference with that of the 2000 Revised Family Code is that Oromia's Family Code, same as the 1960 Civil Code, stipulates that children under the age of five should be under the custody of their mother[59] unless there is a reason compelling the court to decide otherwise. Under Article 211 of Oromia's Family Code, the interest of the child is protected in adoption contracts through similar procedural requirements like that of the 2000 Revised Federal Family Code.

Article 124 (3) of the Family Code of the Amhara National Regional State, similarly, follows the same procedures (pursued in Oromia's Family Code) in post-divorce custody of children. With regard to adoption, the Family Code of the Amhara Regional State follows the footsteps of the federal as well as Oromia's Family Codes by providing for the same requirements.[60] The Family Code of the SNNP National Regional State has avoided the age limitation of the child in determining his/her post-divorce custody situation.[61] In this regard, it departs from the above mentioned family codes of the two national regional states and it strictly follows the 2000 Revised Family Code. However, Art. 209 of the SNNP Regional State Family Code embodies similar stringent provisions in adoption contracts. To sum up, most constitutions and family codes of the regional states, in spite of some departures from the 2000 Revised Family Code, seem to follow the latter in determining what is best for the child.

4.3. The law and the practice

There are basic problems in implementing the FDRE Constitution and international conventions in deciding what is best for the child. Ato Gedion Sisay, former judge at the first instance of the A.A. Municipal court, notes that judges both at the federal as well as at the municipal level, especially in the first instance, can be reluctant to reason out their decision both in the post-divorce custody of children or in approving the adoption contract by citing and analyzing provisions of the Constitution (and/or other international human right instruments) that are relevant to the rights of children.[62] The reason for this, he said, is the uncertainty as to what constitutes constitutional interpretation. This raises the issue whether citing or analyzing a provision from the Constitution or from the international instruments, amounts to constitutional interpretation which falls outside their jurisdiction.

However, Ato Gedion explained that it is for the courts to apply the laws including the Constitution and international instruments as per Article 6(1)(a) of

[59] Art. 127(3), Revised Family Code of the Oromia National Regional State.
[60] See Art. 205 of the Family Code of the Amhara Regional State.
[61] See Art. 128 of the Family Code of SNNPR.
[62] Interview with Ato Gedion Sisay, 15 December 2009.

the Federal Courts Proclamation No. 25/1996. What is not allowed for the courts to do, in fact, is adjudicating constitutional cases, which is the power of the House of Federation; but citing provisions from the Constitution and making it the basis for a well reasoned decision falls within the ambit of the functions of courts. After all, the courts have the constitutional duty to respect as well as enforce the human rights provisions of the Constitution as per art. 13(1) of the FDRE Constitution and other Constitutions of Regional States.

Others strongly argue that constitutional adjudication is the function of judicial organs while the interpretation falls within the jurisdiction of the House of the Federation as per Article 62(1) of the FDRE Constitution. Here, a demarcation is made between constitutional adjudication that involves a certain dispute and at least two parties (to be settled by judicial decision) and constitutional interpretation that may not necessarily involve a dispute or opposing parties, and which can also called "abstract review."[63] Be that as it may, Art. 36 (2) of the Constitution indicates the primary concern of courts in the protection of child rights, and this provision should be taken as a guiding principle in their decisions.

However, this principle is not put into practice in various courts. A case in point is the decision rendered by Bonga District court, Kaffa Zonal High court and the Southern Nations, Nationalities and Peoples Regional State Supreme Court respectively. The case was brought to the attention of these courts as a result of a dispute between the father of a child and the child's aunt who took full responsibility of the child's welfare and proper upbringing. The child was brought up by his aunt immediately after the death of his mother. Later on, his father, who was not at all involved in supporting the child, appeared and claimed the legal custody of his son. The aunt refused to submit to this claim by arguing that the father's actual motive is the inheritance left by the child's deceased mother.

Bonga District court to which the case was first brought gave the custodial right to the father by reasoning out that the aunt cannot claim the right of guardianship to a child who has a father. The aunt lodged an appeal to the Kaffa Zonal High Court. However, the ruling of the lower court was affirmed by the appellate high court based on Article 235(1) of the SNNP Regional State's Family Code.[64] The Court held that if one of the parents of the child is dead, the

[63] Assefa Fiseha (2000), "Constitutional Interpretation: The Respective Role of Courts and the House of the Federation (HOF)", *Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution*, Faculty of Law, ECSC, May 2000, p. 11.

[64] Proclamation No. 75/1996 (2005), Southern Nations, Nationalities and Peoples Regional State's Family Code.

remaining parent will take the custody of the child, as a result of which the father is entitled to take the custody of the child even though the court had the opinion that the intention of the father in requesting the custody is not genuine. The aunt filed a petition to the Cassation Division of the SNNP Regional State's Supreme Court by stating that both of the lower courts made a basic error of law in granting the custody right to the father. However, the Cassation Division of the Regional State's Supreme Court rejected the petition by stating that the lower courts have not committed any error in interpreting the law.

None of the three benches invoked or considered the principle of *best interest of the child*. Ultimately, a petition was submitted to the Cassation Division of the Federal Supreme Court which reversed the decisions of the District Court, Zonal High Court and the Cassation Division of the Regional Supreme Court. The Cassation Division of the Federal Supreme Court underlined that in all situations concerning children, priority must be given to what is best for them. It decided that any legal provision (including those of custody rights of parents) should be tested against this principle which is embodied, not only in the 1989 Universal Convention on the Rights of the Child, but also under Article 36(2) of the FDRE Constitution.[65]

This decision shows that the Ethiopian judiciary can directly apply international human right instruments. Moreover, interpretation of the Cassation Division of the Federal Supreme Court is binding on lower courts pursuant to Article 2(1) of Proclamation No. 454/2005.[66] Following the footsteps of the Federal Supreme Court Cassation Division's decision (on the principle of *the best interest of the child*), the Addis Ababa City First Instance Court has rendered a similar decision by interpreting Article 36(2) of the FDRE Constitution and the Article 3(1) of the 1989 UN Convention of the Rights of the Child.[67]

Concluding remarks

The preceding sections have briefly addressed the principle of the best interest of the child from the perspectives of international instruments and in light of Ethiopia's federal and regional legal regime. The problems that need to be addressed in relation with international instruments relate to the lack of clarity regarding the elements that constitute the notion of best interest of the child.

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[65] *Tsedale Demisse vs. Kifle Demisse* (Federal Supreme Court Cassation Division) Cassation File No. 23632, Tikimit 26/2000 (6th November 2007 G.C. See also *Genet Mamo G. et al., vs. Tezazu Abate D.* (Federal Supreme Court Appellate Division) Appellate File No. 20461, Hidar 26/1998 E.C. (December 6/2006 G.C).

[66] Federal Courts Proclamation Re-amendment Proclamation No. 454/2005.

[67] *Tilahun H/Mariam and Frehiwot Tsegaye vs. Matewos Asaye* (AA First Instance Court File No. 2608/02, Ginbot 28/2002 (6th June/2010).

Despite such need for clarity in the articulation of its elements, the principle is indeed, in varying degrees, embedded in various international human right instruments such as the 1948 Universal Declaration of human Rights, the 1966 International Covenant on Civil and Political rights, the 1966 International Covenant on Economic, Social and Cultural Rights and mainly the 1989 Convention on the rights of the Child.

The Ethiopian legal regime has gone a long way in the path towards the express embodiment of the principle. However, judicial decisions are expected to pursue the recent trends in the interpretation of Article 36(2) of the FDRE Constitution and the Article 3(1) of the 1989 UN Convention of the Rights of the Child in the course of adjudicating cases that involve the principle of *the best interest of the child*. Even more so, courts are expected not to shy away from the analysis and application of constitutional provisions and human rights instruments in the course of judicial reasoning on legal issues that arise in the process of adjudication. ■

CASE COMMNET

THE MEANING OF "DEPENDANTS" FOR THE PURPOSE OF COMPENSATION UNDER THE LABOR PROCLAMATION: CASE COMMENT

Bisrat Teklu Hailemichael ♣

Decisions of the Cassation Division of the Federal Supreme Court (hereinafter Cassation Division) rectify basic errors of law[1] in final court decisions and also enhance the harmony and predictability of statutory interpretation in Ethiopian courts. The Cassation Division has published its decisions in ten consecutive volumes. As some of the Cassation Division's decisions evoke critique,[2] I would like to make some comment on its decision in *Cassation File No. 36194*.[3] In this case, the Cassation Division has rendered decisions on several issues, including:

- the meaning of work related injury/accident;
- dependants benefit in case of work related fatal accidents; and,
- the circumstances in which a spouse of a victim of work related fatal injury is entitled to get compensation from an employer who commits no fault.

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[1] Note that, the interpretations of a law by the Cassation Division on its judgments are binding on both federal and regional courts at all levels, including, regional state cassation divisions. *See* Federal Courts Proclamation Re-amendment Proclamation No.454/2005, Article 2(4). It reads:
"Interpretation of a law by the Federal Supreme Court rendered by the Cassation Division with not less than five judges shall be binding by federal or regional [courts] at all levels. The Cassation Division may, however, render a different interpretation some other time."

[2] *See, e.g.,* Dejene Girma (2009), 'Tell me why I need to go to court: A Devastating Move by the Federal Cassation Division' *Jimma University Journal of Law* (Vol. 2 No.1), pp.114-135. Dejene Girma criticizes the constitutionality of a judgment rendered by the Cassation Division on April 19, 2007 in Cassation File No. 20938.

[3] የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ችሎት ውሳኔዎች ቅጽ 8 (2003) ገጽ 167-172. (Decisions of the Cassation Division of the Federal Supreme Court, 2010, Amharic, pp. 167-172). Note that, on the soft copy released on the Federal Supreme Court website, the case is found on pages 162 to 167.

This comment examines the interpretation of the Cassation Division on the latter issue, i.e. its finding on the issue formulated in the decision: '*when does a spouse of a deceased victim of work-related accident get compensation from an employer who commits no fault?*' This comment examines the decision of the Cassation Division in light of the relevant canons of statutory interpretation and based on the relevant provisions of the Labor Proclamation (Proclamation No. 377/2003, hereinafter the Labour Proclamation).

Overview of the Case[4]

The cassation petition was submitted to the Cassation Division of the Federal Supreme Court by the husband of the deceased (hereinafter the Petitioner) representing himself and his daughter. He is now the minor's guardian. The Petitioner stated that the death of his wife and the mother of his minor child in a car accident is a work-related accident/injury as the accident occurred during her return from Hawassa to Addis Ababa after having accomplished the task assigned to her by the Respondent.[5] The Petitioner claimed the payment of costs and other benefits, including, funeral expenses and dependants' compensation pursuant to Article 110 of the Labor Proclamation.

The Cassation Division ruled that there is work related injury, and further rendered decisions on the issue of dependents' compensation where the worker's death is attributable to work related injury. The Court noted the right of survivors of the deceased to get pension, gratuity or compensation pursuant to Articles 107(1)(c) and 110(2) of the Labor Proclamation, and framed the issue as to the persons who can claim compensation from the employer (Respondent).

The Court held that Article 110(2) of the Labor Proclamation entitles the spouse, children under the age of eighteen and parents of the deceased who were supported by the latter to be considered the dependants of the deceased. However, the Court stated that the law does not define the word *'dependent'*, and it resorted to providing meaning for the word '*dependant*' embodied in Article 110(2) of the Labor Proclamation.

The Court held that even though the Labor Proclamation does not define the word '*dependent*', one can give a meaning to it based on the general framework of Article 110 of the Proclamation. It further stated that the word '*dependant*' refers to an individual who relies on the deceased for his/her basic necessities of life, such as, food, shelter, clothing and medical expenses.

[4] This general overview primarily focuses on the issue of dependant's compensation. It does not discuss other issues in the case.

[5] The deceased was working at the Respondent's organization as a project coordinator from 25/08/1996 E.C to the date of her death 09/12/1997 E.C.

It was thus held that "Article 110(2) does not entitle compensation to a spouse that does not prove that he/she cannot fulfill his/her basic necessities by himself/herself". The Court further made reference to Article 112 of the Labor Proclamation and decided that the provision exempts the dependant's benefits under Article 110(2)(a) of the Labor Proclamation from any kind of tax, assignment, attachment or deduction because it has the rationale of enabling a spouse that uses the compensation to cover his/her livelihood.

This, according to the Court, indicates that Article 110(2)(a) envisages the beneficiary of compensation to be a spouse who really needed economic support of his/her late partner in his/her livelihood. The Court thereupon reached at the conclusion that, a spouse capable of fulfilling his/her necessities is not entitled to compensation under Article 110(2)(a) of the Labor Proclamation.

The Cassation Division thus denied the payment of compensation to the Petitioner by invoking Article 110(2)(a) of the Labor Proclamation and stating that he has enough income to sustain his life. With regard to the deceased's daughter, however, the Cassation Division decided that she is entitled to compensation pursuant to Article 110(2)(b) of the Labor Proclamation as the daughter requires the economic support of the deceased to sustain her life and education.

Comment on the Decision of the Cassation Division

1. The need to apply the clear reading of the law

When the law is clear no further interpretation is needed. This is because the words themselves are presumed to express the intention of the legislator, unless the literal reading is susceptible to a meaning which is clearly unintended by the law maker. By virtue of Article 110(2) of the Labour Proclamation "[t]he following shall be considered dependants:

a) the worker's widow or widower;
b) children of the deceased worker who are under eighteen years of age;
c) any parent who was being supported by the deceased worker."

Article 110(2)(a) clearly considers the deceased's spouse dependant without attaching any condition while the condition of non-attainment of eighteen years is attached to the dependant status of children (Article 110/2/a). The provision that deals with parents (i.e. Art. 110/3) considers parents of the deceased as dependants subject to the condition of "*their being supported by the deceased worker*." The pre-condition of "being supported by the deceased" thus only applies to parents and not to the spouse of the deceased. As Mahari Redae

notes, "the law automatically considers a widow/widower whose spouse dies due to work related injury the dependant of the deceased spouse".[6]

In short, the law does not attach any precondition for a widow/widower to be considered dependant to the deceased spouse. This is apparently because spouses are dependants to one another owing to the bond of matrimony which involves mutual support and care for one another not only in the material domain but also in the social, psychological, emotional and spiritual aspects of the relationship. The decision of the Cassation Division thus goes against the rules of statutory interpretation because it has interpreted the word '*dependant*' under Article 110(2)(a) of the Labor Proclamation while the provision clearly considers spouses as dependants without attaching a condition.

A title or caption of a provision does not control its meaning. If a provision is clear its meaning should not be restricted by a title/caption found at its heading and one should not interpret it in light of the general framework of the law.[7] The interpretation given by the Court based on the general framework of the law (while the clear meaning of the word can be deducted from Article 110(2) of the Labour Proclamation) is thus against canons of interpretation.[8]

2. The Reference of the Court to Article 112 of the Labour Proclamation

The Cassation Division refers to Article 112 of the Labour Proclamation to substantiate its argument on the necessity of the spouse's economic dependence as a precondition to be regarded as 'dependant'. The Court held that Article 112 of the Labour Proclamation exempts the compensation given for dependants from any kind of tax, assignment, setoff or attachment because it intends to give the compensation for a spouse that needs the money to cover his/her livelihood expenses. However, this is an assumption that has not been backed by analysis of documents such as the minutes of the legislature or *exposé des motifs* of the drafters. In fact, laws and policies take various factors into account in exemptions and other waivers. In the absence of analysis on legislative intent, the intention behind Article 112 cannot substantiate the interpretation pursued by the Cassation Division of the Federal Supreme Court.

It is to be noted that other disability benefits are also exempted from any kind of tax, attachment, assignment and setoff. This does not, however, warrant the

[6] Mahari Redae (2009), *Employment and Labor Law Teaching Material*, (Sponsored by Justice and Legal System Research Institute), unpublished, p.82.

[7] The Cassation Division rendered its decision basing itself on the general framework of the provision. This includes the caption of Article 110 of the Labour Proclamation.

[8] A court can interpret a clear law only if it ascertains that the intent of the legislator is inconsistent with the literal reading of the provision.

assumption that economic dependence is a decisive factor in disability benefits. In fact, a victim may be economically self-sufficient, and still be entitled to disability benefits. This is because the victim's economic status cannot be a factor that determines entitlement. Moreover, funeral expenses are freed from any of the above restrictions, and this is not related with the economic conditions of the deceased's family, heirs or legatees. The legislator may thus allow tax and other exemptions for several reasons other than the factor mentioned in the decision of the Cassation Division.

3. Assessment of Compensation under the Labour Proclamation and its Implications

Article 110(3)(a) of the Labour Proclamation allocates fifty percent of the five year salary of the deceased to his/her widow/widower as compensation. The provision requires the amount mentioned (i.e. 50% of the compensation) to be paid to a widow or widower (who falls under Article 110(1)(a) of the Labour Proclamation) irrespective of economic status. Had economic dependence been the rationale behind the stipulation, a flat rate of 50% would not have been allocated because the degree of economic dependence varies among different widows/widowers. In this regard, the cumulative reading of Article 110(1)(a) of the Labour Proclamation with the latter sub-article reinforces the argument that the economic dependence of the deceased is not required by the Proclamation. In short, all widows/widowers are equally treated as dependants of the deceased for the purpose of compensation under Article 110(2)(a) of the Labour Proclamation.

Article 110(3) of the Labour Proclamation allows equal compensation for all widows/widowers based on the deceased's salary at the time of the latter's death. This shows the contradiction between Article 110(3)(a) of the Labour Proclamation and the meaning given to the word '*dependant*' by the Cassation Division of the Federal Supreme Court. If the legislator had intended to consider the economic dependence of the widow/widower under Article 110(3), the provision would have provided that, "*the spouse shall be entitled to the compensation to the extent necessary to cover his/her livelihood, provided that the compensation to be paid shall not exceed fifty percent of five times the annual salary of the deceased worker*". In other words it would not have entitled all widows/widowers the flat rate of fifty percent. The Cassation Division has thus erred by disregarding the cumulative reading of Articles 110(2)(a) and 110(3)(a) of the Labour Proclamation.

Conclusion

Unless there is absurdity or contradiction with the purpose in view, a legal provision that is clear cannot be interpreted in a manner different from its

reading. However, the Cassation Division has, in *Cassation File No. 36194*, resorted to the interpretation of Article 110(2)(a) of the Labor Proclamation while in fact, the reading of the provision, as discussed above, considers a widow or a widower as *dependant* irrespective of economic dependence on the deceased.

While the provision incorporates no precondition in the entitlement of the widow/widower to compensation due to his/her spouse's death in work related injury, the Court requires the former to be economically dependent on the deceased. The Cassation Division's decision thus disregards the careful considerations that could have easily been inferred from the cumulative reading of 110(1)(a) and the rule of compensation embodied under Article 110(3). The Cassation Division is thus expected to rectify this interpretation in future cases that involve the same issue so that widow/widowers who lose their spouses in work related injury would not continue being denied of the compensation to which they are entitled. ■

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Focus: Period of limitation for provident fund

ማስታወሻ- የአመልካች የአባት ስም አልተገለፀም። (The patronymic of the petitioner is omitted)

Federal Supreme Court Cassation Division

Cassation File No. 32545
Ginbot 14, 2000 E.C (22 May 2008)

Petitioner Ato Girma …
Respondent …

Period of limitation for claiming provident fund: Art. 162 of the Labour Proclamation No. 377/2003; Articles 1677(1) cum 1845 of the Civil Code.

Whether the statute of limitation of one year for payment of employment entitlements which is embodied in the Labour Proclamation bars legal action for the payment of provident fund; whether the period of limitation embodied in the Civil Code can be applicable for provident fund.

The petitioner brought action at the Federal First Instance Court seeking the payment of provident fund after the termination of the contract. The respondent replied that the action is not acceptable because it has not been brought within the one-year period of limitation as stipulated under Article 162 of Labour Proclamation No. 377/2003 (377/1996 E.C.). The First Instance Court decided that the petitioner cannot claim the provident fund because the action was not brought within one year from the termination of the employment relationship. This decision was confirmed by the High Court. The cassation petition was brought from these decisions.

Decision

1. The decisions of the First Instance Court and the High Court are reversed.
2. The Labour Proclamation provides for a limitation period of one year for payments that accrue from employment, namely, salary, payment for overtime services or payment in place of leave; and the limitation period applies only to such payments. It is not applicable to claims of provident fund made after the termination of employment because the source includes the contribution of the employee and its purpose is different from payments that are earned from employment. Therefore, the applicable statute of limitations should be ten years as stipulated under Article 1677(1) *cum* Article 1845 of the Civil Code.

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አመልካች፡- አቶ ግርማ ...

ተጠሪ፡- የክርስቲያን በጎ አድራጎት ልማት ድርጅት ...

መዝገቡ የተቀጠረው ለምርመራ ነበር፡፡ መዝገቡን መርምረን የሚከተለውን ፍርድ ሰጥተናል፡፡

ፍ ር ድ

ጉዳዩ የቀረበው የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት የቂራ ምድብ የሥራ ክርክር ችሎት በመዝገብ ቁጥር 22417 ሚያዚያ 29 ቀን 1999 ዓ.ም የሰጠው ውሣኔና የፌዴራል የከፍተኛ ፍርድ ቤት ሰኔ 10 ቀን 1999 ዓ.ም የሰጠው ትዕዛዝ መሠረታዊ የሕግ ስህተት ያለበት በመሆኑ በሰበር ታይቶ ይታረምልኝ በማለት አመልካች የሰበር አቤቱታ በማቅረቡ ነው፡፡ የክርክሩ ፍሬ ጉዳይ አመልካች ተጠሪው ብር 19173.70 /አሥራ ዘጠኝ ሺ አንድ መቶ ሰባ ሦስት ብር ከሰባ ሣንቲም/ ፕሮቬደንት ፈንድ እንዲከፍላቸው ያቀረቡት ክስ ተጠሪው በአዋጅ ቁጥር 377/96 አንቀጽ 162 መሠረት በይርጋ ይታገዳል በማለት ያቀረበውን ክርክር በመቀበል የመጀመሪያ ደረጃ ፍርድ ቤት ክርክሩ በይርጋ ቀሪ ይሆናል ብሎ ውሣኔ በመስጠቱና የከፍተኛው ፍርድ ቤትም ይህንኑ የመጀመሪያ ደረጃ ፍርድ ቤት ውሣኔ በማጽደቁ ነው፡፡

አመልካች ፕሮቪደንት ፈንድ ከሠራተኛው ደመወዝ በየወሩ በፐርሰንት እየተቀነሰ በአሠሪው የሚቀመጥና የሚጠራቀም ሠራተኛው ከሥራ ሲሰናበት የሚጠቀምበት በጡረታ መልክ የሚከማች የሠራተኛው ገንዘብ ነው፤ ይህ ገንዘብ በፍትሐብሔር ሕግ ቁጥር 2800 እና በፍትሐብሔር ሕግ ቁጥር 2802 የተቀመጠ በመሆኑ በፍትሐብሔር ሕግ ቁጥር 1756 ንዑስ አንቀጽ 3 መሠረት ባለመብቱ ሲጠይቅ በተጠየቀ ጊዜ የሚከፈል ስለሆነ በይርጋ ይቋረጣል መባሉ ተገቢ አይደለም በማለት አመልክቷል፡፡ ተጠሪው በበኩሉ፤ ፕሮቪደንት ፈንድ በመዝገበ ቃላት ውስጥ ያለውን ትርጓሜ በመጥቀስና ፕሮቪደንት ፈንድ የሠራተኛ ጥቅማጥቅም በሚባሉት ውስጥ፤ የሚመደብ እንደሆነ በመግለጽ እንደዚሁም ፕሮቪደንት ፈንድ ሠራተኛው 5% አሠሪው ደግሞ 15% በማዋጣት በባንክ በተከፈተ ሒሣብ እንደሚቀመጥ በመግለጽ፣ በይርጋ ይታገዳል መባሉ ተገቢ ነው በማለት ተከራክሯል፡፡ የክርክሩ ፍሬ ጉዳይና በሰበር በግራ ቀኙ መካከል የተደረገው ክርክር ከላይ የተገለፀው ሲሆን እኛም መዝገቡን መርምረናል፡፡ መዝገቡን እንደመረመርነው ከሥራ ቅጥር ውል የሚመነጩ የደመወዝ እና የትርፍ ሰዓት ክፍያ ጥያቄዎች በአንድ ዓመት ጊዜ ውስጥ መቅረብ ያለባቸው መሆኑን በአሠሪና ሠራተኛ ጉዳይ አዋጅ ቁጥር 377/96 አንቀጽ 162 ተደንግጓል፡፡ እነዚህ ክፍያዎች በመሠረታዊነት ሠራተኛው ሥራ ላይ እያለ የይገባኛል ጥያቄ ሊያቀርብ እና የመብት ጥያቄ ሊነሳ የሚችልባቸው ናቸው፡፡

ይህ ከሆነ የአዋጅ ቁጥር 377/96 አንቀጽ 162 የተደነገገው የይርጋ የጊዜ ገደብ፣ በባህሪው የደመወዝ ጭማሪ፣ ከትርፍ ሰዓት እና በዓል ቀን ክፍያ የተለየ ነው፡፡ የገንዘቡም ምንጭ ቢሆን ሙሉ በሙሉ አሠሪው አይደለም፡፡ ከተጠራቀመው ገንዘብ ውስጥ፣ ከሠራተኛው በየወሩ አምስት ፐርሰንት እየተቆረጠ ተቀምጧል፡፡ ዓላማውም ሠራተ(ኞች) ከሥራ ሲሰናበቱ ወይም ሥራውን በራሣቸው ፈቃድ ሲለቁ፤ እነሱና ቤተሰቦቻቸው ችግር ላይ እንዳይወድቁ፣ ለመደጎምና የማህበራዊ ደህንነትና ዋስትና ክፍያ ተጠቃሚ እንዲሆኑ ለማድረግ ነው፡፡ ከዚህ አንፃር

ስንመለከተው ፕሮቪደንት ፈንድ ይከፈለኝ የሚለው ጥያቄ በአሠሪና ሠራተኛ ጉዳይ አዋጅ 377/1996 አንቀጽ 162 መሠረት በይርጋ ቀሪ ይሆናል በማለት የሥር ፍርድ ቤቶች የሰጡት ውሣኔ መሠረታዊ ስህተት ያለበት ነው፡፡

በሌላ በኩል አመልካች ገንዘቡ የአደራ ገንዘብ በመሆኑ በተጠየቀ በማናቸውም ጊዜ ሊከፈል ይገባዋል በማለት ያቀረበው ክርክር ፕሮቪደንት ፈንድ ባለባቸው መሥሪያ ቤቶች የሚተዳደሩ ሠራተኞች በሕይወት ባሉበት በማናቸውም ጊዜ ወይም የእነርሱ ወራሾች፤ መብቱን ሊጠይቁ ከሚችሉበት ቀን አንስቶ፣ ከሃያ ዓመት በኋላ፣ ከሃምሣ ዓመት በኋላ እና ከዚያም በላይ እየመጡ፣ ጥያቄ እንዲያቀርቡ ዕድል የሚሰጥ ነው፡፡ ይኸ ደግሞ የሚበረታታና የሕግ ጥበቃ የሚሰጠው አይደለም፡፡ ስለሆነም ፕሮቪደንት ፈንድ፤ በስንት ዓመት ውስጥ መጠየቅ አንደሚገባው የሚደነግግ ግልጽ የሕግ ድንጋጌ ባይኖርም በፍትሐብሔር ሕግ ቁጥር 1677 አንቀጽ 1 እና በፍትሐብሔር ሕግ ቁጥር 1845 መሠረት መታየት ያለበት ነው፡፡ ከዚህ አንፃር ፕሮቪደንት ፈንድ ባለመብቱ በአሥር ዓመት ውስጥ ካልጠየቀ በይርጋ ቀሪ ይሆናል፡፡ አመልካች ከተጠሪ ጋር ያለው የሥራ ውል የተቋረጠው ጥቅምት 29 ቀን 1992 ዓ.ም በመሆኑ፣ ፕሮቪደንት ፈንዱን ተጠሪ አንዲከፍለው ያቀረበው ጥያቄ አሥር ዓመት አልሞላውም፡፡ በመሆኑም የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት እና የከፍተኛ ፍርድ ቤት የአመልካች ጥያቄ በይርጋ ቀሪ ይሆናል በማለት የሰጡት ውሣኔ መሠረታዊ የሕግ ስህተት አለበት በማለት ፍርድ ሰጥተናል፡፡

ው ሣ ኔ

1. የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤትና የከፍተኛ ፍርድ ቤት የአመልካች ክስ በይርጋ ቀሪ ይሆናል በማለት የሰጡት ውሣኔ ተሽሯል፡፡ …
2. የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት ቁራ ምድብ ችሎት አመልካችና ተጠሪ የሚያደርጉትን ሌሎች የፍሬ ጉዳይና የሕግ ክርክር በመስማትና ማስረጃቸውን በማመዛዘን የመሰለውን ውሣኔ ይሰጥ ዘንድ ጉዳዩን በፍትሐብሔር ሥነ ሥርዓት ሕግ ቁጥር 341 መሠረት መልሰን ልከንለታል፡፡ …
3. በዚህ ፍርድ ቤት ያወጡትን ወጭና ኪሣራ ግራ ቀኙ ራሣቸው ይቻሉ፡፡ ይህ ፍርድ በፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ግንቦት 14 ቀን 2000 ዓ.ም በሙሉ ድምጽ ተሰጠ፡፡ …

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IN MEMORIAM

JIM PAUL & YOHANNES HEROUI

Mizan 5.2 is dedicated to Professor James C. N. Paul (the founding Dean of HSIU –currently AAU– Faculty of Law) and Ato Yohannes Heroui (Asst. Prof and former Ethiopian Supreme Court Justice) who passed away on September 13th 2011 and July 30th 2011 respectively.

EXCERPTS FROM MIZAN'S SEPT 14-20 EMAIL FILES:

SAD NEWS ABOUT DEAN PAUL

… Subject: News of Jim Paul. Wednesday, September 14, 2011, 10:21 PM

Dear All,

Dad passed away peacefully last night. Nick, Adelaide and I were with him. Mom had desperately needed hip replacement surgery on Monday, and is recovering in the hospital. She will come home in a week. It has been a difficult time …. Were he here, he would say to all of you, "God bless."

Molly

From: Elias Nour … Thursday, September 15, 2011, 4:14 PM

Dear Molly,

I am sorry to hear the sad news about Dean Paul. And I wish your mom quick recovery. … Dean Paul's accomplishments while he was the founding dean of HSIU (currently AAU) Faculty of Law in 1963 and during the years that followed will indeed render his aspirations and achievements immortal. …

From: Peter Strauss ... Thursday, September 15, 2011, 4:31 PM

Dear Molly,

A friend observed to me when my father passed away that one terribly misses the shadow of the sheltering wing -- however frail it has become, however expected its passing. Jim remains the best Dean I have ever had, a constant inspiration to law teaching, a wonderful friend. I don't have so many of my colleagues' email addresses here at home, but will try to reconstruct them at the office and send your note out across those waters. …

From: Fikremarkos Merso ... Thursday, September 15, 2011, 5:37 PM

Dear Molly,

This is a very sad news. I met Dean Paul for the last time in October 2009 and he was very strong in spirit and sharp in memory despite the visible failing health. His love for Ethiopia and his commitment for improving legal education

in the country was amazing. As a pioneer of modern legal education in Ethiopia every Ethiopian who has gone through formal legal education owes him a lot and he will remain in our hearts and minds. …

From Selamu Bekele … Tuesday, 20 September 2011, 1:23 PM

Dear Molly,

... The legacy of and the gratitude and appreciation for Dean Paul, the founder and first Dean of the HSIU law school will live in the minds and souls of generations of Ethiopian lawyers who are in the academia, judiciary, legal practice and other fields of the legal profession.

From Menberetsehai Tadesse … Tuesday, September 20, 2011, 2:39 PM

… Although I did not have the privilege to be one of Dean Paul's students, the impact of his work has enriched many of us. He has made a priceless contribution to the development of the Ethiopian legal system and we will all remember him for that. May his soul rest in peace. ..

From: Norman Singer ... Tuesday, September 20, 2011, 10:28 PM

… It actually all starts with Jim. He was the motivating force for a bunch of young enthusiastic, actually highly motivated people. I know that his personality and thoughtfulness motivated most of us to learn about teaching and running a law school. It was just the way that he gave us liberties, yet moved all of us to get things done which made a big difference. I know I have not had a Dean that measures up to him in any way. It was the way he did it, and the way he instilled in all of us (faculty and students) a special spirit that we all carried with us and got involved in the enterprise of creating an institution. He was the leader and in a very special way made us realize what everything was about. It was a lesson that all of the teachers learned and then carried forward (if they were able) to their subsequent appointments. It is difficult to actually verbalize it, but he moved us and was the force that made things happen. Actually, HSIU was unique for all of us because it was clearly the best institution I have ever been associated with - and most of the people (not all) who were on the faculty have said the same thing. It was the spirit that led us that was the cause of everything that took place. Actually, we were all very lucky - and I mean all of us the faculty and students.

Even when there were negatives, Jim was able to get things together to turn it into a positive learning and building experience. ... Jim turned [negative events] around so that it became a positive element in the learning experience that we all had. At least that was what I felt.

.... I think all of us had a pretty profound and unique experience in those early days. Something that lives with us all.

MIZAN LAW REVIEW

ST. MARY'S UNIVERSITY COLLEGE
FACULTY OF LAW

Cultural Problems in Research and Publications

Source:
Reform Document on Legal Education and Training in Ethiopia (June 2006) § 2.4.1/A

1. Lack of research, reading, and writing culture
   - Complacence with our work merely as teachers.
   - No sense of urgency about the need to engage in research and turn up research products.
   - No '*publish or perish*' attitude.
   - No attempt to work beyond the positive laws.
2. Lack of Institutional Commitment
   - In terms of budget, time, and resource allocation for R&P
   - In terms of reduction of teaching load or granting (Research Leave).
3. Lack of team spirit for Research and Publications
   - Among staff members;
   - Between staff and students;
   - Lack of collaboration among institutions.
4. Lack of innovation in diversification of publications, and problems regarding spheres of focus in research.
5. Raising the stakes too high in assessing the quality of publishable manuscripts (despite) shortage of (such) manuscripts.
6. Lack of tradition of salvaging "distressed" manuscripts through sympathetic editing without compromising quality.
7.. Weak consumption of research products in the legal professional community and in government institutions, and poor state of constructive feedback.
8. Inadequate attention to relevance of research to the real life or actual problems of the society.

Vision of law schools

Law schools shall have vision towards elevating the standard and quality of legal education to the level of leading law schools in other countries, and towards preparing graduates who will have optimum impact in Ethiopia's development, democracy, good governance and social justice.

Mission of law schools

Law schools shall promote the intellectual and social conditions of Ethiopia by providing equitably accessible quality legal education and training programs through teaching, research and service to prepare competent and responsible members of the legal profession who actively contribute towards rule of law, democracy, human rights, good governance, social justice, equality, tolerance and development.

Source: **Ethiopian Legal Education and Training Reform Document (June 2006)**

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