6 (2) Mizan Law Rev. ISSN-1998-9881

Mizan Law Review

Vol. 6, No. 2 December 2012

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Interdisciplinary Research Paper:

Ambiguities and Inconsistencies in the 'Prescriptions' toward Development'

Comment

Law Journal published twice a year by
St. Mary's University College, Faculty of Law
Center for Law in Sustainable Development (CLiSD)
Addis Ababa, Ethiopia

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Mizan Law Review
St. Mary's University College, Faculty of Law
Center for Law in Sustainable Development (CLiSD)
P.O. Box 18490
Addis Ababa, Ethiopia

MIZAN LAW REVIEW

VOL. 6, NO. 2 ISSN-1998-9881 **DECEMBER 2012**

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ERITREA-ETHIOPIA ARBITRATION:

A 'CURE' BASED ON NEITHER DIAGNOSIS NOR PROGNOSIS

Seyoum Yohannes Tesfay[♣]

Abstract

The Eritrea-Ethiopia peace process remains stalled a decade after the arbitral award by the Boundary Commission and several years after awards by the Claims Commission. This article assesses why arbitration by the two commissions did not produce the desired outcome. To this end, the author analyzes primary and secondary sources and argues that arbitration was not the right method of conflict resolution. Mayer's multi-dimensional approach to conflict and conflict resolution informs the discussion that the conflict between the two countries has cognitive, emotional and behavioral dimensions. It is argued that arbitration as a settlement of dispute by purely legal means is ineffective to adequately address the multiple dimensions of the conflict. The author underscores that such conflicts can only be resolved by using a combination of different interventions. Specifically, while arbitration may be appropriate to deal with some essentially resource related matters, the resolution of emotional and cognitive dimensions of this conflict call for a multi-track approach in which different segments of the people from the two countries can play critical roles.

Key words

Conflict resolution, arbitration, border conflict, boundary commission, claims commission, multi-track, peace, Eritrea, Ethiopia.

DOI http://dx.doi.org/10.4314/mlr.v6i2.1

Introduction

Ethiopia and Eritrea 'sought' to resolve all aspects of their conflict by arbitration. To this end, they established Boundary and Claims Commissions. Although the two Commissions have given awards in respect of all the matters submitted to them, none of these awards have been implemented. What is worse, the two countries still remain on a war footing. The author contends that this is in part attributable to the ineffectiveness of arbitration as the sole mechanism to resolve the conflict.

[♣] Assistant Professor, Addis Ababa University School of Law; also teaches on part-time basis at the Institute for Peace and Security Studies. The author's deepest gratitude goes to all those who contributed to this work in a variety of ways. Email: dayaseyoum@yahoo.com

The first section of the article highlights the meaning and causes of conflict and sheds some light on interstate conflict. Section 2 introduces the states at conflict and the relationship between the leaderships of the two countries. Particularly, the multiple underlying causes of the conflict are discussed. In Section 3, the claims litigated before the two arbitral tribunals and the awards given are presented in brief. The fourth section demonstrates the mismatch between arbitration and the Eritrea-Ethiopia conflict. The last section, examines the parallels between the conflict resolution scheme and the dimensions of conflict. Then, a few observations are stated as to how resolution of the conflict between the two countries should be attempted.

As regards methodology, a mix of qualitative and quantitative methods has been utilized. It should, however, be noted from the outset that participants in the field study do not necessarily represent the populations of the two countries. The objective of this article is not to generalize about the entire populations of the two countries directly from the sample. The aim of the sample is rather limited to shedding some light on the views and feelings of certain influential segments of the societies in the countries at conflict and those that were particularly affected by the conflict. This being the objective, the participants were for the most part people living close to the border, refugees from Eritrea, Ethiopian deportees from Eritrea, persons who were considered opinion makers and others.

1. Conflicts in General and Interstate Conflict: An Overview

1.1. Conflict: Meaning and Causes

Conflict has different meanings in different contexts. For some it refers to 'behavior' or 'action'. For instance, there is a conflict when a trade union goes on 'strike' or when two states are at 'war'. According to Wallensteen if these events merely involved 'actions', conflict would be over when the behavior or action ends, say when war stops. He notes that conflict is rather a 'social situation in which a minimum of two actors (parties) strive to acquire at the same moment in time an available set of scarce resources'.[1] In a bid to explain his definition he writes, one needs to note elements like 'strive' and 'scarce resources'. The word strive refers to the parties doing 'something' however minimal to acquire the resource. So strive includes anything, 'war' being its highest form. He further states that the notion of 'available set of scarce resources' should be interpreted broadly to include non-material/non-economic resources. Accordingly, the term 'resources' covers all kinds of positions that

[1] Peter Wallensteen (2007), *Understanding Conflict Resolution* (London and Thousand Oaks: SAGE Publications Limited, 2nd ed), p. 15.

are of interest to an actor. So it can, *inter alia*, include territory, position of power, acceptance of responsibility for destructive actions, psychological needs like retribution and other intangible values.[2]

Johan Galtung proposes an influential model regarding how conflict takes place. According to this model, 'conflict' can be viewed as a triangle with attitude (A), behavior (B) and contradiction(C) at its vertices. "Attitude" refers to disposition towards an adversary and has two elements, the cognitive and emotive. The cognitive element refers to the mental image one holds about the enemy while the emotive element relates to the affect or emotions, the feelings one has towards an adversary[3]. "B", the behavioral dimension refers to what parties do such as gestures signifying cooperation or/and coercion. In violent conflicts the behavior could be violent attack.[4] That will be war if it involves the coordinated use of violent force in combination with other instruments according to Clausewitz.[5] Finally, "contradiction" in this model refers to the underlying conflict situation including actual and perceived 'incompatibility of goals' between the parties to the conflict. These three dimensions taken together make the conflict system wherein each reinforces the others.[6] Conflict is a dynamic phenomenon. One actor is reacting to what another actor is doing, that further leads to yet another action to the extent that it may become difficult to decipher who is more responsible.[7]

1.2. Interstate Conflict: The Different Levels of Analysis

Many have grappled with the causes of interstate conflict and other forms of state behavior. Particularly, the causes of war have been analyzed in different ways. Waltz's 'level-of-analysis framework' can be a useful tool in making sense of the varied understanding of causes of war and other state behavior. His level-of-analysis framework divides the causes of war in terms of whether they are located at the level of the individual, the nation-state or international system.[8]

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[2] *Ibid.*

[3] Johan Galtung cited in Kenneth Fox (2007), "What Private Mediators Can Learn from the Peace- Builders", *Cardozo Journal of Conflict Resolution*, Vol 7, p. 245.

[4] Oliver Ramsbotham, Tom Woodhouse and Hugh Miall (2005), *Contemporary Conflict Resolution* (Cambridge and Malden : Polity Press), p. 10.

[5] Jack Levy (2007), "International Sources of Interstate and Intrastate War", in Chester Crocker, Fen Hampson and Pamela Aall (edds) *Leashing the Dogs of War* (Washington: US Institute of Peace Press), p. 20.

[6] Galtung, cited at note 3 above.

[7] Wallensteen, *supra* note 1, p. 32.

[8] Levy, *supra* note 5, p. 21.

The first, the individual level, focuses primarily on human nature and inclinations towards aggression. In this thinking, wars are ultimately clashes not of armies, laws, or even cultures but of masses of individuals each of whom is a distinct personality and whose behavior while affected by the command of the superior officer, laws and symbols, is also affected by individual hereditary as well as individual experiences.[9] Hence, the personalities, belief systems, psychological process of individuals, particularly, leaders such as heads of state are subject of emphasis at this level of analysis. The implication of the individual level of analysis could be that, if a different person had been the leader, the state would have behaved differently; say would not have gone to war.[10] The second, the national level, considers wider factors and settings as points of focus, such as the structure of the political system, policy making process, the role of public opinion, interest groups, ethnicity and nationalism, political culture and ideology.[11] The third level, also called the system-level, includes variables like the structure of the international system, number of major powers in the system, norms influencing their behavior, patterns of international trade and military alliance and other factors that constitute the external environment to states.[12]

At this juncture one notes that no single level of analysis provides a complete explanation for the causes of war given the complexity of international politics. Hence, many theories of war combine causal variables from different levels of analysis, i.e., the individual, nation-state, and systems level.[13] Another point to be noted in this connection is that showing or explaining why a state or a leader wants war is not enough. Since interstate war involves violence between two political organizations, a theory of war must explain why both states fight. For this reason, a complete analysis will not be achieved solely at 'individual' or state level. Analysis of a war at the system level becomes inevitable where more than one country will have to be studied.[14] In this article, the focus of analysis will be at the nation-state level though the other two levels have undeniably their own contributions.

According to Mayer, nation-state level conflicts could be viewed as occurring along three dimensions; these are cognitive (perception), emotional

[9] Quincy Wright (1964), A *Study of War*, (2nd Abridged ed.), (Chicago: University of Chicago Press), p. 112.
[10] Levy, *supra* note 5, pp. 20-21.
[11] *Ibid*.
[12] *Ibid*.
[13] *Ibid*., p. 22
[14] *Ibid*., p. 23.

(feeling/identity) and behavioral (action) dimensions.[15] These are essentially the elements that make two of the three vertices of Galtung's triangle stated above. The cognitive and emotional dimensions constitute the 'attitude' vertex while the behavioral dimension in Mayer's analysis is exactly the same as the 'behavior' vertex in Galtung's triangle. Mayor's three dimensions will inform the analysis of the Eritrea-Ethiopia conflict where necessary in the course of the discussion in the following sections.

2. An Overview of the Eritrea-Ethiopia Conflict: the Parties and Underlying Causes

The 1998-2000 'border' war represents the highest point in the current Eritrea-Ethiopia conflict. It also provided the setting for a multitude of violations of humanitarian and human rights laws that were brought before the Eritrea-Ethiopia Claims Commission. But did Ethiopia and Eritrea really fight over the disputed territory which some called 'inconsequential piece of real estate' owing to the small size and absence of known resources? How is it possible for two formerly 'friendly' governments to turn into deadly adversaries in a matter of weeks, willing to sacrifice tens of thousands of their people on the battlefields? Why is it that we have simmering tensions between the two countries a decade after the ceasefire and an arbitral award on the 'disputed border' has been given? Why did the awards by the Claims Commission on the consequences of the war fail to be implemented? Even more so, why are these arbitral awards used as propaganda tools for what one may call a 'cold war'?

An international dispute is not an isolated event. It has a past and presumably some sort of a future.[16] It cannot be understood independently of its historical context. According to Mayer, "the history of the people who are participants in a conflict, of the system in which the conflict is occurring and of the issues themselves has a powerful influence on the course of the conflict".[17] This observation is particularly correct regarding the conflict between Eritrea and Ethiopia. Hence, a proper understanding of the conflict and the way forward presupposes having an in-depth knowledge of the two countries, their peoples as well as the leaderships at conflict. Unfortunately, it is impossible to do justice to such broad and complex subjects in an article like this. Therefore, only a cursory look at the relationship between the two countries, their people and the political leadership will be attempted.

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[15] Bernard Mayer (2000), *The Dynamics of Conflict Resolution*: A Practitioner's Guide (San Francisco: Jossey-Bass), p. 4.

[16] Jacob Bercovittch (1996), *Resolving International Conflicts*: The Theory and Practice of Mediation (Boulder: Lynne Reinner Publishers), p.16.

[17] Mayer, *supra* note 15, p. 13.

2.1. The Relationship between the Two People and Countries

Ethiopia and Eritrea occupy most of the Horn of Africa. Eritrea has a land and sea area of about 117,600 square kilometers and a population of about 6 million. Ethiopia is relatively a big country, almost ten times the size of Eritrea and a population of about 93 million.[18] Ethiopia lost the entire coastline along the Red Sea upon the independence of Eritrea in 1993. Thus, Ethiopia is landlocked whereas Eritrea has a coastline of 1200 kilometers.[19]

Since some two thousand years back, most of today's Tigray and much of Eritrea saw intensive intercommunication of various peoples. The intermingling of 'humans, animals, plants cultures and ideas across the Red Sea produced a distinct civilization that can be deemed Afro-Asiatic'. Its heartland was Axum, the antecedent of the modern Ethiopian state.[20] Owing to this, there are primordial ties between various ethnic groups living in both countries. For instance, four of the nine languages spoken in Eritrea are widely spoken in Ethiopia.[21]

This is particularly clear when it comes to the Tigrigna-speaking community straddling the border between the two countries. The Tigrayans and Eritreans of the southern highlands (kebesa) spoke the same language, Tigrigna. They use the same script, and belonged to the same political realm and Orthodox Church with its Geez liturgy. Moreover, these two people shared the same agrarian culture and social hierarchy.[22] Common people on both sides of the Mereb River admit the existence of this close cultural, ethnic and linguistic ties although individuals from different walks of life accord slightly different weight and meaning to those relationships.[23]

While the above commonalities inform the historical and cultural similarities of the peoples of both countries to this day, the two countries have a period of

[18] CIA, The World Factbook: available at <https://www.cia.gov/library/publications/the-world-factbook/geos/html>, accessed on August 3, 2012.

[19] Berhane Woldegabriel (2006), 'A War for National Unity' in Lenco Leeta (ed), *The Search for Peace*: The Conflict Between Ethiopia and Eritrea, July 2006, available at: <www.fafo.no/pub/rapp/20014/20014.pdf>, accessed on May 29, 2012.

[20] Gebru Tareke (2009), *The Ethiopian Revolution*: War in the Horn of Africa, (New Haven: Yale University Press), p. 55. See also Alemseged Abbay (1998), *Identity Jilted*, or, *Re-Imagining Identity*? The divergent paths of the Eritrean and Tigrayan Nationalist Struggles, (Lawrenceville: Red Sea Press).

[21] Berhane, *supra* note 19, p. 34.

[22] Gebru, *supra* note 20, p.55.

[23] Alemseged, *supra* note 20, p.160.

separate history, which the political leadership of both have played up or played down depending on their political aspirations.[24] Here it should be noted that some Eritrean sources totally disagree with any assertion that Eritrea was ever part of Ethiopia. Although they agree most parts of Eritrea were part and parcel of the Axumite kingdom, they contend that the Ethiopian state cannot and should not be deemed to be the inheritor of the Axumite kingdom.[25] In the more recent past, while Ethiopia remained independent, Eritrea was colonized by Italy from 1891 to 1941.[26] Subsequently, Eritrea was under British rule from 1941 to 1952.[27]

In December 1950 the United Nations General Assembly by Resolution 390 A(V) decided that Eritrea be grated autonomous federal status under the sovereignty of the Ethiopian Crown not later than 15 September 1952. Many Eritreans question the legitimacy of this decision. Ruth, an Eritrean intellectual for instance, contends that Ethiopia exploited traditional Eritrean societal cleavages and manipulated the nascent party politics prevalent at the time in Eritrea.[28] The societal cleavages that she talks about refer to highland-lowland, Christian-Muslim dichotomy that is raised by several authors in relation to this. Particularly, a considerable segment of the Muslim community opposed the Federal arrangement.[29] Whether Ruth's interpretations are correct or not it is incontestable that the people of Eritrea did not vote on this issue of federation with Ethiopia. Both Eritrean and Ethiopian sources confirm this.[30]

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[24] Tekeste Negash (1997), *Eritrea and Ethiopia:The Federal Experience*, (New Brunswick: Transaction Publishers), p. 13.

[25] Othman Saleh Sabby, *The History of Eritrea*, available at: <www.eritrios.net/the_history_of_eritrea.htm>, accessed on August 3, 2012. The author who was one of the founders of the Eritrean Liberation Front and the official spokesperson for the external mission of the Popular Liberation Forces of Eritrea contends that Eritrea is part of the Arab homeland, which the sea could not separate from the Arab Peninsula.

[26] Tekeste, *supra* note 24, p. 13.

[27] *Ibid*, p. 18.

[28] Ruth Iyob (1995), The *Eritrean Struggle for Independence: Domination, Resistance, Nationalism* (New York: Cambridge University Press), p. 86.

[29] Tekeste Negash (2007), '*The Dilemma of Eritrean Identity and Its Future Trajectories*' A Paper read at the 4th Congress of the Association of African Historians, May 2007, read generally, available at: <http://asmarino.com/en/articles/242-the-dilemma-of-eritrean-identity-and-its-future-trajectories>, accessed on June 14, 20012.

[30] Bereket Habte Selassie (1989), *Eritrea and the United Nations* (Lawrenceville: Red Sea Press), p.27, See also Bahru Zewde (2006), 'Eritrea and Ethiopia: *In Quest of a Culture of Peace and Dialogue*' in Lenco Leeta (ed.), *supra* note 19, p.17.

Once federation was attained, the federal arrangement that aimed at satisfying unionist and pro-independence segments of the Eritrean society was found unsatisfactory to both sides. According to Bahru the Unionists that had the upper hand in the newly constituted Eritrean Government systematically eroded the federal arrangement excelling in zeal the Government in Addis Ababa.[31] Bahru further writes that the Emperor welcomed and even encouraged these developments because the federal arrangement was an anomaly given the centralized, autocratic, feudal system in Ethiopia.[32] Finally, in 1962 the federal arrangement was abolished when the Eritrean Parliament voted for unitary system, which according to many Eritrean sources resulted from the pressure and intrigue exerted by Emperor Haileselassie.[33]

This resulted in liberation struggle by several Eritrean groups, which led to 30 years of civil war or 'liberation war' according to many Eritreans. This war brought untold misery to the people of both countries.[34] In April 1993, Eritrea gained *de jure* independence following a UN sponsored referendum held on April 23/24. Ethiopia extended recognition to Eritrea's sovereignty and independence on April 29, 1993 just two days after the results of the referendum were announced and three weeks before the independence of Eritrea was formally declared.[35]

2.2. The Relationship between the Leaderships of the Two Countries

The parties in power in both countries, the Tigray People's Liberation Front, TPLF, now subsumed into the Ethiopian People's Revolutionary Democratic Front, EPRDF, and the Eritrean People's Liberation Front, EPLF, now renamed People's Front for Democracy and Justice, PFDJ, were guerrilla organizations fighting in close cooperation for nearly 17 years. As guerrilla movements, their major power base was the same ethnic group, Tigray/Tigriya found in both

[31] *Ibid.*
[32] *Ibid.*
[33] Bereket Habte Sellassie, *supra* note 30, p. 43.
[34] Ruth Iyob (1995), *supra* note 28, p.96.
[35] Ruth Eyob (2000), "The Ethiopian-Eritrean Conflict, Diasporic vs. Hegemonic States in the Horn of Africa", *The Journal of Modern African Studies*, Vol. 38, No 4, p. 670, See also Eritrea-Ethiopia Boundary Commission, Decision Regarding Delimitation of the Border between Eritrea and Ethiopia, Decision of 13 April 2002, p. 105, available at: <www.untreaty.un.org/cod/riaa/cases/vol_XXV/83-195.pdf>, accessed on August 3, 2012.

countries. What is more, after the two organizations came to power, the party now in power in Ethiopia facilitated and endorsed Eritrea's independence.[36]

Notwithstanding the above facts, those who have studied the two organizations closely have maintained that the two parties had disputes on a range of ideological, military as well as national questions. Aregawi Berhe, one of the founders of the TPLF and member of the leadership until 1985, confirms the above. According to him, the TPLF-EPLF relationship was amorphous from the very beginning. In his view, it was by and large the pressure from the common enemy that propelled the relationship to work to the extent it did.[37]

When the two fronts were fighting the Dergue, the most enduring disagreements between the two pertained to differing points of view on the nature of the Soviet Union, the question of nationality, and military strategy to be applied for combating the Dergue.[38] Regarding the question of nationality, for instance, the major point of difference was that the TPLF insisted officially that if post-independence Eritrea was to be democratic it would have to recognize and respect the rights of nations and nationalities in Eritrea to self-determination including and up to secession.[39] As Eritrea has nine ethnic groups, unlike nearly homogenous Tigray, this stand of the TPLF did not suit the vision EPLF had for Eritrea.[40]

In 1985, these tense circumstances led to the withdrawal of TPLF's last contingent from the Eritrean trenches in Sahel where they had been deployed to help the EPLF. Months later, the EPLF retaliated by taking a series of measures that angered not only the TPLF but many Tigrayans from different walks of life. The measures included blocking the TPLF from using the only route to the Sudan from where the food aid to the population suffering from one of the worst famines would be obtained, and closing the 'Dimtsi Woyane', a TPLF radio operating from EPLF territory in Sahel. These measures led to a complete breakdown of relationship between the two and the TPLF began openly supporting various splinter groups of ELF against EPLF.[41] The TPLF and EPLF

[36] Kjetil Tronvoll (2009), *War and Politics of Identity in Ethiopia* (Chippenham: Boydell and Brewer Inc.), p. 46.
[37] Aregawi Berhe (2009), *A Political History of the Tigray People's Liberation Front* (1997-1991) (Los Angeles: Tsehai Publishing and Distributors), p.210.
[38] *Ibid*, p.218.
[39] John Young (1996), 'The Tigrayan and Eritrean Eritrean Liberation Fronts: A History of Tensions and Pragmatism', *The Journal of Modern African Studies* 34(1), (105) p. 112.
[40] *Ibid.*
[41] Aregawi Berhe, *supra* note 37, p. 220.

resumed relations only after April 1988 when they agreed to put aside their propaganda and attacks against each other, and to fight the Dergue together.[42]

2.3. The 1998-2000 War: The Underlying Causes

As indicated earlier, conflict may be viewed as occurring along cognitive (perception), emotional (feeling), and behavioral (action) dimensions.[43] As Mayer notes "conflict among groups clearly has cognitive, affective, as well as behavioral dimensions" even if "we might better use terms like culture, ethos, public opinion or popular beliefs to signify the greater complexity and different nature of these dimensions in social systems".[44] This three-dimensional perspective, as stated above, essentially conforms to Galtung's triangle of conflict. This perspective can explain the Eritrea-Ethiopia conflict.

2.3.1. The behavioral dimension of the conflict

The behavioral or action dimension of conflict, consists of actions that people take to get their needs met in ways that have the potential for interfering with someone else's ability to get his/her needs met.[45] At this juncture one recalls 'striving' in Wallensteen's definition of conflict discussed above. In other words, this refers to parties 'doing something', however minimal, in ways that have the potential to limit the share of the other in the 'pie' (scarce resource) which is sought after by two states.[46]

Some real issues lurking behind the border conflict form this behavioral dimension of the conflict. These include unsettled issues of economic relationship and citizenship of people of Eritrean origin. For seven years following Eritrea's independence, the two countries had an extensive economic relationship. Ethiopia continued to use the ports of Assab and Massawa. Hence, Eritrea gained port fees and charges which by 1997 amounted to a total of

[42] Medhane Tadesse (1999), *The Eritrean-Ethiopian War: Retrospect and Prospects* (Addis Ababa: Mega Printing Enterprise), p. 50, See also, John Young (1997), *Peasant Revolution in Ethiopia: The Tigray People's Liberation Front* (Cambridge: Cambridge University Press), p. 156, Richard Reid (2003), 'Old Problems in New Conflicts: Some Observations on Eritrea and Its Relations with Tigray, from Liberation Struggle to Inter-State War', *Africa: Journal of the International African Institute* 73(3), p.375.

[43] Bernard Mayer, *supra* note 15, p. 13.

[44] *Ibid*, p. 6.

[45] Bernard Mayer, *supra* note 15, p. 5.

[46] Peter Wallensteen, *supra* note 1, p 15.

22.6% of total public revenue excluding external grants.[47] Moreover, close to 300,000 Eritreans got direct and indirect employment opportunities in Ethiopia because of the close relationship between the two countries.[48] An estimated 60-80% of Eritrean exports were destined to Ethiopia before the war erupted as its products did not meet the standards required in Europe or neighboring Gulf markets[49]. What is more, the two countries used the same currency until Eritrea introduced its own in 1997.[50]

The two countries had concluded a number of agreements on trade, transit and port services, communication, transportation and the like although these agreements were not comprehensive.[51] Moreover, there were spheres which were not clearly agreed upon. For instance, there was no clear official articulation or exchange of ideas about how to resolve problems resulting from differences in national economic plans, access to markets, currency exchange rates and the nature of this relationship and the benefits that accrue to the people of each country.[52] Although the two countries had signed an agreement on the harmonization of economic policies on September 23, 1993, it showed some signs of incompatibility from the outset and caused grievances. Particularly, people in the two countries viewed the commodity trade sector, the monetary arrangement, Eritrea's new currency and issues of citizenship differently.[53]

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[47] Gote Hansson (2001), '*Building New States: Lessons from Eritrea*', Discussion Paper No. 2001/66 presented at United Nations University World Institute for Development Economics Research, p. 11.

[48] Gilbert Khadiagala (1999), 'Reflections on the Ethiopia-Eritrea Conflict', *The Fletcher Forum of World Affairs* XXIII, No. 2, p. 43.

[49] Ross Herbert, *The End of the Eritrean Exception*? The South African Institute of International Affairs, 2002, Country Report No. 8, p 17 available at: http://dspace.cigilibrary.org/jspui/bitstream/123456789/29833/1/Country%20Report%20No%208.pdf?1, accessed on August 4, 2012.

[50] *Ibid*, p. 9.

[51] Trade Agreement and Trade Protocol between the Transitional Government of Ethiopia and the Government of the State of Eritrea(Sep 27, 1993), Transit and Port Services Agreement between the Transitional Government and the Government of the State of Eritrea(Sep 27, 1993), Protocol Agreement on Transport and Communications between the Transitional Government of Ethiopia and the Government of the State of Eritrea(Sep 27, 1993), Air Services Agreement between the Transitional Government of Ethiopia and the Government of the State of Eritrea(Sep 27, 1993).

[52] Abebe Zegeye and Melakou Tegeng (2007), *The Ethiopia-Eritrea Conflict: A Critical Observation* (Johannesburg: Institute for Global Dialogue), p. 18.

[53] *Ibid*.

a) The commodity trade sector

One feature of the harmonization agreement was that it provided for free re-export of goods imported from third countries. Thus, for instance, Eritreans could export to Ethiopia products they imported, say, from China or India without having to pay Ethiopian customs duty and vice versa. Since the two countries did not have common external tariff, this resulted in grievances on the part of Ethiopian businesses. This was due to the very low external tariff of Eritrea as compared to Ethiopia. Because of this difference in tariff rates Eritrean businesspersons could import goods from third countries through Eritrea and sell them in Ethiopia without paying the high tariff their Ethiopian counterparts paid. This gave them a competitive edge over Ethiopians in the Ethiopian market and caused bitter complaints. Various Eritrean writers, however, expressed a totally different view. According to Alemseged, this arrangement benefited Ethiopia more because, the goods re-exported to Ethiopia were bought using meager Eritrean hard currency but sold for Ethiopians in Birr, a soft currency.[54]

The other feature of the harmonization agreement was that it provided for free movement of goods and services except those that were in short supply between the two countries. The Eritrean side found this restriction on "goods in short supply", which was an Ethiopian inclusion, difficult to understand and work with. The complaint was that any product could be so declared at any time, thus hampering free trade in goods.[55] The complaint on the Ethiopian side was that Eritrea was abusing the agreement in respect of free movement of goods to export Ethiopian products to third countries and thus getting hard currency at the expense of Ethiopia in contravention of another provision of the treaty that prohibited such conduct. The perception of certain sections of the Ethiopian society was that Eritrea had become one of the 'biggest exporters of coffee' in the world although it does not grow coffee at all.[56] For instance, Capital, a weekly Ethiopian Newspaper in its March 20, 2011 issue states that Eritrea ranked the 13th biggest exporter of coffee before the outbreak of the 1998 war although it does not produce coffee at all.[57] Such perceptions complicated relations even if they were at times exaggerated.

[54] Alemseged Tesfai, The Cause of Eritrean-Ethiopian Conflict, available at: <http://www.denden.com/Conflict/newscom/com-alem98.html>, accessed on August 7, 2012.

[55] Tekeste Negash and Kjetil Tronvol (2000), *Brothers at War: Making Sense of the Eritrean Ethiopian War* (Ohio University Press), p. 32.

[56] Abebe Zegeye and Melakou Tegeng, *supra* note 52, p19.

[57] Solomon Bekele, 'Africa: the continent of billionaires', *Capital* , Year 13, Issue 640, p 32.

Due to the foregoing reasons, it was clear by 1996 that the implementation of the 23 protocols signed by the two countries in 1993 was greatly hampered.[58] A joint review committee was thus set up. Tekeste and Tronvoll summarize the problems identified by the committee as follows:[59]

i. Restrictions had been imposed on Eritrea's import of Ethiopia's exportable products.
ii. There was a serious lack of adequate institutional mechanisms to implement the agreements reached.
iii. No action had been taken to combat illegal trade.
iv. Several types of local charges and intermediate payments had been introduced.
v. Licensing systems were different and discriminatory.

b) The monetary arrangement

Pursuant to Article 1 of the Harmonization Agreement, the two countries used the Ethiopian currency (the Birr) until Eritrea issued its currency in November 1997.[60] The view in Eritrea was that Ethiopia benefited more from this arrangement. For Eritreans, using the Birr meant *de facto* currency union, without however allowing Eritrea voice in Ethiopia's conduct of monetary policy, thereby putting Eritrea at a disadvantage. This was the case, it is maintained, because the interest rates set by the National Bank of Ethiopia was not necessarily appropriate to business conditions in Eritrea.[61] Second, without its own currency, Eritrea had no seignorage revenue,[62] and this factor was regarded as an important consideration given the need to finance reconstruction and development spending.

Ethiopia on the other hand viewed this arrangement as relatively more beneficial to Eritrea. The view was that Eritrea was paying in soft currency, i.e, in Birr, for Ethiopian products as well as for products Ethiopia imported using its meager hard currency. The result of all this led to a deeply held belief that Eritrea was siphoning off Ethiopia's economic resources.[63] The pressure on the Ethiopian government thus was to require Eritrea as a sovereign country to shop around for resources in the same way as Ethiopia does.

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[58] Tekeste Negash and Kjetil Tronvoll , *supra* note 55, p. 33.
[59] *Ibid.*
[60] Alemseged Tesfai, *supra* note 54.
[61] Hansson, *supra* note 47, p. 7.
[62] This is the profit obtained from minting coins/printing money if the cost of producing say a bill or coin is less than the worth of the bill or coin as the case may be. It is possible for the costs to exceed the value of the coin, in which case the government will incur loss. <http://www.investopedia.com/terms/s/seigniorage.asp#axzz22qtWBqoa>, accessed on August 7, 2012.
[63] Ruth Iyob (2000), *supra* note 35, p. 667.

c) Eritrea's introduction of new currency

In 1997 Eritrea introduced its own currency, Nakfa. This, according to Eritrean authorities, was necessitated by the divergent fiscal, trade and investment policies the two countries had begun to follow. There was lack of transparency in the way the Nakfa was introduced. For instance, no understanding was reached about its relationship to the Ethiopian Birr. Thus, when the currency began to circulate, the Ethiopian government refused Eritrea's request for Nakfa-Birr parity. It asked Eritrea to conduct trade using hard currency and Letter of Credit (LC) unless it merely involves border trade not exceeding 2000 Birr.[64] Eritrea rejected Ethiopia's proposal to trade by Letter of Credit. [65]

According to some Eritreans, the Nakfa-Birr parity 'controversy' was actually an Ethiopian creation. All Eritrea requested was 'free convertibility', i.e., to give traders in both countries the opportunity to agree on the use of the currency of their choice for settlement. It did not request parity of the two currencies.[66] Other Eritreans admit that Eritrea did request the parity of the two currencies. Moreover, they allege that Ethiopia had accepted that or at least 'Eritrean officials had naively believed' it before the issuance of the Nakfa.[67] The contention that Eritrea did not request Nakfa-Birr parity seems to be *a post-facto* argument aimed at buttressing the stand of Eritrea on this issue as the demand for party was found to be flying in the face of logic.

d) The Issue of citizenship

The two countries have divergent laws regarding the issue of nationality. Eritrea recognizes anyone of Eritrean parentage on paternal or maternal side as its citizen. In fact, the Eritrean law envisages the possibility of having multiple citizenships although some extra procedures have to be complied with,[68] while Ethiopia does not. According to Article 11 of the 1930 Ethiopian nationality law (that was in force at the time of the conflict), any person who acquires another citizenship immediately forgoes Ethiopian citizenship. Since the two countries never took legal steps to put matters to rest in this regard, problems began arising. The problem was broad, as all Eritreans had Ethiopian citizenship and

[64] Hansson, *supra* note 47, p.11.
[65] University of Pennsylvania African Studies Center, Horn of Africa Monthly Review, 3-4/98, March to April 8, 1997 issue, available at: <http://www.africa.upenn.edu/Hornet/HOA0398p.html> accessed on August 7, 2012.
[66] Alemseged Tesfai, The Causes of Eritrean Ethiopian Conflict, *supra* note 54.
[67] Ruth Iyob (2000), *supra* note 35, p. 674.
[68] The Eritrean Nationality Proclamation no 21/1992, Art 2(5) available at: <http://www.unhcr.org/refworld/docid/3ae6b4e026.html> accessed on Aug. 4, 2012.

no arrangements were set in place to identify who among them have adopted Eritrean citizenship.[69]

Thus, in the Joint High Ministerial Commission, Ethiopia voiced its concern over a significant number of Eritreans still carrying Ethiopian passports and requesting renewals. This situation created problems especially in the issuance of licenses for investment in sectors such as the banking and insurance industries reserved for Ethiopian nationals alone. To put it simply, the Ethiopian side felt that Eritreans were taking unfair advantage of the free movement, residence and business agreements by being treated as nationals in both countries while Ethiopians were not. Some Ethiopians were particularly resentful because Eritrea had, in 1991-2, expelled about 120,000 Ethiopians without meaningful protection to their rights.[70]

Establishing the veracity of each allegation above is not the purpose of this article. Its objective is limited to showing the kind of behavioral issues that were lurking behind the border war.

2.3.2. The emotional dimension of the conflict

The emotional dimension refers to an emotional reaction to a situation that signals a disagreement of some kind.[71] At the foundation of this dimension is the contention that men and groups do not act only, or in fact to a large measure, to achieve conscious objectives. In other words, subconscious or unconscious attitudes and behavior patterns constitute their more important aspects. In this view, behind the state is the nation. The latter implies a group whose members feel as a unit of some kind and react spontaneously in ways that can cause and perpetuate war or lesser forms of conflict in response to encroachment, real or imagined.[72] Wars, therefore, can be considered in some cases as clashes between identity groups.

This third, emotional/identity dimension of international conflict began to get attention in recent decades. Instead of viewing international conflict as struggles over resources only or 'as the hard shells of nation-states bouncing off each other', a new view suggested that conflicts 'were just as often struggles within and between nations over contending ideologies, values, needs and most fundamentally, *identities*.' In this context, identity represents "people's need to preserve a sense of who they are and what their place in the world is", and it plays a major role in conflict.[73] When a group is in conflict or at war with a

[69] Ruth Iyob (2000), *supra* note 35, p. 664.
[70] Ross Herbert, *supra* note 49 p. 32.
[71] Mayor, *supra* note 15, p. 5.
[72] Wright, *supra* note 9, p.111.
[73] Mayer, *supra* note 15, p.19.

neighbor, group members become acutely aware of their large group identity to the point where it may far outweigh any concern for individual needs, even survival.[74] Hence, members of the group rally around a leader without questioning his leadership.[75]

In other words, the new assumption is that the need for recognition, meaning and self-esteem, as well as the need to be 'right' could be the root cause of conflict. So, in this outlook, the economic man fighting to produce or control resource is viewed as a full-blooded being with hopes, fears, goals, values, needs and identities. So, identity is now a focus in conflict analysis and resolution.[76]

According to analysts who regard self-image or identity as a crucial factor in conflicts, there is the rigidity of a group's need to be 'right' about the other and the events surrounding the conflict, and there is also a desire to place the blame, for what caused the conflict and what happened during the conflict, on the other group in the conflict. The analysts maintain that there is a reflexive reaction to put all the responsibility onto the 'aggressive and evil other' to protect one's righteous self-image. This mutual deflection of responsibility by the two groups in conflict is a powerful reaction to protect one's self-image or identity and to protect oneself from the trauma related with conflict. This is an aspect of the emotional dimension of conflict causing and fueling conflicts.[77]

But can countries be in conflict along the emotional or identity dimension? Mayer answers this in the positive and rightly so. The Ethio-Eritrean conflict has this dimension. However, this is not meant to say that everyone in the two countries had similar emotions. Mayer's caution in this regard is pertinent. He notes that when one says two countries are at conflict along the emotional dimension it does not mean that every individual member of each country shares the same feelings or even that the majority do. It rather means that the conflict evokes certain reactions and attitudes from the dominant leaders or a significant number of people in each country.[78] This point should be particularly emphasized in the Ethiopian context. Given the size and diversity of the country

[74] Vamik Volkan (1997), *Bloodlines: From Ethnic Pride to Ethnic Terrorism* (New York: Farrar, Straus and Giroux), p. 25.
[75] *Ibid*, p. 27.
[76] Jay Rothman and Marie Olson (2001), 'From Interests to Identities: Towards a New Emphasis in Interactive Conflict Resolution', *Journal of Peace Research* 38(3), at pp.294-295.
[77] Donna Hicks (2001), 'The Role of Identity Reconstruction in Promoting Reconciliation', in Raymond Helmick and Rodney Petersen (eds.), *Forgiveness and Reconciliation,* (Philadelphia: Templeton Foundation Press), p.139.
[78] Mayer, *supra* note 15, p.7.

and its people, some sections of the Ethiopian society had little emotional involvement in the conflict.[79]

In the course of examining the Ethio-Eritrean conflict, one is struck by the anger, pride, betrayal and generalized hostility it has entailed. Thus, Ethiopian-Eritrean discourse both formal and informal has been acrimonious and revolves around the emotive issue of 'betrayal'.[80] Participants of the field study confirm this observation. Asked how much role emotions played in fueling the 1998-2000 war, an overwhelming number of Eritrean and Ethiopian respondents said it had a role. Of the 96 Eritreans that answered this question, 46 said emotions played very big role while 38 said they played big role. Only 8 respondents thought emotions did not play any role. So, 91.7% of Eritrean respondents replied that emotions had very big role, big role or some role in fueling the conflict. Ethiopian respondents too confirmed that emotions had significant role in the conflict. On the Ethiopian side 42 out of 70 respondents said emotions had very big role, 16 said they had big role while 2 respondents said they had some role. Only 10 respondents said emotions had no role in fueling the war.

Regarding self-image or identity on the Ethiopian side, one notes significant section of the society feels a strong sense of pride over the country's almost uninterrupted independence for long time. The victories achieved in several wars fought against the Turks, Egyptians, Mahdists, Italians, etc…who tried to invade the country, are gloriously remembered, and to some extent mystified. Some segments of the society justify this by ancient and biblical myths portraying Ethiopians as a chosen people.[81] A military challenge by Eritrea, formerly only a province of Ethiopia, was therefore, an affront. In short, there was a high degree of symbolism involved in the war. Thus, for Ethiopians negotiating before Eritrea's withdrawal from the territory it occupied by force was compromising their identity. The speech made just after the outbreak of the conflict by Ato Ghebru Asrat, President of the Regional State of Tigrai (during the period) illustrates this point. He said[82]:

> …we will pay any kind of sacrifice, even if the war takes spans of generations. No force can invade us! Impossible! This is because Ethiopia means 'anti-invasion'. An Ethiopian means one who dies for his honor and fights for freedom and independence.

[79] Informal discussion with Ethiopians of diverse background indicates this fact. The Eritrean Government further extends this reality to portray the conflict as a conflict which does not involve most Ethiopians as such.

[80] Ruth Iyob (2000), *supra* note 35, p.678.

[81] William Scott (1993), *The Sons of Sheba's Race:African Americans and the Italo-Ethiopian War*, 1935-41 (Indianapolis: Indiana University Press), p. 23.

[82] Kjetil Tronvoll, *supra* note 36, p. 66.

This feeling was shared by a significant number of Ethiopians. It was not uncommon to hear a common man treating the conflict as an affront to identity of Ethiopia and Ethiopians. Tronvol presents what an elderly peasant from the outskirts of Mekelle told him. The peasant said: "The present 'habo' (resolve in the face of difficulty) is even greater than in the past because Eritreans … have shown their contempt for us by stating that they are better than we are, and have taken our land". [83]

The survey conducted by this author in Shire-Indaselassie and Addis Ababa confirmed the role of self-image and identity in the conflict. To assess the extent to which issues of self-image fueled the 1998-2000 war, four questions were put to participants of the study. They were asked whether the war was really a border war, and particularly what they thought on this issue during the war, whether or not ethnic/regional feelings were apparent during the war and the extent to which people felt the need to win the war irrespective of who started it. The answers to these questions indicated that the war was not really seen as a border war. For instance, 64 out of 68 Ethiopian respondents said the war was not a border war. 34 out of 62 participants said they felt the war was not a border war even at the time of the war. Moreover, 48 out of 69 respondents said ethnic or regional feelings were apparent during the war and 60 out of 68 respondents said the need to win the war irrespective of who started it, played a very big role in fueling the conflict while the remaining 8 did agree this had a role but only 'some' role. Although the survey was not meant to make generalizations about the entire populations of the two countries, the figures indicate that the conflict, to a significant extent, involved issues of self-image and identity at least to certain segments of the societies.

As regards Eritrea, one notes that Eritreans, both at home and in diaspora are imbued with a strong sense of nationalism. According to some written and oral sources, Fascist propaganda and policy of divide and rule has succeeded in instilling the feeling of superiority in the Tigrigna speaking Eritrean urban elite against Ethiopians, but mainly over Tigray owing to its geographic and cultural proximity to Eritrea. The Italians were engaged in intensive propaganda which claimed that Eritreans were superior to the people south of the Mereb in 'intelligence, creativity, moral virtues and will-power'. It has been alleged that some archives in Rome indicate that in the last years of the 1930s the Italians went to the extent of banning intermarriage between people on the two sides of the Mereb, the justification being 'biological difference'. Some contend that this racist propaganda appealed to some of the Eritrean urban elite hence they began

[83] *Ibid*, p. 67.

to develop a distorted self-image.[84] In the course of solidifying the Eritrean self-image, the EPLF has further reinforced this problem thereby steadily letting it develop into a political culture.[85]

Volkan's view on identity formation seems to partly explain the Eritrean situation. According to him, a new nation may define its identity around a 'chosen trauma' and/or 'chosen glory.' A 'chosen trauma,' as used by Volkan, reflects a large group's unconsciously defining its identity by trans-generational transmission of injured selves infused with the memory of the ancestor's trauma.[86] Eritreans feel highly victimized by the Ethiopian state due to the heavy-handed and undemocratic methods that were used to emasculate and silence the opposition to unity, thus gradually alienating the Eritrean population. They had also experienced real and perceived discrimination in connection with jobs and other opportunities.[87] As the Ethiopian state was using unrestrained power for thirty years in its attempt to suppress the separatist movement, many concur that the key element in the process of the formation of nationalism is a consensus that defines the common, and usually 'alien enemy'. There is thus little question that modern Eritrean nationalism is a by-product of Ethiopian hegemonic domination, according to many sources.[88]

As a result of the identity formed around this collective victimization, many Eritreans saw the border conflict as another attempt to humiliate them. One of the questions put to Eritreans was whether the 1998-2000 war had the effect of opening old wounds caused by previous Ethiopian governments to the Eritrean people. Of the 90 Eritreans that answered this question 74 answered yes. They saw the 1998 war as a continuation of past injustice inflicted, in their view, by the Ethiopian state. This was a strong obstacle to negotiating a settlement.

The identity that Eritreans formed around their real and perceived achievements during the armed struggle for independence also contributed to the failure to negotiate a settlement to the conflict. As Volkan explains, 'chosen glory,' the mental representation of a historical event that induces feelings of success and triumph, can be a basis for identity of a large group. He observes

[84] Medhane Tadesse, *supr*a note 42, p. 36, See also Tekeste Negash, *supra* note 24, p.16.

[85] Peggy Hoyle (1997) *Eritrean National Identity*: The Role of Education and Constitution (Unpublished PhD dissertation at the University of North Carolina) p. 56. See also Medhane, *supra* note 42, p. V and Tronvol, *supra* note 36, p.72.

[86] Vamik Volkan, *supra* note 74, p.48.

[87] Alemseged Abay, *supra* note 20, p. 224.

[88] Ruth Iyob (1995), *supra* note 28, pp. 120-21. See also Hoyle *supra* note 85, p.57 and Medhanie *supra* note 42, p. V.

that the shared mental representation of a war for independence is a powerful ethnic or large-group maker.[89]

This view is confirmed by other writers. Endowed with battle hardened military and self-confidence, Eritrea's leader seemed eager to boost this national identity of Eritrea in every possible way. Particularly, the fact that Eritrea won its war of liberation has resulted in an elevated sense of national identity and made it a very assertive country with an ambition to exert power regionally. In some ways, it is comparable to Israel, a small nation that is very assertive.[90] Many believe this phenomenon contributed to the escalation of the conflict.

Some explain the very root cause of the war as identity dilemma. Alemseged Abay, whose book on Eritrean identity was published just before the outbreak of the conflict, has the following to say:

> Created in reaction to genocidal-like state behavior of [Ethiopia], Eritrean-ness remains yet to be delivered. … Massimo d'Azeglio, once said: 'we have made Italy, now let us make Italians'. Making Eritreans and nurturing 'Eritrean-ness' demands self-definition and boundary delimitation. … [I]dentity is inherently contrastive and needs the relevant other ... [91]

He further contends that the Eritrean elite are searching for what Frederik Barth calls 'border guards' to separate Eritreans from Ethiopians. They have gone to the extent of renaming ethnic groups to create a rift between them and the same ethnic groups in Ethiopia. Other authors concur that concerted and conscious effort was made to 'write a liberation history.' Still others go to the extent of explaining the motive for the war itself as the desire to strengthen separate Eritrean identity.[92]

There is no way of telling whether the war was aimed at creating emotional scars strong enough to draw a wedge between the two people. That the war created emotional scars is, however, evident. The field study confirmed that the conflict was rife with emotions on the Eritrean side. Asked whether the 1998-2000 war was really a border war, 84 out of 96 Eritrean respondents said it was not. They were further asked whether ethnic or regional feelings were apparent during the war, to which 68 out of 86 persons (who responded to this question) said yes, while 21% answered no. Asked to what extent the desire to win the war, irrespective of who started it, fuelled the war, 72 out of 90 respondents said such feelings played a very big role, while 10 respondents said it played some

[89] Volkan, *supra* note 74, p. 82.
[90] Khadiagala, *supra* note 48, p. 43.
[91] Alemseged Abay, *surpra* note 20, p. 225.
[92] Tekeste and Tronvoll, *supra* note 55, pp.30-31, See also Berhane, *supra* note 19, p. 34. *See also* Alemseged Abay, *supra* note 20, p. 226.

role. Only 4 out of 90 respondents answered that it had no role. Obviously, the sample was not really representative of the entire Eritrean public and hence no claim is being made about the exact proportion of Eritreans who shared these feelings. However, the figures reflect the emotional aspects of the war.

This was further confirmed by interviews conducted with Ethiopians who were 'deported' from Eritrea. Interviews with returnees confirmed that particularly after the fall of Barentu the biggest threat to their personal safety was the Eritrean public, especially the youth and militia. Angesom, who was born and raised in Gindai, a town between Asmara and Massawa, told me a compelling story of his own. He said he witnessed brutal beating of civilian Ethiopians. In fact, he himself had to run for his life into a police station.[93] W/ro Tsaidu, an elderly deportee, told me of another incident. She said that when they were being transported to Ethiopia, the Eritrean public would throw stones at their buses. For instance, she said this happened at Maihabar.[94] Almost all other interviewees in Adigrat and Mekelle confirmed that such occurrences were very prevalent after the fall of Barentu to Ethiopian forces, and this was particularly worse outside Asmara.

In light of the foregoing, the conflict should not be seen only as state-to-state conflict devoid of emotions and identity issues.

2.3.3. Cognitive dimension of the conflict

The cognitive dimension refers to a belief or understanding that one's own 'needs, interests, wants or values are incompatible with someone else's'.[95] In other words, this refers to what the parties to a conflict think about the motives and activities of each other. It could, for example, be a belief in country 'A' that country 'B' is working to destabilize the former, and the vice-versa. This perception could cause and fuel conflict. At the root of this dimension of conflict is the sociological principle that "action always proceeds … from the interpretation of conditions by decision makers. In other words, action comes from image in the mind".[96]

On the part of Eritrea the perceptions were, to significant degree still are, that Ethiopia and Ethiopians still think Eritrea is by nature and logic part of Ethiopia and thus want Eritrea to fail as a sovereign entity.[97] The views of Professor

[93] Interview with Angessom Gebreanenia, Addigrat February 26, 2010. This interviewee also told me of the severe condition under which the returnees were detained and the various techniques the Eritrean authorities would use to avoid scrutiny of this by the Red Cross.
[94] Interview with Wro Tsadu Berhe, Adigrat February 27, 2010.
[95] Mayer, *surpa* note 15, p. 4.
[96] Wright, *supra* note 9, p. 254.
[97] Tekeste Negash and Tronvoll, *supra* note 55, p. 94.

Tekie, a member of Eritrea's Constitutional Commission, perhaps summarizes the perception in significant quarters in Eritrea:

> The TPLF, after paying lip service to the birth of Eritrea, is now trying to snuff the life out of Eritrea's sovereignty. Ethiopia's rulers past and present share the lust for the land (of Eritrea) though the TPLF is more debilitating. [98]

This kind of image painted by Eritrean opinion makers such as Professor Tekie seems to have been consciously created by the Government of Eritrea. An Eritrean I interviewed in Maiaynie refugee camp told me that as a young university graduate in the war years and even after that he would be required to paint this image of Ethiopia in weekly political indoctrination lessons at his workplace; he was required to incorporate in the 'lessons' how the rulers of Shoa and Tigray always tyrannized over Eritreans and that they still desire to do that. Perhaps in part owing to such indoctrination, even the common people seem to share or to have shared this outlook about Ethiopia's intentions. Summarizing the outlook after the border war, Richard Reid observes that:

> [the Eritrean society is broadly] governed by the notion of destiny usually, and increasingly couched in militaristic terms, and by a potent sense of isolation which rests on the belief that Eritrea can trust no-one, from Ethiopia to the 'international community'; and thus 'suffering and hardship' have been and will be for some time to come the lot of the Eritrean people. [99]

The field study confirms the prevalence of negative perceptions at the time of the war. Asked whether there were fears, during the war, that the real intention of the Ethiopian Government was to 're-occupy/dismember/destabilize Eritrea' 62 out of 94 of the respondents answered yes. Another rather surprising answer was asked whether Eritrean Government works to destabilize Ethiopia 44 out of 84 Eritreans answered yes.

The overwhelming majority of the respondents being Eritrean refugees living in Ethiopia one cannot claim the foregoing perceptions are representative of the larger Eritrean society. They do however indicate that the perceptions about the intentions of Ethiopia on Eritrea have improved. In an interview with the Chairperson of Maiaynie refugee camp coordinating committee, a refugee himself, he told me that perceptions have improved greatly. He notes that the number of refugees who come to Ethiopia is a good indication, and this is so,

[98] Tekie Fessehatzion (2002), *Shattered Illusion, Broken Promise* (Lawrenceville: Red Sea Press), p.252.

[99] Richard Reid (2005), 'Caught in the Headlights of History: Eritrea, the EPLF and the Post-War Nation-State', *Journal of Modern African Studies* 43(3), p. 468.

despite the intense propaganda by the Eritrean government that the Ethiopian government injects HIV into the body of Eritrean refugees and similar horrifying stories. According to him, a few years back many Eritreans feared coming to Ethiopia because of the negative perceptions actively fostered by Eritrea. Moreover, fleeing to Ethiopia was considered extremely unpatriotic, while today it is absolutely a different story.[100]

Similarly, a significant number of Ethiopians believed that Eritrea wished to manipulate the Ethiopian economy to the maximum benefit of Eritrea despite its declaration of sovereignty. Moreover, they believed, that Eritrea had an undeclared design to destabilize Ethiopia and weaken its economy through intermittent skirmishes which would sap the nation's resources that are essential for development. Asked what the intentions of Eritrea were at the time of the war, 50 out of 70 Ethiopian respondents in the survey said that the Eritrean Government wanted to destabilize and dismember Ethiopia. They believe that Eritrea foments dissidence and insurgency in Ethiopia by training and arming various fundamentalist and separatist groups.[101] Today, the perception has worsened. Asked about the current intentions of Eritrea, 52 out of 68 of Ethiopian respondents said Eritrea now works to destabilize and dismember Ethiopia. Many Ethiopians also contend that Eritrean daily broadcasts in several Ethiopian languages corroborate the existence of a design to destabilize Ethiopia.

3. The Boundary and Claims Commissions: A Cursory Look at Their Mandates and Awards

The two countries solely took a purely legalistic approach to solve their conflict. The Algiers agreement, signed on December 12, 2000, which terminated the war provided for the establishment of two arbitral tribunals: the Boundary Commission and the Claims Commission.[102] Each had to base all its decisions on relevant rules of international law. Particularly, the Boundary Commission was given mandate to delimit and demarcate the border between the two countries on the basis of the 1900, 1902 and 1908 treaties between Italy and Ethiopia and applicable international law.[103] Similarly, the Claims Commission had the mandate to give awards on all claims for loss, damage or injury resulting from[104] (a) the actions of one government against the other, (b) the actions of the

[100] Interview with Misgina MaiAyni Refugee Camp, February 22, 2010.
[101] Paul B. Henz, Eritrea's War Against Ethiopia: Causes and Effects, Reflections, Perspectives at <http://www.fas.org./man/dod-101/ops/war/docs/02501001.htm>
[102] The Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Articles 4 and 5.
[103] *Id.* Art 4(2).
[104] *Ibid.* Art. 5(1).

nationals of either party against the government or entities owned by the other government, and (c) violations of international humanitarian law. The Tribunal did not have jurisdiction to hear claims arising from the cost of military operations, preparing for military operations or the use of force, except to the extent that such claims involved violation of international humanitarian law.[105] Neither Commission had the power to make decisions *ex aequo et bono*.[106]

The Boundary Commission embarked on its task by underscoring that it will stick to the terms of the Algiers agreement and rely on the three boundary treaties and international law, with a caveat that international law attaches significance to the conduct of parties to a treaty subsequent to conclusion of a treaty. It observed[107]:

> The effect of a subsequent conduct may be so clear in relation to matters that appear to be the subject of a given treaty that the application of an otherwise pertinent treaty provision may be varied…. The nature and extent of the conduct effective to produce a variation is, of course, a matter of appreciation by the tribunal in each case.

On the basis of the above understanding of its mandate and applicable rules, it considered the claims of each side as to where exactly the boundary between the two countries should be. It then rendered its decision on April 13, 2002. The scope of this article does not allow delving into the details of the decision other than a brief indication of two points. The first is that each state won some territories the other had claimed, and the territories won or lost by each were not particularly vast or endowed with proven resources. The second is that Badme the flashpoint of the conflict was awarded to Eritrea although this was not clearly mentioned in the award itself.[108]

As regards the work of the Claims Commission, one should note that the issues pending before it were many, diverse and complex. Dealing in detail with the claims of each country is clearly beyond the themes of this article. Hence, we will be confined to highlighting the types of claims and the awards given.

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[105] *Id*.

[106] *Id*. Art. Art 4(2) and 5(13).

[107] Ethiopia-Eritrea Boundary Commission Decision Regarding the Delimitation of the Border Between the State of Eritrea and The Federal Democratic Republic of Ethiopia, Paragraphs 3.8 and 3.9 (pages 22 and 23) available at: <http://www.eritrea-hilfswerk.de/fileadmin/Daten/pdf/eebc_decision-l.pdf> Accessed on May 4, 2012.

[108] *Ibid*, Par 8.1 and 8. 2 (pp. 97 to104). For a quick view of the final boundary decision one is advised to look at these pages and maps 10, 11 and 12 included in the award of the Commission itself.

Ethiopia claimed, among other things, that Eritrea waged war against it in violation of the UN Charter that bans the use of force.[109] The claim accuses Eritrea of violation of the laws of war and killed, raped, tortured, abducted, physically and mentally abused, forcefully displaced, interned, subjected to frequent beatings, Ethiopians in Ethiopian territory it occupied in the initial months of the war and within Eritrea. Ethiopia further claimed that Eritrea was engaged in shelling and aerial bombardment of civilian targets. Ethiopia's contention was that in the aggregate, almost 242,000 people were potentially exposed to these violations.[110]

Other claims included execution and mistreatment of Ethiopian prisoners of war,[111] confiscation of cargoes from Ethiopia that were in Eritrean ports at the start of the war, taking property of Ethiopians in Eritrea[112], causing economic loss throughout Ethiopia by starting the war,[113] and mistreatment of Ethiopian Embassy personnel and interference with access to Ethiopian Embassy in Eritrea.[114] On the basis of the above allegations, Ethiopia claimed total damages amounting to 14.3 billion USD. This amount, according to the Claims Commission, was more than three times the Gross National Product of Eritrea in 2005 measured on purchasing power parity.[115]

Eritrea on its part claimed, among other things, that Ethiopia breached the laws of war especially after occupying Eritrean territory following its May 2000 offensive. The claims included destruction and looting of property, abuse of civilians which in some instances like Teseney and Barentu included rape, and shooting of civilians.[116] Eritrea claimed that Ethiopia caused internal displacement of thousands of civilians in Eritrea and prevented their return to their homes.[117] Eritrea further claimed that Ethiopia engaged in aerial bombardment of six towns causing civilian casualties and loss of property, targeting infrastructure, for instance, water reservoir and power station near Assab and Massawa respectively.[118] Other claims stated that Ethiopian troops were engaged in desecration of cemetery of Eritrean patriots and have damaged the historic stela at Matara.[119] Yet another major claim of Eritrea was that Ethiopia violated the rights of Eritreans and Ethiopians of Eritrean origin living

[109] *Jus Ad Bellum*, Ethiopia's Claim 1-8.
[110] Final Award for Ethiopia paragraphs 76 and 77.
[111] Ethiopia's Claim 4.
[112] Ethiopia's Claim 6.
[113] Ethiopia's Claim 7.
[114] Ethiopia's Claim 8.
[115] Damage Award for Ethiopia, Section III, Paragraph 18.
[116] Eritrea's Claim 3 paragraphs 26 and 28.
[117] Eritrea's Claim 14, Paragraph 122 and Claim 21, Paragraph 131.
[118] Eritrea's Claim 26, Paragraph 99 and 107.
[119] Eritrea's Claims 2,4,6,7,8 and 22.

in Ethiopia at the outbreak of the war by wrongfully denationalizing them, expelling them *en mass*, detaining them without due process and depriving them of their property in violation of international legal obligations. Regarding the numbers affected, Eritrea alleged that 75,000 persons were expelled from Ethiopia.[120] Other claims of Eritrea included deliberate killing, physical and mental abuse of Eritrean prisoners of war, that Ethiopia ceased to pay pension to Eritreans who were in the service of the Ethiopian state prior to the independence of Eritrea[121] and that Ethiopia was engaged in a systematic confiscation of business, real property, trucks and other property of Eritreans in Ethiopia.[122] On the basis of these claims, among others, Eritrea requested an award approaching 6 billion USD against Ethiopia.[123]

The Commission decided on each claim and gave awards. The awards given in respect of each claim filed by the two countries are voluminous and they cannot be presented in meaningful details here. We thus confine ourselves to highlighting five observations. These are[124]:

a) Neither side got all it wanted. In fact, both sides were found to have committed serious violations of international humanitarian law;
b) The violations of international humanitarian law committed by Eritrea were in some sense more egregious as they were mostly directed at the life and limb of the victims. The Commission found Eritrea liable for severe crimes like unlawfully killing or permitting the killing, rape and abduction of civilians. It also found it liable for abuse and improper care for Ethiopian prisoners of war and failure to give proper protection to civilians it expelled in addition to looting civilian property.
c) The Commission found Ethiopia liable for failure to give proper protection and treatment to Eritrean prisoners of war, for indoctrinating them, for improperly detaining and expelling Eritreans from its territory, engaging in looting and unlawful destruction of property.

[120] Eritrea's Claims 15, 16, 23, 27, and 32.
[121] Eritrea's Claims 15, 17 par 3, 19 and 23.
[122] Eritrea's Claim 24.
[123] Eritrea Final Award for Damages , Paragraph 18.
[124] Read the awards available at: <http://www.pcacpa.org/showpage.asp?pag_id=115>, accessed on May 15,2012. Of particular interest in this regard are: Partial award, Western and Eastern Front-Ethiopia's Claims 1 and 3, Partial Award: Central Front-Ethiopia's Claim 2, Partial Award: Prisoners of War:-Ethiopia's Claim 4, Partial Award: Civilian Claims- Ethiopia's Claim 5, Partial Award: Prisoners of war-Eritrea's Claim 17, Partial Award: Central Front-Eritrea's Claims 2,4,6,7,8 and 22, Partial Award: Civilian Claims-Eritrea's Claims 15,16,23, and 27-32, Partial Award Jus Ad Bellum, Ethiopia's Claims 1-8; Final Award Eritrea's Damages Claim Sec IX, Parag 21; Ethiopia's Damages Claims Final Award, Sec XII E.

d) The Commission found Eritrea liable for starting the war in violation of Article 2 paragraph 4 of the Charter of the United Nations by resorting to the use of force; and,
e) On the basis of the foregoing findings, among others, and on the basis of its understanding of the rules of international law dealing with determination of the quantum of compensation it awarded Ethiopia a total monetary compensation of USD 174,036,520; and it awarded Eritrea and its named nationals a total of USD 163,520,865.

4. The Mismatch between the Eritrea-Ethiopia Conflict and Its Arbitration

According to Wallensteen, *conflict resolution* is a situation "where the conflicting parties enter into an agreement that solves their central incompatibilities, accept each other's continued existence as parties and cease all violent action against each other".[125] In the context of conflict resolution, acceptance of each other's continued existence implies a situation wherein parties to the conflict accept each other as parties to future dealings with one another.[126] Conflict resolution also means more than the absence of war or fighting. The parties are agreeing to respect each other and to live together. However, it may or may not include broader meanings of peace such as cooperation, integration and justice.[127]

Contemporary views of conflict resolution take a broad view of the nature and timing of intervention in conflicts. While the classical view of conflict resolution focused on intervention addressed at the core parties to the violent conflict, the contemporary view emphasizes the 'bottom-up' process.[128] In general, there has been a shift from seeing a third party intervention as the primary responsibility of outsiders to appreciating the role of indigenous peacemakers. Instead of outsiders offering a solution to a conflict say in one-shot arbitration or even mediation, the emphasis is now on the need to build constituencies and capacity within societies that aim at managing conflicts in a sustained way.[129]

The idea behind this approach is that in societies or even countries that are in conflict you have people involved in the conflict to different degrees. Certain segments of the society will be more invested in the conflict than others. You will thus have core parties to the conflict, at the very center of the conflict. Next to this layer you will have actively influential parties, the second layer. The third

[125] Wallensteen, *supra* note 1, p. 8.
[126] *Ibid.*
[127] *Ibid.*, p. 9.
[128] *Ibid*, p. 23.
[129] *Ibid*, p. 25.

layer consists of marginal parties to the conflict. The fourth layer may consist of 'uninvolved' parties. This latter group is a party to the conflict in a minimal sense and is not meaningfully absorbed in the conflict. All these groups can play their own roles in resolving a conflict. In other words, the new approach sees working from the outside layer towards the key or core parties to the conflict as an option that has to be taken in tandem with focusing on the core group.[130] The essence of this new approach is that there are various tracks to conflict resolution. For instance, where two countries are involved in a conflict, you could work on the top leaders in the two countries. This is Track I. You can also work with middle level leaders in the two countries with the assistance of say international NGOs, churches, academics, Track II. Further down it is possible to work at local community level or at grassroots, Track III.[131]

In all the three tracks to peace what needs to be done to attain resolution of conflict could vary depending on the type and extent of the conflict. Where the conflict had emotional/identity dimension, for example, concrete steps must be taken to address the need for recognition, esteem and respect for each of the parties. Hence, for example, where the conflict resulted in death or created other injures steps must be taken to condemn the injustice, bring perpetrators to justice and as far as practicable 'compensate' the victim or show empathy and recognition. In other words, rectificatory justice is important. Mani writes this type of justice after conflict could have three rationales, namely, legal, political and psychosocial.[132]

Track II and III methods, also known as Track II and III diplomacy, complement the official Track I method that focuses on government to government relations. This is so because the two routes have the potential to provide social, psychological and spiritual support for the peace building endeavor. As a result of this process, some of the basic self-esteem (identity) and security needs of the parties are satisfied and wrong perceptions dispelled.[133] On top of this, in more general ways, Track II and III diplomacy assists political leaders by compensating for the constraints imposed on them by the understandable pressure exerted on leaders to be strong in the face of the enemy. In other words, they foster a political environment through the education of public opinion that would make it safer for political leaders to take risks for peace.[134]

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[130] *Ibid.*
[131] *Ibid*, p. 26.
[132] Rama Mani (2002), *Beyond Retribution: Seeking Justice in the Shadows of War* (Malden: Polity Press), p. 7. See also Rothman and Olson, *supra* note 76, p. 295.
[133] Olga Botcharova, 'Implementation of Track II Diplomacy: Developing a Model of Forgiveness', in Helmick and Rodney (eds.), *supra* note 77, p. 284.
[134] *Ibid.*

Arbitration is settlement of a dispute by a binding award rendered by an entity that is granted with such powers by the parties themselves. The award is arrived at by authoritative legal process and by considering the merits of the opposing positions.[135] It is used when parties to a dispute opt to handle the conflict by legal means and precedent rather than by more political means. As a result, it allows a vindication of a winner and the humiliation of the loser.[136] If objective elements linked to resources are predominant at a given point, then third party methods that facilitate a compromise or provide a judgment are appropriate. So, arbitration could be appropriate for disputes which focus on resource allocation. If on the other hand subjective elements such as misperception, emotions and miscommunication predominate, then third party activities that improve the relationship and induce problem-solving are more appropriate.[137] As Bercovitch points out, as an international conflict escalates and de-escalates, different interventions will be appropriate at different stages.[138]

With the benefit of hindsight one can contend that it was wrong for the peace deal to choose to resolve the boundary problem by arbitration.[139] According to Zondi and Rejouis, by opting for this method Ethiopia and Eritrea actually chose 'conflict settlement' over 'conflict resolution'. For them, conflict resolution is based on an analytical approach to get to the underlying causes of the problem and bring about permanent solution which as far as possible produces a win-win ending.[140] So, although the choice of arbitration may have been motivated by expectations that the ruling might well be just, fair and, therefore acceptable to both parties, this winner-loser route at least in the case between Eritrea and Ethiopia has probably prolonged the conflict rather than resolve it.[141]

In fact, arbitration could even be another way of continuing the conflict as each side may go for arbitration in the hope that the outcome will justify the human and material costs of a war. In part because of this, arbitration on the boundary problem after a full-fledged war may be of doubtful utility. It has the potential for complicating matters further as it can produce results that fly on the face of the outcome of the fighting as was the case here. Ethiopia was literally required to snatch defeat from the jaws of victory which is politically extremely

[135] Bercovitch, *supra* note 16, p. 242.
[136] *Ibid*, p. 240.
[137] *Ibid.*
[138] *Ibid.*
[139] Sally Healy and Martin Plaut (2007), '*Ethiopia and Eritrea Allergic to Persuasion*', Chatham House Brefing Paper, BP No. 07/01, p. 9.
[140] Siphamandla Zondi and Emmanuel Rejouis (2006), 'The Ethiopia-Eritrea Border Conflict and the Role of the International Community', *African Journal of Conflict Resolution* 6(2), p. 76.
[141] *Ibid*, p. 77.

difficult to stomach.[142] Regarding the Claims Commission, one easily notices that most of the matters brought to it were not really resource related. So, the observation that arbitration is inappropriate for non-resource focused conflict holds true as briefly shown below.

5. The Eritrea-Ethiopia Conflict: The Three Dimensions of Resolution

As Mayer observes, the dimensions of resolution depend on the dimensions of conflict. That is, the process of resolution occurs along emotional, cognitive, and behavioral dimensions.[143] In what follows, we will look at these three dimensions of resolution and examine the ways in which the Eritrea-Ethiopia conflict can reach resolution in each of these dimensions.

5.1. Emotional Resolution

The emotional dimension of resolution involves both the way disputants feel about the conflict and the amount of emotional energy they put into it.[144] If people experience the feelings associated with a conflict at high level of intensity, for example, same as when they were fully engaged, there is no emotional resolution.[145] Although it may be easier to think of emotional resolution in terms of experience of individuals, the concept applies to systems as well.[146] Unfortunately, in spite of the peace deal, arbitral awards on the disputed border and socio-economic claims, the level of misunderstanding and resentment between the two countries and people is still high. This, of course, is not the same for every segment of the people in both countries. Moreover, it does appear that emotions are subsiding among certain sections of the societies in the two countries though not to the desirable level.[147]

How can then those involved get over this, and look forward? Volkan suggests mourning. He observes that human nature gives this painful but ultimately effective way to let go of previous attachments, to adjust internally to

[142] Healy and Plaut, *supra* note 139, p.9.
[143] Mayer, *supra* note 15, p. 98.
[144] *Ibid*, p. 100.
[145] *Ibid*, p.101.
[146] *Ibid*, p. 103.
[147] Reid, *supra* note 99, p. 476. According to him young, educated, urban Eritreans are increasingly blaming the Eritrean Government, rather than Ethiopia, for what went wrong while rural Eritreans and the older struggle generation, *tegadelti* remain apologetic. Similarly, informal discussions the author of this piece had with Ethiopians show that emotions in certain quarters still remain high though lower than previously. The closer one goes to the border the more intense the emotions.

the absence of lost people or things and to get on with the future. He observes that humans cannot accept change without mourning what has been lost.[148] Like individuals or families, large groups also mourn. Members of a group who share the same loss collectively go through a similar psychological mourning process.[149] However, in some situations a shared calamity can leave members of a group "dazed, helpless and too afraid and angry to complete or even initiate a mourning process".[150] When this happens, the large group that survived the ordeal passes down the memory of the tragedy and its feelings about it to its descendants.[151]

How can this be avoided in the Ethiopia-Eritrea context? How can the people of the two countries mourn their past losses so that they do not induce feelings of anger, humiliation and desire for revenge in the future generations? Religious leaders in both countries can play critical role in this regard. This could be by cultivating the culture of forgiveness, encouraging people to people contacts and teaching the need for peace. One recalls the initiatives by the religious leaders of the two countries with the assistance of the Norwegian Aid.[152] Elders from both countries too can have a critical role.

Another but related method is suggested by Rothman and Olson. They suggest what they call 'resonance phase' as a starting point for the resolution of identity-based conflict. In this phase, disputants reflexively articulate their core concerns sought, threatened or frustrated within the conflict first to themselves and then to each other.[153] The second element of this refers to affording opportunity to groups in conflict the chance to get the other's views regarding the causes of the conflict and what happened during the conflict. This implies that there should be interaction between members of the two groups in conflict to dispel the rigid views maintained by each regarding who is responsible and how to rectify the situation. In other words, where there is no interaction between the two groups, the desired outcomes to the conflict are seen in zero-sum terms by each group because each side has expelled the other and the experiences of the other from one's assessment of what is 'right'.[154] It is only after this has been done that the disputants can ask what they can do about their identities which are in confrontation. This process will enable the parties realize

[148] Volkan, *supra* note 74, p. 36.
[149] *Ibid*, p. 39.
[150] *Ibid*, p. 41.
[151] *Ibid.*
[152] <http://www2.reliefweb.int/rw/rwb.nsf/db900SID/OCHA-64c8c8?OpenDocument>, accessed on June 2, 2010.
[153] Rothman and Olson, *supra* note 76, p. 298.
[154] Hicks, *supra* note 77, p.142.

that their identities are not mutually exclusive. Through this process they discover that their identities have points in which they mesh.[155]

People of the two countries should thus engage in in-depth discussion about the conflict instead of trying to forget about it. They should make known first to themselves and then interactively to each other the details of what were lost (in terms of life, liberty, property, opportunities etc...) on both sides. This may be done by organizing *fora* first in each country for this purpose. Then the discussion should involve people from both countries interacting with each other. For instance, both victims and perpetrators of wrong from both sides could express their feelings and motives in a forum similar to say the Truth and Reconciliation Commission of South Africa. The South African Commission was mandated with establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights committed by all the parties to the conflict in South Africa. To this end, it conducted hearings and investigations and exposed various violations of human rights including the antecedents, circumstances, factors and context of such violations as well as the perspectives of victims and the motives of perpetrators of the crimes.[156] What is more, it worked with the aim of restoring the human and civil dignity of victims by granting them an opportunity to relate their own accounts of the violations of human rights and by recommending reparation in respect of them.[157]

Similar *fora* would certainly be helpful, as having an opportunity to express feelings and having them acknowledged by others is frequently an important part of reaching emotional closure.[158] A question that one may raise here is whether these multifaceted steps can really be taken given the narrow political space in the two countries. Unfortunately, at this point in time, the political space in the two countries is not wide enough for private citizens to fully engage in such activities.[159] But this should not be an excuse for sitting idle. No matter how little it might appear, whatsoever is possible should be done because every little step in the right direction helps. This, of course, should be in tandem with working for the widening of political space necessary for such exercises.

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[155] Rothman and Olson, *supra* note 76, p. 298.

[156] Promotion of National Unity and Reconciliation Act, No. 34 of 1995, Art. 3(1)(a). <http://www.doj.gov.za/trc/legal/act9534.htm>, accessed on October 30, 2009.

[157] htt://www.doj.gov.za/trc/special/index.htm, accessed on October 19, 2009.

[158] Mayer, *supra* note 15, p. 103.

[159] For instance, Freedom House in its 2012 report categorizes Ethiopia as 'not free', with scores of 6 each for civil liberties and political rights, 7 being the worst possible score any country can get. Eritrea is considered to be even worse, scoring 7 each on political liberties and civil rights, hence 'qualifying' to the club dubbed 'the worst of the worst', Freedom House, Freedom in the World 2012, <www.freedomhouse.org|report|freedom-world|freedom-world-2012>.

Anyway, freedom is always to be claimed by the citizen, not bestowed by those in power.

Volkan suggests yet another path in addressing such dark chapters of the past in which a group or its leader asks for forgiveness from another group. He, however, cautions that this is effective only if the wronged group has already done a sufficient amount of mourning.[160] Although admission of the commission of wrongs is helpful, the desired effects materialize only if such admissions are mutual, complete and widely publicized in the fora prepared for that purpose. Perhaps, this may be attempted in the Ethio-Eritrean context as long as the apology and forgiveness are genuinely offered.

5.2. Cognitive Resolution

From the cognitive dimension of a conflict follows the cognitive dimension of resolution. In other words, as the mental image or perception of people is a cause of conflict, it must be addressed as a necessary part of conflict resolution. As the UNESCO Constitution correctly puts it, "wars are made in the minds of men, and it is in the minds of men that the defense of peace must be constructed".[161] Mayer notes that cognitive resolution occurs when the disputants believe that their key issues have been addressed. When a complete resolution in this dimension is attained, parties to a conflict change their essential views of the people with whom they are at conflict, the nature of the conflict or the issues themselves.[162] In other words, disputants view the conflict as part of their past as opposed to their future.[163]

Assessment of the reality on the ground gives mixed results at best. Significant forces in Eritrea and Ethiopia still believe that the relationship is not improving as desired and will not improve that much in the near future. Evaluating the situation in Eritrea in 2005, Reid says, in the views of Eritreans, especially the struggle generation, no political, social or even economic development will take place unless Ethiopia is defeated militarily.[164] The outcome of an online poll conducted by an Eritrean opposition website in the summer of 2012 indicates that some segments of the Eritrean society still envisage an outbreak of a full-fledged war as a possibility. Asked "what is the likelihood of full war breaking between Eritrea and Ethiopia in 2012", 259 respondents (13% of those who responded to the question) answered "very high" while another 267 persons (yet another 13%) responded "high". 951 and

[160] Volkan, *supra* note 74, p.226.
[161] Wright, *supra* note 9, p. 257.
[162] Mayer, *supra* note 15, p. 99.
[163] *Ibid*, p. 98.
[164] Reid, *supra* note 99, p. 481.

429 persons regarded the possibility as "very low" and "low" respectively.[165] Although a clear majority of respondents believed that the possibility is very low and low, it should be noted that the question was about the possibility of full-fledged war between the two countries in 2012. This does not thus disprove the observations of Reid regarding the thoughts of a significant number of Eritreans about a renewed war as a possibility, if not a probability, in the near future.

In contrast to public opinion in Eritrea, the Ethiopian public shows a general tendency of forgetting away[166] the Eritrea-Ethiopia conflict while the Ethiopian government oscillates between containment and taking proactive defensive measures. Talking to the media on March 12, 2011, the late Prime Minster Meles Zenawi indicated that the policy of Ethiopia (until that time) had been foiling terrorist and other attacks sponsored by Eritrea. He however, added "it is now difficult to hold down this force of destruction only guarding our borders". There should be, he continued, an effort to change either the policy of the Eritrean Government or the regime itself.[167] The raids Ethiopia conducted inside Eritrea in March 2012 to wipeout what it called 'training camps for subversive groups'[168] can be understood in light of this change of strategy.

On the side of the Government of Eritrea the perception seems to be going from bad to worse. On March 24, 2011 the Ambassador of Eritrea to the United Nations, Araya Desta wrote to the President of the Security Council that Ethiopia has been pursuing, during the past ten years "an active policy of subversion and hostility against Eritrea under the rubric of regime change". The Ambassador then reminded the President of the arms embargo the Security Council 'unjustifiably' imposed on Eritrea in December 2009 and warned that the embargo might encourage Ethiopia to contemplate reckless acts of further aggression against Eritrea.[169]

The foregoing statements show that interventions at top level are difficult at least in the short run. This does not, however, mean that intervention in this track is entirely impossible. In fact, there are signs of conciliatory tone at the level of the political leadership. For example, in a recent interview with

[165] <www.awate.com> accessed on August 2, 2012. The total number of respondent as of this date was 2,022.

[166] Eritrean refugees whom the author met in Addis Ababa told him that they are bewildered to meet some Ethiopians who ask them whether they came from Asmara by plane ignorant that such thing is unthinkable.

[167] Addis Fortune, Weekly Newspaper published in English, Vol. 11, No. 568, March 20, 2011, p. 46.

[168] <http://www.bbc.co.uk/news/world-africa-17386161>, accessed on August 14, 2012.

[169] <http://www.embassyeritrea.org/pressstatement /2011_March 24 ADesta PermRep of Eri2UN letter.pdf> .

Aljezeera, Prime Minister Hailemariam Dessalegn said that "If you ask me, 'Do you want to go to Asmara and sit down and negotiate with Isaias Afwerki?' Then, I will say yes."[170] He further noted that the late Prime Minister Meles Zenawi had a similar position, and said that both sides need to have the same position for this to materialize.

Yet, a solid achievement in this realm seems to be difficult in the short run. Hence, a wide range of conflict resolution mechanisms focusing on mid and grassroots levels, i.e Track II and Track III diplomacy, should become current priorities toward attaining resolution on the cognitive dimension of the conflict. This is not, however, to suggest that efforts need not be exerted at the level of the two governments (Track I). In fact, efforts at Tracks II and III are not substitutes for the engagement of governments (Track I), but rather aim at enabling the governments address the conflict.

As these tracks are underway, there should also be sub-regional, regional and global efforts to encourage and facilitate the resolution of the conflict. With regard to regional intervention, Getahun Seifu, suggests "intervention by the AU mechanisms for conflict prevention, management and resolution".[171] In this regard, he points out the challenges that AU may encounter in the process such as the criticism for not defending the arbitral ruling based on the Algiers agreement and the accusation of undue influence by Ethiopia on the African Commission.[172] Yet, he suggests that "AU should leave no stone unturned to intervene in the Ethio-Eritrean conflict", and that "[i]t is in the best interest of the AU (as well as the conflicting parties) to immediately … seek peaceful resolution".[173]

5.3. Behavioral Resolution

We usually focus on the behavioral dimension of conflict when we think of its resolution. We think of resolution "as being about what people will do (or not do) or what agreements they will make about what they will do".[174] According to Mayer, behavioral resolution has two aspects. The first refers to discontinuing

[170] Interview with Aljezeera, December 8th 2012, <http://www.aljazeera.com/programmes/talktojazeera/2012/12/201212710354627687.html>, Accessed: 10 Dec. 2012.

[171] Getahun Seifu (2012), "Ethiopian-Eritrean Conflict: Options for African Commission Intervention" in *Managing Peace and Security in Africa: Essays on Approaches to Interventions in African Conflicts"*, (The Africa Peace and Security Programme, Institute for Peace and Security Studies, Addis Ababa University, Selected Cases in Africa, December 2012), p. 146.

[172] *Ibid*, p. 179.

[173] *Ibid*, p. 180.

[174] Mayer, *supra* note 15, p.106.

the conflict behavior, and its second aspect is related with instituting actions to promote resolution. He notes that "stopping fighting is one part of behavioral resolution, taking steps to meet each other's needs and implement a new mode of interaction is another".[175] Mayer further observes that unless we are dealing with a conflict in which there will be no future interdependence or interaction among the disputants and in which nothing more than the cessation of certain behavior is necessary to end the conflict, then it is important to address both elements of the behavioral dimension to reach a full resolution.[176]

The Eritrea-Ethiopia conflict resolution must envisage the inevitability of future interaction and interdependence. This is admitted even by the late Tekie Fissehazion who was strongly opposed to any form of political union between the two countries. For instance, he is quoted as having stated that "Eritrea is not just another country. History, location and happenstance have contributed to the creation of an economic region that traverses political boundaries, so much so that economically Northern Ethiopia and Eritrea are like two siamese twins joined at the back and mutually looking in opposite directions". [177]

This, no doubt, is a correct observation. Thus, behavioral resolution of the conflict will require taking steps to meet each other's needs and to implement a new mode of interaction between the two countries. At this juncture, it is necessary to remember that the issues that were lurking behind the border conflict were issues like commodity trade, monetary arrangements and use of ports. So, behavioral resolution of the conflict calls for entering into a comprehensive economic cooperation that includes trade, investment, use of ports, and the mobility of people on openly negotiated terms that are fair to both sides.

Conclusion

The Conflict between Ethiopia and Eritrea is a conflict which has emotional, cognitive as well as behavioral dimensions. Arbitration as the sole means of conflict resolution on the basis of authoritative legal standards is not effective for a conflict that is permeated by emotions and adverse perceptions. Yet, Ethiopia and Eritrea opted for binding arbitration as the sole mechanism of conflict resolution. Apparently, this choice was based neither on satisfactory analysis of the causes of the conflict nor on the prognosis of the role arbitration would play in resolving the conflict. Hence, in spite of the awards rendered by

[175] *Ibid,* p. 107.
[176] *Ibid,* p. 108.
[177] Tekeste Negash and Tronvoll, *supra* note 55, p. 92, *See also* Amare Tekle (1994) Ethiopia and Eritrea: From Conflict to Cooperation (Lawrenceville: The Red Sea Press), p. 69.

the Boundary and Claims Commissions, the conflict remains unresolved. In fact, since both Commissions have decided for each side on some of the issues presented to them, each side is cherry-picking parts of the awards that are favorable to it and using the same for propaganda to fuel the conflict.

To make progress in all the dimensions of conflict resolution, all stakeholders, and particularly the citizens of the two countries, should be aware that there are multiple tracks to conflict resolution and take matters into their own hands. They should not expect that the governments of the two countries will, for that matter can, resolve every dimension of the conflict one fine morning. Given the current nature and relationship of the political leaderships in the two countries, the approach to the resolution of the conflict should be initiated and steadily nurtured 'bottom-up'. ■

ETHIOPIA'S WTO ACCESSION AND FINANCIAL SERVICES LIBERALIZATION:

STRIKING THE BALANCE BETWEEN TRADE LIBERALIZATION AND DOMESTIC POLICY SPACE

Tilahun Esmael Kassahun♣

Abstract

This article examines some of the main provisions of the General Agreement on Trade in Services (GATS) and the Annex on Financial Services to evaluate its impact on domestic financial regulation and macroeconomic policy. In particular, it analyzes whether Ethiopia can – upon accession and within the WTO's GATS framework – achieve the objective of liberalizing international trade in financial services while maintaining adequate domestic regulatory institutions and the normative framework needed in this regard. The article investigates whether GATS provides a flexible framework for Ethiopia to negotiate liberalization commitments while at the same time preserving a sufficient level of domestic regulatory space to achieve financial and economic stability.

Key words

WTO accession, GATS, financial liberalization, domestic policy space, trade liberalization, Ethiopia

DOI http://dx.doi.org/10.4314/mlr.v6i2.2

Acronyms and Abbreviations

BOP	Balance of Payments
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IMF	International Monetary Fund
MFTR	Memorandum of Foreign Trade Regime
MFI	Micro Finance Institution
NBE	National Bank of Ethiopia
WTO	World Trade Organization

♣ LL.M (Business Law) Addis Ababa University, LL.M (International Economic Law and Policy, IELPO) University of Barcelona; the author teaches at Haramaya University College of Law and is currently on study leave. He would like to give his sincere gratitude to the editorial team at Mizan Law Review and the two anonymous reviewers for their valuable comments, remarks, and suggestions. He can be reached at <tekassahun@ielpo.org>.

Introduction

The WTO was established as a successor of the General Agreement on Tariffs and Trade (GATT).[1] Built upon a broader legal and political base than the GATT, it can correctly be described as the mutated GATT.[2] The WTO covers numerous trade agreements, one of the most important being the WTO General Agreement on Trade in Services (GATS).[3] This accord which came into force in January 1995 is the first and only set of multilateral rules that cover trade in services, with a broad scope and coverage of all traded services including financial services.[4] Ethiopia has applied to accede to this system in 2003 and is now deeply involved in the multi-stage accession process whereby negotiations on trade in financial services will be one of the key issues that determine Ethiopia's WTO accession. This is due to both the role of financial services for the economy at large, the closed nature of the service against foreign investment and the nature of WTO negotiating trade in financial services considering potential market failures and regulatory issues in these services.[5] This article addresses these issues.

However, the article does not address broad questions on the economic and social benefits of financial market reform and liberalization. Nor does it deal with the benefits and positive externalities of financial market and trade policy reform for broader financial sector development, growth, income distribution

[1] World Trade Organization (1999), *The Legal Texts, The Results of The Uruguay Round Of Multilateral Trade Negotiations*, Marrakesh Agreement Establishing The World Trade Organization.

[2] Michael J. Trebilcock and Robert Howse (1999), *The Regulation of International Trade*, Second Edition, Routledge, See Chapter 1; An Intellectual History of International Trade Theory And Policy, pp. 1-24.

[3] GATS, *supra* note 1.

[4] The word "trade in services" has earlier history since 1973 under the OECD framework. See OECD (1973), *Report by the High Level Group on Trade and Related Problems*, Paris: OECD.

[5] All this can be seen from various official and non official statements. See for instance the views of the Minister of Foreign Affairs who stated his belief that "existing differences on the telecom and financial sectors should not be impediments to the ongoing accession process as Ethiopia had expressed its readiness to work on these issues on a short-to-medium term basis." <http://www.mfa.gov.et/weekHornAfrica/morewha.php?wi=789>. Also see Venture Africa which stated that "[k]ey issues pertaining to Ethiopia joining the WTO have surrounded the opening up of currently state-monopolised sectors, such as the telecommunications and finance sectors, while the country has also been called upon to allow investment by foreign entities." <http://www.ventures-africa.com/2013/01/ethiopia-set-to-join-wto-by-2014/> .

and poverty.[6] Without denying the importance of these questions, the study assumes that sufficient literature exists in this realm.[7] Rather, this article focuses on GATS commitments (of WTO Members) in financial services and its impact on national policy objectives. The central inquiry will be whether there exists any reason for Members to hold back on GATS commitments in order to retain the freedom to pursue certain macroeconomic and regulatory policy objectives of their internal economy.

Accordingly, the evaluation of the system below shows that commitments under GATS need not compromise the ability of governments to pursue sound regulatory and macroeconomic policies and hence still leaves them with considerable freedom to achieve other domestic policy targets. Based on the examination of the possible commitment scenarios which Ethiopia can possibly commit to, the author argues that there exists no reason why GATS commitments on financial services will have to compromise Ethiopia's ability to pursue sound regulatory and macro-economic policies.[8]

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[6] On all these issues generally see John Williamson and Zdenek Drabek (1999), *Whether and When to Liberalize Capital Account and Financial Services*, World Trade Organization Economic Research and Analysis Division, Staff Working Paper ERAD-99-03; Gerard Caprio (2001), *Financial Liberalization, How Far, How Fast?*, Cambridge University Press; Stiglitz, J. E. (2000), *Capital Market Liberalization, Economic Growth, and Instability*, World Development, Vol. 28, 1075-1086; World Trade Organization, WTO (1997), Newsletter , *Liberalizing Trade in Financial Services: Why It Matters*? Focus No. 22; Agénor, Pierre-Richard (2001), *Benefits and Costs of International Financial Integration: Theory and Facts*, Policy Research working paper, 2699, the World Bank; Jonse Bane (2002), *Merits and Demerits of Allowing Entry of Foreign Banks into the Ethiopian Banking Sector* Banking Sector*: Lessons From Selected Countries*, Paper Prepared for the First International Conference on the Ethiopian Economy organized by EEA (January 3-5, 2002 Addis Ababa, Ethiopia)

[7] See Kiyota, K., Peitsch, B., and M Stern, R. (2007), *The Case for Financial Sector Liberalization in Ethiopia***,** Research Seminar in International Economics, Discussion Paper No. 565, University of Michigan and Yokohama National University; Robert M. Stern *et al*., (2007), *Assessment of the Impact of the General Agreement on Trade in Services (GATS) on the Ethiopian Financial Services Sector*, Ministry of Trade and Industry, Addis Ababa; Gebrehiwot Ageba and Derk Bienen (2008), *Ethiopia's Accession to The WTO and the Financial Services Sector*, Munich;, Also see, Solomon Abay Yimer (2011), *Financial Market Development, Policy and Regulation; The International Experience and Ethiopia's Need for Further Reform*, Academisch Proefschrift, ter verkrijging van de graad van doctor aan de Universiteit van Amsterdam.

[8] Financial services fall into two broad categories: insurance and banking, both of which cover a range of activities.

To this end, the article evaluates the existing norms under the general WTO framework, and in particular GATS commitments and thereby examines to what extent the existing framework under the WTO allows regulatory freedom and policy space to achieve objectives such as prudential regulation and macro-economic policy. The article also evaluates to what extent Ethiopia's commitment scenario could be shaped-up to maintain the economic and regulatory space stated above and the tools needed in this regard. In particular, a detailed analyses of some of the main provisions of the GATS and the Annex on Financial Services will be made to determine its impact on domestic financial regulation and whether Ethiopia can achieve, under the WTO's GATS framework, an objective of liberalizing international trade in financial services while allowing itself maintain adequate domestic regulatory institutions.

The article is organized into three major sections. The first section provides an overview of the nature of GATS commitments and the modality of negotiations. This will be followed by the second section which briefly discusses Ethiopia's Accession to the WTO and Financial Services and the experience of recently acceded developing and least developed countries. The section also highlights the possible commitment scenarios with which Ethiopia could accede to the system. The last section consists of the major topics of discussion and evaluates *the Ethiopian Case* of financial market liberalization and economic policy space followed by a conclusion.

1. The Nature of GATS Commitments and Modality of Negotiations

Rather than representing itself as a liberalization agreement, GATS mainly provides a framework for liberalization of trade in services.[9] In so doing, it is based on three pillars. One, it includes a framework agreement, which contains a comprehensive general accord governing all possible sectors (i.e. financial services, telecommunications, and information technology).[10] Two, special sector annexes and other agreements, such as the *Understanding on Financial Services*, contain provisions focusing specifically on the sector concerned.[11] It finally, consists of scheduled commitments on market access, national treatment

[9] Peter Van den Bossche (2005), *The Law and Policy of the World Trade Organization Text, Cases and Materials*, Cambridge University Press, p 480.

[10] See GATS Part II General Obligations and Disciplines.

[11] The list of annexes include; Annex on Article II Exemptions, Annex on Movement of Natural Persons Supplying Services under the Agreement, Annex on Air Transport Services, Annex on Financial Services, Second Annex on Financial Services, Annex on Negotiations on Maritime Transport Services, Annex on Telecommunications, Annex on Negotiations on Basic Telecommunications.

and other commitments.[12] With regard to the last point, the GATS define trade in financial services, like in other services, in terms of *four modes of supply*, which are respectively referred to in this article as *Mode 1*, *Mode 2*, *Mode 3* and *Mode 4*:

> For the purposes of this Agreement [i.e. GATS], trade in services is defined as the supply of a service: (a) from the territory of one Member into the territory of any other Member; (b) in the territory of one Member to the service consumer of any other Member; (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member. [13]

These modes are in short referred to as cross-border supply of services (*Mode 1*), consumption abroad (*Mode 2*), commercial presence (*Mode 3*), and temporary movement of natural persons (*Mode 4*).

In terms of market access, GATS does not provide positive and normative definition for market access but only provides six types of restrictions that a member cannot impose, unless identified in its schedule.[14] Conceptually this is similar to the principles of quantitative market access limitations under GATT Art XI.[15] Generally, GATS Art XVI:2 provides for rules that prohibit members from imposing market access limitations on: (i) the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test; (ii) the total value of service transactions or assets; (iii) number of operations or quantity of output; (iv) number of natural persons supplying a service; (v) type of legal entity or joint venture or, finally; (vi) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment, unless properly provided in their schedules. The existence of any limitations in these areas has to be indicated

[12] See GATS Art XX, Schedules of Specific Commitments; 1. Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement.

[13] General Agreement on Trade in Services (GATS), Art I.

[14] *Ibid*, Art XVI.

[15] General Elimination of Quantitative Restrictions: "1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

with respect to each of the four modes of supply in scheduled sectors.[16] The idea is that such market access limitations are prohibited even if they are not discriminatory.[17]

At the same time, GATS does not provide a comparable list in respect of national treatment restrictions, and it is up to members to ensure that all potentially relevant measures are listed in sectors where commitments are scheduled and, if they wish, members can inscribe various types of national treatment limitation (e.g., regarding taxation or regulations).[18] "If a member no longer wishes to conform to its specific commitments, it may modify its schedule by providing compensation in the form of alternative market access (even across sectors)."[19] "However, this undertaking may involve difficult negotiation and often creates confusions regarding the member's commitments."[20]

With respect to the final part of the GATS framework, the GATS schedules are key framework instruments providing the list of services with members' commitments in terms of market access, national treatment and additional commitments. The lists of services correspond to GATT secretariat classification,[21] which is a standardized harmonized framework also following numerical references to the Central Product Classification system of the United Nations.[22]

It is important here to recall that, depending on how commitments are made, treaties liberalizing trade in services make use of either a 'positive list' or a

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[16] This done in accordance with United Nations CPC classification (Statistical Papers, Series M, No.77, 1991). Also see WTO, *Guidelines For The Scheduling Of Specific Commitments Under The General Agreement On Trade In Services (GATS),* Adopted by the Council for Trade in Services (2001).

[17] Nicolas F. Diebold (2010), *Non Discrimination In International Trade In Services 'Likeness' In WTO/GATS*, Cambridge University Press, p 29.

[18] Art XVII lit 2 states; A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

[19] International Monetary Fund, *Reference Note on Trade in Financial Services*, Prepared by the Strategy, Policy, and Review and Legal Departments (September 3, 2010) p 5 <http://www.imf.org/external/np/pp/eng/2010/090310.pdf > General Agreement on Trade in Services (GATS), Art XXI: Modification of Schedules.

[20] *Ibid*.

[21] See Uruguay Round, *Services Sectoral Classification List, Note by the Secretariat*, MTN.GNS/W/120 (10 July 1991).

[22] Various versions available, see for instance, *Central Product Classification, CPC Version 1.1,* (Updated: 21.02.2002), *Version submitted to the United Nations Statistical Commission*, 5-8 March (2002).

'negative list' approach.[23] Under a positive list approach, countries undertake national treatment and market access commitments specifying the type of access or treatment offered to services or service suppliers in scheduled sectors. The alternative top-down approach is based upon negative listing, whereby all sectors and measures are to be liberalized unless otherwise specified by reservations or non-conforming measures. This is the so-called "list-or-lose technique."[24] GATS follows a 'hybrid trend'; a positive list for sectoral coverage and a negative list for limiting market access and national treatment commitments "(with the qualification that even here, the GATS allows for entries that are 'unbound', that is where no commitment at all are made for a particular mode of supply under a given sector)."[25]

If a service sector is listed in the national schedule, it implies that the listing economy has liberalized its domestic market in that sector for trade and is ready to offer market access to foreign suppliers. It applies to all the members on a non-discriminatory basis in the selected services area. The GATS accord is fairly flexible, and members have complete freedom in choosing services as well as the degree to which foreign services suppliers can operate in their domestic markets. For instance, if a member country chooses financial services and commits to open its domestic banking sector for foreign suppliers, it is also free to limit market access by limiting the number of licenses it grants. Additionally, it may predetermine the number of foreign bank branches it is going to allow to operate in its territory. Thus, the services agreement, unlike the GATT, provides for both market access and national treatment limitation.[26]

Consequently, despite the almost unanimous agreement that GATS is a technically difficult agreement to comprehend, there is also outstanding evidence that trade negotiations over GATS is comparatively less rigid for

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[23] James Gillespie (2000), *Financial Services Liberalization in the World Trade Organization,* Harvard Law School, p 11.

[24] Sherry M. Stephenson (2001), *Multilateral and Regional Services Liberalization by Latin America and the Caribbean,* A Publication of the Organization of American States Trade Unit (March 2001) p 30.

[25] Sherry Stephenson and Patricio Contreras, *An Asymmetric Approach to Services Liberalization: the European Union-Mercosur Case*, <http://www.sedi.oas.org/DTTC/TRADE/PUB/STAFF_ARTICLE/steph01_asym.asp> (accessed Jan 2013) Also See Sherry M. Stephenson, *Approaches to Liberalizing Services*, Development Research Group of the World Bank (DECRG). The positive list approach was adopted specifically at the request of developing countries which felt they did not have the administrative resources required to determine all the measures that apply to each sector and to decide which they want to exempt. See Paul Kruger, *GATS Commitments of the SADC EPA Configuration,* Tralac (2009).

[26] Dilip K. Das (2005), *The Doha Round of Multilateral Trade Negotiations: Arduous Issues and Strategic Responses*, Palgrave Macmillan, p 131.

negotiating members inside the system which is equally relevant to those in the process of accession because of the following major peculiarities of GATS. First, member/acceding countries identify the sectors and sub-sectors for making commitments to foreign services suppliers. Although members have a schedule of commitments, there is no minimum requirement in this regard. Members have liberty to identify as small part of one sector for guaranteeing the rights of foreign suppliers to provide services as they please.[27] Second, having identified the sector(s), member/acceding governments have a right to set limitations on market access and the degree of national treatment they are willing to guarantee. Third, developing country governments frequently limit their commitments to one or two modes of supply through which services can be traded. Furthermore, if they see it is reasonable and appropriate, they may withdraw or renegotiate commitments.[28] This *modus operandi* has thus rendered the GATS accord essentially and relatively adaptable and accommodating.[29]

2. Ethiopia's Accession to the WTO and Financial Services: Setting the Stage

Accession to the WTO is a protracted, multi-stage and complex process.[30] Essentially, the way to become a WTO member is through accession "on terms to be agreed" between the acceding country or customs territory and other WTO members.[31] The WTO Agreement does not contain any further guidelines on

[27] Generally see, Council for Trade in Services, *Guidelines for the Scheduling of Specific Commitments Under The General Agreement On Trade In Services (GATS)*, S/L/92 (2001).

[28] GATS Article X Sub 2: In the period before the entry into effect of the results of the negotiations referred to in paragraph 1, any Member may, notwithstanding the provisions of paragraph 1 of Article XXI, notify the Council on Trade in Services of its intention to modify or withdraw a specific commitment after a period of one year from the date on which the commitment enters into force; provided that the Member shows cause to the Council that the modification or withdrawal cannot await the lapse of the three-year period provided for in paragraph 1 of Article XXI.

[29] Dilip K. Das, *supra* note 26 above. This however does not mean that there is a 'level playing field' in the WTO accession process. Unfortunately, acceding members have, more often than note, less bargaining chip than incumbent members.

[30] ICTSD, *An Analysis of the WTO Accession Guidelines for Least Developed Countries*; ICTSD Programme on Competitiveness and Development; Information Note; International Centre for Trade and Sustainable Development, Geneva, Switzerland, <www.ictsd.org>, (2012), p 2.

[31] Art Article XII:1 of the Marrakesh Agreement Establishing the WTO states, "Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be

what the "terms to be agreed" are or how the accession process is going to follow from here except that it leaves the discretion to the incumbent WTO members and the results of the negotiations.[32]

Within the above context, the accession process can be categorized into a four stage process of multilateral and bilateral negotiation. The first stage starts when the acceding country (or customs territory as the case may be) submits its formal request of membership and its Memorandum of Foreign Trade Regime (MFTR). This is a document that provides detailed sets of information on the country's economic, political and legal infrastructure that mostly has to do with international trade. The second stage in the accession process establishes a designated working party which is a multilateral negotiation medium open for all interested WTO members and it essentially involves a fact finding process. At this stage members would send various sets of questions based on the MFTR submitted. It is an important stage which makes sure that the internal policies and laws of the acceding country are in compliance with the WTO Agreement. This stage is followed by,[33] the third stage of bilateral negotiation between the acceding country and individual WTO members. It is perhaps the most important stage of the negotiation process as it determines the shape of commitments to be taken by the acceding country. The final stage deals with more administrative issues such as drafting the terms of accession protocol, schedules of commitments and of course involves final decision making by the WTO Ministerial Conference.[34]

Ethiopia applied for the accession to the WTO in January 2003 and the WTO's General Council has established a Working Party to which the Government of Ethiopia submitted a Memorandum of Foreign Trade Regime of the country for the consideration of WTO members. Until December 2012 the working party has met three times and Ethiopia is in the process of responding to its fourth set of questions from WTO members about the workings of its economy and trade regime.

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agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto." It is to be noted that this provision follows similar language contained in the accession provision of GATT Art. XXXIII.

[32] Ivan Marković (2009), *How To Join The World Trade Organization: Some Aspects Of The Accession Process*, Economic Annals, Volume LIV, No. 180, (January – March 2009) p 121.

[33] Often overlaps are also common between the multilateral negotiations under the working party meetings and bilateral trade negotiations.

[34] According to Art XII:2, "[d]ecisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO."

As part of achieving membership in the WTO, Ethiopia will enter into bilateral negotiations with various members of the WTO and perhaps will be required to make commitments to market access for a number of sectors and modes of supply in the services sector. As an LDC, Ethiopia is likely to be given some flexibility in assuming liberalization commitments in services.[35] However, it should be expected that Ethiopia will be asked to agree to some threshold of liberalization in the financial sector, and it is important for Ethiopia to develop a negotiating strategy that protects its macroeconomic and regulatory interests but also be prepared to undertake some commitments in these sectors. Ethiopia will also be required to have a system of transparency in regulation that meets the general obligations of the GATS.

2.1. Experience of Recently Acceded Countries

The vast number of agreements for the liberalization of trade in services that has been implemented both at the multilateral and bilateral levels has shed light on the negotiating strategies that might be considered by governments in order to obtain the full benefits of liberalization. "The main conclusion arising from these experiences is that no specific recipe can be prescribed for negotiating the liberalization of trade in services,"[36] but that, whatever negotiating modality is chosen, it should take into account the speed with which the economies of participating countries are able to open their markets to international trade and the degree to which the agreement is capable of conveying credibility.[37] "The legitimacy of an agreement will depend upon how it is structured, while the

[35] Although it is not as effective as it ought to be, the WTO Guideline on LDCs accession is a notable indicator to these flexibilities. See WTO, *Guidelines for Accession of Least-Developed Countries*, WTO document WT/L/508 of 20 January 2003, Decision of 10 December 2002. Paragraph 1 states for example "1.Market Access -WTO Members shall exercise restraint in seeking concessions and commitments on trade in goods and services from acceding LDCs, taking into account the levels of concessions and commitments undertaken by existing WTO LDCs' Members." Also see recent efforts to "further strengthen, streamline, and operationalize the 2002 LDC accession guidelines," under the Eighth WTO Ministerial Conference in December 2011. Accession of Least-Developed Countries Decision of 17 December 2011WT/L/846, (19 December 2011).

[36] Sherry Stephenson and Patricio Contreras, *supra* note 25.

[37] In exploring the current account implications of alternative speeds of liberalization, studies have shown that in a framework where a country faces a borrowing constraint, a gradual liberalization of trade is to be preferred to an immediate approach. However, this question is one that has often been debated in the economic literature and no universally agreed conclusion exists with respect to the optimum speed of undertaking trade liberalization, whether for goods or services. Generally see World Bank, *Finance for growth: Policy choices in a volatile world*, Policy Research Report (2001).

ability of members to implement the commitments to be undertaken will depend to a considerable extent on their level of development and particularly on the sophistication of their regulatory instruments".[38] The commitment scenarios of four recently acceded developing and least developed countries are highlighted below.

2.1.1. Kingdom of Cambodia

"Cambodia has undertaken market access commitments in at least one sub-sector under each of 11 different services headings under the WTO classification".[39] The Cambodian Law on Banking and Financial Institutions and subsequent regulations guaranteed foreign banks rights and obligations equal to local banks and there was no restriction regarding foreign ownership of banks.[40] Accordingly, Cambodia made commitments on: acceptance of deposits and other repayable funds from the public, lending of all types, including, among others, consumer credit, mortgage credit, factoring and financing of commercial transaction, and all payment and money transmission service, including credit, charge and debit cards, travellers' cheques and bankers drafts.[41] Thus Cambodia did not commit to financial services under sub-sectors B(c), (e), (f)–(l).[42] Cambodia maintained that it will unbound these sectors until the Government determines what types of entities can conduct these services, the related laws and regulation are established, and such business is authorized by the government or other relevant designated authority. Thus, the commitments for subsectors (a), (b) and (d) only refer to commercial banking.

2.1.2. Cape Verde

The accession schedule of Cape Verde shows that, Cape Verde made market access commitments on *Mode 2* and *3* on sectors such as (v) acceptance of deposits and other repayable funds from the public; (vi) lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction; (vii) financial leasing; (viii) all payment and money

[38] Sherry Stephenson and Patricio Contreras, *supra* note 25.

[39] Sok Siphana (2005), *Lessons from Cambodia's Entry into the World Trade Organization*, Asian Development Bank Institute, ADBi Publishing -11/05, p 51.

[40] Samnang Chea, et al., *Trade in Services in Cambodia*, ASEAN Economic Forum, <http://siteresources.worldbank.org/INTRANETTRADE/Resources/Topics/Services/Cambodia-Asean_services.pdf> (last accessed April 2012).

[41] World Trade Organization, *Report Of The Working Party on The Accession Of Cambodia, Addendum Part II- Schedule of Specific Commitments in Services List of Article II MFN Exemptions*, T/ACC/KHM/21/Add.2 (2003).

[42] These sectors are (c) Financial leasing, (e) Guarantees and commitments, (f) Trading for own account or for account of customers, (g) Participation in issues of all kinds of securities, (h) Money broking and finally (i) Asset management.

transmission services, including credit, charge and debit cards, travellers' cheques and bankers drafts; (ix) guarantees and commitments; (x) trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following: (A) money market instruments (including cheques, bills, certificates of deposits); (B) foreign exchange; (C) derivative products including, but not limited to, futures and options; (D) exchange rate and interest rate instruments, including products such as swaps, forward rate, etc.[43] Cape Verde also made commitments on areas of (xi) participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues (xii) money broking (xiii) asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services (xiv) settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments, while at the same time Cape Verde forfeited the privilege to discriminate against foreigners except on *Mode 4*, in accordance with limitations under horizontal commitments. In the meantime Cape Verde, in its financial services head note, maintained that it will permit the establishment of branches for committed sub-sectors in insurance, banking and securities within 10 years from the date of Cape Verde's accession to the WTO.[44]

2.1.3. Kingdom of Nepal

The schedules of services commitments of the Kingdom of Nepal shows that Nepal made full market access and national treatment commitments (except on *Mode 4*) on all Banking and other Financial Services, [45] which includes; (a) acceptance of deposits and other repayable funds from the public, (b) lending of all types, including, *inter alia*, consumer credit, mortgage credit, factoring and financing of commercial transactions, (c) financial leasing (d) all payment and money transmission services (e) guarantees and commitments (f) trading for own account or for account of customers, whether on an exchange, an over-the-counter market, participation in issues of all kinds of securities, including under-writing and placement as agent (whether publicly or privately) and provision of service – related to such issues. It further includes (h) money broking, (i) asset

[43] Cape Verde, *Report of The Working Party on The Accession of Cape Verde: Addendum, Part II Schedule of Specific Commitments in Services List of Article II MFN Exemptions*, WT/ACC/CPV/30/Add.2.

[44] *Ibid*.

[45] For a detailed review of the financial services reform in Nepal see, Project Research & Management Associates P. Ltd (2007), *Study on Financial Sector Reform in Nepal; Overall Impact and Public Ownership of Financial Institution*, South Asian Network of Economic Institutes –SANEI.

management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial depository and trust services, (j) settlement of and clearing services for financial assets, including securities, derivative products, and other negotiable instruments, (k) provision and transfer of financial information, and financial data processing and related software by providers of other financial services, and (l) advisory services on all the activities listed above.[46]

In the meantime, Nepal maintained under the services schedule head notes that financial services in the form of operations identified in the Schedule can be carried out in Nepal only through a locally incorporated company. Importantly, branches for insurance services and wholesale banking were scheduled to be allowed only as of 1 January 2010.[47] In addition, only a licensed commercial bank, a licensed specialized bank or a registered finance company may accept deposits. Only financial institutions with rating of at least 'B' by 'Credit Rating Agency' e.g. MOODI, Standard & Poor can have commercial presence in Nepal. Another important limitation is the total foreign shareholding in any institution providing financial services which is limited to 67 per cent of the issued share capital. It has, nevertheless, been bound for the existing foreign financial service providers as to their scope of operation and equity structure. Nepal also maintained that the shares held by foreign nationals and foreign financial institutions in their locally incorporated companies are not transferable without the prior written approval of the Nepal Rastra Bank (the central bank) or any other competent authority as the case may be. Moreover, representative offices in Nepal may not be engaged in commercial business.[48]

2.1.4. Jordan

Jordan's GATS commitments in financial services are not different from the other recently acceded states. Essentially, Jordan made full market access and national treatment commitments on banking services such as; acceptance of deposits and other repayable funds from the public, guarantees and commitments and money broking.[49] The only exceptions were that Jordan bound a national treatment exception on mode one that real property in Jordan may not be mortgaged to banks outside Jordan and that national treatment on *Mode 4* is unbound, except as indicated in the horizontal section while, branches of foreign banks are required to have a resident regional manager. Jordan also made

[46] World Trade Organization (2004), *Trade in Services, The Kingdom of Nepal, Schedule of Specific Commitments*, GATS/SC/139.
[47] *Ibid*.
[48] *Ibid*.
[49] World Trade Organization (1999), *Report of the Working Party on the Accession of Jordan*, Schedule CXLVIII-Jordan, WT/ACC/JOR/33/Add.2, WT/MIN(99)/9/Add.2.

market access and national treatment commitments with respect to, lending of all types including consumer credit, factoring, mortgage credit, and financing of commercial transaction, financial leasing and all payment and money transmission services, except that under mode three market access is limited to services provided through banks and specialized financial companies and like the above commitments branches of foreign banks are required to have a resident regional manager.[50]

Jordan made full national treatment commitments on the first three modes with the usual limitations on *Mode 4* and at the same time made market access commitments on *Mode 1* and *Mode 2* with an exception to derivative products which are unbound. On *Mode 3*, access is restricted to: banks and financial services companies constituted in Jordan, in the form of public shareholding company, Limited Liability Company or a limited partnership in Shares Company.[51] Finally, with respect to advisory and other auxiliary financial services on all the activities including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy and provision and transfer of financial information as related to financial data processing and related software by providers of other financial services, Jordan made market access and national treatment commitments except with respect to the former access which is restricted to financial services companies constituted in Jordan.[52]

2.2. The Financial Services Market, Policy and Ethiopia's Possible Commitment Scenarios

The current picture of financial services in Ethiopia is dominated by banks. "Banks are the dominant financial institutions in the country" and they "account, on average, for 96% of total gross financial assets. Non-banks account only for about 4%".[53] Unfortunately, the current state of performance of the banking services in the country is one of the lowest in sub-Saharan Africa. "Ethiopia has a very low rural banking density and consequently one of the lowest financial inclusion ratios of Sub-Saharan Africa, with only 14 percent of adults having access to credit. Most of the bank branches are in urban areas. The ratio of the rural population to a commercial bank or a Micro Finance Institution (MFI) branch is one branch to 125,158 people. Thus it is not surprising that only one

[50] *Ibid*.
[51] *Ibid*.
[52] *Ibid*.
[53] Ebisa Deribie (2012), *The Effects of Post 1991 Era financial sector deregulations in Ethiopia: An Inspirational guide for agribusiness*, Research Journal of Agricultural Science and Review ISSN 2315-6880 Vol. 1(4) pp. 81-87 (October 2012) p 82.

percent of the rural population have bank accounts".[54] In the meantime, Ethiopia is the host of one of the fastest growing microfinance institutions in the World. By the end of 2005, "26 MFIs had 1,277,939 borrowing clients with an aggregated portfolio of 1.622 billion Birr".[55] "Ethiopia's insurance industry is relatively undeveloped which is exemplified by the sector's low penetration levels – there are an estimated 0.3 million formal insurance clients in Ethiopia".[56] According to the Centre for Financial Regulation and Inclusion report; "insurance premiums, including life and general insurance, totaled US $105 million in the 2006/07 financial year represented merely 0.2% of GDP in 2007 - while in Kenya and Namibia premiums represent 2.5% and 8.1% of GDP respectively".[57]

From the public governance side of the market, major economic policy and regulatory interests revolve around areas of financial stability and banking regulation. The Ethiopian legal regime in banking services regulation takes the form of nationality and investment limitations in the banking sector.

> The typical forms of limitations in relation to investment in banks are: the nationality requirement restriction, the restriction on maximum amount of investment (shares) to be held by a single investor/related investors, and the prohibition of an investor having allegedly substantial investment in one bank (influential shareholder) from investing in any other bank. On the other hand, Ethiopian law has delineated the scope of banking activities and it has also limited the scope of equity participation of banks in other firms.[58]

Financial stability issues in Ethiopia are centred towards the closed nature of international capital account and restrictions on the free convertibility of foreign exchange. Concerns in this regard are highly tied with the aim to maintain price

[54] World Bank, *Enabling Environment: Access to Financial Services and Transportation*, technical brief (2012) <http://www.agrifinfacility.org/enabling-environment-access-financial-services-ethiopia> (last accessed Jan 2012).

[55] Alemayehu Yirsaw (2008), *The Performance of Micro Finance Institutions in Ethiopia: A case of six microfinance institutions*, Addis Ababa University Master Thesis, p 6.

[56] AEMFI, Association of Ethiopian Microfinance institutions, *Overview of Ethiopia's Insurance Industry*,<http://www.aemfi-ethiopia.org/.../6-articles.html?...14%3Ainsurance-overvi> ... (Last accessed Jan 2012) Generally see Hailu Zeleke (2007), *Insurance in Ethiopia: Historical Development, Present Status and Future Challenges*. Addis Ababa: Master Printing Press.

[57] *Ibid*.

[58] Getnet Temechew (2010), *Investment Limitations in and by Banks in Ethiopia*, Addis Ababa University The School Of Graduate Studies Faculty of Law, Master's thesis, p 51.

and exchange rate stability, and achieving balance of payments equilibrium since these are ongoing problems in the country.

Currently, Ethiopia does not have limits on the number of banks, insurers and microfinance institutions that have to be licensed. It, however, prohibits the ownership of these institutions by foreign nationals and foreign owned juridical persons.[59] This aspect of financial sector development was also common in most developed, developing and transition economies of Eastern Europe, Asia and Latin America.[60] But in due time, most of these countries, including African states have removed these types of restrictions and opened up their financial markets for foreign investment after the reforms of the late 1980s and the 1990s.[61] The works of international and regional institutions, primarily the IMF, World Bank and WTO, were instrumental in this regard.[62]

The first among the four modes of supply, in GATS Part I terms, relates to cross border supply of financial services. In this particular mode, the experience of WTO Members and recently acceded countries shows that Ethiopia can possibly maintain the status quo of whatever practically exists now. It may also seem viable to achieve this in the accession negotiations as this is one of the most important modes which is highly dependent on international capital transfers and hence possibly entails capital movement volatility. Such strategy also seems wise considering other objectives of financial market liberalizations such as technology transfer and transfer of managerial skills or any other expectations of positive spillover from openness. Compared to *Mode 3* trade for instance, liberalization of cross-border trade in financial services carries more

[59] See Investment Proclamation, (Proclamation No 769/2012). And the regulation, Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation, Regulation No 270/2012 Art 3. For former legal instruments see Re-Enactment of the Investment Proclamation, Proclamation No. 280/2002, According to the Investment Proclamation, The banking, insurance, and micro-credit sectors, are restricted to domestic investors; Also see Transitional Government of Ethiopia, *Licensing and Supervision of Banking Business Proclamation* No. 84/1994, Art 4(2); Also see Federal Democratic Republic of Ethiopia, *Banking Business Proclamation No. 592/2008*, Arts 4(1)(d), 2(5) & 9.

[60] Earl H. Fry, *The Politics of International Investment* (McGraw-Hill Book Company, 1983) p.133, Also see Ha-Joon Chang, *Foreign Investment Regulation in Historical Perspective: Lessons for the Proposed WTO Agreement on Investment*, University of Cambridge, Faculty of Economics and Politics, (2003) p 1; Jeswald.W.Salacuse, *Direct foreign investment and the law in Developing Countries*, Foreign Investment Journal, Vol.15,No. 2, (2000) p. 389-390.

[61] See Solomon Abay Yimer, *supra* note *7*, p 26.

[62] Generally see Ahn, Dukgeun, *Linkages between International Financial and Trade Institutions*: IMF, World Bank and WTO, Journal of World Trade 34(4).

risks and fewer benefits.[63] The experiences of recently acceded countries also seem to allow this scenario. But, of course, new precedents can always be set any time and hence pressure to commit to this mode is expected.

On the other hand, compared to other service sectors, Ethiopia is less likely to bear pressure to commit in *Mode 2* financial services. Considering the virtual impossibility of regulation against individuals and firms consuming services abroad, this mode also seems the less difficult for Ethiopia to swallow. The experience of recently acceded countries also shows that with the exception of Nepal, this mode has been fully liberalized by all acceded countries. Indeed, the consumption of financial services abroad is almost impossible to monitor or distinguish from other modes of trade.[64] Therefore, offering full liberalization of this mode might be a wise tactical move by any acceding country as it constitutes a liberalization proposal without incurring any cost.[65]

With respect to the third mode of supply, i.e., commercial presence, Ethiopia currently has one of the few overtly protected financial markets in the world.[66] Primarily, the current system does not allow commercial presence of foreigners in the financial sector. This perhaps will be the most important subject of negotiations in Ethiopia's accession bid and possibly the entire accession negotiations can become contingent upon the commitment result of this particular service sector and mode of supply. Thus, potentially, there exists a very small chance that Ethiopia will be able to join the system without committing anything in this particular sector. But still there can be different scenarios of commitment levels.

For starters, one option is entry through equity ownership, with significant, but less than 100% share. This still would allow the various macro and efficiency benefits expected out of foreign partaking. Basically, the increased capital base would increase availability, accessibility and affordability of finance to the economy in general.[67] The other scenario is full commercial

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[63] Gebrehiwot Ageba and Derk Bienen, *supra note 7*, p 13.

[64] Marion Panizzon, Nicole Pohl And Pierre Sauvé (2003), *GATS and The Regulation of International Trade In Services*, Cambridge University Press (2008) pp. 183-187, Also see Sydney J. Key (2003), *The Doha Round and Financial Services Negotiations*, The AEI Press, Washington DC, p 8.

[65] Gebrehiwot Ageba and Derk Bienen, *supra* note 7.

[66] Kozo Kiyota *et al*. (2007), *The Case for Financial Sector Liberalization in Ethiopia*, Research Seminar In International Economics, Gerald R. Ford School of Public Policy, Discussion Paper No. 565, p 4.

[67] Generally see Kevin Davis, *Competition Policy in Banking and Financial Services*, <http://kevindavis.com.au/secondpages/workinprogress/Competition%20Policy%20in%20Banking%20and%20Financial%20Services-Mar08.pdf> (last accessed May 2012).

presence. This is both economically useful and will also address other regulators' concerns that Ethiopia faces. Basically under this scenario, the subsidiary's solvency is determined by its own financial performance, and in accordance with the laws and regulations set by the Ethiopian government. This strategy could also be accompanied by the type of market access limitations enumerated under Art XVI.[68] The experience of recently acceded counties shows that market access limitations in this mode are less limited compared to limitations on national treatment, whereas in this latter case as well most of recently acceded countries have eliminated all or virtually all limitations on national treatment.[69]

With regard to the last mode of supply, *Mode 4*, the issues will be highly entrenched with the commitment scenarios undertaken under the 3rd mode. Moreover, there is less pressure from the accession negotiations and perhaps less concern from domestic economic considerations towards committing to this mode. In this respect almost none of the recently acceded countries made commitments in this mode. This reinforces any strategy Ethiopia could have in this regard.

3. Financial Market Liberalization and Domestic Policy Space

The financial services sector is a key to any properly functioning economy.[70] Essentially, the sector facilitates financial intermediation in the economy (i.e. mobilization and allocation of funds). Financial services are also important for the economy as a whole since it allows financial transfers and payments. Hence, a healthy and stable financial service is essential for sustainable economic

[68] These include limitations on the number of service suppliers (e.g. such as ceilings on the total number of banks); limitations on the total value of transactions on assets (e.g. foreign bank subsidiaries limited to X per cent of total domestic assets of all banks); limitations on the total number of service operations or on the total quantity of service output (e.g. restrictions on amount of lending capital for foreign firms); limitations on the total number of natural persons (in particular non-nationals) that may be employed in the sector (or the share of wages paid to foreign labour); restrictions on, or requirements of, specific types of legal entity through which that service may be supplied (e.g. commercial presence exclude representative offices, foreign companies required to establish subsidiaries, commercial presence must take the form of a partnership, commercial presence must take some form of incorporation); and limitations on the participation of foreign capital.

[69] See section 2.1 above in this article.

[70] Gary Gorton and Andrew Winton (2002), *Financial Intermediation,* Wharton Financial Institutions Center, p 1.

growth.[71] Conversely, instability in financial service can potentially have economy-wide effects (local or global) and can be seen most dramatically in the crisis in Latin America, East Asia and the US financial crisis where fragility in the financial system spilt over to other countries in the region and the World at large.[72]

The process of review of domestic regulation and the accompanying regulatory reform go hand-in-hand with services liberalization under any given approach. It is a common understanding that services liberalization involves essentially the removal of discriminatory regulation, whether in quantitative or qualitative form, while nondiscriminatory restraints are a matter of domestic regulation. This distinction allows countries to tackle the reduction of barriers to services trade, on the one hand, and the reform of domestic regulation, on the other.[73] In the WTO accession context, the challenge today is on how to fine tune financial sector liberalization with the necessary legislative and institutional reforms which will enable it to easily accomplish the objectives of financial liberalization without at the same time tearing down legitimate regulatory instruments and risk financial collapse.

Accordingly, it is important to keep in mind that services liberalization and domestic regulatory reform must go forward in a parallel and unified path so that liberalization does not occur faster than the necessary regulatory reform in service sectors that are susceptible to specific types of market failure. Thus the Ethiopian government is expected to set appropriate sequencing and moderating infrastructure parallel to market liberalization efforts. In the mean time, it should

[71] John Bonin and Paul Wachtel, *Financial Sector Development in Transition, Economies: Lessons from the First Decade*, Financial Markets, Institutions & Instruments, V. 12, No. 1, New York University Salomon Center (February 2003) p 1

[72] International Finance Division Research Department Nepal Rastra Bank, *A Comparative Review of Financial Services Sector Commitments in The Selected SAARC Member Countries: Relevant Experiences For Nepal's Accession to WTO*, p 4.

[73] This issue has been extensively discussed in the context of the classification of market access and national treatment commitments under GATS. See Feketekuty, Geza (2000), *Improving the Architecture of the General Agreement on Trade in Services*, in Sherry Stephenson (eds.), *Services Trade in the Western Hemisphere: Liberalization, Integration, and Reform*, Brookings Institution Press, Chapter 1; Low, Patrick and Aaditya Mattoo, *Is There a Better Way? Alternative Approaches to Liberalization under GATS*, (in) Pierre Sauvé and Robert M. Stern, *GATS 2000: New Directions in Services Trade Liberalization*, Brookings Institution Press, Chapter 15 Also see, Stephenson Sherry, *GATS and Regional Integration*, in Pierre Sauve and Robert Stern (eds.), *GATS 2000: New Directions in Services Trade Liberalization*, Brookings Institution Press, 2000, Chapter 18.

be noted that efforts towards multilateral trade negotiations, typically the WTO, do not obstruct the government's policy options to achieve these objectives.

Four types of government intervention or involvement are believed to have impact on the financial services sector, namely: (i) macroeconomic policy management, (ii) prudential regulations, (iii) non-prudential regulation to pursue various public policy objectives other than that falling under, and (iv) trade restrictions concerning market access or national treatment.[74] A brief discussion is made on three of these issues in the context of Ethiopia's accession to the WTO. Under the GATS, item (ii) is dealt with by paragraph 2 of the Annex on Financial Services, and (iii) by Article VI. Item (iv) is dealt with by Articles XVI and XVII.

3.1. Financial Sector Liberalization and Capital Account Liberalization

3.1.1. GATS on Capital Movements

Global experience with financial deregulation and liberalization has been a mix of bewildering array of experiences. "Several countries have suffered serious banking crises following the opening of their financial markets, and, as formal econometric work shows, banking crises have generally been good predictors of currency crises."[75] GATS does not, in principle, oblige a Member to allow international capital mobility.[76] It is to be noted that liberalization of capital movements is distinct from – but closely related to – liberalization of trade in financial services.[77] For example, provision of financial information by foreign financial organizations is entirely unrelated to capital account liberalization.[78] In the meantime, if a Member undertakes a market-access commitment in relation to the cross-border supply of a service and if the cross-border movement of capital is an essential part of the service itself, the Member is consequently

[74] See WTO (1997), *Opening Markets in Financial Services and the Role of the GATS*, WTO Special Studies, Geneva.

[75] Peter K. Cornelius (2000), *Trade in Financial Services, Capital Flows, and the Value-at-Risk of Countries*, Harvard Institute for International Development, Research Note RN-00-2, p 3.

[76] Victor Murinde and Cillian Ryan (2003), *The Implication of WTO and GATS for the Banking Sector in Africa*, Blackwell Publishing Ltd ; See footnote text 9, p 185.

[77] A. Kireyev (2002), *Liberalization of Trade in Financial Services and Financial Sector (analytical approach)*, IMF Working Paper WP/02/138, pp 10-14. Also see Tamirisa, N. *et al* (2000), *Trade Policy in Financial Services*, IMF Working Paper WP/00/31.

[78] See A.Kireyev, *Ibid*, pp. 10-14.

committed to allow such movement of capital.[79] Further, if a Member undertakes a market access commitment in relation to the supply of a service through commercial presence, that Member is committed to allow related inflows of capital.[80]

Thus, the establishment of a commercial presence in a host country by a foreign service supplier involves both trade in services under the GATS and international capital transactions.[81] In theory, it is still possible that once established, a subsidiary of a foreign financial firm could conduct its on-going activities without engaging in additional international capital transactions.[82] However, its activities would need to be limited to transactions with host-country residents involving domestic financial assets.[83] This may happen in very rare circumstances – and certainly not in a small developing economy.

WTO Members do not seem to have any obligation with respect to capital flows related to consumption abroad and capital outflows related to commercial presence.[84] Hence, GATS primarily mandates Members to liberalize inward

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[79] See A. Cornford (2003), *The Multilateral Negotiations on Financial Services : current issues and future directions.*

[80] This is particularly provided under footnote 8 of Art XVI GATS which states: "[l]f a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(a) of Article I and if the cross-border movement of capital is an essential part of the service itself, that Member is thereby committed to allow such movement of capital. If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(c) of Article I, it is thereby committed to allow related transfers of capital into its territory."

[81] As we all know, the capital account covers capital movements for investments while the current account covers (the payment of) imports and exports of goods and services.

[82] This could for instance be a situation where the foreign subsidiary wishes to raise its capital from equity or debt capital from the host economy itself. Thus only later, for example, when the bank wishes to repatriate profits from its foreign operations, may a capital flow occur, but out of the host country. See for instance Sydney J. Key, *Financial Services* (in) Patrick F. J. Macrory et al, (eds.*) The World Trade Organization: Legal, Economic and Political Analysis*, Volume 1, Springer, 2005, p 962.

[83] Under standard balance-of-payments accounting, however, even if the earnings of the subsidiary were reinvested, they would be regarded as additional foreign direct investment by the parent in the subsidiary.

[84] This can be inferred by reading Article XI, the provision on international payments and transfers together with footnote 8 to Article XVI, the market-access provision. See Wendy Dobson, *Financial Services and International Trade Agreements: The Development Dimension* (in) Aaditya Mattoo et al, (eds.), *A Handbook of International Trade in Services*, Oxford (2008) p 294; For Mode 2 transactions, not

transfers of international payments in connection with services that are provided pursuant to a specific commitment made under the GATS.[85] "The bottom-line is that if a country makes a commitment to liberalize trade with respect to a particular financial service in the GATS, it is also making a commitment to liberalize most capital movements associated with the trade liberalization commitment".[86] The country is not, however, making an across-the-board commitment to freedom of capital movements.[87]

While GATS Article XI, as a general rule, prohibits any restrictions on international transfers and payments on sectors subject to commitments, it permits exceptions in five sets of circumstances. These are: (1), restrictions which are applied to safeguard the balance of payments in accordance with Article XII GATS; (2), in case a general exception applies in accordance with Art XIV and XIV*bis* GATS; (3), in case an exception applies in accordance with Para 2 lit. a, of the Annex on Financial Services; (4), in the case of current transactions, if consistent with the rights and obligations of the members of the IMF under the IMF Agreement; or (5), in the case of capital transactions, at the request of the IMF. The types of restrictions that can possibly lie under GATS Article XII and Para 2 (lit a) of the Annex on Financial Services will be discussed in the subsections below.

The first of the other three exceptions relates to the case of current transactions, which are consistent with the rights and obligations of the members

even this obligation exists. Rather, under Mode 2 countries seem to be free to set restrictions on capital transfers related to services supplied under the market access commitments made. As Kono et al. (1997, p. 23) emphasize, "(t)he GATS focuses upon seeking improvements in the terms and conditions of market access and non-discriminatory treatment for foreign suppliers of financial services, and not on the question of how far and how fast a government liberalizes capital account restrictions." See Peter K. Cornelius, supra note 75 above.

[85] Christian Tietje *et al*. (2010), *Liberalization and Rules on Regulation in the Field of Financial Services in Bilateral Trade and Regional Integration Agreements; A Scientific Study*, Halle, September, p 7.

[86] Sydney J. Key, *Financial Services* (in) Patrick F. J. Macrory *et al*, (eds.*) supra* note 82; See GATS Article XI: Payments and Transfers.

[87] Sydney J. Key (2003), *supra* note 64. Also see Diemo Dietrich *et al* (2010), *Liberalization and Rules on Regulation in the field of Financial Services in Bilateral Trade and Regional Integration Agreements*, Institute of Economic Law (TELC), Martin Luther University Halle-Wittenberg, p 12. In the words of Dietrich *et al* "GATS does not aim at the overall liberalization of international payments and transfers. However, it provides for a 'conditional obligation' according to which WTO members must not restrict current transactions and capital transactions that have been made in relation to service for which a member has undertaken specific commitments."

of the IMF under the IMF Agreement. This exception permits certain transitional or, with the IMF's prior approval, temporary restrictions in accordance with Article XIV and VIII of the IMF Agreement.[88] The second exception refers to situations where the IMF Agreement permits any of these practices and, to the extent that they relate to current transactions, the IMF Agreement will take precedence over the GATS to avoid any inconsistencies between IMF and GATS rights and obligations.[89] The reference made to 'the request of the Fund' "relates to Art VI Section 1 [of the] IMF Agreement under which the IMF may request a Member to impose capital controls",[90] to prevent "the use of the IMF's resources to meet a large or sustained outflow of capital".[91] Therefore, as with current transactions, the IMF Agreement takes precedence regarding capital transactions, but only if (direct or indirect) capital controls actually have been requested by the IMF.[92]

The last exception refers to the General Exceptions under Arts XIV and XIV*bis*. These exceptions to Article XI provide for exceptions to a Member's obligations under the GATS in a number of circumstances. These articles refer to concerns such as measures maintained to protect public morals or to maintain public order, measures necessary to secure compliance with laws or regulations, essential security interests etc. This essentially means that a member can maintain measures such as seizure or blocking of assets in connection with bankruptcy or to enforce criminal procedures. Thus, even though such measures can, strictly speaking, amount to restrictions of international transfers and payments, they prevail over other GATS rules for public policy reasons by operation of Articles XIV and XIV*bis* over the rules of Article XI.

Thus, we can see that GATS does not oblige WTO members to fully liberalize capital flows related to the activities of such local establishments. This means that the opening up of financial services is consistent with an option to maintain certain capital account restrictions. "This is particularly important to

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[88] Rüdiger Wolfrum, *et al* (2008), *WTO – Trade in Services*, Max Planck Commentaries on World Trade Law, Martinus Nijhoff Publishers, p 255; Generally see Deborah E. Siegel (2002), Legal Aspects Of The IMF/WTO Relationship: The Fund's Articles Of Agreement And The WTO Agreements, 562 The American Journal Of International Law, Vol. 96:561.

[89] *Ibid.*

[90] Rüdiger Wolfrum, *et al*, *supra* note 88, p 256, *Articles of Agreement of the International Monetary Fund*, IMF, Article VI Capital Transfers, Section 1.

[91] Joshep Gold (1991), Borrowing by the IMF, *ultra vires* and other problems, (in) Jacob A. Frenkel and Morris Goldstein, (eds.) *International Financial Policy: Essays in honour of Jacques J. Polak,* p 215.

[92] *Ibid*.

most of developing countries, where domestic financial markets remain underdeveloped and small, and balance of payments positions are weak".[93]

3.1.2. The Ethiopian Case

Ethiopia authorizes the National Bank of Ethiopia (NBE) – the central bank – to regulate the supply of money and interest rates of financial institutions, the use of foreign currency, exercise of foreign exchange transactions and exchange rates of the financial institutions, and the conditions, limitations and circumstances under which residents of the country and the financial institutions can hold foreign currency and instruments of payment in foreign currency.[94] Thus, for the moment (considering the closed status of the financial services sector now), there does not seem to be any case where the practice of the National Bank would essentially violate the main principles and the important exceptions of the GATS provisions.

The Ethiopian government is expected to negotiate demands by considering what should be done in the accession negotiations to achieve legitimate economic goals under this issue. In principle, "domestic reform and trade policy reform can be seen as precursors of capital account liberalization".[95] A sound and diverse financial system will better intermediate volatile international capital flows. However, a variety of sequences seen in various countries will demonstrate that there is no one-size-fits-all approach to sequencing. For example, Taiwan has not fully deregulated its domestic financial markets and still imposes some restrictions on the capital account, but it permits market access by foreign financial service providers.[96] South Korea restricted both market access and capital flows, yet in 1997 it experienced a severe balance of payments crisis related in part to a weak record of domestic reform.[97] Thus,

[93] Yun-Hwan Kim (2002), *Financial Opening Under The WTO Agreement In Selected Asian Countries: Progress And Issues,* Asian Development Bank, ERD Working Paper No. 24 (September 2002), p 2.

[94] *The National Bank of Ethiopia Establishment (as Amended) Proclamation* No 591/2008, Articles 5 (4), 5 (5-6 and 9-10) and 19-21; *Micro-Financing Business Proclamation* No. 626/2009, Article 28 (1).

[95] Wendy Dobson, *supra* note 84.

[96] *Ibid*, p 294.

[97] *Ibid*, Also *a*ccording to Yoon Je Cho "The immediate cause of the crisis was the run of foreign creditors." "The accelerated opening up to international capital flows from 1994 without adequate supervision also contributed to the currency crisis. See Yoon Je Cho, *The Role of Poorly Phased Liberalization in Korea's Financial Crisis (in) Gerard Caprio (eds.)* (2001), *Financial Liberalization, How Far, How Fast?*, Cambridge University Press, p 159.

there is no clear-cut evidence which correctly shows the relevant relationship between financial market liberalization and financial crisis.[98]

Moreover, it is to be noted that financial services liberalization does not necessarily imply complete capital account liberalization. Yet, it is important to find strategic ways to limit the country's exposure to potential financial crises. For instance, it appears that the relationship between trade in financial services and capital flows is particularly close under *Mode 1* (cross-border supply) than the other modes. The experience of WTO members also shows that at present, relatively few countries have made commitments under *Mode 1*, reflecting fears that a more liberal trade policy in this mode could seriously undermine financial stability while its potential gains are in contrast limited. Studies have shown the various contrasting effects of commitments under the various modes of GATS commitments. The table below shows a simple representation of the effects of financial services commitments on capital flows and the financial system as affected by the mode of supply and range of instruments.

Table 1: Effects of Financial Services Commitments on Capital Flows and the Financial System, As Affected by the Mode of Supply and Range of Instruments [99]

	By Mode of Supply		**By Range of Instruments which can be supplied**	
	Mode 1	**Mode 3**	**Narrow ***	**Broad**
Capacity Building				
Improved transparency/information	Weak	Strong	Weak	Strong
Incentive to improve regulation/ supervision	Weak	Strong	Weak	Strong
Infrastructure/ market development	Weak	Strong	Weak	Strong
Risk management	Weak	Strong	Weak	Strong
Capital Flows				
More capital flows	Yes	Limited	**	**
Bias toward short-term lending	Strong	Weak	Possibly strong	Weak
Increased volatility	Strong	Weak	Possibly strong	Weak
Efficiency/local benefits				
More competition/efficiency	Strong	Strong	Weak	Strong
Skills/technology transfer	Weak	Strong	Weak	Strong
Local employment creation	Weak	Strong	weak	Strong

** Commitments exclude or limit provision of important instruments/allow only lending and deposit-taking.*
*** Depends on the instrument and mode of supply permitted, and market conditions*

[98] Eswar S. Prasad, *Effects of Financial Globalization on Developing Countries, Some Empirical Evidence*, IMF (2003), p. 1. Also see Arturo Galindo (2002), "Financial Liberalization: Does It Pay to Join the Party? [with Comments]", *Economía*, Vol. 3, No. 1.

[99] Adopted from Masamichi Kono and Ludger Schuknecht (1998), *Financial Services Trade, Capital Flows, and Financial Stability*, World Trade Organization Economic Research and Analysis Division, Staff Working Paper ERAD-98-12.

In light of the severe financial turmoil over the last few years, some countries could have pursued a more cautious approach to capital account convertibility and financial services trade.[100] Rather than dismantling barriers to trade in financial services across-the-board, it might have been preferable for them to at least maintain restrictions under *Mode 1*. This applies primarily to countries with weak financial systems. For these countries, they caution against modal neutrality, i.e., equal liberalization commitments between, for example, cross-border supply and supply through commercial presence.

While in their view, "…countries with stable financial systems and a sound macroeconomic and regulatory framework have every reason to apply a very broad liberalization strategy and commit to far-reaching trade liberalization across all modes of supply," they recognize that in countries with weak financial systems potentially volatile capital flows can be highly destabilizing, resulting in banking and currency crises.[101] "Thus, with respect to these countries they counsel to confine commitments to the commercial presence of foreign institutions, requiring only limited liberalization of capital flows in the GATS context".[102] Hence, for Ethiopia it seems preferable to save this policy space against GATS *Mode 1* commitments in financial services until the necessary domestic capacity in regulatory capacity and a sound economic setting are created.

3.2. Problems in Balance of Payments

3.2.1. General features of BOP and policy options

An unsustainable Balance of Payments (BOP) situation in a given country may arise for a number of reasons and the risk of its aggravation onto a BOP crisis is always a possibility.[103] One example of an unsustainable current account position is when the current account is in deficit, and the net imports of goods and services cannot be financed with a sufficient inflow of foreign capital or a reduction in foreign reserves. This may lead to an unsustainable BOP situation.[104] The policy options available include improving the current account,

[100] Peter K. Cornelius, *supra* note 75.
[101] *Ibid*.
[102] *Ibid*.
[103] C. Thomas (2000), "Balance-of- Payments Crises in the Developing World: Balancing Trade, Finance and Development in the New Economic Order", *Am. U. Int'l L. Rev*. IV.
[104] World Trade Organization, *Concept Paper On Balance-Of-Payments Safeguards*, Working Group on The Relationship Between Trade And Investment, Communication From The European Community and its Member States, WT/WGTI/W/153, (2002) p 2.

for instance by expanding exports or restricting imports (provided these restrictions are compatible with its international obligations and preferably not counterproductive in terms of future developmental objectives) etc. "In seeking to avoid serious BOP difficulties, governments have sometimes taken restrictive measures on current transfers as well as on capital movements".[105]

As discussed above, GATS Art XI mandates WTO members to allow movement of capital in line with the commitment obligations of the Member state. In principle, a member's market access commitments oblige it to allow a certain degree of capital mobility – specifically, when the cross-border movement of capital is an essential part of the service itself and inflows of capital are related to commercial presence. Nevertheless, the agreement allows a member to impose restrictions on current or capital transactions in the event of serious balance of payments or external financial difficulties or the threat thereof.[106] This is what is stated under Art XII of the GATS Agreement, (*Restrictions to Safeguard the Balance of Payments).*[107]

To a very large extent, this article applies the same terms, conditions and procedures defined by the GATT for the invocation of Balance-of-payments Safeguards Provisions.[108] As in GATT Article XVIII,[109] there is recognition in

[105] *Ibid.*

[106] The GATT also contains similar provisions that address financial stability concerns regarding a member's right to derogate from liberalization commitments when it is suffering a severe balance of payments imbalances. See General Agreement on Tariffs and Trade (GATT) Articles XII and XVIII:B.; Also see Annex 1A of the Marrakech Agreement, Multilateral Agreements On Trade In Goods, Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade (1994).

[107] Article *XII Restrictions to Safeguard the Balance of Payment; (*1) states - "In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments…" Importantly, sub-article 3 provides, - "In determining the incidence of such restrictions, Members may give priority to the supply of services which are more essential to their economic or development programmes. However, such restrictions shall not be adopted or maintained for the purpose of protecting a particular service sector."

[108] See GATT Art XII.

[109] See Article XV paragraphs 4 and 9. Paragraph 4 specifically provides: "Contracting parties shall not, by exchange action, frustrate the intent of the provisions of this agreement…" Article XV, Paragraph 9(a) provides Nothing in this Agreement shall preclude: (a) the use by a contracting party of exchange controls or exchange restrictions in accordance with the Articles of Agreement of the International Monetary Fund …

the GATS that a developing country Member may need to use trade restrictions in order to ensure the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development, and in the GATS this provision extends also to economies in transition.[110] Generally, in the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may restrict trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments.[111] The restrictions should be non-discriminatory, consistent with the IMF Articles of Agreement, temporary and phased-out progressively. Such restrictions should also avoid unnecessary damage to the commercial, economic and financial interests of other Members, should not exceed what is necessary to address the balance-of-payments problem, and should not be used to protect specific industries or sectors.[112]

A number of important features of Article XII are worth noting. First of all, Article XII:1 clearly gives WTO Members with developing or transitional economies an autonomy to take measures that provide a level of financial reserves "adequate" for that particular Member's programme of economic transition or development. Thus, Art XII:1 affirms that development goals are the legitimate basis for a WTO Member in determining the kinds of balance of payments measures it needs. Whereas the measures must "not exceed those necessary" to deal with "serious balance-of-payments and external financial difficulties or threat thereof," Art XII: 3 affirms that a Member "may give priority to the supply of services which are more essential to their economic or development programmes." The concept of "necessity" ought to be interpreted in the context of Art XII as a whole, which gives considerable emphasis to an individual Member's approach to development. There is also ample room to

[110] WTO, *Concept Paper On Balance-Of-Payments Safeguards*, Communication From The European Community And Its Member States, WT/WGTI/W/153 (28 November 2002) p 4.

GATS Art XII (1) second sentences which states "It is recognized that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, *inter alia*, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition."

[111] For instance the GATT interpretive notes make clear that the intent of paragraph 4 is not to limit the ability of countries to impose exchange controls when they are considered warranted by the IMF, but rather to ensure that countries do not use exchange actions as a way to get around the intent of the substantive GATT provisions such as those in Article XI.

[112] World Trade Organization (2002), *Exceptions and Balance-Of-Payments Safeguards*, Note by the Secretariat, Working Group on the Relationship between Trade and Investment, WT/WGTI/W/137, p 8.

read Art XII so as not to require a Member to use alternative policy measures, even if less restrictive of services trade, where those measures undermine the objectives set by the Member's development program.[113]

At this juncture, reading GATS Art XII together with the language of XI: 2, indicates an extremely important difference between GATT and GATS. That is, no matter how narrowly or restrictively interpreted, the relevant provisions of the GATT contain only disciplines on 'current account' measures. However, under GATS, a Member's specific commitments may not prevent it from instituting 'capital account' controls. This nature of GATS Art XI & XII exceptions makes it one of the most important provisions that install policy space and flexibility into the system.[114]

The imposition of restrictions on current or capital transactions in the event of serious balance-of payments and external financial difficulties or the threat thereof is thus generally permitted. This would allow members in serious balance of payments difficulties – or threatened by such difficulties – to restrict trade in services for which they have undertaken market accesses commitments. Hence, such restrictions may be utilized by developing countries, or countries in transition, if such measures are necessary to maintain a level of reserves adequate for the prudent management of their economies.[115] These restrictions, however, must not discriminate among members, cause unnecessary damage to the trading interests of other members, or be unnecessarily restrictive, and should be temporarily phased out as the situation improves.[116] Although the restrictions may possibly focus on a particular sector, they must not be used or maintained as a protectionist trade barrier.[117] It is also important to notice the

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[113] Robert Howse (2008), *Pursuing Sustainable Development Strategies: The case of the balance of payment rules in the WTO*, NYU Law School, pp 26 -27.

[114] *Ibid*.

[115] Kern Alexander (2003), *The World Trade Organization and Financial Stability: The Balance between Liberalization and Regulation in the GATS*, Cambridge Endowment for Research in Finance, p 20.

[116] General Agreement on Trade in Services (GATS) Art XII sub 2 primarily mentions - (c) shall avoid unnecessary damage to the commercial, economic and financial interests of any other Member; (d) shall not exceed those necessary to deal with the circumstances described in paragraph 1.

[117] Generally, the burden of proof while invoking the prudential carve out - like any exception - rests with the country taking the prudential measure. Accordingly, the prudential exception is limited by certain good faith requirements including the requirement that 'such measures shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement'. See Anne van Aaken and Jurgen Kurtz, *Prudence or Discrimination? Emergency Measures, The Global Financial Crisis and International Economic Law*, Journal of International Economic Law 12(4), 859–894, p 876 Also see Bart De Meester, *The Global*

institutional accountability framework as restrictions adopted pursuant to Article XII must be reviewed periodically by the WTO Balance of Payments Committee.[118]

3.2.2. The Ethiopian Case

Ethiopia has experienced chronic balance of payments difficulties since the Imperial era, with the exception of a few periods.[119] The major factor in the deteriorating balance of payments was and still is the worsening situation of merchandise trade. This situation persisted for decades and the trade deficit that existed during the imperial years continued to grow after two revolutions, despite the introduction of various adjustment measures including import controls or export promotion.[120]

A typical means by which foreign financial institutions can exacerbate the above situation and hence cause greater financial instability is by lending in foreign currencies. This leads to the payment and repayment of loans in foreign exchange which increases the rate of inflow and outflow of international capital. When this results in an imbalanced exchange between local and foreign currencies, it puts the exchange rate and foreign exchange reserves under pressure, particularly if the loans are short-term. Thus, "too much demand for foreign exchange increases the balance of payments deficit and with it the risk of exchange rate and financial instability".[121]

What is said to be difficult to predict after liberalization efforts have been undertaken is "how branches or subsidiaries of foreign financial firms and their headquarters will behave in times of financial crises"[122] – especially in developing countries.[123] Various studies have been undertaken to evaluate

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[118] Article XII sub 5.

[119] National Bank of Ethiopia, *Annual Report - 2008/9*, Economic Research and Monetary Policy Directorate, 2009, pp. 3, 62.

[120] <http://www.mongabay.com/history/ethiopia/ethiopia-balance_of_payments_and_foreign_assistance.html>

[121] M. Vander Stichele (2004), *Critical Issues In The Financial Sector*, SOMO sector report (full report at www.somo.nl: publications), (2004) p. 19; Also see A. Cornford, *The WTO negotiations on financial services : current issues and future directions*, Paper for the Financial Markets Center.

[122] Halfan Mkiwa (2007), *The Anticipated Impact of GATS on The Financial Service Industry In Africa*, University Of The Western Cape-Cape Town, South Africa, p. 59.

[123] Generally see Thomas, Chantal (2000). *Balance-of-Payments Crises in the Developing World: Balancing Trade, Finance and Development in the New*

whether foreign source capital and its holders would panic and abruptly move out upon the first signs of crisis as they did in East Asia in 1997? "Or will they be able to resist the crisis with capital flowing in from the headquarters?"[124]

In the late Argentinean crisis, studies have shown that "foreign banks refused to recapitalize their branches and subsidiaries".[125] Most East Asian countries have not been able to borrow in their own currency, which means "that they are continuously exposed to problems that triggered the crisis in 1997".[126] Generally, current empirical studies in relation to banking crises have been able to identify "channels of transmission through which financial liberalization may exert an influence on banking stability".[127]

Considering the above, it might be wise to expect that smaller economies such as Ethiopia can be more vulnerable to capital movements that result in financial volatility and destabilization of domestic bank credit.[128] In the GATS accession offers and negotiations, it is important to consider that cross-border e-banking and buying foreign products – or even securities – through internet,[129]

Economic Order. American University International Law Review 15, no. 6, p 1249-1277.

[124] See Myriam Vander Stichele, *The Risks of Financial Service Liberalization For Financial Stability*, <www.somo.nl>

[125] Generally however empirical evidence for developing countries is in favor of a "stability-enhancing" role for international banks in periods of local financial crises. See Christian Tietje *et al*, *supra* note 85, p 12.

[126] Halfan Mkiwa, *supra* note 122 above. Or on the other hand, other studies in relation to the recent financial crisis has shown the reverse of the above situation. According to Ibrahim Zeidy, "The financial meltdown suffered by the parent banks following market capitalisation losses was not passed down to their African subsidiaries. In fact, some subsidiaries of foreign banks saw considerable increases in their market capitalisation. For example, Swaziland Ned bank, Bank of Africa Benin and Standard Bank of Ghana saw their market capitalisation increase between July 2007 and January 2009. Therefore, the contagious effect of the financial meltdown is weak compared to the effect on parent banks" <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Knowledge/Financial%20crisis_Impacts%20on%20Africa.pdf> (last accessed: May 2012) Also see AfDB, *The Current Financial Crisis: Impact on African Economies*, Briefing note prepared for Ministerial Conference on the Financial Crisis, Nov, 12, 2008.

[127] J.-P. Allegret, B. Courbis, Ph. Dulbecco (2003), *Financial Liberalization and Stability of the Financial System in Emerging Markets: The Institutional Dimension of Financial Crises*, Review of International Political Economy, Vol. 10, No. 1 (Feb., 2003), p 75.

[128] Normally, foreign banks may repatriate all the profits to the parent country. Moreover, if lending rates rise in the parent country and/or profit rates decline in the host country, foreign banks may withdraw their investment.

[129] This would be '*Mode 1*' under GATS.

typically involve cross-border capital movements and foreign currencies which puts the country at potentially risky situations. Ethiopia is thus expected to negotiate the appropriate undertaking considering the existing overall situation by prudently avoiding risks and distinguishing between what limitations should be sought after and which ones should not. This is because some kinds of (outbound) capital controls might be viewed as conditions which should be bound under GATS schedules of commitments.

Typical instances are, conditions on who can supply services (number of service suppliers) in violation of XVI: 2(a), or as "limitations on the total value of service transactions or assets" in violation of XVI: 2 (b) or "total number of service operations or the total quantity of service output" in violation of XVI:2(c). This possibility arises from the extremely broad interpretation of XVI:2(a) and (c) by the Appellate Body in the *US-Gambling* case.[130] The Appellate Body suggested that to violate either provision, measures need not take the explicit forms described in those provisions provided they have comparable *effects* on restricting market access and are quantitative in nature.[131] Since capital account controls are clearly measures that are quantitative in nature they may well have effects on the number of service suppliers, the total value of services transactions or assets under Art. XVI.[132] However, speaking of GATS rules, we can say that GATS provisions provide the Ethiopian Government with sufficient domestic policy space to implement its financial stability objectives.

3.3. Macroeconomic Policy

Despite an overwhelmingly broad understanding of services in the WTO and hence GATS, the services supplied in the exercise of governmental authority, including activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies are entirely excluded from the scope of the GATS.

One of its principal provisions in the discussion of financial services is GATS Article I. This provision excludes services supplied in the exercise of governmental authority, the activities of central banks or other authorities carrying out monetary or exchange rate policies. GATS Art I:3 (b) provides that, 'services' includes any service in any sector except services supplied in the exercise of governmental authority. According to Art I:3 (c); 'a service supplied in the exercise of governmental authority' means any service which is supplied

[130] Appellate Body Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, (WT/DS285/AB/R), Report of the Appellate Body, paragraphs 232, 247.

[131] *Ibid*.

[132] Robert Howse, *supra* note 113, pp 6-7.

neither on a commercial basis, nor in competition with one or more service suppliers. In the words of, Patrick Low and Aaditya Mattoo, *et al*, "when a central bank conducts open market operations, for example, conditions in the financial sector could be affected through the impact of such interventions on the money supply, interest rates or exchange rates. These types of interaction fall entirely outside the ambit of the GATS."[133]

The exclusion of foreign service suppliers also extends to activities which form part of statutory social security or public retirement plans, or other activities that are carried out by a public entity on behalf of the government, or using government financial resources, provided that domestic non-governmental financial suppliers are also not allowed to take part in these activities.[134] The agreement also allows a member to pursue other domestic policy objectives through, for instance, directed lending programs, provided that the measures are neither discriminatory nor intended to restrict the access of suppliers to a market.[135]

In the Ethiopian context, the National Bank of Ethiopia regulates the money supply, interest rates, exchange rates or various other macroeconomic functions.[136] Considering the central place that these measures have in the on-going economic policy in the country, the National Bank of Ethiopia and other relevant government agencies will still be able to maintain such kind of macroeconomic activities after accession irrespective of the form of accession commitments the country has granted. This is mainly because, services supplied in the exercise of governmental authority, including activities conducted by a national bank, central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies are excluded from the scope of the GATS.[137]

Another instance is where the Ethiopian government may wish to maintain other rules and regulations that influence the operations of markets and competition in market, such as for example, a requirement to lend to certain

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[133] Patrick Low *et al* (1997), "Opening Markets in Financial Services and the Role of The GATS", *WTO Special Studies*, p 3.

[134] General Agreement on Trade in Services, Annex on Financial Services Art 1 (b), Scope and Definition.

[135] Rudolf Adlung *et al* (2002), *The GATS: Key Features and Sectors* (in) Bernard Hoekman *et al* (eds.), *Development, Trade, And The WTO*: A Handbook, The World Bank, Washington, D.C. pp 259-279.

[136] Proclamation No. 591/2008, Articles 5 (4), 5 (5-6 and 9-10) and 19-21; and See National Bank of Ethiopia (2007), *Interest Rates Directive* No. NBE/INT/10/2007.

[137] General Agreement on Trade in Services, Art I: 3, General Agreement on Trade in Services, Annex on Financial Services Art 1 (b), Scope and Definition. Also see, Wendy Dobson, *supra* note 84 above.

sectors or individuals, or lending mandated on the basis of preferential interest rates for certain types of lending. Even though such measures sometimes have been argued against for not being the most efficient means of achieving particular objectives, these policies are not necessarily subject to GATS commitments. "If they are neither discriminatory nor intended to restrict the access of foreign suppliers to a market, then such domestic regulatory measures would be permitted provided they met certain basic criteria, such as impartiality and objectivity".[138]

3.4. Financial Market Liberalization and Prudential Regulation

The aims of GATS can potentially provoke concern that its rules might compromise the ability of governments to pursue legitimate regulatory and prudent measures or might limit their freedom to achieve other domestic policy objectives. Most of these concerns seem to have been already addressed under GATS rules.[139]

None of the GATS provisions prevent a member from taking measures for prudential reasons, for example, to protect investors or depositors or to ensure the integrity and stability of the financial system.[140] In particular, the prudential 'carve-out' for domestic regulation of financial services, under Art 2 of Financial Services Annex, allows a country to take prudential measures for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed or to ensure the integrity and stability of the financial system regardless of any other provisions of the GATS. Thus prudential measures could, in principle, be inconsistent with a country's national treatment or market access commitments or its Most Favoured Nation obligation.

While these sorts of exceptions are common in the WTO Agreements,[141] the prudential carve-out here differs from other exceptions for domestic policy contained in the GATT and GATS in one very significant respect. In contrast to health and safety, for example, where only 'necessary' measures can be raised

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[138] Wendy Dobson, *Ibid*, p 293; General Agreement on Trade in Services (GATS), Art VI.

[139] But see Lazaros E Panourgias, *Banking Regulation and World Trade Law, GATS, EU and 'Prudential' Institution Building*, Oxford (2006) Chapter III.

[140] There is no definition of what it means by 'prudential' objectives under GATS or any of the other agreements under the WTO. For the moment this is left for the GATS adjudicatory body (dispute settlement body) to interpret what sort of measures fall under this notion.

[141] See Art XX of General Agreement on Tariffs and Trade, General Exceptions, Art XXIV of GATS General Exceptions, Agreement on Trade-Related Aspects of Intellectual Property Rights, Art 73, and Security Exceptions etc.

as an exception under Article XXIV of GATS,[142] here all prudential measures are exceptions to the rule under GATS Art XI and hence can be claimed without the need to prove necessity.[143] As a result, a prudential measure may not be challenged on the ground that it is not 'necessary' or 'least trade restrictive.' Moreover, "the prudential carve-out overrides the requirements for domestic regulations in GATS Article VI (Domestic Regulation)".[144]

3.4.1 The Ethiopian case

As discussed above, GATS recognizes that governments may find it necessary to exercise considerable regulatory control over the activities of banks, insurance companies and other financial institutions. Its Annex on Financial Services therefore provides that the liberalization commitments undertaken should not prevent them from taking measures for prudential reasons, including the protection of investors, depositors, policy holders or to ensure the integrity and stability of the financial system. Although the Annex does not give details as to what constitutes prudential measures, licensing requirements intended to ensure business competence and financial integrity, minimum capital requirements and regular accounting requirements would ordinarily be considered prudential measures. Accordingly the National Bank of Ethiopia

[142] See for instance Art XXIV of GATS General Exceptions states; Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (a) necessary to protect public morals or to maintain public order; (b) necessary to protect human, animal or plant life or health; (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement..

[143] Meester, B.de, *Testing European Prudential Conditions for Banking Mergers in Light of Most Favoured in the GATS*, Journal of International Economic Law II (2008) pp 609-647.

[144] Sydney J. Key (2003), *supra* note 63 above. She reiterates, "The absence of a necessity test does not, however, resolve the issue of whether a measure is prudential or is being used to avoid the obligations of the agreement. An allegedly prudential measure that violates a country's obligations or commitments under the GATS might be challenged on the grounds that its purpose is really trade restrictive rather than prudential and therefore it does not fall within the scope of the prudential carve-out." Also See Diemo Dietrich *et al* (2010), *Liberalization and Rules on Regulation in the field of Financial Services in Bilateral Trade and Regional Integration Agreements*, Institute of Economic Law (TELC), Martin Luther University Halle-Wittenberg, p. 12.

(NBE) can keep regulating financial institutions in the above terms after accession irrespective of any commitment scenario upon accession.

Below is a brief review of some of the major prudential regulatory measures that are currently being practised under the supervision of the National Bank of Ethiopia.[145] A brief evaluation is made whether these measures can be accommodated within the bounds of GATS prudential carve-out thereby allowing policy space for the government upon accession.

a) Establishment and structural requirements

Ethiopian law mandates private banks, insurers and Micro Financial Institutions (MFIs) to be incorporated as share companies.[146] It, among others, mandates all banks to get a banking business license, including branch permits, from the National Bank of Ethiopia (NBE) and to notify the latter on their new branching decisions to the latter.[147] A bank to which a license is granted is required to "fulfill, before commencing operation, sound information management and internal control systems, risk management policies and procedures, and human resource organization and such other essential obligations to carry out banking business as determined by the directive to be issued by the National Bank".[148] The NBE is also authorized to impose qualification, fitness and propriety criteria on influential shareholders of the banks and directors and on chief (and senior) executives of the banks.

These establishment and structural requirements are compatible with the GATS rules as long as they are based on objective and transparent criteria, not

[145] It is beyond the purpose of this note to discuss the appropriate content of prudential regulation or the means of adequate supervision of financial institutions. For a detailed synthesis on the subject please see IMF, *International Capital Markets*, IMF, Washington, D.C, (1998) This study describes the overall developments in prudential regulation and banking supervision in the world. Major international achievements have also been made by the various international institutions to improve regulatory and supervisory standards across countries. In this regard the activities of the Basle Committee on Banking Supervision in developing prudential standards for banking are extensive and well-documented. See BIS, *Core Principles for Effective Banking Supervision, Basle Committee on Banking Supervision*, Bank for International Settlements, Basle (1997).

[146] Primarily see *Commercial Code of the Empire of Ethiopia*, 1960, Title VI. Also see Article 513; Proclamation No 592/2008, Article 4.

[147] Proclamation No 626/2009, Article 6 (5); Proclamation No 592/2008, Article 3 (3) 1/ It is prohibited to transact banking business in Ethiopia without obtaining a banking business license from the National Bank. 2/ No person shall use the word 'bank' or its derivatives as part of the name of any financial institution unless it has obtained a license from the National Bank.

[148] Proclamation No 592/2008, Article 6.

more burdensome than necessary to ensure the quality of service, and less trade restrictive, as the GATS requires. But, with respect to the form and type of organizations allowed to operate banking business, it seems wise to include the rules under the Ethiopian Commercial Code and the Banking Proclamation in the commitment schedules. For instance, Cape Verde maintained a market access exception that commercial presence must take the form of a limited liability company, or as provided for in the financial services head note of the respective schedule.[149] This aspect of the regulatory system is out of the exception given to measures falling under the prudential carve-out. This objective can also be achieved by enlisting a general condition under the financial services schedule whereby the concerned regulatory tools and the institutions can easily be enlisted. For instance, the services schedule of Nepal maintains the following:

> "[T]he commitments in financial services are made in accordance with the General Agreement on Trade in Services and the Annex on Financial Services. All the commitments are subject to entry requirements, domestic laws, rules and regulations and the terms and conditions of the Nepal Rastra Bank (the central bank of Nepal) and any other competent authority in Nepal, as the case may be, which are consistent with Article VI of the GATS and paragraph 2 of the Annex on Financial Services." [150]

b) Operational and disclosure requirements

Financial services providers in Ethiopia are generally obliged to comply with directives issued by the National Bank on "minimum amounts of capital and reserves to be maintained by banks and the rules for their computation" shall be determined by the latter.[151] Article 29 of the Banking Proclamation also empowers the National Bank to periodically or at any time, without prior notice, make, or cause to be made, an on-site inspection of any bank. With respect to disclosure rules, it is notable that transparency in the banking sector is, compared to other sectors or the general commerce, better regulated and monitored in the country. The National Bank of Ethiopia is given a mandate to

[149] As discussed above in Section (3), the financial services head note maintains that Cape Verde will permit the establishment of branches for committed sub-sectors in insurance, banking and securities within 10 years from the date of Cape Verde's Accession. See Cape Verde, *Report of The Working Party on The Accession of Cape Verde: Addendum, Part II - Schedule of Specific Commitments in Services List of Article II MFN Exemptions*, WT/ACC/CPV/30/Add.2.

[150] World Trade Organizations, *Trade in Services, The Kingdom of Nepal, Schedule of Specific Commitments*, GATS/SC/139 (2004).

[151] Proclamation No 592/2008, Article 18.

see into the compliance of these sectors with their disclosure and transparency obligations.[152] Among many, the working regulation empowers the NBE to see that banks keep records and accounts following international financial statements standards,[153] to have their assets valued by government approved experts, to have their accounts audited by independent auditors appointed upon approval of the NBE or the government,[154] and to report the state of their financial activities and affairs to the NBE, their customers and the general public annually and as may be required by the NBE. The NBE is also authorized to lay down auditing standards,[155] and impose an obligation on banking services providers to provide their audited annual balance sheets and profit and loss accounts in accessible places of businesses, etc.[156] Understandably, all these measures are not incompatible with the GATS since they are meant to protect the financial institutions, investors, consumers and the general public against fraud.

c) Prudence and performance requirements

Article 18 of the Banking Proclamation empowers NBE to set the minimum amounts of capital and reserves that should be maintained by banks and the rules for their computation.[157] The same Proclamation provides that "the National Bank may prescribe different capital and reserve requirements to be maintained by different banks depending on their risk profile."[158] Accordingly, the NBE has issued various directives aimed at providing prudence and performance requirements. They include Directive No. Sbb-50-11 on minimum capital requirement for Banks, Licensing and Supervision of Banking Business, Directive No. SBB/4/95 and SBB/37/2004 Reserve Requirement on Legal Reserves, Licensing and Supervision of Banking Business, Directive No. SBB/12/1996 Limitation on Investment of Banks, Directive No. SBB/39/2006

[152] National Bank of Ethiopia Establishment (as amended) Proclamation No. 591/2008. Micro-Financing Business Proclamation No. 626/2009.

[153] Banking Business Proclamation No. 592/2008, Article 23.

[154] *Ibid*, Article 24.

[155] Banking Business Proclamation No. 592/2008 Article 26.

[156] Generally see Article 28 (titled Disclosure of Information) of the Banking Business Proclamation No. 592/2008. It provides the following: (1) Every bank shall, within a time period to be determined by the National Bank, send to the National Bank duly signed financial statements and other reports as prescribed by it. (2) Every bank shall: a) exhibit at every place of its business, including its branches, in a conspicuous place throughout the year, a copy of the last audited balance sheet and profit and loss account in respect of all of its operations; b) cause such balance sheet and profit and loss account, together with the notes thereto, to be published in a newspaper of wide circulation.

[157] Proclamation No 592/2008, Article 18.

[158] *Ibid*.

Amendment for New Bank Licensing on Approval of Directors and CEOs, and Directive Sbb-44-08 Liquidity Requirement (3rd replacement). The Banking Business Proclamation separates the banking businesses from non-banking and other commercial activities and the insurance businesses from non-insurance activities.[159] It also requires banks to adhere to single borrower limits to diversify their investments as the NBE prescribes.[160]

Having seen the nature of the above legal instruments and prudential supervision from the National Bank, one might wonder whether GATS rules will prohibit such kinds of government interventions in the financial sector. The aforementioned regulations in Ethiopia are not incompatible with the GATS since they have the purpose of protecting the prudence and stability of the financial system against *contagion* and the GATS do not prescribe and impose particular regulatory provisions on domestic regulations. It does not also put a limit on the choice and preferences of how a member would like to discipline its banks or the functioning of the entire economy as long as the measures employed are not discriminatory and thus act as a disguised trade barrier. [161]

On final note, if Ethiopia's negotiators/regulators are concerned about whether a particular measure would be generally accepted as prudential, there is the option of listing that measure as a limitation when making initial market access and national treatment commitments, thereby avoiding the need to rely on the prudential carve-out. This seems preferable considering the different positions of member states as to what sort of measures fall under the prudential

[159] Proclamation No 592/2008, Art 22 (2), 50; Licensing and Supervision Of Banking Business, Directive No. SBB/12/1996; which inter alia provides; 1, No bank shall engage in insurance business but may hold up to 20% in an insurance company and up to a total of 10% of the bank's equity capital in such business. 2. Banks are prohibited from engaging directly in non-banking businesses such as agriculture, industry, and commerce. 3. A bank may hold shares in a non-banking business only up to 20% of the company's share capital and total holdings in such business shall not exceed10%.

[160] Proclamation No 591/2008, Art 15 (1) lit. a and (2); Proclamation No. 592/2008, Art. 22 (1); Proclamation No 86/1994, Arts 14, 42 lit. e and f; Proclamation No 626/2009, Arts. 3 (1), 14 (2) lit. a and d and 16; Directives National Bank of Ethiopia, *Licensing and Supervision of Banking Business Directive* No SBB/16/1996 on *Amendment of Single Borrower Loan Limit* Directive No SBB/8/1995 (1996); National Bank of Ethiopia, *Licensing and Supervision of Banking Business Directive* No. SBB/29/2002 on Amendment of Single Borrower Loan Limit, 13 May 2002; National Bank of Ethiopia, *Licensing and Supervision of Insurance Business Directive* No SIB/25/2004 on Investment of Insurance Funds, (2004).

[161] Bart De Meester (2010), *The Global Financial Crisis And Government Support For Banks: What Role For The GATS*?, Journal of International Economic Law Vol. 13 No. 1, p 48.

exception. For instance, some WTO members imposed lending and other operating limits based on branch capital-equivalency requirements; Korea and Turkey, for example, listed the measures as limitations in their schedules of commitments, which could be interpreted as an acknowledgement that the measures may not be generally accepted as prudential. By contrast, there are members that imposed the measures but did not list them as limitations in their schedules; Chile for example, clearly believed that the measures are within the scope of the prudential carve-out.[162] The EU practice shows that branches (as opposed to subsidiaries) of third-country financial firms are, in general, not subject to harmonized EU prudential measures and that each member state may therefore impose its own measures for prudential purposes.[163] This shows that members have different views towards what sort of measures are prudential and thus need not be schedules based on the annex on financial services. Thus, Ethiopia should not take any risk if a particular measure (which is not anticipated during accession) can possibly be challenged on prudential grounds; and should thus have it scheduled.

Conclusion

This article began with a brief discussion on the central role of the negotiation on financial services in Ethiopia's accession bid to the WTO. In doing so, the article did not discuss the macroeconomic relevance and market efficiency emplacements of financial services liberalization, whether within and outside the WTO system. Rather the central inquiry in this article focused on whether Ethiopia can maintain the existing status-quo and hold back on any GATS commitments in financial services so as to retain the freedom to pursue certain domestic policy and regulatory objectives.

These concerns are legitimate mainly for two reasons. Primarily, financial services play key roles in any economy, including Ethiopia, while at the same time the risk of market failures in the services sector is equally high. State regulation in financial services is thus expedient. Acceding WTO member countries such as Ethiopia make sure that the relevant WTO instruments are flexible enough to allow sufficient level of macroeconomic and regulatory autonomy. The second reason relates to the recent worldwide financial crisis which clearly shows the potential vulnerabilities of the highly liberalized, deregulated and overwhelmingly intermingled financial systems of the western world. Important pressures have thus emerged pushing countries all over the world to rethink and maintain the regulatory role of the government in the financial services market.

[162] See Sydney J. Key (2003), *supra* note 64.
[163] *Ibid*.

The discourse on the cause, nature and degree of these risks and their ultimate solutions is still underway. No one can possibly know precisely where and how the next global crisis will unfold or what measures national governments should take to protect their economies from a global contagion. In this extremely fluid and unpredictable situation, it is thus essential that governments retain the necessary policy space.

With regard to Ethiopia's WTO accession package, the evaluation of the WTO framework and the GATS obligations in financial services demonstrates that commitments under GATS need not compromise the ability of the Ethiopian Government to pursue sound regulatory and macroeconomic policies. A review of the relevant obligations in this article shows that states acceding to the system will still be left with considerable freedom to achieve macroeconomic and regulatory policy objectives. After examining the possible commitment scenarios which Ethiopia can possibly commit to, it is argued that there exists no definite reason why GATS commitments on financial services will have to compromise Ethiopia's ability to pursue sound regulatory and macro-economic policies. ■

THE ADMISSIBILITY OF SUBREGIONAL COURTS' DECISIONS BEFORE THE AFRICAN COMMISSION OR AFRICAN COURT

Abdi Jibril Ali ♣

Abstract

Some courts of Regional Economic Communities deal with human rights and they base their decisions on the African Charter on Human and Peoples' Rights. Other subregional courts have directly or indirectly considered human rights matters. However, it is not clear whether the cases decided by subregional courts are admissible before the African Commission on Human and Peoples' Rights or the African Court on Human and Peoples' Rights. Focusing on the Economic Community of West African States Court of Justice, the East African Court of Justice, and the Southern African Development Community Tribunal, I argue that the African Commission or the African Court should not admit cases decided by subregional courts. First, accepting such cases would overburden the African Commission and the African Court. Second, the decisions of subregional courts are final according to the treaties establishing them. Third, states should not be tried twice by international institutions for the same violation. Fourth, decisions of subregional courts have *res judicata* effect. Fifth, subregional courts are envisaged under Article 56(7) of the African Charter. Finally, the African Court or the African Commission can interpret the text of the African Charter to preclude the admissibility of cases decided by subregional courts.

Key words

Admissibility, African Commission, African Court, subregional courts, *res judicata*

DOI http://dx.doi.org/10.4314/mlr.v6i2.3

Acronyms and Abbreviations

RECs	Regional Economic Communities
EAC	East African Community

♣ LLB (Haramaya University), LLM (University of Pretoria); Postgraduate Diploma (Åbo Akademi University); Lecturer and Post-Graduate Programme Coordinator, School of Law, Addis Ababa University; <abdeejibril@gmail.com>. The author is very grateful to Professor Frans Viljoen and Assistant Professor Brooke I Glass-O'Shea for their constructive comments. He also thanks the anonymous reviewers for their comments. Any remaining errors are the author's sole responsibility.

SADC	Southern African Development Community
EACJ	East African Court of Justice
ECOWAS	Economic Community of West African States
ICCPR	International Covenant on Civil and Political Rights
OP-CEDAW	Optional Protocol to the Convention on the Elimination of Discrimination against Women

Introduction

African states have established Regional Economic Communities (RECs) to achieve increased trade and improved economic links.[1] RECs serve as the building blocks for the economic integration of Africa.[2] While pursuing these goals, they recognise the enhanced role of human rights, *inter alia*, as a means to their economic development.[3] In the Algiers Declaration, African leaders identified a political environment in which human rights are observed as a precondition to economic growth.[4] They also recognised that conflict, one of the obstacles to economic growth, may arise from the violation of human rights.[5] For these reasons and others, RECs are involved in human rights matters.

Treaties establishing the RECs recognise the promotion and protection of human rights among their principles and different organs have been established to achieve these objectives.[6] Some of these organs contribute to human rights

[1] Frans Viljoen (2007), *International Human Rights Law in Africa* (Oxford: Oxford University Press), p.495.

[2] Art 88(1), Treaty Establishing the African Economic Community, adopted in 1991 in Abuja, Nigeria and entered into force in 1994.

[3] See Magdalena Sepúlveda et. al. (2004), *Human Rights Reference Handbook* (San Jose: University for Peace), p.403; Oliver Christian Ruppel 'Regional economic communities and human rights in East and southern Africa' in Anton Bösl & Joseph Diescho (eds) (2009),*Human Rights in Africa: Legal Perspectives on their Protection and Promotion* (Windhoek: Macmillan Education), p. 279. Respect for human rights immensely contributes to economic development. See also Nneoma Nwogu (2007), 'Regional integration as an instrument of human rights: Reconceptualizing ECOWAS, *Journal of Human Rights 345*.

[4] Declaration on the Political and Socio-economic Situation in Africa and the Fundamental Changes Taking Place in the World (the Algiers Declaration), OAU Doc AHG/Decl.1(XXVI), para 10 - 11.

[5] Rachel Murray (2004), *Human Rights in Africa: from the OAU to the African Union* (Cambridge: Cambridge university Press), p.126.

[6] See Consolidated Text of the Treaty of the Southern African Development Community (as Amended), art 4(c); Treaty Establishing the East African Community, art 6(d); Treaty of ECOWAS, art 4(g); COMESA Treaty, art 6(e). These treaties were reproduced in Solomon Ebobrah & Armand Tanoh (eds) (2010), *Compendium of*

through setting standards.[7] Other organs of RECs such as subregional courts can positively contribute to the protection of human rights. Subregional courts are organs of RECs vested with judicial powers. Some of them have decided human rights cases. Although it is advantageous to have as many institutions as possible to enhance the promotion and protection of human rights, overlapping judicial powers of organs raise concerns such as the possibility of divergent conclusions on the same issues, duplication of efforts, and inefficient allocation and use of scarce resources, particularly when different courts have jurisdiction over the same case.[8]

In *Yogogombaye v Senegal*, the African Court on Human and Peoples' Rights (African Court) was confronted with issues that had already been raised before the ECOWAS Community Court of Justice.[9] Such issues render the discussion on admissibility of cases decided by subregional courts before the African Court relevant. Although such a case has never been presented to the African Commission on Human and Peoples' Rights (African Commission), it is important to discuss admissibility before it because the African Commission is the main forum through which cases come to the African Court. So far, few countries have made declarations under Article 34(6) of the African Court Protocol and individuals or NGOs can bring cases to the African Court against these states only. Cases against other states should come to the African Court through the African Commission.[10]

African Sub-Regional Human Rights Documents (Pretoria: Pretoria University Law Press).

[7] The supreme organs of the RECs adopt instruments that address human rights issues.

[8] See Viljoen (2007), *supra* note 1, p. 501; Abdul Rahaman Lamin 'African sub-regional human rights courts: the ECOWAS Court of Justice, the SADC Tribunal and the EAC Court of Justice in comparative perspective' in John Akokpari & Daniel Shea Zimbler (eds) (2008), *Africa's Human Rights Architecture* (Fanele: Auckland Park), p.239; Kithure Kindiki (2006) 'The African Human Rights System: Unnecessary Overlap or Useful Synergies?' *East African Journal of Peace and Human Rights* Vol. 12, p. 332.

[9] *Yogogombaye v Senegal* (2009) AHRLR 315 (ACtHPR 2009). The case was brought to the African Court to obtain suspension of proceedings instituted by Senegal in order to charge, try and sentence Mr Hissein Habré, former Head of State of Chad who had asylum in Senegal. The African Court declared the case inadmissible on the ground that the applicant lacks standing. See also *Hissein Habré v Republic of Senegal*, General Role No. *ECW/CCJ/APP/07/08* Judgment No: *ECW/CCJ/JUD/06/10*, ruling delivered on 18 November 2010. The same case was brought before the ECOWAS Court of Justice on 6 October 2008 and was decided on 18 November 2010.

[10] See *African Commission on Human and Peoples' Rights v the Great Socialist Libyan People's Arab Jamahiriya*, Application No. 004/2011, ruling 2 September 2011. The African Court rejected most cases on the ground that the respondent state did not make declaration under art 34(6) of the African Court Protocol. See, for example,

Regulating the admissibility of cases decided by subregional courts would alleviate problems such as duplication of efforts or the possibility of divergent conclusions. The article addresses this issue in four sections. The first section provides the background on subregional courts and briefly discusses their establishment and human rights mandate. Section 2 provides an overview of Article 56(7) of the African Charter on pending and settled matters in relation to other international and regional human rights instruments. Section 3 discusses the reasons why cases decided by subregional courts should not be admitted before the African Commission or the African Court on Human and Peoples' Rights (the African Court).

1. Human Rights Mandate of Subregional Courts

Most treaties establishing Regional Economic Communities (RECs) that were adopted or revised after the adoption of the African Charter recognise the promotion and protection of human rights as one of their principles.[11] These treaties have established judicial bodies that, to some extent, have been dealing with human rights matters. The ECOWAS Community Court of Justice is the pioneer in upholding human rights because it has clear human rights jurisdiction. The East African Court of Justice and the SADC Tribunal have also dealt with human rights matters.

1.1. ECOWAS Community Court of Justice

The Economic Community of West African States (ECOWAS) was established in 1975 with the objective of economic integration.[12] In July 1993, the member states revised the Establishing Treaty.[13] One reason for the revision seems to have been the developments in the field of human rights in ECOWAS and the

Daniel Amare and Mulugeta Amare v Republic of Mozambique and Mozambique Airlines, application No. 005/2011, Decision of 16 June 2011; *National Convention of Teachers Trade Union v The Republic of Gabon*, Application No 012/2011, decision 15 December 2011; *Delta International Investments S.A., Mr and Mrs A.G.L. De Lange v The Republic of South Africa*, Application No 002/2012, decision 30 March 2012; *Emmanuel Joseph Uko and Others v The Republic of South Africa*, Application No 004/2012; *Amir Adam Timan v The Republic of Sudan*, Application No 005/2012, decision 30 March 2012; *Baghdadi Ali Mahmoudi v. The Republic of Tunisia*, Application No 007/2012, decision 26 June 2012.

[11] *Supra* note 6.

[12] Solomon Ebobrah (2007), 'A Rights-Protection Goldmine or A Waiting Volcanic Eruption? Competence of, and Access to, the Human Rights Jurisdiction of the ECOWAS Community Court of Justice', *African Human Rights Law Journal* 309, Vol. 7, p. 309.

[13] *Ibid*, p. 310.

continent.[14] The revised ECOWAS Treaty re-established the ECOWAS Community Court of Justice together with seven other organs of the Community.[15]

The Protocol on the ECOWAS Court did not confer human rights jurisdiction on the Court.[16] The Court acquired jurisdiction on human rights in 2005 by a Supplementary Protocol amending the establishing Protocol of 1991.[17] The human rights jurisdiction of the ECOWAS Court is the power to hear cases for violations of 'the so-called Community rights endowed on ECOWAS citizens' and the power of the Court to receive cases on violations of the African Charter.[18] The former is similar with the inter-state complaint mechanism of the African Charter as 'the ECOWAS Commission acquires access to bring human rights case against a member state where the state fails to perform its human rights obligations under the ECOWAS legal regime.'[19]

The ECOWAS Court of Justice's jurisdiction on human rights is largely due to the recognition that human rights and access to justice in the sub-region are fundamental values of the ECOWAS Community enshrined in Articles 4(g), 56(2) and 63(2) of the 1993 Revised ECOWAS Treaty and Articles 9(4) and 10(d) of the 2005 supplementary protocol.[20] Individuals can also bring complaints that allege violation of the African Charter and other human rights instruments before the ECOWAS Court.[21] The following examples illustrate this point.

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[14] The Preamble to the Treaty of ECOWAS, adopted by the Heads of State and Government of the Member States of ECOWAS in Cotonou on 24 July 1993. The preamble refers to African Charter on Human and Peoples' Rights and the 1991 Declaration on Political Principles of the Economic Community of West African States.

[15] Art 6(1)(e) & art 15, the Treaty of ECOWAS. See A Banjo 'The ECOWAS Court and the politics of access to justice in West Africa' (2007) 32 *Africa Development* 73.

[16] Protocol A/P/1/7/91 on the Community Court of Justice adopted on 6 July 1991 in Lagos, Nigeria and entered into force on 5 November 1996.

[17] Supplementary Protocol A/SP1/01/05 to Protocol on the Community Court of Justice (1991) adopted in 2005 which provisionally came into force upon signature in 2005, reproduced in Ebobrah & Tanoh, *supra* note 6, p. 199.

[18] Enyinna S. Nwauche 'Regional economic communities and human rights in West Africa and the African Arabic countries' in Anton Bösl & Joseph Diescho (eds) (2009) *Human rights in Africa: Legal perspectives on their protection and promotion* 332.

[19] Ebobrah, *supra* note 12, p. 314.

[20] Muhammed Tawfik Ladan (2009), *Introduction to ECOWAS Community Law and Practice: Integration, Migration, Human Rights, Access to Justice, Peace and Security* (Zaria: The Ahamdu Bello University Press), p. 269-280.

[21] See Nwauche , *supra* note 18, p. 332; Ebobrah , *supra* note 12, p. 314.

In *Manneh v The Gambia,* the Court considered a case submitted against The Gambia by legal counsels of Chief Ebrimah Manneh, a Gambian journalist who was arrested without warrant by two officials of the National Intelligence Agency of The Gambia.[22] The officials did not give any reason for his arrest. The plaintiff had been detained *incommunicado*. He had been detained for more than a year without any criminal charge. The counsels for the plaintiff submitted that the defendant violated Articles 4, 5, 6 and 7 of the African Charter. They requested the Court to order the defendant to release the plaintiff and pay him five million US dollars in damages. Although the defendant refused to make an appearance, the Court heard witnesses and found that Articles 2, 6 and 7(1) of the African Charter were violated.[23] The Court also ordered the defendant to pay US$ 100,000 to the plaintiff as damages.[24]

In *Koraou v Niger,* the Court considered a case of Hadijatou Mani Koraou, a Nigerien woman who was sold at the age of 12 to a 46 years-old man as "the fifth wife" called *sadaka* for the sum of 240,000 CFA Francs.[25] The sale was conducted according to *wahiya* practice which was prevalent in Niger and consisted of "acquiring a young girl, generally under the conditions of servitude, for her to serve both as domestic servant and concubine."[26] "The *sadaka* generally carries out the domestic chores and caters for the 'master'" who can engage her in sexual relations at any time.[27] The plaintiff had served her master for nine years and obtained a certificate of emancipation from him in 2005.[28]

However, the 'master' refused to let the plaintiff free even after she obtained certificate of emancipation.[29] She escaped from her master and brought a case against him which led to a judgment that she had never been married to her master.[30] While her civil case was being considered by appellate courts, the plaintiff was prosecuted for bigamy upon the complaint of the master.[31] The plaintiff, her brother and her husband were sentenced to six months imprisonment and a fine, and they were incarcerated until they were released on appeal.[32]

[22] *Manneh v The Gambia* (2008) AHRLR 171 (ECOWAS 2008), para 5.
[23] *Ibid*, para 41.
[24] *Ibid*, para 44
[25] *Koraou v Niger* (2008) AHRLR 182 (ECOWAS 2008), para 8.
[26] *Ibid*, para 9.
[27] *Ibid*, para 10.
[28] *Ibid*, para 13.
[29] *Ibid*, para 14.
[30] *Ibid*, para 15-16.
[31] *Ibid*, para 21.
[32] *Ibid*, para 22-23.

Meanwhile, the plaintiff sued the Republic of Niger before the ECOWAS Court of Justice for violation of Articles 1, 2, 3, 5, 6, and 18(3) of the African Charter.[33] Upon request of the plaintiff, the Court transferred its session to Niamey for hearing.[34] Having regard to the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention relating to Slavery, the Convention relating to the Abolition of Slavery, Slave Trade and Institutions and Practices Similar to Slavery, and the African Charter on Human and Peoples' Rights, the ECOWAS Court of Justice declared that the plaintiff was a victim of slavery and awarded her CFA 10,000,000.[35] The Court blamed the defendant for inaction of its administrative and judicial authorities.[36]

In *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v Nigeria,* the ECOWAS Court of Justice dealt with admissibility of a case brought against the Federal Republic of Nigeria by human rights non-governmental organisation registered under the laws of the defendant. The plaintiff alleged that Nigeria violated Articles 1, 2, 17, 21 and 22 of the African Charter. [37] The ruling of the ECOWAS Court of Justice regarding jurisdiction was the following:

> This court clearly has subject matter jurisdiction over human rights violations in so far as these are recognized by the African Charter on Human and Peoples' Rights, which is adopted by Article 4(g) of the Revised Treaty of ECOWAS. As the plaintiff's claim is premised on Articles 1, 2, 17, 21 and 22 of the African Charter on Human and Peoples' Rights, the Court does have subject matter jurisdiction of the suit filed by the plaintiff.[38]

After asserting its jurisdiction over the case, the Court held that "[i]t is trite law that this court is empowered to apply the provisions of the African Charter on Human and Peoples' Rights and Article 17 thereof guarantees the right to education. It is well established that the rights guaranteed by the African Charter on Human and Peoples' Rights are justiciable before this court".[39] The ECOWAS Court of Justice has been acclaimed as the first international judicial

[33] *Ibid*, para 28.
[34] *Ibid*, para 31-34.
[35] *Ibid*,para 96.
[36] *Ibid*.
[37] *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v Nigeria* (2009) AHRLR 331 (ECOWAS 2009).
[38] *Ibid*, para 13.
[39] *Ibid*, para 19.

body to uphold justiciability of socio-economic rights because of its holding that the right to basic education is justiciable before it.[40]

1.2. East African Court of Justice

Cooperation among Kenya, Tanzania and Uganda dates back to the colonial era. In 1917, Kenya and Uganda formed Customs Union, and Tanzania (then Tanganyika) joined in 1927.[41] The Customs Union was followed by the East African High Commission (1948-1961) and the East African Common Services Organisation (1961-1967).[42] In 1967, the East African Community was established and took over the assets and liabilities of the East African Common Service Organisation.[43] The East African Community lasted for ten years and became defunct in 1977 for various reasons.[44] The businesspersons in Kenya put pressure on the government to withdraw.[45] "Differences in economic policies and political approaches" were considered as reasons for the failure.[46] The present East African Community (EAC) was re-launched in 1999.[47] The areas of co-operation among members of EAC include political, social and cultural fields, research and technology, defence, security, and legal and judicial affairs.[48] To achieve these objectives, the EAC Treaty sets out fundamental and operational principles that include the promotion and protection of human rights.[49]

The East African Court of Justice (EACJ) is one of the seven organs that were established by EAC Treaty.[50] It exercises the judicial function of the EAC through its first instance and appellate divisions.[51] The EAC Treaty vests human

[40] Frans Viljoen 'The African Regional Human Rights System' in Catarina Krause & Martin Scheinin (2012), *International Protection of Human Rights: A Text Book* (Turku: Institute for Human Rights, Åbo Akademi University), p. 555.
[41] History of the EAC: From Cooperation to Community, available at <http://www.eac.int/index.php?option=com_content&view=article&id=44&Itemid=54>
[42] *Ibid*.
[43] Viljoen, *supra* note 1, p. 490.
[44] *Ibid*.
[45] *Ibid*
[46] *Ibid*
[47] Art 2(1) of Treaty Establishing East African Community, signed on 30 November 1999, came into force 7 July 2000, and amended on 14 December 2006 and 20 August 2007. The EAC Treaty was concluded among Kenya, Tanzania and Uganda. Rwanda and Burundi acceded to the Treaty on 18 June 2007. See also Viljoen , *supra* note 1, p. 490; Ruppel , *supra* note 3, p. 301.
[48] Art 5(1), EAC Treaty.
[49] Art 6(d) & 7(2), EAC Treaty.
[50] Art 9(1), EAC Treaty.
[51] Art 9(1)(e) & 23(2), EAC Treaty.

rights jurisdiction in the EACJ, but postpones its operation until a future protocol authorises the commencement of the human rights jurisdiction.[52]

In *Katabazi v Secretary-General of the East African Community*, the Court was seized with a case in which Ugandan security personnel interfered with preparation of bail documents by surrounding Ugandan High Court and re-arresting persons who were released on bail.[53] The arrested persons were taken before a military General Court Martial which remanded them in custody.[54] Although the Ugandan Constitutional Court ruled that the interference of the security personnel with the High Court was unconstitutional, the arrested persons were not released.[55] The plaintiffs mainly invoked the violation of the EAC Treaty. The Court held that "jurisdiction with respect to human rights requires a determination of the Council and a conclusion of a Protocol to that effect."[56] Since both of those steps did not take place, the Court held that "this Court may not adjudicate on disputes concerning violation of human rights *per se*."[57] However, the Court has shown some judicial activism.[58] It held that 'the intervention by the armed security agents of Uganda to prevent the execution of a lawful court order violated the principle of the rule of law.'[59] Actually, the EACJ upheld the right to liberty and claimed jurisdiction in human rights cases by framing its decisions in terms of treaty violations.

In *East African Law Society v Attorney-General of Kenya,* the applicant challenged the procedure of amending the EAC Treaty on the ground that it did not consult the people.[60] Triggered by earlier decisions of the Court, the amendment modified the Court's structure by introducing an appellate division. The impact of the amendment was negative as it narrowed the jurisdiction of the Court and provided a time limit within which references by natural and judicial persons may be instituted before the Court. The Court held that 'the lack of people's participation in the impugned amendment process was inconsistent with the spirit and intendment of the Treaty.'[61] In essence, the Court upheld the

[52] Art 27 (2), EAC Treaty.
[53] *Katabazi and Others v Secretary-General of the East African Community and Another* (2007) AHRLR 119 (EAC 2007), para 2.
[54] *Ibid*, para 3.
[55] *Ibid*,para 4.
[56] *Ibid*,para 34.
[57] *Ibid*.
[58] Solomon T Ebobrah (2009), 'Human rights development in sub-regional courts in Africa in 2008' *African Human Rights Law Journal* Vol. 9, p. 315.
[59] *Katabazi* case , *supra* note 53, para 54.
[60] *East African Law Society and Others v Attorney-General of Kenya and Others,* Reference 3 of 2007 at 11.
[61] *Ibid*, p. 42.

right to participation of the people which is guaranteed under Article 13 of the African Charter although it did not refer to the latter.

The protocol that would trigger the human rights jurisdiction of the EACJ was drafted in 2007 by the EAC Secretariat.[62] However, it has not come into force yet. Recent developments in the region show that pressure was exerted on the EAC to expand the jurisdiction of the EACJ to cover human rights cases.[63]

1.3. The SADC Tribunal

The Southern Africa Development Co-ordination Conference, a loose association of states, was created in 1980 in Lusaka, Zambia.[64] The Conference was transformed into the Southern African Development Community (SADC) in 1992 in Windhoek, Namibia.[65] The state parties to the Treaty establishing SADC were aware of the need to observe human rights to involve their people in regional integration.[66] The Treaty requires SADC and its Member States to act in accordance with 'human rights, democracy and the rule of law.'[67] It establishes the SADC Tribunal along with seven other institutions.[68]

The SADC Tribunal is vested with the judicial power of the Community.[69] It was established to interpret the provisions of the SADC Treaty and its subsidiary instruments,'[70] with both contentious and advisory jurisdiction.[71] The SADC Treaty and the Protocol on Tribunal and the Rules of Procedure thereof

[62] Solomon T Ebobrah (2010), 'Human rights developments in African sub-regional economic communities during 2009' *African Human Rights Law Journal* , Vol. 10, p. 240.
[63] *Ibid*.
[64] Munetsi Madakufamba (2007), 'SADC in the twenty-first century', *Open Space: a digest of Open Society Initiative for Southern Africa* vol. 2 p. 90. See also Viljoen, *supra* note 1, p. 492.
[65] Mbugua Mureithi 'The Impact of regional courts in Africa in fostering regional integration and the development of international human rights jurisprudence' in George Mukundi Wachira (ed.) (2007), *Judiciary Watch Report: Regional and Sub-regional Platforms for Vindicating Human Rights in Africa* (Nirobi: Kenyan Section of International Commission of Jurists), p. 84; Madakufamba, *supra* note 64, p. 91.
[66] SADC Treaty , preamble.
[67] SADC Treaty, Art 4 (c).
[68] SADC Treaty, Art 9 (1).
[69] SADC Treaty, Art 9.
[70] SADC Treaty, Art 16(1); Art 14, Protocol on Tribunal and the Rules of Procedure thereof.
[71] SADC Treaty, Art 16(1) & (4).

do not provide that the Tribunal has jurisdiction on specific disputes,[72] nor do they exclude from the jurisdiction of the Tribunal any dispute under any field of law.[73]

To ascertain the Tribunal's jurisdiction over a given dispute, one needs to examine whether SADC has legal instruments that govern the area of the dispute, because the Tribunal has jurisdiction over instruments applicable in SADC.[74] The Tribunal has jurisdiction over human rights because SADC has human rights instruments that include the Charter of Fundamental Social Rights and the Protocol on Gender and Development. The Tribunal itself confirmed that it has jurisdiction on human rights in *Mike Campbell (Pvt) Limited v Zimbabwe*.[75]

In the *Campbell* case, the SADC Tribunal entertained a case in which the government of Zimbabwe compulsorily acquired agricultural land on the basis of constitutional amendment that vests ownership of acquired land in the State of Zimbabwe and sets aside the jurisdiction of courts to question the legality of such compulsory acquisition. The agricultural lands were mainly acquired from white owners who, for reasons attributable to colonial history, happened to own large tracts of land suitable for agriculture. The applicants submitted that the enactment and implementation of the constitutional amendment violated the SADC Treaty. They also alleged that they were denied access to justice and compensation for their land as well as equal treatment. The respondent state challenged the jurisdiction of the Tribunal over the matters. In confirming its jurisdiction, the Tribunal relied on Article 21(b) (the Protocol on Tribunal and Rules of Procedure Thereof) which requires reference to 'treaties, general principles and rules of public international law and any rules and principles of the law of States.' The Tribunal held that it 'has jurisdiction in respect of any dispute concerning human rights, democracy and the rule of law.'[76]

According to some commentators, the SADC Tribunal has competence to interpret even non-SADC instruments.[77] The subject-matter jurisdiction of the

[72] See generally the SADC Treaty; The Protocol on Tribunal and the Rules of Procedure Thereof, adopted on 7 August 2000 in Windhoek, Namibia by the SADC Heads of State and Government and entered into force on 14 August 2001, reproduced in Ebobrah & Tanoh , *supra* note 6, p. 375.

[73] Compare art 27 (2), EAC Treaty where the Treaty confers human right jurisdiction on the court and suspends it.

[74] See Article 16 of SADC Treaty and Article 14 of the Protocol on Tribunal and the Rules of Procedure Thereof.

[75] *Mike Campbell (Pvt) Limited and Others v Zimbabwe* (2008) AHRLR 199 (SADC 2008).

[76] *Ibid*, para 32.

[77] Mmatsie Mooki 'African regional courts and their role in the promotion and protection of human rights: The Southern African Development Community

SADC Tribunal 'clearly covers human rights issues, including the interpretation and application of the African Charter.'[78] The Tribunal seems to have concurred with this view in the *Campbell* case. It "first referred to Article 21(b) which, in addition to enjoining the Tribunal to develop its own jurisprudence, also instructs the Tribunal to do so 'having regard to applicable treaties, general principles and rules of public international law' which are sources of law for the Tribunal". [79] In this holding, the Tribunal made it clear that its sources of law are not limited to SADC instruments. Rather, the Tribunal situated itself in a position similar to the African Court on Human and Peoples' Rights.[80] Thus, the African Charter and other treaties are sources of law for the SADC Tribunal.

Campbell and other cases brought against Zimbabwe seem to have boomeranged on the very existence of the SADC Tribunal. Because of the Tribunal's holding in that case, Zimbabwe questioned the legality of the SADC Tribunal.[81] As a result, the SADC Summit first refused to fill vacancies on the Tribunal and subsequently suspended the Tribunal at the 2010 SADC Summit.[82] Although the Summit has the power to amend SADC Treaty, the procedure it followed in suspending the Tribunal was *ultra vires*.[83]

Tribunal' in George Mukundi Wachira (ed) (2007), *Judiciary Watch Report: Regional and Sub-regional Platforms for Vindicating Human Rights in Africa* (Nirobi: Kenyan Section of International Commission of Jurists), p. 39. Mooki concluded that the use of treaties which promotes and protects human rights by the SADC Tribunal is inevitable. Chidi Anselm Odinkalu 'Complementarity, Competition or Contradiction: The Relationship between the African Court on Human and Peoples' Rights and Regional Economic Courts in East and Southern Africa' (Unpublished) (Presentation to Conference of East and Southern African States on the Protocol Establishing the African Court on Human and Peoples' Rights, Gaborone, Botswana, 9-10 December 2003) at <http://www.africancourtcoalition.org/images/docs/research-papers/chidioncomplementarity.pdf> (accessed on 13 November 2011).

[78] Odinkalu, *Ibid*, p. 9.

[79] *Campbell* case, *supra* note 75, para 31.

[80] Compare Art 7, Protocol to the African Charter on Human and People's Rights on the establishment of an African Court on Human and People's Rights, adopted in Addis Ababa, Ethiopia, on 10 June 1998, OAU DOC. OAU/LEG/EXP/AFCHPR/PROT (III). Art 7 empowers the African Court to apply the provisions of the African Charter and any other relevant human rights instruments ratified by the States concerned.

[81] Viljoen (2012), *supra* note 40, p. 556.

[82] *Ibid*; Solomon T Ebobrah (2012), 'Human rights developments in African sub-regional economic communities during 2011' 12 *African Journal of Human Rights Law* 223, Vol. 12, p. 225.

[83] 'SADC Tribunal Dissolved by Unanimous Decision of SADC Leaders', Speech by Ariranga G. Pillay, Former President of SADC Tribunal, available at

On 17 August 2012, the SADC Summit disbanded the Tribunal and directed SADC Ministers of Justice and Attorneys-Generals to negotiate a new protocol in order to reconstitute the Tribunal with a fresh mandate.[84] The mandate of a new tribunal will be 'confined to interpretation of the SADC Treaty and Protocols relating to disputes between Member States.[85]

Civil society organisations are campaigning against the decision of the SADC Summit that disbanded the Tribunal. Part of their campaigning activities includes resorting to continental human rights bodies: the African Commission and the African Court. The African Commission has accepted the admissibility of a communication about the decision of the SADC leaders to suspend the Tribunal.[86] The communication has been submitted on behalf of Zimbabwean farmers, and all 15 SADC leaders have been cited as respondents.[87] Pan African Lawyers Union and Southern Africa Litigation Centre have requested advisory opinion from the African Court on the legality of suspending the SADC Tribunal.[88]

2. Admissibility of Pending or Decided Cases in General

Some international human rights bodies do not admit cases that are pending before other international judicial or quasi-judicial organs. International human rights instruments treat such cases as simultaneously duplicating procedures (*pendente lite*). Other human rights bodies do not admit cases that have already been decided or settled, and there are bodies that do not admit both pending and decided cases.

The first category of international human rights bodies prohibits only simultaneously duplicating procedures. They may admit cases or communications that have already been decided under another procedure of international investigation or settlement. An example of this type of human rights body is the

<http://www.osisa.org/sites/default/files/article/files/Speech%20by%20former%20President%20of%20SADC%20Tribunal.pdf> (accessed on 6 February 2013).

[84] Zvamaida Murwira 'Southern Africa: Regional Leaders Permanently Disband SADC Tribunal' 21 August 2012 *All Africa*, <available at <http://allafrica.com/stories/201208210893.html>.

[85] 'Southern African Development Community: SADC Tribunal', available at <http://www.sadc.int/about-sadc/sadc-institutions/tribun/>

[86] Richard Lee 'African Commission to hear SADC Tribunal case' 22 November 2012, available at <http://www.osisa.org/law/regional/african-commission-hear-sadc-tribunal-case>

[87] *Ibid*.

[88] Richard Lee 'African Court asked to rule on SADC Tribunal' 22 November 2012, available at <http://www.osisa.org/law/regional/african-court-asked-rule-sadc-tribunal>.

United Nations Human Rights Committee.[89] Under Article 5(2)(a) of the Optional Protocol to the International Covenant on Civil and Political Rights, the Human Rights Committee does not consider an individual communication unless it has ascertained that 'the same matter is not being examined under another procedure of international investigation or settlement.'[90]

In *Fanali v Italy*, the Human Rights Committee entertained a communication alleging violation of the right to appeal contrary to Article 14(5) of the ICCPR.[91] The author of the communication along with other defendants was tried and sentenced before the Constitutional Court of Italy. His co-defendants submitted complaints to the European Commission of Human Rights while the author did not. Since the respondent State made reservation under Article 5(2)(a) of the Optional Protocol, it argued that the communication was inadmissible as the same matter was being examined before the European Commission of Human Rights. The Human Rights Committee rejected the respondent's argument and defined 'the same matter' as 'including the same claim concerning the same individual, submitted by him or someone else who has the standing to act on his behalf before the other international body.'[92] Although it did not find violation, the Committee found the communication admissible.

In *O.F. v Norway*, the Human Rights Committee was seized with a communication against Norway for violation of Article 14 of the International Covenant on Civil and Political Rights (ICCPR).[93] Although the case was submitted to the European Commission of Human Rights, it was rejected since it was not submitted within six months from the time of exhaustion of local remedies. While considering admissibility of the communication, the Human Rights Committee accepted Norway's argument that 'Article 5(2)(a) [of the Optional Protocol] prevents simultaneous duplicating procedures.' Since the European Commission of Human Rights did not examine the communication,

[89] Other example include the Inter-American Commission on Human Rights under art 46(1)(c) of the American Convention on Human Rights, adopted by the Inter-American Specialised Conference on Human Rights on 22 of November 1969 at San José, entered into force on 18 July 1978.

[90] Art 5(2)(a) of Optional Protocol to the International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976.

[91] Communication No. 75/1980, *Fanali v Italy* adopted on 31 March 1983 at eighteenth session of Human Rights Committee in *International Covenant on Civil and Political Rights: Selected Decisions of the Human Rights Committee under the Optional Protocol* CCPR/C/OP/2 Vol 2 para 7.2, p. 100.

[92] *Ibid*, para 7.2 at 100.

[93] Communication No. 158/1983, *O. F. v Norway* (Human Rights Committee) (twenty-third session) 26 October 1984 CCPR/C/OP/2.

the Human Rights Committee did not reject it on the grounds of prior examination. Rather, the Committee's finding of inadmissibility was based on the author's failure to substantiate his or her communication.

Through reservation, some countries exclude the Human Rights Committee from examining communications in which 'the same matter has already been examined under other procedures of international investigation or settlement.'[94] Where such reservation exists, the Human Rights Committee does not admit communications pending before or decided by other international tribunals. Such reservation 'sets forth the principle of *non bis in idem*.'[95] This principle bars blaming a state twice for the same violation.

Among African countries, only Uganda made similar reservation under the ICCPR.[96] The reservation precludes the Human Rights Committee from reviewing cases against Uganda that have already been decided by subregional and regional judicial or quasi-judicial bodies such as the East African Court of Justice, African Commission, the African Court or the African Committee of Experts on the Rights and Welfare of the Child.

The second category of human rights bodies does not admit a case that has already been decided although they admit a case that is pending before other international bodies. Unlike the first category, simultaneously duplicating procedures are allowed under this category. The advantage of such a requirement is to avoid the 'unsettling possibility of divergent "conclusions" to a particular matter before different bodies.'[97]

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[94] These countries Austria, Croatia, Denmark, France, Germany, Iceland, Ireland, Italy, Luxembourg, Malta, Norway, Poland, Romania, Russia, Slovenia, Spain, Sweden , Turkey, Uganda, El Salvador, Moldova, and Sri Lanka. They are mostly European countries. See Reservation under the Optional Protocol to ICCPR, available at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en#2Some > (accessed on 11 February 2013).

[95] *O.F. v Norway*.

[96] Frans Viljoen 'Communications under the African Charter: Procedure and Admissibility' in Malcolm Evans & Rachel Murray (eds) (2008), *The African Charter on Human and Peoples' Rights: the System in Practice 1986–2006* (Cambridge: Cambridge University press), p. 127. The reservation provides that 'Uganda does not accept the competence of the Human Rights Committee to consider a communication under the provisions of article 5 paragraph 2 from an individual if the matter in question has already been considered under another procedure of international investigation or settlement.' See <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en#EndDec> (accessed on 7 February 2013).

[97] *Ibid*, p.126.

The African Commission and the African Court belong to this category.[98] Article 56(7) of the African Charter precludes the African Commission from dealing with 'cases which have been settled.' However, the decisions of the African Commission do not seem consistent on this issue. For example, the African Commission, contrary to Article 56(7) of the African Charter, declared a communication inadmissible on the ground that it 'had already been referred for consideration to the Human Rights Committee' in *Mpaka-Nsusu v Zaire.*[99] Although it does not come out from the records of the case, it may be surmised that the African Commission had learned reference of the case to the Human Rights Committee from submissions of the respondent state.

In another communication, the African Commission proceeded to consider a communication that had already been submitted to the Working Group of the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities in *Njoku v Egypt.*[100] The respondent challenged admissibility of the communication under Article 56(7) of the Charter. Rejecting the argument of the respondent, the Commission held that:

> [Article 56(7)] talks about 'cases which have been settled . . .' It is therefore of the view that the decision of the United Nations Sub-Commission not to take any action and therefore not to pronounce on the communication submitted by the complainant does not boil down to a decision on the merits of the case and does not in any way indicate that the matter has been settled as envisaged under Article 56(7) of the African Charter on Human and Peoples' Rights. The Commission therefore rejected the arguments of the defendant.

The African Court decides on 'the admissibility of cases taking into account the provisions of Article 56 of the Charter.'[101] By referring to Article 56 of the

[98] See art 6(2) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. This provision refers to art 56 of the African Charter. Other example include art 35 of European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, signed by the Members of the Council of Europe on 4 November 1950 at Rome, entered into force on 3 September 1953.

[99] *Mpaka-Nsusu v Zaire* (2000) AHRLR 71 (ACHPR 1994), para 3-4.

[100] *Njoku v Egypt* (2000) AHRLR 83 (ACHPR 1997), para 56. The Commission did not consider the matter settled as the Working Group of the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities did not decide on the merit of the decision.

[101] Protocol on the African Court, Art 6(2). It should be noted that the wording of Art 6(2) of the Protocol gives more lee ways to the African Court. The Court need not strictly apply the provision of art 56(7). But the African Commission has no such lee ways. See Viljoen (2007), *supra* note 1, p. 448.

African Charter, the establishing Protocol places the African Court in a similar position as the African Commission regarding admissibility of pending or decided cases and that position was confirmed in Rule 40(7) of the Rules of the African Court.[102]

The third category of human rights bodies does not admit cases that are pending before or have already been decided by other tribunals. For example, the Optional Protocol to the Convention on the Elimination of Discrimination against Women (OP-CEDAW) precludes the Committee on the Elimination of Discrimination against Women from examining a communication in which 'the same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement.'[103] Thus, OP-CEDAW and other similar human rights instruments prohibit *pendente lite* and establish the principle of *non bis in idem.*[104]

3. Reasons for the Inadmissibility of Cases Decided by Subregional Courts

3.1. Threat of Massive Backlog and Wise Use of Resources

Human rights treaty bodies consider communications or cases that comply with admissibility requirements. The requirements serve as screening mechanisms between national and international institutions or among international institutions.[105] There is an apprehension that the absence of such screening

[102] African Court on Human and Peoples' Rights, Rules of Court, adopted and entered into force on 2 June 2010, rule 40(7).

[103] Optional Protocol to the Convention on the Elimination of Discrimination Against Women, adopted by UN General Assembly in resolution A/54/4 on 6 October 1999 at New York and entered into force on 22 December 2000.

[104] Other examples include Art 3(2)(c) of Optional Protocol to the International Covenant on Economic, Social and Cultural Rights adopted on 10 December 2008 by the General Assembly resolution A/RES/63/117; Art 30(2)(e) International Convention for the Protection of All Persons from Enforced Disappearance, adopted by General Assembly resolution 61/177 of 20 December 2006; Art 2(c) of the Optional Protocol to the Convention on the Rights of Persons with Disabilities adopted by General Assembly resolution 61/106 of 13 December 2006; Art 22(5)(a) of Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly in resolution 39/46 of 10 December 1984 at New York, entered into force on 26 June 1987; Art 77(3)(a) of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by General Assembly resolution 45/158 of 18 December 1990, entered into force on 1 July 2003.

[105] Some admissibility requirements (eg exhaustion of local remedies) serve as filtering mechanisms between national and international mechanisms. See Viljoen (2008),

mechanisms overburdens international institutions with cases.[106] Article 56(7) of the African Charter serves as a screening mechanism between the African Commission or the African Court and other international institutions. It is submitted that Article 56(7) of the African Charter can serve the purpose of reducing the number of cases that come to the African Commission and the African Court.

Both the African Commission and the Court do not have sufficient time and resources to deal with a massive number of cases. The African Commission is a part-time body.[107] It carries out its mandate in ordinary and extraordinary sessions.[108] The ordinary sessions of the Commission are held at least twice a year and they last for about two weeks unless the African Commission decides to reduce or extend the duration.[109] The Chairperson of the African Commission may convene extraordinary sessions when requested by the majority of the commissioners or by the Chairperson of the African Union Commission.[110]

As a part-time body, the African Commission does not have sufficient time to carry out its functions. A perusal of its activity reports reveals that the Commission keeps postponing a large number of communications from one session to another. For example, on its 45th Ordinary Session held from 13 to 27 May 2009, the Commission deferred to the next session 71 out of 80 communications tabled for the Commission, among others, owing to time constraints.[111] On its 46th Ordinary Session held from 11 to 25 November 2009, it deferred 62 communications for similar reasons.[112] Although the Commission managed to hold the 7th Extraordinary Session from 5 to 12 October 2009 between ordinary sessions, the backlog reduced only by nine communications.

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supra note 96, p. 88. The admissibility requirement that a communication must have not been settled by another procedure of international investigation or settlement serves as screening mechanisms between international institutions.

[106] Viljoen (2008), *Ibid*, p. 88.

[107] Viljoen (2007), *supra* note 1, p. 315.

[108] Rules of Procedure of the African Commission on Human and Peoples' Rights, approved by the African Commission on Human and Peoples' Rights during its 47th ordinary session held in Banjul, The Gambia from May 12 to 26, 2010, Rule 25.

[109] *Ibid*, Rule 26.

[110] *Ibid*, Rule 27(2).

[111] 26th Activity Report of the African Commission on Human and Peoples' Rights (ACHPR) submitted in Accordance With Article 54 of the African Charter on Human and Peoples' Rights, submitted to African Union Executive Council, Fifteenth Ordinary Session, 24 - 30 June 2009, Sirte, Libya , EX.CL/529(XV), para 141.

[112] 27th Activity Report of the African Commission on Human and Peoples' Rights (ACHPR) submitted in Accordance with Article 54 of the African Charter on Human and Peoples' Rights, para 209.

For similar reasons, 74 communications were deferred in its 47th Ordinary Session held from 12 to 26 May 2010, and other 74 communications were deferred in the 48th Ordinary Session held from 10 to 24 November 2010.[113]

Lack of human and financial resources has undermined the capacity of the African Commission to resolve its mounting backlog. The Commission has consistently been complaining about lack of support staff at its secretariat. On its 47th Ordinary Session, for instance, the Executive Secretary reported that 'high staff turnover, combined with the [Commission's] chronic understaffing, are some of the factors that lie at the heart of the challenges confronting the [Commission] in its processing and consideration of communications.'[114] Although the Executive Secretary reported improvements on the 48th Ordinary Session, the report to the 49th Ordinary Session shows that the staffing problem was very critical and that it was no longer possible for the Secretariat to provide the African Commission with 'the support which it needed to function effectively and deliver on the mandate entrusted to it.'[115] The problem of understaffing is mainly attributed to the lengthy process of the African Union Commission's Human Resource Department.[116]

The African Commission consists of 11 members.[117] Compared with its counterpart in the Inter-American system which consists of only seven members, 11 commissioners seem to be high.[118] With a lesser number of commissioners, the Inter-American Commission on Human Rights is more productive than the African Commission.[119] While the Inter-American Commission annually receives more than 1,500 petitions, the African Commission receives less than one per cent of that.[120] Still, 11 commissioners are said to be insufficient to adequately implement the mandate of the African

[113] 28th Activity Report of the African Commission on Human and Peoples' Rights (ACHPR), submitted to AU Executive Council, Seventeenth Ordinary Session 19 – 23 July 2010, Kampala, Uganda, EX.CL/600(XVII), para 212; 29th Activity Report of the African Commission on Human and Peoples' Rights (ACHPR), submitted to AU Executive Council, Nineteenth Ordinary Session 23—28 June 2011, Malabo, Equatorial Guinea, EX.CL/678(XIX), 184.

[114] 28th Activity Report, *supra* note 113, para 193.

[115] 29th Activity Report, *supra* note 113, para 224.

[116] Magnus Killander & Adem K Abebe(2012), 'Human rights developments in the African Union during 2010 and 2011' *African Journal of Human Rights Law* 199, Vol. 12, at 201.

[117] African Charter, Article 31.

[118] American Convention on Human Rights adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969 and entered into force on 18 July 1978; O.A.S.T.S. 36; 1144 U.N.T.S. 123, art 34.

[119] Killander & Abebe, *supra* note 116.

[120] *Ibid.*

Commission.[121] In 2006, it was recommended that the number of commissioners be increased from 11 to between 15 and 18.[122]

The African Commission had been under-resourced in the past.[123] It relied on outside sources for most of its works.[124] Such dependence on outside sources subjected the Commission to serious criticisms that it was being manipulated by donors.[125] Recently, financial resources of the Commission have been showing improvements. Since 2008, the Commission presents and defends its budget.[126] The Commission's budget for the 2013 Financial Year stands at 8.5 million US Dollars (US $ 8,488,716).[127]

Likewise, the African Court does not have much time as the judges perform their functions on a part-time basis.[128] The Court holds only four ordinary sessions a year.[129] The Court may hold extraordinary sessions which may be convened by the President of the Court or at the request of a majority of members of the Court.[130] Since there are no strict rules providing for a maximum number of extraordinary sessions to be held in a year, the Court can be flexible and hold more extraordinary sessions when there are more tasks. Nevertheless, it lacks the mandate to operate as a permanent judicial body.

A discussion on the admissibility of subregional courts' decision before the African Commission would have been pointless had access to the African Court been open to individuals and NGOs. It is only the African Commission, state parties and African intergovernmental organisations that have direct access to the Court.[131] Even the African Committee of Experts on the Rights and Welfare of the Child is omitted from the list of organs that have direct access to the Court although one may argue that it falls under African intergovernmental

[121] Report of the Brainstorming meeting on the African Commission, on Human and Peoples' Rights: 9-10 May 2006, Corinthia Atlantic Hotel, Banjul, The Gambia, Twentieth Activity Report of the African Commission on Human and Peoples' Rights, Annex II.
[122] *Ibid*.
[123] Viljoen (2007), *supra* note 1, p. 315.
[124] *Ibid*.
[125] *Ibid*.
[126] Japhet Biegon & Magnus Killander (2009), 'Human rights developments in the African Union during 2008' *African Journal of Human Rights Law* 295, Vol. 9, at 297.
[127] AU Executive Council, Decision on the Budget of the African Union for the 2013 Financial Year, Doc. EX.CL/721(XXI).
[128] Protocol on the African Court, art 15(4).
[129] African Court on Human and Peoples' Rights, Rules of Court, adopted and entered into force on 2 June 2010, Rule 14.
[130] *Ibid*, rule 15.
[131] Protocol on the African Court, Art 5(1).

organisations.[132] So far, few African states have made declarations under Article 34(6) of the Protocol establishing the African Court to allow individuals and NGOs to submit cases directly to the African Court.[133]

The African Commission will, therefore, remain the major organ through which human rights cases are submitted to the African Court. The Commission's referral of cases is discretionary. Its Rules of Procedures provide for three illustrative instances of seizing the African Court with cases.[134] First, the African Commission submits a case to the African Court when a respondent state fails to implement its recommendations that have been considered by the Assembly of Heads of State and Government of the African Union within 180 days.[135]

Second, the African Commission may refer a case to the African Court when a respondent state fails to comply with provisional measures.[136] The African Charter is silent on provisional measures. However, the African Commission may order provisional measures to prevent irreparable damage to victims of human rights violations on the basis of its Rules of Procedures.[137] The Commission has developed the practice of granting provisional measures.[138]

Third, the African Commission may submit a case that 'constitutes serious or massive violations of human rights.'[139] Besides, the Commission has an obligation to refer such cases to the Assembly of Heads of State and Government.[140] In 2011, the African Commission made its first reference under this rule in *African Commission on Human and Peoples' Rights v Great Socialist Libyan Arab Jamahiriya*.[141] The Commission filed an application before the African Court on the basis of several communications that it received following the 2011 uprising against Mummar Qadafi's regime in Libya. In its

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[132] Compare Statute of the African Court of Justice and Human Rights, art 30(c). The Committee is listed as one of the organs having direct access before the African Court of Justice and Human Rights.

[133] Only Burkina Faso, Ghana, Malawi, Mali and Tanzania had mad declaration under article 34(6). See I de Meyer 'Chart of ratifications: AU human rights treaties, Position as at 30 April 2012' (2012) *African Human Rights Law Journal*, Vol. 12, p. 308.

[134] African Commission Rules of Procedures, Rule 118.

[135] *Ibid*, Rules 112(2) & 118(1).

[136] *Ibid*, Rules 98 & 118(2).

[137] *Ibid*, Rule 98(1).

[138] See, for example, International Pen and Others (on behalf of Saro-Wiwa) v Nigeria (2000) AHRLR 212 (ACHPR 1998), para 8-9; Interights and Others (on behalf of Bosch) v Botswana (2003) AHRLR 55 (ACHPR 2003), para 10.

[139] *Ibid*, rule 118(3).

[140] African Charter, Article 58.

[141] *African Commission on Human and Peoples' Rights v the Great Socialist Libyan People's Arab Jamahiriya*, Application No. 004/2011, ruling 2 September 2011.

submission as an applicant, the Commission alleged that violent suppression of demonstration by aerial bombardment and excessive use of heavy weapons and machine guns against the population resulting in death and injuries amounts 'to serious violations of the right to life and to the integrity of persons, freedom of expression, demonstration and assembly.'[142] The Court ordered provisional measures against Libya on its own motion as the Commission did not make a request to that effect.[143]

As long as direct access to the African Court by individuals and NGOs is limited and the Commission's referral of cases remains discretionary, the solution to the massive backlog before the African Court is a distant possibility. Even more so, individuals and NGOs may bring cases that have already been decided by subregional courts to the African Commission with the hope of accessing the African Court. One may also optimistically assume that many African states will make declarations to allow individuals and NGOs to access the African Court. Under either scenario, there would be pressure on the resources of the African Court and the African Commission.

Africa should thus prudently use its regional human rights institution and scarce resources. Africans need to learn a lesson from the European Court of Human Rights, which has become 'a victim of its own success' in recent years as it 'faces a docket crisis of massive proportions.'[144] Narrowing the admissibility criteria has been taken as one of the steps to reform the European Court.[145] It is, therefore, submitted that the African Commission and the African Court should not admit cases decided by subregional courts because such cases unnecessarily consume their scarce time and resources.

Any assumption that sub-regional courts might be subject to more local interests and open to manipulation is not supported by evidence. This assumption is not plausible because experience, on the contrary, shows that neighbouring countries are more concerned about human rights violations at their doorsteps. In fact, African governments with records of human rights violations rather incline towards opposing the human rights jurisdiction of subregional courts. These courts have been a challenge to states in the subregions. As evidenced by restructuring of East African Court of Justice and suspension of the SADC Tribunal, various African states are reacting to the

[142] *Ibid*, para 2.
[143] *Ibid*, para 9.
[144] Laurence R Helfer (2008), 'Redesigning the European Court of Human Rights: Embeddedness as a deep structural principle of the European human rights regime' *The European Journal of International Law* 125, Vol. 19, p. 125.
[145] Philip Leach (2009), 'On reform of the European Court of Human Rights' *European Human Rights Law Review* 725, Vol. 6, p. 728.

decisions of subregional courts by amending their constitutions or taking other decisions. The assumption does not thus justify the admissibility of subregional courts' decisions before the African Commission or African Court.

3.2. Finality of Subregional Courts' Decisions

International[146] courts or tribunals are usually empowered to render final and binding decisions no matter how different their subjects of jurisdiction are. A perusal of instruments establishing international courts and tribunals reveals that the finality of their decisions does not depend on the number of states party to the constituting instrument or on the permanent or temporary nature of the court or tribunal. For example, the Statute of the International Court of Justice (ICJ), to which almost all states are party, provides that the judgement of the Court is 'final and without appeal.'[147] The 2000 Algiers Peace Agreement which was concluded between Ethiopia and Eritrea at the end of Ethio-Eritrean war can be another example.[148] Article 5(17) of this Agreement establishes a neutral Claims Commission, a temporary arbitral tribunal, and provides that the decision of the Commission is 'final and binding.'

The Treaties establishing subregional courts in Africa are no exception. They provide that the decisions of these courts are final and binding.[149] These treaties foreclose any appeal from subregional courts to regional bodies like the African Commission and the African Court, or any other global courts and tribunals such as the ICJ. A concern raised in this regard is that 'it may be desirable to give room for reference of cases from' subregional courts as these courts are not 'specifically established for the purpose of human rights protection.'[150]

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[146] The word 'international' is used here to mean 'connected with or involving more than one [state].' See A S Hornby *Oxford Advanced Learner's Dictionary of Current English* (2000) 680. It refers to all *supra* national institutions whether they are subregional, regional or global.

[147] Art 60 of the Statute of International Court of Justice.

[148] Peace Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea signed in Algiers, Algeria on 12 December 2000 available at <http://server.nijmedia.nl/pca-cpa.org/showfile.asp?fil_id=1030> (accessed on 13 November 2011).

[149] Art 76(2) of the Revised ECOWAS Treaty provides that the decision of the ECOWAS Community Court 'shall be final and shall not be subject to appeal; Art 16(5) of SADC Treaty provides that 'the decisions of the Tribunal shall be final and binding.' Art 35(1) of the Treaty Establishing the East African Community stipulates that the judgment of the Community Court is 'final, binding and conclusive and not open to appeal.' Art 31(1) the COMESA Treaty provides that the judgment of the COMESA Court is 'final and conclusive and not open to appeal.'

[150] Solomon T Ebobrah (2009), 'The admissibility of cases before the African Court on Human and Peoples' Rights: who should do what?' *Malawi Law Journal* 87, Vol. 3, p. 98.

Although a reference from subregional courts to the African Court may ensure a uniform interpretation of the African Charter, it overburdens the Court. Besides, there is no sufficient legal basis for making such references. Member states of RECs, subregional courts and other organs of RECs are bound by the provisions of their treaties according to which decisions of subregional courts are final and binding. Thus, their reference from subregional courts' decision would be violation of treaties establishing these courts.

An inter-state reference from decisions of subregional courts, albeit unlikely, may be made by a state party to the African Charter (which is not a member of a particular REC) against another state party (which is a member of a particular REC). For example, Kenya which is not a member state of ECOWAS may refer an inter-state complaint to the African Court against, say, Ghana which is a member state of ECOWAS. In such scenarios, the state making reference would not be bound by the finality clause. Yet such reference would encounter the defence of *res judicata* as discussed below. Treaties establishing subregional courts do not also bind individuals and NGOs. However, their reference to the African Court will not fulfil admissibility requirement under Article 56(7) of the African Charter as discussed below.

3.3. Prohibition of Double Jeopardy

In Common Law legal system, double jeopardy means 'the fact of being prosecuted twice for substantially the same offense.'[151] The corresponding term in civil law legal system is *non bis in idem*.[152] An accused person faced with the risk of double jeopardy can raise the plea of *autrefois acquit* or *autrefois convict*. *Autrefois acquit* is 'a plea by a person indicted for a crime for which he or she had previously been tried and acquitted' while *autrefois convict* is 'a plea by a person indicted for a crime for which he or she had previously been tried and convicted.'[153] The principle that a person should not be prosecuted twice for the same crime is recognised as a human rights principle.[154]

[151] Bryan A. Garner (ed.) (2000), *Black's Law Dictionary* (St. Paul: West Group), p. 506.

[152] See Garner, *supra* note 151, p. 1665. The legal maxim '*non bis in idem'* or its imperative 'n*e bis in idem'* literally means 'not twice for the same thing.' The maxim expresses the principle that 'a person shall not be twice tried for the same crime.'

[153] Susan Ellis Wild (ed) (2006), *Webster's New World Law Dictionary* (Hoboken: Wiley Publishing, Inc.) p. 38.

[154] See art 14(7) of ICCPR. See Nihal Jayawickrama (2002), *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge: Cambridge University Press), p.584. Jayawickrama argues that the right recognized in art 14(7) of ICCPR is broader in scope than the common law principle of *autrefois convict*.

Article 56(7) of the African Charter extends the principle of double jeopardy beyond individuals to state parties since it prohibits the African Commission and the African Court from considering a matter that has already been settled. Thus, it establishes the rule *ne bis in idem*.[155] Applied to a state, the rule implies that 'a state should not be found in violation twice' for the same action or conduct.[156]

In *Bakweri Land Claims Committee v Cameroon*, a communication was brought before the African Commission concerning sale of land owned or used by Bakweri, an indigenous community in Cameroon's Fako division. The respondent state raised preliminary objection under Article 56(7)[157] and argued that the communication was inadmissible as the UN Sub-Commission on the Promotion and Protection of Human Rights had already settled the case.[158] While explaining the principle behind the requirement under Article 56(7), the Commission held the following:[159]

> The principle behind the requirement under this provision of the African Charter is to desist from faulting member states twice for the same alleged violations of human rights. This is called the *ne bis in idem* rule (also known as the principle or prohibition of double jeopardy, deriving from criminal law) and ensures that, in this context, no state may be sued or condemned for the same alleged violation of human rights.

In Africa, human rights are expected to be protected at four levels: national, subregional, regional and global.[160] The promotion and protection of human rights at subregional, regional and global levels fall within the international protection of human rights.[161] Subregional courts are regarded as international courts because they are permanent organs established by international legal instruments and apply international law according to their own rules of procedure on disputes between states or disputes in which one of the parties is a state.[162] If the cases that are already tried by subregional courts are admissible to the African Commission or the Court, the defendant states would be tried twice for the same conduct before international tribunals. Therefore, admitting cases

[155] Viljeon (2007), *supra* note 1, p. 126.
[156] *Ibid*.
[157] *Bakweri Land Claims Committee v Cameroon* (2004) AHRLR 43 (ACHPR 2004).
[158] *Ibid*, para 38.
[159] *Ibid*, para 52.
[160] Viljoen (2007), *supra* note 1, p. 9. Africa has subregional institutions that deal with human rights.
[161] *Ibid*.
[162] Lucyline Nkata Murungi (2009), 'Revisiting the role of sub-regional courts in the protection of Human rights in Africa' unpublished LLM thesis, University of Pretoria, p. 32.

decided by subregional courts before the African Commission or Court would violate the prohibition of double jeopardy.

3.4. *Res judicata* Effect of Subregional Courts' Decisions

Prohibition of double jeopardy is closely related to the principle of *res judicata*. The African Commission held that the principle of double jeopardy is connected with 'the recognition of the fundamental *res judicata* status of judgments issued by international and regional tribunals and/or institutions such as the African Commission.'[163] *Res judicata* can be defined as: "[a]n affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been ─but was not ─ raised in the first suit". [164]

According to the African Commission, *res judicata* 'is the principle that a final judgment of a competent court/tribunal is conclusive upon the parties in any subsequent litigation involving the same cause of action.'[165] It implies that 'decision in the circumstances is final, binding and without appeal.'[166]

Certain grounds have been advanced to justify *res judicata*.[167] First, *res judicata* serves public interest because the general public interest requires ending 'disputes that have already been litigated by establishing the finality of judicial decisions.'[168] Secondly, it is used as 'a means to reduce controversies and disputes and to promote stability.'[169] Thirdly, it saves courts' time as it ensures 'the economic efficiency of the courts and the speedy termination of controversies.'[170]

The ICJ considered the principle of *res judicata* in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case.[171]

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[163] *Ibid*.
[164] Garner, *supra* note 151, p. 1052.
[165] *Ibid*, para 52.
[166] Malcolm N Shaw (2005), *International Law* (Cambridge: Cambridge University Press), p. 95.
[167] Yuval Sinai (2011), 'Reconsidering *Res Judicata*: A Comparative Perspective' *Duke Journal of Comparative and International Law* 353, Vol. 21, p.360.
[168] *Ibid*.
[169] *Ibid*, at 362.
[170] *Ibid;* Edward W. Cleary (1948), 'Res Judicata Reexamined' *The Yale Law Journal* 339, Vol. 57 No. 3, p. 344.
[171] Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) Judgment of 26 February 2007, International Court of Justice: Reports of Judgments, Advisory Opinions and Orders, available at <http://www.icj-cij.org/docket/files/91/13685.pdf> (accessed on 13 February 2013).

The case dealt with claim of Bosnia and Herzegovina against Serbia and Montenegro for violating the Convention on the Prevention and Punishment of the Crime of Genocide by destroying and attempting to destroy in whole national, ethnical or religious groups within the territory of the Republic of Bosnia and Herzegovina.[172] The Court identified two purposes of *res judicata*.[173] 'First, the stability of legal relations requires that litigation come to an end.'[174] 'Secondly, it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again.'[175]

For a case to be barred by *res judicata*, it must pass 'the triple identity test.'[176] That is, *res judicata* 'applies where there is an identity of parties, identity of cause, and identity of subject-matter in between the earlier and subsequent proceedings.'[177] Based on the Civil Procedure Acts of Kenya, Uganda and Tanzania, the East African Court of Justice laid down almost a similar test.[178] The Court identified three situations that are essential to apply *res judicata*:[179] "One, the matter must be 'directly and substantially' in issue in the two suits. Two, parties must be the same or parties under whom any of them claim litigating under the same title. Lastly, the matter was finally decided in the previous suit."

The African Commission applied this test in *Bakweri Land Claims Committee* case when it held that the 'parties before the African Commission have not disputed the fact that they were the very *same parties* at loggerheads before the UN Sub-Commission disputing *the same issues* as before the African Commission.'[180] However, the Commission does not consider decision on admissibility as a final settlement of the matter. The principle of *res judicata* applies when the decision has been taken on the merits.

In this case, the Commission considered a communication that had already been declared inadmissible by the UN Sub-Commission on the Promotion and Protection of Human Rights.[181] It was of the opinion that had there been final settlement of the matter, the decision of the UN Sub-Commission would have

[172] *Ibid*, para 65.
[173] *Ibid*, para 116.
[174] *Ibid.*
[175] *Ibid.*
[176] Michael Ottolenghi & Peter Prows (2009), 'Res Judicata in the ICJ's *Genocide* Case: Implications for Other Courts and Tribunals?' *Pace International Law Review* 37, Vol. 21, at 48.
[177] Genocide case, supra note 162, joint dissenting opinion of judges Ranjeva, Shi and Koroma.
[178] *Katabazi* case, *supra* note 53, para 31.
[179] *Ibid*; see also Garner, *supra* note 151, p. 1052.
[180] *Bakweri Land Claims Committee* case, *supra* note 157, para 53. Emphasis supplied.
[181] *Ibid*, para 50.

had *res judicata* status and the case would have been inadmissible under Article 56(7) of the African Charter.[182] Assuming that its decisions remain consistent, the African Commission is thus expected to recognise the *res judicata* effect of subregional courts' decisions. The admissibility requirements of the African Commission *mutatis mutandis* apply to the African Court since both rely on the African Charter.

Analogy can also be made between the African Court and the ICJ. Article 60 of the Statute of the ICJ provides that its judgment is 'final and without appeal.' In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the ICJ held that the 'fundamental character of that principle appears from the terms of the Statute of the Court and the Charter of the United Nations.'[183]

Similarly, the African Court Protocol provides that the 'judgment of the Court decided by majority shall be final and not subject to appeal.'[184] If the African Court faces cases that have already been decided by subregional courts, it may derive the principle of *res judicata* from its protocol. The caveat in this analogy is that the ICJ applied the principle in its own previous judgment.

There are exceptions to the principle of *res judicata*. A court may review and interpret its decisions. For example, the African Court can review its judgment on the basis of new evidence.[185] It can also interpret its judgment.[186] With the exception of revision and interpretation, *res judicata* has the effect of barring the litigants from taking the same case to another court with hopes of obtaining a different judgment, or in anticipation of raising new issues that were not raised at the previous trial.[187] Therefore, the African Commission and the Court may apply the principle of *res judicata* to cases that have already decided by subregional courts.

3.5. Subregional Courts under Article 56(7)

Article 56(7) of the African Charter deals with the settlement of certain matters without, however, laying down any criterion for identifying an adjudicatory organ. Nevertheless, the African Commission has adopted certain criteria in its jurisprudence. In *Constitutional Rights Project v Nigeria*, the African Commission held that it is improper to require the complainant to exhaust domestic remedies from a body that does not 'operate impartially' and that has

[182] *Ibid*, para 53.
[183] Genocide case, *supra* note 171, para 115.
[184] Protocol on the African Court, art 28(2).
[185] *Ibid*, Art 28(3).
[186] *Ibid*, Art 28(4).
[187] Wild, *supra* note 153, p. 244.

no 'obligation to decide according to legal principles'.[188] The African Commission "would not rely on the process or mechanism of a 'discretionary, extra-ordinary … non-judicial nature' to preclude the admissibility of a communication under Article 56(7) of the African Charter".[189]

From the few decisions of the African Commission, it can be gathered that the Commission has depended on the nature of a tribunal or an organ to ascertain whether it falls under Article 56(7) of the African Charter. If a tribunal is of a judicial nature, or if it has an obligation to decide according to legal principles, then it falls under Article 56(7). *Interights v Ethiopia and Eritrea* illustrates the point.[190] In this case, the complainant claimed that expulsion or deportation of Eritreans from Ethiopia and that of Ethiopians from Eritrea during the Ethio-Eritrean war of 1998 violated Articles 1, 2, 3, 4, 5, 6, 7(1), 12(1), 12 (2), 12(4), 12(5), 14, 15, 16 and 18(1) of the African Charter.[191] In their submissions on admissibility, both Eritrea and Ethiopia argued that the communication was inadmissible under Article 56(7) of the African Charter.[192] The African Commission considered the nature of the Ethiopia-Eritrea Claims Commission that was established by the 2000 Algiers Peace Agreement concluded between Ethiopia and Eritrea.[193]

The African Commission extended the test of 'obligation to decide according to legal principles' to identify organs that fall under Article 56(7) of the African Charter.[194] The African Commission held that the Ethiopia-Eritrea Claims Commission falls under those bodies envisaged under Article 56(7) as the Claims Commission 'is bound to apply rules of international law and cannot make decisions *ex aequo et bono*.'[195]

As the African Commission accepts the Ethiopia-Eritrea Claims Commission as a body envisaged under Article 56(7), it should also view subregional courts in the same way for stronger reasons. Subregional courts are more judicial in nature than the Ethiopia-Eritrea Claims Commission because the former are courts while the latter is an arbitral tribunal.[196] Consisting of five arbitrators, the

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[188] *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria* (2000) AHRLR 180 (ACHPR 1995), para 8.

[189] Communication 233/99, *Interights (on behalf of Pan African Movement and Citizens for Peace in Eritrea) v Ethiopia* and Communication 234/99, *Interights (on behalf of Pan African Movement and Inter Africa Group) v Eritrea*, Sixteenth Activity Report 2002–2003, Annex VII.

[190] *Ibid*, para 56.

[191] *Ibid*, para 1-9.

[192] *Ibid*, para 28-29.

[193] Algiers Peace Agreement, *supra* note 148, Art 5.

[194] *Interights v. Ethiopia and Eritrea*, *supra* note 189, para 56.

[195] *Ibid*.

[196] See Art 5 of the Algiers Agreement, *supra* note 148.

Claims Commission was mandated 'to decide through binding arbitration'[197] and the Claims Commission was required to use the 1992 Permanent Court of Arbitration Optional Rules.[198] Moreover, the Claims Commission is temporary,[199] while subregional courts are permanent.

The other point stressed by the African Commission is a duty of a court or a tribunal to apply rules of international law to be within the purview of Article 56(7). Obviously, subregional courts have the duty to apply rules of international law. As international treaties constitute one of the primary sources of international law,[200] subregional courts are empowered to adjudicate on international treaties.[201] For example, in developing its own jurisprudence, the SADC Tribunal has expressly stated that it should have 'regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of States.'[202] In *Campbell* the SADC Tribunal referred to several international treaties including the UN Charter while the ECOWAS Court of Justice based its decision on several international human rights treaties.[203]

Subregional courts, albeit few, also have a human rights mandate while the Claims Commission did not have clear human rights mandate. Subregional courts are more likely to deal with human rights cases than the Claims Commission. Moreover, the number of state parties to the treaties establishing subregional courts is greater than that of the parties to the Algiers agreement, if numbers matter at all. Thus, subregional courts are envisaged under Article 56(7) of the African Charter.

3.6. Textual Interpretation of the African Charter

The text of the African Charter could be interpreted to include subregional courts. Article 56(7) of the African Charter provides:

> Communications relating to human and peoples' rights … shall be considered if they… [d]o not deal with cases which have been settled by the states involved in accordance with … [the Constitutive Act of the African Union] or the provisions of the present Charter.

[197] *Ibid*, Art 5(1) & (2).
[198] *Ibid*, Art 5(7).
[199] *Ibid*, Art 5(8) & (12).
[200] Art 38(1)(a) of Statute of International Court of Justice.
[201] See Art 27(1) of Treaty Establishing East African Economic Community; Art 16(1) of Consolidated Text of the Treaty of the Southern African Development Community, as Amended.
[202] Art 21(b) of SADC Protocol on the Tribunal and Rules of Procedure Thereof.
[203] *Campbell* case, *supra* note 75; *Manneh* case, *supra* note 22; *Koraou* case, *supra* note 25; *SERAP* case, *supra* note 37.

If the case is settled by subregional courts, can such cases be considered as cases that have been settled in accordance with the Constitutive Act of the African Union? Although subregional courts are not organs of the African Union (AU), it could be said that RECs were envisaged within the framework of the AU. For example, Article 3(l) of the Constitutive Act provides that one of the objectives of the AU is to harmonise the activities of RECs. Further evidence that RECs are within the framework of the AU is found in the AU Assembly's Rules of Procedure.[204] Article 34(2) provides that the regulations and directives of the AU Assembly bind RECs. This provision obviously binds organs of RECs, including subregional courts.

Article 56(7) of the African Charter prohibits the admissibility of cases that have been settled in accordance with the provisions of the African Charter. Subregional courts can settle cases in accordance with the provisions of the African Charter because Article 56(7) of the African Charter does not require that the organ that settles cases in accordance with the African Charter be established by the African Union. Moreover, there is no requirement that such organ should be established on a particular level. Practically speaking, the ECOWAS Community Court of Justice, a subregional court, is deciding cases in accordance with the African Charter.[205]

However, it may be argued that subregional courts were not intended to be included under Article 56(7) because these courts were not established at the time when the African Charter was being drafted. The article only refers to the Organs established by the African Charter or Protocol to the African Charter. In this view, it is only the African Commission or the African Court that can settle cases in accordance with the provisions of the African Charter.

This argument which is based on historical circumstances does not render the 'prudential interpretation'[206] of the African Charter invalid. Giving a monopoly of settling matters in accordance with the African Charter to the continental organs alone requires the insertion of the phrase 'before the organs established by the present Charter' at the end of Article 56(7) of the African Charter. Thus, the text of the African Charter could be understood as precluding the African Commission or the African Court from admitting cases that have already been decided by subregional courts.

[204] Rules of Procedure of the Assembly of the Union, ASS/AU/2(I) - a, Assembly of the African Union, First Ordinary Session 9 – 10 July 2002 Durban, South Africa.

[205] *Manneh* case, *supra* note 22; *Koraou* case, *supra* note 25; *SERAP* case, *supra* note 37.

[206] Here, 'Prudential interpretation' is used to mean the interpretation that allows wise use of the African Court and the African Commission.

Conclusion

African Human rights architecture has become substantially different from other regions of the world since subregional courts have ventured into human rights matters.[207] Human rights mandate of these courts is now clear from their constitutions and decisions although such decisions have had bad consequences for the courts in some instances. However, the relation of subregional courts with the African Commission and the African Court is not clear. In particular, it is not clear whether cases decided by subregional courts are admissible before the African Commission or the African Court.

Cases decided by subregional courts have not yet been submitted to the African Commission or the African Court. The main reason seems to be that the involvement of subregional courts in human rights matters is a recent phenomenon and the number of cases entertained by these courts is very few. As a result, the African Commission or the African Court has not decided on the admissibility of cases from subregional courts. Still, *Yogogombaye v Senegal* hints that such submission is inevitable and will be made in the near future.

Consideration or revision of subregional courts' decisions by the African Commission or the African Court might have advantages such as ensuring uniform interpretation of the African Charter. However, the legal basis for referring cases from subregional courts to the African Court or the African Commission is shaky. There is not sufficient legal basis for establishing hierarchical structure between the continental human rights bodies and subregional courts.

Admitting cases that have already been decided by subregional courts would have repercussions. It would overburden the African Commission and the African Court as these continental human rights bodies have little time to deal with cases. It would put the defendant state in a difficult position, as the decisions of these courts are final according to treaties establishing them. It would result in trying the defendant states twice by international institutions for the same violation. It would contradict the principles of *res judicata*. It would contradict some decisions of the African Commission. Therefore, the African Commission and the African Court should not admit cases that have already been decided by subregional courts. ■

[207] The ECOWAS Community Court of Justice has clear human rights mandate. The SADC Tribunal ruled that it has human rights mandate. The East African Court of Justice upheld human rights despite suspension of its human rights jurisdiction.

THE PRINCIPLE OF THE PRESUMPTION OF INNOCENCE AND ITS CHALLENGES IN THE ETHIOPIAN CRIMINAL PROCESS

Simeneh Kiros Assefa, Esq.[♣]

Abstract

The administration of the criminal justice system tries to strike a balance between the search for truth and the fairness of the process. To this end, the law should protect individual rights and impose various legal burdens on the state. One such tool is the principle of the *presumption of innocence until proven guilty*. This is a constitutional principle under Ethiopian law and requires the public prosecutor to prove each element constituting the crime which, as argued in this article, should be proved beyond reasonable doubt. However, this principle is being violated by various subsidiary laws, procedures and practices. First, there are various provisions in the criminal law that limit (or arguably disregard) this constitutional principle. Such criminal law provisions assume as proved the existence of some of the elements of certain crimes without requiring the public prosecutor to submit evidence. Second, the Criminal Justice Administration Policy adopted in 2011 contemplates shifting the burden of proof to the defendant in selected serious crimes. Third, the courts also wrongly shift burden of proof to the accused regarding certain facts in various court decisions. These laws and judicial practices deprive the accused of the right to be presumed innocent until proven guilty. This article, *inter alia*, examines the constitutionality of such shifting of the burden of proof and also analyzes the standards of proof that are required in criminal cases in the Ethiopian context.

Key words

Presumption of innocence, burden of proof, criminal process, criminal justice, confessions, Ethiopia

DOI http://dx.doi.org/10.4314/mlr.v6i2.4

Introduction

The state has the primary responsibility of detection, apprehension, prosecution and conviction of offenders. In this process, the accused always faces the mighty state and this challenges the fairness of the criminal justice system. Using

[♣] LL.B., AAU Law Faculty, 1998; LL.M., University of Pretoria, 2002; LL.M., Kyushu University, 2006; LL.M., University of San Francisco, 2008; practicing attorney before the Federal Courts of Ethiopia, member of the State Bar of California, and Lecturer at A.A.U. Law School. Contact: Simeneh@simenehlaw.com.

various tools, the law tries to maintain the balance between the search for truth and ensure the fairness of the process. The criminal justice system is expected to maintain the rights of the individual even when this at times seems to go against the search for truth. The law does so by affording the individual certain protections, such as, the presumption of innocence until proven guilty before a competent, independent and impartial court and by imposing on the state the duty of proving each ingredient that constitutes the crime.

Presumption of innocence is a restatement of the rule that in criminal matters the public prosecutor has the burden of proving guilt of the accused in order for the accused to be convicted of the crime he is charged with. Burden of proof has two elements: the first element is evidentiary burden, i.e. producing evidence in support of one's allegation, while the second element relates to the burden of persuasion (also referred to as the legal burden), which is the obligation of the party to convince the court that the evidence tendered proves the party's assertion of facts. This distinction and its consequences are not appreciated in Ethiopia's legal system.

The allocation of burden of proof is complicated by factors, such as, affirmative defences and presumptions which are considered to be exceptions thereby shifting the burden of proof to the defendant. Moreover, the determination of the elements of the crime is a formidable task because often, all the elements may not be found in a single provision that defines the crime. There is also lack of clarity regarding the rules and/or the practice relating to the standards of proof.

The central issue relating to the presumption of innocence and burden of proof in Ethiopia's legal system is a matter of constitutionality. The FDRE Constitution recognises the principle of presumption of innocence and there is no exception/limitation to this principle. However, there are provisions in the Criminal Code that allow proof of facts constituting an element of a crime, mainly intention or knowledge, by presumption. In some cases, the public prosecutor does not even have to prove any basic facts for those facts to be deemed to exist. Some of the provisions even preclude contrary proof of facts that are presumed to exist. The *Criminal Justice Administration Policy* (the Policy) adopted by the Council of Ministers in 2011 anticipates shifting the burden of proof to the defendant in some serious crimes. Moreover, courts routinely impose the burden of proof on the defendant. These state actions and legislative provisions that shift the burden of proof to the defendant not only restrict (and sometimes nullify) the constitutional principle of presumption of innocence, but also negatively impact the fairness of the criminal justice system administration in a fundamental way.

Section 1 of the article discusses the debate in the administration of criminal justice. The themes of the discourse include how the criminal justice system should balance the detection, apprehension, prosecution and conviction of

offenders and also ensure the rights of the suspect or accused. In so doing, it examines some of the constitutional provisions that strike a balance between the utilitarian approach to the crime control model and the process value model. It further examines the challenges posed by the subsidiary laws and the practice against such balance in value choices as enshrined in the Constitution. Section 2 highlights the concept of burden of proof, its elements, allocation of burden of proof, presumption of innocence; elements that constitute an offence that need proof and standards of proof. Section 3 dwells on whether such burden of proof on the prosecution may be shifted to the defendant by affirmative defences and presumptions. As the central theme of this article is shifting the burden of proof to the defendant by presumptions, it discusses presumptions as they exist in the law and as are contemplated in the Policy. Finally, the last section discusses burden of proof where there is alleged coercion to extort confessions during police investigation.

1. Values Choice Debates in Criminal Justice Administration

The criminal process is tuned at a particular point in the continuum of two extremes. On the one hand, it pursues the repression of criminal conduct by "detection, apprehension, prosecution and punishment of offenders," which is sometimes referred to as the '*crime control model*;' on the other hand, it deals with the protection of the rights of the suspect in the administration of the criminal justice, which is sometimes referred to as the '*due process model*'.[1] It is a matter of policy of the state whether a criminal justice administration inclines in the direction of *crime control* or *due process*. Even though, such choice is certainly influenced by the political ideology of the system, the state endeavours to maintain a balance between *crime control* and *due process* in view of their interdependence.[2] Thus, the law keeps a balance between the two values.[3]

[1] J. Griffiths (1970) "Ideology in Criminal Procedure or a Third 'Model' in the Criminal Process" in *79 The Yale L.J No. 3*, at 363, 364, 366.

[2] The political ideology of a state manifests itself by (and very much influences) the justice system, and especially in the administration of its criminal justice. A liberal and democratic society, generally, inclines toward a liberal criminal justice system administration; an authoritarian political system has an illiberal criminal process; and there are those that are in between.

[3] The adjective laws are addressed to officials who are "properly qualified to execute the commands of the legislature" particularly in the administration of the criminal justice. [footnotes omitted] G. J. Postema (1977) "The Principle of Utility and the Law of Procedure: Bentham's Theory of Adjudication" in *11 Georgia L. Rev.*, at 1398.

Persons in public office generally tend to favour the principle of utility, and the utility of adjective law is seen only in the context of adjudication.[4] The application of the principle of utility in the administration of the criminal justice aims at maximizing the correct results[5] by minimizing the direct and error (moral) costs in the application of the substantive law.[6] Those moral costs for the acquittal of the guilty and the conviction of the innocent are expressed in terms of low public confidence in the administration of the criminal justice.[7] In order to minimize the moral cost, the criminal justice tolerates very little error; thus, the public prosecutor must prove guilt beyond a reasonable doubt.[8] However, in as much as truth is an essential value, it is not an overriding value; there are what are called "process values"[9] or "inherent process values".[10] Procedures have values that are worth pursuing independent of correct outcome, although they incidentally also help achieve a correct outcome.[11] Therefore, the

[4] The purpose of adjudication is rectitude of decision - the correct interpretation of laws and application to the facts. Therefore, the adjective law has to maximise those correct decisions. T. Anderson, D. Schum and W. Twining (2005) *Analysis of Evidence*, Cambridge: Cambridge University Press, at 83, 84; M. Bayles (1986) "Principles for Legal Procedure" in *5 Law and Philosophy*, at 45; Postema, *supra* note 3, at 1397.

[5] Bayles, *supra* note 4, at 41. Those correct outcomes are conviction of the guilty and acquittal of the innocent.

[6] B. D. Underwood (1977) "The Thumb on the Scale of Justice: Burdens of Persuasion in Criminal Cases" in *86 Yale L. J.*, at 1307, 1330; Bayles, *supra* note 4, at 46, 47; Postema, *supra* note 3, at 1396, 97.

[7] Bayles, *supra* note 4, at 46, 47

[8] Bayels, *Id.*, at 45; Postma, *supra* note 3, at 1397. The 'rationalist approach' to proof in adjudication is based on three assumptions. First, it assumes litigation has its objective as the pursuit of truth through a rational process. Second, the pursuit of truth in adjudication is a high but not an overriding objective of justice. And third, pursuit of truth through reason is only a means to achieving the ends of substantive law. Anderson, Schum and Twining, *supra* note 4, at 79. This rationalist approach to adjudication is reflected in modern procedure and evidence laws including ours. For instance, the provisions relating to investigation and proof both in the civil and criminal procedure provisions as well as the various substantive legislations reflect the epistemological aspect of adjudication. The Constitution on the other hand contains several provisions that reflect the "process value" in the administration of the criminal justice system.

[9] R. S. Summers (1974) "Evaluating and Improving Legal Process - A Plea for 'Process Values'" in *60 Cornell L. Rev. No. 1*, at 3.

[10] Bayles, *supra* note 4, at 51.

[11] Summers *supra* note 9, at 3, 4. Also see, Bayles, *supra* note 4, at 50, 51. Summers also catalogues process values some of which are: Process Legitimacy, at 21, Process Peacefulness, at 22, Humaneness and Respect for Human Dignity, at 23, Personal Privacy, at 24, Procedural Rule of Law, at 25, and Procedural Rationality, at 26.

criminal process tries to balance the manifestation of truth (as the foundation of justice) and the process values (as expressions of fairness). This balance of values is made in the Ethiopian Constitution.

1.1. The Constitutional Value Choice

The law has many tools that focus on the fairness of the process independent of the correctness of outcome of the process. These tools include the principle of the presumption of innocence of the accused until proven guilty and the obligation of the state to prove each ingredient that constitutes the crime. The Constitution has fairly balanced the rule of law and the crime control models. It has clear and detailed provisions regarding the rights of the accused, the arrested or the convicted person; and this is unusual for a constitution.[12]

The Constitution provides that, "human rights and freedoms emanating from the nature of mankind, are inviolable and inalienable".[13] Many of the constitutional rights relating to the administration of the criminal justice system emanate from the recognition of the natural rights of the person, such as, the right to life, liberty and personal security.

Although Article 17 of the Constitution deals with the right to liberty, it is also a restatement of the due process of law. It provides that "... [n]o one shall be deprived of his or her liberty except *on such grounds* and *in accordance with such procedure* as are established by law".[14] [Emphasis added.] It further provides that "[n]o person may be subjected to arbitrary arrest, and no person may be detained without a charge or conviction against him".[15] The Constitution also prohibits "...cruel, inhuman or degrading treatment or punishment".[16] The arrested person shall not be compelled to make confessions or admissions which

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Some of those process values are also discussed in one or another form by Bayles, *supra* note 4, at 53-56; for a similar but different perspective, see J. Thibau and L. Walker (1978) "Theories of procedure" in *66 California L. Rev.*, at 541 – 543.

[12] D. A. Donovan (2002) "Leveling the Playing Field: The Judicial Duty to Protect and Enforce the Constitutional Rights of the Accused Persons Unrepresented by Counsel." *1 Eth. L. Rev.*, at 32, 33; Wondwossen Demissie (2000) "The Role of Courts in the Enforcement of Constitutional Rights of Suspects" *Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution.* Addis Ababa: ECSC, at 45-47.

[13] Federal Democratic Republic of Ethiopia (FDRE) Const. Art 10(1).

[14] In order for a suspect to be detained, there must be a substantive law which imposes a sentence of imprisonment and there must be a procedure which provides for the manner and the requirements of arrest. In the absence of either of this, a person may not be arrested.

[15] Arbitrary arrest is effected under circumstances where either of the above requirements is not met.

[16] FDRE Const. Art 18(1).

would be used in evidence against him. It is further provided that, "[a]ny evidence obtained under coercion shall not be admissible".[17] The arrested person has the right to be promptly informed of the reasons for his arrest (during his arrest and when he appears in court within 48 hours).[18] The arrested person also has the right to remain silent and the right to be informed that any statement he makes may be used in evidence against him in court.[19] The arrested person has the right to file a petition to a court for his physical release;[20] and has the right to be released on bail.[21]

The Constitution has extensive provisions regarding the rights of the accused. The accused has the right to trial by an ordinary court of law within a reasonable time.[22] He has the right to be informed, in writing, of the charges with sufficient particulars.[23] The accused has the right to have full access to any evidence presented against him, to examine witnesses testifying against him, to present evidence or have witnesses produced in his own defence, and to obtain the attendance of and examination of witnesses on his behalf before the court.[24] He has the right to be represented by a counsel and to be assisted by an interpreter.[25] Another right of the accused, which constitutes the core theme of this article, is the right to be presumed innocent until proven guilty according to law.[26] It is further provided that the accused may not be compelled to testify against himself.[27]

The Constitution is the supreme law because "[a]ny law, customary practice or a decision of an organ of a state or a public official which contravenes [the] Constitution shall be of no effect."[28] The Constitution requires "[a]ll Federal and State legislative, executive and judicial organs at all levels ... to respect and enforce" the provisions relating to individual rights and freedoms.[29] It is evident from the readings of these provisions that the crafting and application of any

[17] *Id*., Art 19(5).
[18] *Id*., Art 19(1), (3).
[19] *Id*., Art 19(2).
[20] *Id*., Art 19(4).
[21] *Id*., Art 19(6).
[22] *Id*., Art 20(1).
[23] *Id*., Art 20(2).
[24] *Id*., Art 20(4).
[25] *Id*., Art 20(5), (7).
[26] The PDR Ethiopia Constitution had similar provisions. Art 45(1) provides that "[n]o person criminally accused of violating the law shall be considered guilty unless it is so determined by a court." The Amharic version of the provision is much more closer to the provisions of the current Constitution.
[27] FDRE Const. Art 20(3).
[28] *Id*., Art 9(1).
[29] *Id*., Art 13(1).

legislation may be made only in accordance with the Constitution. Moreover, any criminal investigation and prosecution should observe these minimum standards.

There are provisions in the Criminal Procedure Code that are meant to further the values enshrined in the Constitution.[30] Regarding the *due process* aspect of the administration of the criminal justice, there are provisions relating to the right of the suspect or defendant to remain silent,[31] to be released on bail,[32] protecting the suspect against unreasonable search and seizure,[33] to be treated with dignity,[34] to be visited by relatives and religious fathers,[35] to be represented by an attorney,[36] to have access to and examine prosecution witnesses,[37] to present his defence,[38] and to be presumed innocent until proved guilty by the prosecution.[39] These are the *inherent process values* of the administration of the criminal justice.

From the *crime control* perspective, the Constitution embodies provisions that deal with the detection, apprehension, prosecution, and punishment of offenders in order to promote public and state security. In this regard, there are provisions that restrict the rights of the suspect or the accused. For instance, there are restrictions on the right to liberty; thus, a suspect may be arrested in accordance with the provisions of the laws of criminal procedure.[40] Under exceptional circumstances prescribed by law, the court may deny bail[41] and keep the arrested person in custody. [42] Or the court may remand the arrested person

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[30] It is to be noted that the Criminal Procedure Code was drafted several decades before the current Constitution. However, the issue of balancing the crime control duty of the state and due process of the law is inherent in the administration of the criminal justice. Thus, there is substantial congruence between the Criminal Procedure Code enacted in 1961 and the FDRE Constitution enacted in 1994.

[31] Art 27.

[32] Arts 59 ff.

[33] Arts 32 & 33.

[34] In effecting arrest of the suspect where there is "submission to his custody by word or action", the arresting officer may not use any force or may not even touch the body of the arrestee (Art 56(3)). During the hearing, the law prohibits chaining the defendant "unless there is a good reason to believe that he is dangerous, may be violent or may try to escape" (Art 127(2)). The law also requires that the arrestee be detained on the conditions that are prescribed for prison (Art 60).

[35] Art 60.

[36] Art 61, 127(1).

[37] Art 136(2), 137.

[38] Art 142.

[39] Arts 141, 142.

[40] FDRE Const. Art 17(1).

[41] Art 19(4), (6).

[42] Art 19(4).

for a time strictly required to carry out the necessary investigation,[43] or demand adequate guarantees for his conditional release.[44] The rights of privacy, arguably, may be restricted for the purpose of crime investigation.[45] The Criminal Procedure Code is *mostly* in conformity with the spirit of the Constitution. Articles 11-21 deal with the initiation of investigation; and Articles 22-39 and 49-79 provide for investigation and other police activities pending investigation. Particularly relevant to the discussion, Articles 32-33 deal with search and seizure while Articles 49-59 deal with arrest and Articles 60-79 deal with bail and remand. Articles 40-48 provide for the prosecution of the suspect; and, finally, Articles 94-159 deal with the trial of the case.

1.2. The Challenges to the Constitutional Model of the Criminal Process

The Constitution is clear in its value choice and it balances the interests of *the public* and *of the individual* in the administration of the criminal justice.[46] However, there are constant challenges to this constitutional value choice. A preliminary examination of both the laws in force and the practice in the administration of the criminal justice shows that the constitutional value choice is given a marginal place. This is because there are several procedural laws that overextend their scope and functions of crime control to the extent that they contravene the due process provisions in the Constitution. In fact, these subsidiary laws expressly provide – both in their preambles[47] and in the

[43] *Id*.

[44] FDRE Const. Art 19(4), (6).

[45] *Id*., Art 26. This provision never includes a pending investigation as a ground for restriction of the right to privacy. Sub-article 3 provides that "...[n]o restrictions may be placed on the enjoyment of such rights except in compelling circumstances and in accordance with specific laws whose purposes shall be the safeguarding of national security or public peace, the prevention of crimes or the protection of health, public morality or the rights and freedoms of others."

[46] In the ordinary parlance there appears to be a distinction between the 'public interest' and the 'private interest;' and protection of the rights of the individual is considered a private interest. However, the protection of the constitutional rights of the individual is also a public interest in that if a state power is not constitutionally limited there is no guarantee that every member of the public will not be subjected to the arbitrary action of the state. The concepts 'public interest' and 'private interest' with apparent distinction are used here only as a matter of convenience and for clarity of ideas during these discussions.

[47] Unlike the practice in the common law system, the preamble is an important part of the concerned legislation in the civil law system. It is the policy justification for the adoption of the legislation; as such, it is important to understand the legislative intent in the interpretation and application of the substantive part of that legislation.

substance of their provisions – that they aim at the crime control aspect of the duty of the state. Such are the preambles of the anti-corruption, the vagrancy control and the anti-terrorism proclamations.[48]

These laws modify the mainstream criminal procedure embodied in the Criminal Procedure Code, in order to meet their prime objective; i.e., suppression of crime. They modify several important procedures, such as, bail,[49] remand,[50] admissibility of evidence,[51] etc. Many of the modifications are directed to the practice rather than the law, because there were no express provisions governing those areas where modification was sought by these laws.[52] Ironically, these laws were adopted after the coming into force of the Constitution, and yet they are contrary to the Constitution. In this regard we can the standard of proof for confiscation of property for crimes of corruption,[53]

[48] The Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 236/2001, the Vagrancy Control Proclamation No. 384/2004, and the Anti-Terrorism Proclamation No 652/2009, respectively.

[49] Bail in the initial anti-corruption legislation was governed by the rules of the Criminal Procedure Code as there was no such provision in the Proclamation (Proc. No 236/2001). Later it was amended and the crime of corruption was made non-bailable offence (Proc. No. 239/2001, Art 2). However, it was further amended in order to make only those corruption offences that are punishable by a term of more than 10 years imprisonment non-bailable (Proc. No 434/2005, Art 4(1)). The crime of vagrancy is made non-bailable from the very beginning (Proc. No. 384/2004, Art 6(3)).

[50] The dangerous vagrancy law extended the period of remand form a maximum of 14 days to 28 days (Art 7). So does the Anti-Terrorism Proclamation No. 652/2009 (Art 20(3)).

[51] The Anti-Terrorism Proclamation contains a list of admissible evidence which would not be admissible (Art 23(1), (2) & (4)).

[52] There is no evidence or procedural rule that governs the issue of hostile witness. However, the anti-corruption legislation introduces the concept of hostile witnesses and allows the prosecutor to ask leading questions during the examination in chief of its witnesses (Proc. No 236/2001, Art 40). Likewise, there is no provision in the law that exhaustively lists admissible evidence or sets forth certain standards by which admissibility could be tested. However, the anti-terrorism legislation puts in place provisions regarding the admissibility of specific evidence in such cases, (Proc. No. 652/2009, Art 23(1), (2) & (4)). There were no express provisions that affirmatively state the standards of proof in civil and criminal matters. However, the anti-corruption proclamation expressly provides for standards of proof in application for Confiscation of property acquired by corruption (Proc. No 236/2001, Arts 23 and 24).

[53] Confiscation of property is a penalty as provided for under the Criminal Code, Art 98. Sentence of imprisonment or confiscation of property is contingent upon proof of criminal guilt and conduct. Therefore, the crime should be proved beyond reasonable doubt before the court rules on whether defendant's property should be confiscated.

burden of proof in corruption cases in general,[54] and admissibility of specific categories of evidence.[55] Even when there are provisions that conform to the values of the Constitution, the practice in the administration of justice restricts the rights of the suspect and deviates from what the law provides.[56]

The Criminal Justice Administration Policy adopted on March 4, 2011 by the Council of Ministers contemplates transforming the criminal justice administration.[57] The Policy positively envisages the improvement of the criminal justice system. However, it has, at least, one major predicament; it tends to shift the burden of proof to the accused by the use of presumptions in a few serious crimes, such as, crimes against the Constitution and the constitutional order, acts of terrorism, crimes of corruption and organised crimes stated in the Policy.[58] A brief introduction to the Policy is, thus, appropriate.

1.3. Overview of the Criminal Justice Administration Policy

The Policy is meant to foster efficiency, expediency and fairness in the slow and weak administration of the criminal justice system.[59] The Policy introduces new

[54] It is argued in this article that the constitutional principle of presumption of innocence dictates that the public prosecutor has the burden of proving each ingredient constituting a crime the accused is charged with beyond a reasonable doubt; thus, an element of a crime cannot be proved by presumptions. See section 3.2 of this text.

[55] The Anti-Terrorism Proclamation No 652/2009, Art 23 provides that "(1) intelligence report prepared in relation to terrorism, even if the report does not disclose the source or the method it was gathered" and "(2) hearsay or indirect evidences," among others, are admissible. These evidence are not practically subject to test by defendant; therefore, such restrictions violate the constitutional right of defendant to examine evidence presented against him as enshrined under FDRE Constitution, Art 20(4).

[56] See Simeneh Kiros Assefa (2010) "The Normative, Institutional and Practical Challenges in the Administration of the Criminal Justice in Ethiopia" in *Ethiopian Human Rights Law Series Vol. III* ; Centre for International Legal Cooperation (2005) *Comprehensive Justice System Reform Program Baseline Research Report* (Addis Ababa: FDRE Ministry of Capacity Building) (hereinafter '*Baseline Research Report*')

[57] See the last paragraph of Introduction of the Criminal Justice Administration Policy ('The Policy').

[58] The Policy, Section 4.6.

[59] The former Federal Ministry of Capacity Building had commissioned foreign consultants to conduct a baseline research on the state of the Ethiopian criminal justice administration. The findings of the research depicts a very gloomy and sad picture of the state of the criminal justice system administration. *Baseline Research Report, supra* note 56. There are also other researches on the various aspects of the

concepts and processes, such as, plea bargain[60] reopening of a case after final judgment,[61] prioritizing cases for investigation and prosecution,[62] exclusionary rules for evidence unlawfully obtained,[63] and diversion, both in terms of process and punishment.[64] It has also greatly modified the investigation process both by granting broader supervision power to the public prosecutor[65] and by introducing new (and arguably modern) investigation processes, such as, infiltration and secret surveillance, interception of private communication, both with or without court warrant, protection of informants and agents, and non-prosecution of a person who participated in a crime.[66] The policy also addresses the longstanding problem relating to the gathering, preservation and return of exhibits[67] by granting in the matter full power to the Public Prosecutor.[68]

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criminal justice system. See, Simeneh Kiros, *supra* note 56; Worku Yaze Wodage (2010) "Presumption of Innocence and the Requirement of Proof Beyond Reasonable Doubt: Reflections on Meaning, Scope and their Place under Ethiopian Law" in *Ethiopian Human Rights Law Series Vol. III*, Ali Mohammed Ali (2003) "The Role of Courts, Police and Prosecution in the Respect and Enforcement of Human Rights" (title in Amharic) A discussion paper presented at a workshop organised for Federal Judges, Prosecutors and Police), Menberetsehai Taddesse (2003) "Forgotten Provisions of the Criminal Justice Process" (title in Amharic) (A discussion paper presented at a workshop organised for Federal Judges, Prosecutors and Police).

[60] The Policy, Section 4.5.3.

[61] *Id*., Section 4.8.1.3.

[62] *Id*., Section 3.14.

[63] *Id*., Section 3.16.1.

[64] *Id*., Sections 4.6, 6.4.3.

[65] *Id*., Sections 3.5-3.10.

[66] *Id*., Section 3.17. These methods of investigation are adopted in the Anti-Terrorism Proclamation No 652/2009. For instance, Art 14(1) provides that "in order to prevent and control terrorist acts, the National Intelligence and Security Service may,...:a) intercept or conduct surveillance on the telephone, fax, radio, internet, electronic, postal and similar communications of a person suspected of terrorism; b) enter into any premise in secret to enforce the interception; or c) install or remove instruments enabling the interception." This power is also given to the police under Sub-art (4). The police are also authorized to conduct sudden and covert searches under Arts 16 and 17, respectively. There is also authorised interception of correspondence and letters in corruption cases. Proc. No. 434/2005, Art 46.

[67] For in-depth examination of the problems relating to the gathering, preservation and returning of exhibits, see Mullualem Eneyew (2004) "The Gathering, Preservation and Return of Exhibits: International experience and the law and the practice in Ethiopia" (title in Amharic), a research paper presented to federal justice sector personnel Sodere: August 30- September 1.

[68] The Policy, Section 3.20.

In order to achieve these objectives, the policy anticipates capacity building of the personnel of the respective justice institutions,[69] the adoption of new laws and the modification of the existing ones.[70] Those laws and practices are supposed to conform to the Constitution and international human rights conventions to which Ethiopia is a party.[71]

One who reads those provisions would only assume that the policy anticipates improving the fairness of the criminal process. Notwithstanding this notable positive vision for the improvement of the criminal justice administration, the most serious predicament to fairness in the Policy, in relation to the theme of this article is shifting the burden of proof to the accused by providing for presumptions in serious criminal cases. Ironically, 'The Reverse Onus of Proof' is found under Part 4 titled "Improving the Effectiveness and Fairness of the Criminal Justice Process".[72]

2. Burden of Proof and/or the Presumption of Innocence

2.1. Burden of Proof in General

Burden of proof is the obligation of a party to a dispute to establish by evidence his assertion of facts by a required degree of certainty unless such fact is self-evident. In this proposition, there are three distinct questions: what are the elements of burden of proof? which party has the obligation to prove a given fact? and what is the quantum of evidence or the standard of proof? In addressing these three questions we will see that the concept of burden of proof is one of the most deceptively simple in theory, but elusive in terms of application.[73]

2.1.1. Elements of Burden of Proof

Burden of proof has two elements: the burden of production sometimes referred to as evidentiary burden (or onus) and the burden of persuasion sometimes

[69] *Id*., Section 3.3
[70] *Id*., Part 7; also see the legislative requirements under *infra* note 72.
[71] *Id*., at ii
[72] The last part of the Criminal Justice Administration Policy, i.e. Part 7 provides that existing legislation may be modified and new ones may be adopted to implement the Policy. Accordingly, there is a table prepared for the legislative requirements of the policy. <http://www.democraticdevelopment.ca/criminaljusticepolicy>
[73] Sometimes burden of proof is described as 'slippery.' C. B. Mueller and L. C. Kirkpatrick (2000) *Evidence under the Rules: Texts, Cases and Problems 4th Ed*., (New York: Aspen Law and Business), at 767.

referred to as legal burden (or burden).[74] The burden of production is the obligation of a party to produce evidence in support of his assertion. The party who has the initial burden has the obligation to produce evidence that is "cogent" or "compelling".[75] Where such party produces evidence, the other party does not have to disprove anything; however, he automatically loses if he does not produce rebuttal evidence.[76] The Indian Evidence Act (IEA), from which Ethiopia's Draft Evidence Rule is borrowed, makes a distinction between the burden of production and the burden of persuasion. Thus, regarding the burden of production, Section 102 provides that "[t]he burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side." Regarding the legal burden, Section 101 provides that the party desiring "any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist..." In civil matters, the burden of production may be shifted to the other party by presumptions.[77] In any proceedings, the party who has the legal burden or the burden of persuasion has the obligation to convince the court that the evidence (presented by either party) supports the facts he is relying on for his claim or defence. Such burden remains with the party on whom it is originally cast and cannot be shifted to the other party by any means including presumptions.[78]

2.1.2. Allocation of the Burden of Proof

Allocation of the burden of proof is allocation of risk between the parties because it is an ordinary rule of evidence that the party who has the burden of proof loses should he fail to discharge such burden. However, the party who asserts the affirmative of a fact has the burden of proof. This basic rule for allocation of the burden of proof is uniformly applied both in civil as well as criminal matters.

There are far more detailed specific provisions in civil matters for the allocation of burden of proof based on these principles, both in the substantive and procedural codes, than in criminal matters. Thus, Article 896 of the Ethiopian Civil Code that deals with claims of entitlements under a will made by a deceased provides that "[w]hosoever claims rights under a will shall prove

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[74] A. Singh (1998) *Principles of the Law of Evidence 11th Ed*., Central Law Publications, Allahbad, at 286; G. Dingwall (2002) "Statutory Exceptions, Burdens of Proof and the Human Rights Act 1998" *Modern L. Rev.*, Limited, at 450, 51.

[75] Mueller and Kirkpatrick, *supra* note 73, at 769; R. C. Park, *et. al*., (1998) *Evidence Law: A Student's Guide to the Law of Evidence as Applied in American Trials* (St. Paul, Minn., West Group), at 93.

[76] Mueller and Kirkpatrick, *Id.*, at 769.

[77] See for example FRE Rule 301, *Infra* note 144.

[78] *Id.*

the existence and the contents of such will".[79] Regarding a dispute on the (non)performance of a contract, the law provides that the party "who demands performance of an obligation shall prove its existence".[80] Otherwise, where the other party "alleges that [such] an obligation is void, has been varied or is extinguished, [he] shall prove the facts causing such nullity, variation or extinction".[81] These and similar provisions in the Civil Code and other substantive laws allocate the burden of proof in specific types of litigations. In civil litigation in general, Article 258 of the Ethiopian Civil Procedure Code provides that the plaintiff has the burden of proof.

Various issues of allocation of burden as between the litigants arise based on the above stated principles. There are different formulations of the test for the allocation of such burden. Some state that the party who needs the assistance of the court has the obligation to prove because he is the one who is challenging the status quo.[82] For example, Indian Evidence Act (IEA), Section 101, first alinea, provides that the party desiring "any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist".[83] This test focuses on who brought the action. Accordingly, Article 258(1) of Ethiopia's Civil Procedure Code provides that "...the plaintiff shall be entitled to begin..."[84] In civil matters, It thus appears that the plaintiff bears the burden of proof. This is in conformity with the principle that the party who brought the action should prove the facts in his claim.

Almost all litigations have much more complex issues to be resolved. For the proper determination of the allocation of the burden of proof regarding each issue, there has to be another test. The better test for the allocation of the burden of proof is based on who asserts the affirmative: the party who asserts the affirmative of an issue has the burden of proof because it is much easier to prove the affirmative than the negative.[85] If P claims that he had a contract with D but the latter failed to discharge his contractual obligation, P has to prove that there was a contract to be performed. This may be done by producing the contract

[79] The manners of proof of a will are further provided for under Art 897.
[80] Civ. C., Art 2001(1).
[81] *Id*., Art 2001(2).
[82] Singh, *supra* note 74, at 286.
[83] IEA Section 101. Second alinea further provides that, "[w]hen a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."
[84] The word 'entitled' is misleading because it appears to be the right of the party to begin his case. The word is also used in Civ. P. C., Art 259(1). Seen in light of other provisions, including Arts 137(1) the Amharic version, 223(1), 256(1) and 259(1), it is not an entitlement; it is rather the duty of a party to prove a particular fact the failure of which is sanctioned by losing the litigation on that specific issues.
[85] Singh, *supra* note 74, at 285; Mueller and Kirkpatrick, *supra* note 73, at 768.

document itself. However, this test further begs the question as to what assertion is. This rule is often misunderstood and misapplied convoluting the real problem with unrelated issues.[86]

Certainly, the party who alleges that a contract exists is asserting the affirmative. Assertion of the affirmative needs careful interpretation beyond its grammatical form, and it is the substance of the assertion that needs to be seen. When a person, for example, alleges the non-performance of a contract, a negative action, the proponent is also asserting the affirmative of the fact that the respondent had a positive duty and by his inaction the proponent sustained damage.

The third test which is much more specific to the burden of production of evidence but that can also at times be used for burden of proof in general is that the party who would lose the matter if evidence is not produced by either side has the burden of proof. It appears to be based on the test under Section 102 of India's Evidence Act which provides that "[t]he burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side." This test still does not answer all the questions regarding burden of proof; but it helps to a great extent by supplementing the previous two tests which are not significantly different from each other.

These tests for the allocation of burden of proof are applicable both in civil and in criminal matters. However, it is to be noted that in criminal matters, presumption of innocence is an important tool for the determination of the initial burden of proof. Although the constitutional principle of presumption of innocence generally allocates the burden of proof to the public prosecutor, the real allocation of the burden of proof is complicated regarding proof of each issue. Thus, when we use these tests for the allocation of the burden of proof, we have to use all of them at once, and we can allocate the burden of proof regarding a particular issue to either party only when we are positive about each test.

2.2. Presumption of Innocence and Burden of Proof in Criminal Matters

Presumption of innocence is not an ordinary presumption wherein the basic facts are proved and the presumed facts are taken as proved.[87] Presumption of innocence is a restatement of the rule that the public prosecutor has the obligation to prove each element that constitutes the crime beyond a reasonable

[86] Mueller and Kirkpatrick, *Id.*, at 767; also, see Section 4, and *infra* note 170.

[87] N. H. Holland and H. H. Chamberlin (1973) "Statutory Criminal Presumptions: Proof Beyond a Reasonable Doubt?" *7 Val. U. L. Rev. No. 2*, at 147, 148; sometimes the principle of presumption of innocence is referred to as 'assumption'. *Id*., at 148.

doubt.[88] Article 20(3) of the Ethiopian Constitution stipulates that, "[d]uring proceedings, accused persons have the right to be presumed innocent until proved guilty according to law and not to be compelled to testify against themselves".[89] The accused on his part is not thus required to submit proof before the public prosecutor produces evidence.[90]

The allocation of the initial burden of proof in criminal matters is obvious. Article 136(1) of the Criminal Procedure Code provides that "...the public prosecutor shall open his case explaining shortly the charges he proposes to prove and the nature of the evidence he will lead..."[91] This is further strengthened by the provisions of Articles 141 and 142. If, after the prosecution case is concluded, the court "finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, [it] shall record an order of acquittal".[92] Conversely, where, after the prosecution evidence is concluded "the courts find that a case against the accused has been made out ... it shall call on the accused to enter upon his defence".[93] In entering his defence, "[t]he accused or his advocate may then open his case and shortly explain his defence stating the evidence he proposes to put forward..."[94]

Unlike other principles, there is no exception/restriction to the principle of presumption of innocence.[95] There is no general restriction on the right in the

[88] There is no argument that exempts the state from the burden of proof. It is not only a matter of principle it is also a matter of common practice that the public prosecutor proves the charge he is marshalling against the accused. Singh, *supra* note 74, at 295. Further, although unstated, there is also a specific requirement that the facts need to be 'properly proved.' Properly proved means proof based on lawfully obtained, relevant, admissible and reliable evidence. Anderson, Schum and Twining, *supra* note 4, at 82; B. G. Joubert, S. Tarblanche and V. M. Van Rooney (1999) *Criminal Procedure Handbook, Fourth Ed.*, (Kenwyn: Juta & Co.), p.6.

[89] FDRE Const. Art 20(3)

[90] Defendant is not required to participate in the proof process against himself; that is what is referred to as privilege against self-incrimination. J. D. Jackson (2005) "The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?" *68 Modern L. Rev. No. 5*, at 758

[91] Sub-arts (2) and (3) provide for oath/affirmation and examination of prosecution witnesses which are further elaborated by the subsequent provisions, Arts 137, 139 and 140.

[92] Art 141.

[93] Art 142(1).

[94] Art 142(2).

[95] The *right to life* may be restricted as "punishment for a serious criminal offence determined by law" (Art 15). The *right to liberty* may be restricted "on such grounds and in accordance with such procedures as are established by law" (Art 17). There are also restrictions to the right to privacy as are provided for under Art 26(3).

Constitution nor is there any specific restriction under the provisions of the FDRE Constitution.[96] Therefore, in light of the foregoing discussion, the public prosecutor has the obligation to prove all the elements constituting the crime beyond a reasonable doubt in order for the accused to be convicted of such crime.

These allocations of burden of proof by the law are not arbitrary decisions; they are all in conformity with the basic principle of allocation of burden of proof discussed above – the party who asserts the affirmative shall prove the existence of such fact. Thus, in the criminal charge, the public prosecutor is asserting that the defendant has committed the crime contrary to the criminal law. Before the discussion on the issue of shifting the burden of proof to the defendant, therefore, it is appropriate to examine the facts that constitute the crime and other facts the prosecutor has to prove in his case.

2.2.1. Elements Constituting the Crime and Other Facts that Need Proof

Proof and the substantive criminal law are connected by the latter's identification of the elements constituting the crime. A crime is an action (or omission) that is contrary to law[97] and is deemed to be completed and punishable where "all its legal, material and moral ingredients are present"[98] and "where the Court has found the crime proved and deserving of punishment."[99]

The legal element refers to the provisions of the criminal law that define whether a given action/omission is a crime. Such provisions state what facts constitute a crime the presence of which need to be proved. The identification of the elements constituting the crime is sometimes difficult and becomes a subject of heated argument in the court because all of those elements may not be provided for in the law (the relevant legal provision) that defines the crime.

Although there is no restriction on the *freedom of religion, belief and opinion*, there are necessary limitations on one's freedom to express or manifest his religion and belief (Art 27(5). Certainly, there are such necessary restrictions on the *right of thought, opinion and expression* (Art 29), and *the right to assembly, demonstration and petition* (Art 30).

96 Article 20(3) of the FDRE Constitution. See the discussion on possible restriction of rights provided for in the Canadian and South African constitutions under Section 3.2.1. below.

97 Crim. C., Art 23(1).

98 *Id.*, Art 23(2); *Jemila Mohammed Hagos, et. al., v Public Prosecutor* (Federal Supreme Court Cassation Division, Cass. F. No. 38161) Vol. 9, at 12.

99 Crim. C., Art 23(4).

Thus, identification of the elements in such circumstances may require the judge (or the parties) to go beyond the statutory definition.[100]

The public prosecutor should also prove other facts that may not necessarily constitute the crime. Thus, apart from what the Criminal Code provides for, Article 111(1) of the Criminal Procedure Code provides that "[e]very charge ... shall contain: (a) the name of the accused; and (b) the offence with which the accused is charged and its legal and material ingredients; and (c) the time and place of the offence and,[101] where appropriate, the person against whom or the property in respect of which the offence was committed; and (d) the law and article of the law against which the offence is said to have been committed." Article 112 further provides that "[e]ach charge shall describe the offence and its circumstances so as to enable the accused to know exactly what charge he has to answer [to]. Such description shall follow as closely as [possible] the words of the law creating the offence."

The moral element of crimes is defined under Articles 57 *ff* of the Criminal Code. Accordingly, a person is guilty of a crime "if, being responsible for his acts, he commits a crime either intentionally or by negligence".[102] An action is not punishable "if it was performed or occurred without there being any guilt" on the part of the actor "or was caused by force majeure, or occurred by accident".[103] Likewise, a person may not be convicted for "what he neither knew of or intended, nor for what goes beyond what he intended either directly or as a possibility".[104]

Intention exists where a person commits "an unlawful and punishable act with full knowledge and intent in order to achieve a given result"[105] or that "he, being aware that his act may cause illegal and punishable consequences, commits the act regardless of such consequences may follow".[106] An intentional

[100] Some argue that the public prosecutor has to prove that defendant committed the crime without a justification and excuse. Thus, proof of lack of affirmative defence becomes an element of a crime because it ultimately affects culpability. For instance, the court in *Mullaney v. Wilbur*, 343 U.S. 790 (1952) goes beyond the statutory definition of the crime of murder to find absence of passion. L. E. Chiesa (2011) "When an Offense is Not an Offense: Rethinking the Supreme Court's Reasonable Doubt Jurisprudence" *44 Creighton L. Rev.*, at 653, 675, 658 & 659.

[101] Place and time of the crime is also provided for under Crim. C., Art 26 making the subject matter one of substance rather than mere procedure.

[102] *Id.*, Art 57(1) second *alinea*.

[103] *Id.*, Art 57(2).

[104] *Id.*, Art 58(3).

[105] *Id.*, Art 58(1)(a).

[106] *Id.*, Art 58(1)(b).

crime, in the absence of justifications and excuses, is always punishable.[107] However, once the elements constituting the crime are identified, each of them must be proved beyond a reasonable doubt by the prosecution.

Sentencing comes after conviction; thus, the facts that are essential for the determination of sentence either by aggravation,[108] mitigation or otherwise are proved by preponderance of the evidence.[109] This is because those facts come after the presumption of innocence is effectively disproved.[110] However, where the aggravation changes the article under which the defendant is to be convicted or if it substantially increases the sentence, then those facts should be proved beyond a reasonable doubt as they relate to culpability.[111]

2.2.2. Standards of Proof of Facts Constituting the Crime

Facts exist or do not exist; they do not exist in probabilities.[112] Proof of facts is assessed in terms of conviction; convictions are expressed in term of degrees which is determined based on the quantum of evidence for the determination of the ultimate fact.[113] Thus, proof of facts is assessed in terms of probabilities, e.g., the occurrence of a given fact is more or less probable than its non-occurrence where the standard of proof is by preponderance of the evidence. The "highest degree of probability" is what is called "truth".[114] There is always a degree of doubt/uncertainty that is tolerated in proof because it cannot be avoided, although the degree of doubt that is tolerated in civil matters is much higher than that is tolerated in criminal matters. Therefore, it is commonly stated

[107] *Id.*, Art 58(2).

[108] There are two different ways of looking at the elements of the crime that are relevant to our discussion: the first is violation of what is provided for by the legislature where the law comprehensively includes all the elements of the crime. The second is violation of the prohibitive norm and the absence of justification or excuse. Thus, depending on the nature of a particular crime, the public prosecutor has the burden of proving both the commission of a crime and where appropriate, the absence of justification or excuse. Chiesa, *supra* note 100, at 650, 651.

[109] *Id.*, at 654, 657, 666.

[110] *Id.*, at 654.

[111] Chiesa, *supra* note 100, at 649, 650.

[112] G. Postema (1983) "Fact, Fiction and the Law: Bentham on the Foundation of Evidence" in William Twining (ed.), Facts in Law *16 Archiv fur Rechts-und Sozialphilosophie*, at 40.

[113] *Id.*, at 41, 42 & 57; Park, *et. al*., *supra* note 75, at 88.

[114] Per Olof Ekelof (1964), "Free Evaluation of Evidence" in *8 Scandinavian Studies in Law*, at 51. Also see Postema, *supra* note 112, at 39, 44

that the prosecution has to prove its case beyond a reasonable doubt in order for the defendant to be convicted.[115]

According to the American common law understanding of standards of proof, there are three levels of proof.[116] Proof in civil matters are not that strict; the most lenient degree of proof is by the preponderance of the evidence. In selected matters, where for policy reasons the legislature chooses a higher standard of proof, clear and convincing evidence is required. We seem to have these common law types of standards of proof. The standards of proof in judicial decisions is nowhere expressly stated in Ethiopia's laws except in the Revised Anti-Corruption Special Procedure and Rules of Evidence regarding confiscation of property obtained as a result of corruption.[117] A closer examination of the matter gives the impression that in such areas where there is no specific type of evidence required, as suggested by the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No.434/2005, a lesser standard of proof by preponderance of the evidence is good enough.

In some instances, although the law does not specifically refer to the degree of proof, the substantive codes provide for specific modalities of proof. e.g., proof of ownership,[118] proof of a will,[119] and proof of filiation.[120] Those types of evidence, by their very nature, have higher probative value and thus proof by such evidence is stricter than proof by preponderance of the evidence. The standard of proof in those instances can properly be referred to as *clear and convincing* evidence.

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[115] In the United States the rule is established by the Supreme Court in re *Winship* 397 U.S. 358 (1970). See further, Chiesa, *supra* note 100, at 649. In the United Kingdom and its former colonies, including India, the allocation of the burden of proof is established by the House of Lords in *Woolmington v. Director of Public Prosecution* (1935) A.C. 462.

[116] K. M. Clermont and E. Sherwin (2002) "A Comparative View of Standards of Proof" *50 Am. J. Comp. L.*, at 251-53. In the British system, however, there are only two standards of proof: proof by a balance of probabilities for civil matters and proof beyond a reasonable doubt in criminal matters.

[117] Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No.434/2005, Art 33 provides that "[t]he standard of proof required to determine any question arising as to whether a person has benefited from criminal conduct, or the amount to be recovered shall be that applicable in civil proceedings" This provision was initially introduced in Proc. No 231/2001, Art 24.

[118] Civ. C., Arts 1193 – 1203.

[119] *Id*., Arts 896, 897.

[120] Fam. C., Arts 123 ff.

The standard of proof required in criminal matters is different from that required in civil matters. All the elements constituting the offence have to be proved beyond a reasonable doubt in order to find the defendant guilty.[121] Proof beyond a reasonable doubt is a common law concept.[122] The concept of 'a reasonable doubt' is nowhere intelligibly defined thus leaving the concept vague.[123] The standard of proof in criminal matters is not established in our laws nor is it stated in the Federal Supreme Court Cassation Division decisions that are binding interpretation of the law. However, there are indications that the standard of proof in criminal matters is much higher than in civil matters.[124] The courts in Ethiopia were applying the "beyond a reasonable doubt" standard of

[121] The standards of proving the elements of the crime is not uniform when such element of the crime is proved as an offence, as a defence or as an affirmative defence. The rule is all the elements constituting the crime have to be proved beyond reasonable doubt in order for a defendant to be convicted of such crime. However, when a defendant raises it as a defence, he has to prove such fact by preponderance of the evidence in order to create reasonable doubt. Where the fact is raised as an affirmative defence, defendant has to prove that fact by preponderance of the evidence and the public prosecutor has to disprove it beyond a reasonable doubt. For in-depth analysis of the subject, see Chiesa, *supra* note 100. Also see *infra* note 140.

[122] In the United States, for instance, although the concept of proof beyond a reasonable doubt has long standing history, it is crystallized in *re: Winship* and elevated to the level of a constitutional rule relatively recently. Underwood, *supra* note 6, at 1301; J. C. Sheldon, "Presumptions against Criminal Defendants, Affirmative Defenses, and a Substantive Due Process Interpretation of *County Court of Ulster v. Allen*" *34 Maine L. Rev.*, at 306; Chiesa, *supra* note 100, at 649; Mueller and Kirkpatrick, *supra* note 73, at 801. The concept is reaffirmed by *Mullaney v. Wilbur* 343 U.S. 790 (1952) and *Patterson v. New York* 432 U.S. 197 (1977).

[123] See in general, R. D. Bartels (1981) "Punishment and the Burden of Proof in Criminal Cases: A Modest Proposal" *66 Iowa L. Rev.*; Underwood, *supra* note 6, and Chiesa, *supra* note 100.

[124] Article 2149 of the Civil Code regarding tort claims resulting from a criminal action where a criminal case is filed in another court provides that "[i]n deciding whether an offence has been committed, the court shall not be bound by an acquittal or discharge by a criminal court." Likewise, where there is a civil claim joined to a criminal action, Article 158 of the Criminal Procedure Code stipulates that "[w]here the accused is acquitted or discharged, the court shall not adjudicate on the question of compensation and shall inform the injured party that he may file a claim against the accused in the civil court having jurisdiction." These provisions do not directly state the standard of proof that is employed in civil and criminal trials; however, they give indications that the standard of proof in criminal matters is higher than that required in civil matters. The fact that the Civil Code is borrowed from the continental system and the Criminal Procedure Code is borrowed from the common law system indicates that the difference in the standards of proof in civil and criminal matters is universal.

proof in criminal matters which was presumably introduced by British judges and government advisors.[125] It appears that the proof beyond a reasonable doubt principle has been taken to heart, and our judges *were* consistently using the words when they enter judgment whether it is acquittal or conviction of defendant.[126]

In the French system, including Germany, representatives of the civil law system, the degree of proof required to convict a defendant is "thorough conviction" or *conviction intime* of the judge. This standard does not prescribe rules that can be cited as a source on which "the fullness and sufficiency of a proof particularly depend" but rather requires of the judges "that they ask themselves, in silence and reflection to seek out, in the sincerity of their conscience, what impression the evidence reported against the accused and the ground of his defense have made on their reason".[127]

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[125] Buhagiar, a Maltese, and a British citizen was president of the High Court here in Ethiopia. His mentor and the one who brought him to Ethiopia, Sir Charles Matthew, also British and previously Chief Justice in Malta, was Ethiopian Government advisor at the Ministry of Justice since the second half of the 1950s. Trained and having had worked in the common law system, it is presumed that they introduced the principle of proof beyond a reasonable doubt standard of proof. Buhagiar, William <www.maltamigration.com> (last accessed 26 August 2009).

[126] In recent years, there are judgments which state that that the defendant "has (not) disproved the prosecution evidence." This effectively eliminates the meaning of "a reasonable doubt." It is not clear whether the judges use this phrase in their ruling either because of gaps in reasoning and poor evaluation of the evidence or indifference to the concepts of a reasonable doubt and the degree of proof that is expected of the defendant. At times, court records show that the judge does not even properly evaluate the prosecution evidence when entering a ruling based on Article 141 of the Criminal Procedure Code. In some recent decisions there is no mention of (beyond) a reasonable doubt in writing judgment. There is not even consistent use of the phrase "beyond a reasonable doubt." There are all sorts of phrases for the concept. Worku Yaze, *supra* note 59, at 133, 134 note 37.

[127] Article 353 of the French Code of Criminal Procedure provides the following:
"[b]efore an assize court [the court trying felony cases] retires, the president shall read the following instructions, which, in addition, shall be posted on large letters in the most prominent place in the conference room:

> The law does not ask an accounting from judges of grounds by which they became convinced; it does not prescribe for them rules on which they must make the fullness and sufficiency of a proof particularly depend; it requires of them that they ask themselves, in silence and reflection to seek out, in the sincerity of their conscience, what impression the evidence reported against the accused and the ground of his defense have made on their reason. The law asks them only the single question, which encompasses the full measure of their duties: 'Are you thoroughly convinced?'"

A certain degree of proof is required only to create an equivalent degree of moral certainty in order to reach a certain conclusion regarding a material fact. The degree of one's conviction or moral certainty cannot be measured. The lack of such measurement, makes a rational discussion almost impossible on whether a common law jury is better convinced when a fact is proved beyond a reasonable doubt or a civil law judge is better convinced when the facts are proved to *conviction intime* of the judge. It is certain that both concepts of standards of proof serve the respective society and it is believed that both have achieved their respective purposes.[128] It is cogently argued by comparative lawyers that in criminal matters, the civil law *conviction intime* and the common law beyond a reasonable doubt standards of proof are equivalent.[129]

Although there are no proper and rational distinctions to be made between the common law concept of beyond a reasonable doubt and the civil system concept of *conviction intime*, regarding the degree of conviction in the mind of the trier of fact, our courts need to continue using the common law 'beyond a reasonable doubt' standard of proof in criminal matters for the following reasons.[130] First, Ethiopian courts have been using beyond a reasonable doubt standard of proof for a long time and all practitioners appear to have taken it as the norm thereby rendering its continued use much easier than the civil law *conviction intime*. Second, beyond a reasonable doubt standard of proof appears to be much more intelligible than the *conviction intime* because it is seen in the context of the other two standards of proof – preponderance of the evidence and clear and convincing evidence. Third, related to the foregoing two reasons, beyond a reasonable doubt standard of proof is much less susceptible to abuse than *conviction intime*. Fourth, both the Criminal Procedure and the Civil Procedure Codes are borrowed from the adversarial systems, and the use of beyond a reasonable doubt standard of proof is only a matter of consistency. Finally, the general background of the working situation of the two standards of proof, the training of the judges in the respective systems and integration of the work of the police and the prosecution office is different in systems that have

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Also see, in general, Clermont and Sherwin, *supra* note 116.

[128] Different legal traditions may have different processes. However, human rights conventions and procedures have the effect that the systems have a more or less common standard of process across legal systems. Jackson**,** *supra* note 90, at 739.

[129] Clermont and Sherwin, *supra* note 116, at 245, 246.

[130] A proper and serious comparative examination of both concepts indicates that there is no distinction between the common law beyond a reasonable doubt standard and the civil law *conviction intime*. The unifying factor is the individual right to presumption of innocence until proven guilty which requires a higher standard of proof. Although the concept has not brought about convergence of the two systems' procedures of proof neither system's fair process is superior to the other. Jackson, *supra* note 90, at 757, 764; Clermont and Sherwin, *supra* note 116, at 245, 246

beyond a reasonable doubt standard of proof and those that have *conviction intime*. In this regard, the administration of our criminal justice is much tuned to the common law system, and our judges have yet to have suitable training and a different working experience to handle *conviction intime* and make a proper distinction between *conviction intime* in civil and criminal matters.[131]

Thus, the public prosecutor in Ethiopia has to prove all the elements constituting the crime beyond a reasonable doubt. Elements of the crime include not only the violation of the law prohibiting the act or omission, but it may also include absence of justification or excuse.[132] Further, where the fact is an aggravating circumstance constituting an element of the crime, it has to be proved beyond a reasonable doubt.[133] Such is the case where, because of aggravation, the provision under which the accused is to be convicted is changed even though he is not originally charged under that Article.

3. Burden of Proof Borne by the Defendant

3.1. Affirmative Defences

The initial burden of proof that the state bears to prove all the ingredients of a crime beyond reasonable doubt (in order for defendant to be convicted) may appear to be *shifted* to the defendant only in two circumstances. They are where the defendant raises affirmative defences and where the law allows an ingredient of a crime to be proved by presumptions. Although the main focus of this article is presumptions, a few words may be appropriate about affirmative defences, a tool by which the burden of proof is said to be shifted to the defendant.[134]

In the General Part of the Criminal Code, there are justifications and excuses which may fully or partly exempt defendant from criminal liability.[135] When a defendant raises any of these affirmative defences, he is not denying the facts; the defendant rather affirms the action or omission asserted by the prosecution,

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[131] In the civil law system, both in France and Germany, the standard of proof required in civil matters and criminal matters is *conviction intime*. Clermont and Sherwin, *Id.*, at 245-47, 250. It is alluded earlier that the standards of civil and criminal matters is different. Thus, while using the same standard, making different application is quite a task.

[132] G. C. Christie and A. K. Pye (1970) "Presumptions and Assumptions in Criminal Law: Another View" *Duke L. J.*, at 935, 936).

[133] Chiesa, *supra* note 100, at 654.

[134] Some even consider shifting both elements of burden of proof amount to affirmative defences. Sheldon, *supra* note 122, at 291, 292.

[135] Some of the justifications and excuses include, absolute coercion (Art 71), superior order (Art 73), necessity (Art 75), legitimate defence (Art 78) and mistake of fact (Art 80).

but invokes justifications or excuses against criminal liability. This involves alleging the presence of other facts that do not form part of the prosecution's assertions. In affirmative defences, because the defendant is asserting new facts, the burden of proving those new facts is on him. This is perfectly in line with the principles discussed above for allocation of the burden of proof as between the litigants.[136] A defendant, however, by his affirmation of the facts alleged by the public prosecutor, waives the burden of proof borne by the public prosecutor regarding the facts constituting the crime. Affirmative defences do not actually shift the burden of proof because they do not constitute exceptions to the prosecutor's duty to prove guilt beyond a reasonable doubt.[137]

Some legal systems have the rule that defendants have to prove justifications or excuses by the preponderance of the evidence while the public prosecutor may disprove such justification or excuse beyond reasonable doubt.[138] This is not, however, compatible with Ethiopia's laws. Nevertheless, as guilt (as discussed in the preceding section) must be proved by the public prosecutor beyond a reasonable doubt for a criminal conviction, it is sufficient for defendant to create a reasonable doubt on the prosecution's case.

3.2. Presumptions

Presumptions are not rules of evidence; they are procedural rules that define the relationship between two facts - the basic facts and the presumed fact.[139] The relationship is that, a presumed fact is deemed proved until proven otherwise by the other party if the party in whose favour the presumption operates proves the basic facts by a required degree. The degree of this relationship between those facts differs in different circumstances. The minimum requirement is that there has to be a rational/logical relationship between the basic facts and the presumed facts.[140] For instance, in the case of the issue of paternity, where a man lives

[136] See the discussion on the allocation of burden of proof 2.1.1 above. Also see Underwood, *supra* note 6, at 1303, 04 including note 11 thereunder.

[137] IEA, Sec 105.

[138] This is the case in the United States, for example. Chiesa, *supra* note 100, at 657.

[139] P. C. Giannelli (2003), *Understanding Evidence* (New York: Matthew Bender and Co.), at 54

[140] Regarding presumptions in civil matters, it is necessary to see if there is a rational connection between the operative facts and the presumed facts, and whether the connection is good enough. See *Mobile, Jackson & Kansas City R. R. Co. v. Turnipseed* 219 U.S. 35 (1910) (Holland and Chamberlin, n 88 above, at 162). The degree of the relationship between the basic facts and the presumed facts range from a rational one, when it is permissive presumption, to one of beyond a reasonable doubt, in mandatory criminal presumptions. Sheldon, *supra* note 122, at 279, 283,284. When the mandatory statutory presumptions were initially introduced, the requirement was that there be a rational connection between the operative facts and

with a woman in wedlock and a child is born after 180th day after the marriage and before the 300th day after divorce, the paternity of the man is presumed.[141] There is a logical connection between the facts of the man's living with the woman in wedlock for a specified time and the issue of paternity to a child born during the marriage. Likewise, where there is a house rental agreement in which "A" pays a sum of money to "B" on a monthly basis, a receipt issued by "B" for the month of September leads to the presumption that the payments for the prior months are paid.[142] There is certainly a rational connection between the receipt for the month of September and the issue of payment for the previous months because they are similar transactions emanating from the same legal obligation.

There are two types of presumptions: rebuttable and irrebuttable presumptions. In rebuttable presumptions, once the party in whose favour the presumption operates proves the basic facts, the other party may produce evidence in order to disprove such presumption. The effect of (rebuttable) presumption is that, it shifts the burden of proof to the other party against whom such presumption operates. However, it is only the burden of production that is shifted. In the common law system, where evidence on the issue has not been produced, such non-production of evidence generally exposes a party to an adverse result or a *directed verdict*.[143] The burden of persuasion remains with the party on whom it is originally cast.[144]

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the presumed fact. However, when such presumption affects presumption of innocence such relationship is required to be one of beyond a reasonable doubt. Christie and Pye, *supra* note 132, at 923, 924. For the progressive modification of this standard by the U.S. Supreme Court, see Holland and Chamberlin, *supra* note 87, at 154-159.

141 Fam. C., Arts 126, 128.

142 Civ. C., Art 2022.

143 Directed verdict is a verdict by the judge on matters of fact without presenting the issue of facts to the jury. As Ethiopia does not have a jury system there is no directed verdict. However, the decision to be entered as per Civ. Pro. C., Art 256 is equivalent to this concept of directed verdict. It provides that "[w]here evidence which should have been produced in accordance with Art. 137 or 249 is not so produced due to the default of either party, the court may at once pronounce judgment ..."

144 Regarding presumption in civil actions and proceedings, U.S. Federal Rule of Evidence (FRE) Rule 301 provides that "[i]n all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the other party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such part the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast." Also, see G. Weissenberger

In irrebuttable presumption, once the presumption is established the other party is precluded from disproving such presumption. Such rules are not in the realm of evidence law; they are rules of substantive law.[145] There are social policy justifications for the application of presumptions, both rebuttable and irrebuttable, in civil matters.[146] There appears to be limited application of rebuttable presumptions in criminal matters; however, to the knowledge of this author, there is no irrebuttable presumption that operates in criminal matters in any other legal system.

3.2.1. Presumptions in Criminal Matters

It is an essential manifestation of the principle of presumption of innocence that the state has to prove all the elements constituting the offense beyond a reasonable doubt in order for defendant to be convicted.[147] In several legal systems, there is no exception to this principle. For instance, in *Re Winship*[148] the U.S. Supreme Court held that the public prosecutor has to prove all the ingredients constituting the crime beyond a reasonable doubt. It appears there is no meaningful exception to this rule. In criminal matters, the U.S. Supreme

(1995) FEDERAL EVIDENCE: 1996 Courtroom Manual (Cincinnati: Anderson Publishing Co.) at 29.

[145] Giannelli, *supra* note 139, at 53.

[146] Those policy justifications in using presumptions for proof of facts in civil matters may be seen in the area of presumption of absence, presumption of paternity and presumption of payment. They are all designed to address social problems to make life easy for those affected by the event. The application of such presumption is between the parties which are deemed to have equality of arms and the effect, if there is such negative effect, is only on the property rights or status of the parties.

[147] When a fact is to be proved, it has to be proved in any of the modalities of proof; customarily, there are oral evidence (testimony), documentary evidence and exhibits. Presumptions, although referred to as modalities of proof under Civ. C., Arts 2002 and 2003, in their application in criminal matters, presumptions are exemptions of proof. Proof is an affirmative showing of the existence or inexistence of a fact. Furthermore, presumptions are different from inferences in that they are legislative decisions of mandatory inferences; inferences are left to the discretion of the judge to make his own findings based on his experience and knowledge regarding the relationship between the different categories of facts.

[148] Beyond a reasonable doubt standard of proof is not a constitutional principle; however, the presumption of innocence is crystallized in and is elevated to a constitutional right level in *Re Winship* by the U.S. Supreme Court. See *supra* note 122. Thus, if presumption of innocence is given a constitutional stature, it follows that the other side of the subject, a reasonable doubt, should also be afforded equal treatment because the two are inseparably intertwined. Holland and Chamberlin, *supra* note 87, at 149.

Court held that only permissive statutory presumptions are constitutional.[149] Where there is mandatory statutory presumption, the prosecutor must "demonstrate beyond a reasonable doubt that the presumed fact may be inferred from the proved fact or facts"[150] thereby rendering them useless to the prosecution. Thus, the prosecution cannot rely merely on the inference as a "sole and sufficient basis for finding" of the presumed fact; it must also be shown that such inference actually works "as a matter of objective fact".[151]

In few legal systems, presumption of the existence of an element constituting a crime is considered to be an exception to the above stated rule. For instance, in the United Kingdom, in *Woolmington v Director of Public Prosecutions* it is held that statutory provisions that shift burden of proof to the defendant by presumption are to be regarded as exceptions to this rule.[152] Such parliamentary acts authorising proof of elements constituting the crime by presumption are usually related to *intention* or *knowledge*. The validity of such legislation is tested based on the 1998 Human Rights Act (which is adopted in order to enable the UK discharge its treaty obligations) and Article 6(2) of the European Convention on Human Rights (ECHR) which provides that "[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The 1971 Misuse of Drug Act does not require the Prosecution Services to prove knowledge of the content of the substance in order to prove possession if a defendant was proved to be in control of such substance; it rather places the burden on the defendant to prove that he does not have such knowledge of the content of the substance.[153] The validity of the manner of proof of knowledge in this legislation was tested against UK's treaty obligation under ECHR. Although the provisions of Article 6(2) are stated in absolute terms, the European Human Rights Court's jurisprudence (*Salabiaku v France*) indicates that, it does not

[149] Holland and Chamberlin, *Id.*, at 153.

[150] The U.S. Supreme Court in the Ulster case severely restricted the application of mandatory presumptions that it made it "practically useless to the prosecution." Sheldon, *supra* note 122, at 278, 279, 287, 288

[151] *Id.*, at 278, 279, 287, 288. Statutory criminal presumption some opine, must be regarded as 'irrational' or 'arbitrary' …if there is a reasonable doubt as to the inference of the presumed fact from proof of the operative facts on which it is made to depend. Holland and Chamberlin, *supra* note 87, at 166. When prosecution is proving a fact by presumption, the presumed fact should not receive less evidentiary treatment than other facts constituting the crime. *Id.*, at 163. Statutory presumptions are manifestations that the legislature has less concern for reasonable doubt standard and presumption of innocence. *Ibid*, at 151.

[152] (1935) A.C. 462; Dingwall, *supra* note 74, at 450.

[153] *Id.*, at 457.

prohibit presumption of law or fact. It only "requires states to confine them[selves] within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence".[154] Therefore, the House of Lords held that the convention does not prohibit shifting the legal or evidential burden to the accused.[155]

The court, however, made a distinction between the legal burden and the evidential burden. Shifting the evidentiary burden to the defendant is held to be not contrary to UK's treaty obligation. Regarding the legal burden, the court adopted two stages of analysis: validity of government objective and proportionality of the measure. It was held by majority that imposing the legal burden on the defendant is a disproportionate response to any public objective.[156]

Likewise, Article 11(d) of the Canada Charter of Rights and Freedom provides for presumption of innocence. The provisions of Article 1 make it clear that this right is subjected to "... such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Under the Drug Control Act, which is substantially identical to the UK's 1971 Misuse of Drug Act, David Edwin Oakes was charged with possession of hashish oil for the purposes of trafficking. He was found in possession (control) of the substance with the presumed knowledge of the content of the substance. The accused challenged Section 8 of the Narcotic Control Act on the basis that it violated Article 11(d) of the Charter. The Supreme Court of Canada adopted the test whether there is "pressing and substantial" government objective to warrant overriding a constitutionally protected right that may be upheld under Article 11 of the Charter; and if so, whether the means (shifting the burden of proof to defendant) is proper. The Court finally struck down the rule on the ground that it violates defendant's right to presumption of innocence.[157]

The South African Constitution, very much influenced by the Canadian Charter, has detailed provisions regarding the limitation of the rights enshrined in the Constitution. Thus, Section 36 (1) provides:

> [t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
>
> a) the nature of the rights;
> b) the importance of the purpose of the limitation;
> c) the nature and extent of the limitation;

[154] *Id*., at 453.
[155] *Id*., at 453.
[156] *Id*., at 460, 46.
[157] *R. v. Oakes* [1986] 1 S.C.R. 103.

d) the relation between the limitation and its purpose; and
e) less restrictive means to achieve the purpose.[158]

Such shifting of the burden of proof to defendant may be constitutional for systems like the UK where acts of parliament are not subsidiary to a written constitution [159] or South Africa and Canada where there is a constitutional provision for limited authorisation of restriction of rights within the bounds of such authorisation.

Ethiopia has, however, adopted a constitution which incorporates and entrenches the principle of the presumption of innocence of the accused until proven guilty before an independent, competent and impartial court. As discussed above, the Criminal and the Procedure Codes require that 'intention' as an element of a crime needs to be proved separately as a fact constituting an element of such crime.[160] Despite such constitutional provisions, however, Ethiopia has adopted laws which provide for proof of intention or knowledge by presumption in several and diverse types of crimes.

There is even an irrebuttable presumption regarding such intention or knowledge that constitutes an element of the crime. Thus, with regard to crimes committed through the mass media, the Criminal Code provides that "[i]n determining the liability of a person ... for the crime committed through the product of mass media, the content of the matter shall be *deemed* to have been inserted, published or disseminated with ... *full knowledge and consent*" of the editor-in-chief, deputy editor, publisher, printer, disseminator, etc.[161] [Emphasis added]. It is further provided that "[n]o proof to the contrary may be admitted in

[158] For further discussion on limitations on rights in the South African Bill of Rights see J. De Wall, I. Currie and G. Erasmus (2001) *The Bill of Rights Handbook, Fourth Ed.*, (Lansdowne: Juta & Co.) Chapter Seven, at 144 ff.

[159] In the UK system, as there is no written constitution; the parliament is supreme. Thus, such liberal restriction of rights by acts of the parliament cannot be unconstitutional. In systems where there is constitutional supremacy, such as ours, that is not the case. Every subsidiary legislation needs to conform with the formal and substantive requirements of the Constitution. Where there is legislation with a provision which is contrary to those constitutional provisions, certainly, those provisions of the subsidiary legislation would be of no effect.

[160] Certainly, proving a state of mind is a difficult task for the prosecution. Confession is the best proof there is. Sometimes, confession is not even considered proof; it is considered as a waiver of proof rather than a proof. However, state of mind is also proved by circumstantial evidence; such relevant facts are motive, preparation for the commission of a crime, or premeditation.

[161] Crim. C., Art 43(5). Under this provision the fact that there was no knowledge and consent of the accused regarding the content inserted or disseminated is not defence; it would only be the absence of the content from such media outlet.

such a case".[162] These are not evidentiary provisions; they are substantive provisions which establish guilt by presumption because they preclude contrary proof.[163] Such presumptions are contrary to the principles of presumption of innocence until proven guilty; the public prosecutor is excused from proving those facts that are deemed to exist. Such presumptions are also contrary to the constitutional "right to adduce or to have evidence produced in their own defence, and to obtain the attendance and examination of witnesses on their behalf before the court".[164]

3.2.2. Rebuttable presumption

It is in the nature of the crime of corruption that state of mind should be proved separately as an essential element constituting the crime. Proof of the elements constituting the crime of corruption by presumption appears to be introduced by the Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 236/2001, Art 24. Such presumption is incorporated into the Criminal Code in broader form. Thus, there are presumptions regarding elements of crimes of corruption both for specific corruption offences as well as general/blanket presumptions for certain categories of corruption crimes.

a) Presumptions regarding specific crimes

Article 419(1) of the Criminal Code provides that a certain property is deemed to have been obtained by corrupt practices and such person is punishable where the public prosecutor proves that a person in a public office:

a) maintains a standard of living above that which is commensurate with the official income from his present or past employment or other means; or
b) is in control of pecuniary resources or property disproportionate to the official income from his present or past employment or other means ... unless he gives a satisfactory explanation to the Court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control.

There are also presumptions that affect persons that are related to the accused. It is provided that:

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[162] *Id.*

[163] A provision which is equivalent to the presumption of guilt is a stark contrast to the protection of freedom of expression enshrined in the Constitution. It is almost a presumption of guilt because the basic fact that is required to be proved is the mere content of the media product "inserted, published or disseminated."

[164] FDRE Const., Art 20(4).

> [where the Court] is satisfied that there is reason to believe that any person, owing to his closeness to the accused or other circumstances, was holding pecuniary resource or property in trust for or otherwise on behalf of the accused, such resources, or property shall, in the absence of evidence to the contrary, be presumed to have been under the control of the accused.[165]

These provisions establish and define the crime of corruption. In these provisions, presumptions of the facts constituting the crime are the bedrock of the crime of corruption. It is only by disproving these presumptions that a defendant may be acquitted from the charge of the crime of corruption.

b) General/blanket presumptions

The Criminal Code has introduced a general/blanket presumption of state of mind for those offences considered to be corruption. Thus, in any 'action' that is considered as a corrupt practice, the essential element of the crime, state of mind, is deemed to exist where other facts are proved. Article 360 of the Criminal Code provides that "[i]n respect of the crimes specified under Articles 356-359, the acts shall be presumed to have been done with the intent to utter." It is not clear whether this presumption is rebuttable or irrebuttable. However, it can be argued that because contrary proof is not expressly precluded and precluding such contrary proof would be contrary to the provisions of FDRE Const., Art 20(4), the right of defendant to present evidence in his defence, such presumption is rebuttable presumption. Another example of general or blanket presumption is embodied in Article 403 of the Criminal Code titled 'Presumption of Intent to Obtain Advantage or to Injure". The provision stipulates the following:

> Unless evidence is produced to the contrary, where it is proved that the material element [the act] has been committed as defined in a particular Article providing for a crime of corruption perpetrated to obtain or procure undue advantage or to cause injury, such act shall be presumed to have been committed with intent to obtain for oneself or to procure for another an undue advantage or to injure the right or interest of a third person.

The provisions that follow Article 403 of the Criminal Code list the various categories of corruption offences. As is evident from the provisions, this presumption is rebuttable and the defendant may produce contrary evidence. However, disproving a presumed state of mind is more difficult than proving it. Thus, the burden on defendant is unreasonable.

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[165] *Id.*, Art 419(2)

3.2.3. The kind of presumptions contemplated in the Policy

The Criminal Justice Administration Policy states that when certain basic facts are proved by the public prosecutor, the court shall presume the existence of certain other facts. It is, therefore, up to the defendant to disprove such presumption.[166] This is also referred to in the various papers presented for implementation of the Policy.[167] The presumption regarding the media is taken directly from the 1957 Penal Code, adopted four decades before the current Ethiopian Constitution, with minor modifications. The presumptions regarding the crimes of corruption are incorporated into the Criminal Code from Proclamation No 231/2001 without substantial modification, other than the minor change to give them a broader application for all crimes related to corruption. Therefore, it is hardly possible to expect a milder content or application of presumptions as contemplated by the Policy.

One might wonder whether the burden of proof contemplated to be shifted to the defendant is legal burden or evidential one. This question is legitimate in view of the words used in the papers presented for implementation of the Policy. As the papers are written in English they use the terms "reverse onus of proof".[168] If we have to take the literal meaning of the terms, reversing the onus of proof is only shifting the evidential burden or the burden of production. It is hardly possible to take such terms literally and assume that they are used to mean what they actually connote. They are rather loosely used to mean shifting both the legal and evidential burden to defendant because, this distinction does not seem to be appreciated at all in the practice of various courts nor are defence counsels raising such arguments.

Therefore, such distinction, in Ethiopia's legal system, appears to be without effect. Further, even if it is understood and appreciated, there is no significant practical distinction between the legal and evidential burden. If a defendant is able to produce evidence it is only a little more effort to prove the facts operating in his favour. Therefore, the kind of presumption contemplated by the newly adopted Policy is not expected to be different from what is already in application – shifting both the legal and evidential burden to the defendant regarding the elements constituting a crime, usually intention or knowledge.

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[166] The Policy, Section 4.4.

[167] There were about six papers for the implementation of the Criminal Justice Administration Policy. Only two of them are relevant to this subject where there is a specific mention of shifting the burden of proof to the defendant in few selected serious crimes: 1) Criminal Justice Administration Policy – Federal Democratic Republic of Ethiopia: Elements of an Implementation Plan, at 22; and 2) Preliminary Analysis of the Legislation Requirements of the Criminal Justice Administration Policy, at 11; See *supra* note 72.

[168] *Id.*

However, what cannot be stated for sure is whether the operation of the presumption will also be extended to other material facts or whether they will be limited to knowledge or intention.

4. Burden of Proof in Alleged Coercion during Police Interrogation

The police routinely interrogate suspects as part of the investigation process as per Article 27(2) of the Criminal Procedure Code. A major problem regarding burden of proof in criminal matters is that of proof relating to coercion during alleged confession of a defendant.

The interrogation of the defendant is not the main source of proof to establish crime. A case in point is trial in absentia. However, after having taught the law on criminal procedure and evidence for several years, this author has never encountered a court case which states that a defendant has opted not to give a statement to the police by exercising an accused person's constitutional right to remain silent.[169] Stated otherwise, the suspect (the arrested person) always gives a written statement regarding the commission of the crime. In not few cases, the suspect confesses to the commission of the crime for various reasons. However, the public prosecutor produces the confession as the 'best' evidence on the matter. Often, the defendant contends that he had confessed to the crime on coercion and it should not be admissible as evidence against him.

In the ideal scenario, as laying the foundation of the evidence, the public prosecutor has to prove that such confession is obtained in conformity with the Constitution. In such cases, however, the courts wrongly shift the burden of proof to the accused. The usual erroneous judicial reasoning is that because the defendant asserts the affirmative about police misconduct during investigation, he has to prove his assertion. In some cases, the confession is relevant not only for its content but also for other evidence gathered based on the confession, commonly referred to as fruits of a poisonous tree. Unfortunately, the burden of proof in alleged confession cases is convoluted with other unrelated matters. This is particularly so when courts fail to properly frame the issue.

In police misconduct cases, the defendant challenges *propriety* by contending that the evidence is unlawfully obtained thereby submitting that it should not be admitted into evidence. The courts on the other hand, frame the issue from the

[169] The accused appearing before the investigating police officer (whether on summons or by a compulsory process) may deny or admit the commission of the crime. The third possibility can be opting to keep silent. The author has not seen a police investigation report submitted to the public prosecutor stating that the suspect is present and he, exercising his constitutional right, has refused to give statements.

perspective of *veracity* and, in effect, proceed to examine whether such confession is reliable evidence in the matter.[170] Thus, even in cases where defendant proves coercion, such courts often reason that, the confession is supported by and is in conformity with other evidence and is therefore reliable.[171]

The issue in the alleged confession case is whether such confession is obtained lawfully. In view of the above test for allocation of the burden of proof, it is the public prosecutor who has the burden of proving that the confession was obtained lawfully. That is because the public prosecutor is asserting the affirmative and thus has to prove that the confession is obtained in conformity with the Constitution and other provisions of the law.[172]

In whatever form the confession of a defendant is presented to a court, it is usually presented as documentary evidence. It is, however, arguable whether it is documentary evidence. The public prosecutor submits it to court under the expectation that it is obtained in accordance with the law, and this constitutes its foundation. For the defendant, however, it is good enough if he states that the confession is obtained contrary to law. Such is the case when a person disclaims

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[170] In *Federal Ethics and Anti-Corruption Commission v. Tamirat Layine, et al.*, defendant alleged that he gave incriminating statements to the police after he has been psychologically coerced by the latter. The Federal Supreme Court held that "the confession is supported by other evidence and it cannot be said unreliable." (Federal Supreme Court, 2000, Crim. F. No. 1/89). In *Tesfaye Engdayehu v. Public Prosecutor*, defendant proved he was tortured by the police. The court, however, held that his confessions are consistent with other evidence and are thus reliable (Supreme Court Circuit Bench, Cr. App. File No. 162/Wollo/74). Likewise, in *Ali Dugadibo v. Public Prosecutor* defendant claimed police misconduct (Supreme Court Circuit Bench, Cr. App. File No. 171/75). The court framed almost the same issue and arrived at the same conclusion as above. However, the court acquitted defendant not because of the proof of allegation of police misconduct but because the confession is the only evidence and there is a contradiction between the confession given to the police during investigation and the confession given to the Woreda Court at the preliminary inquiry.

[171] *Id*.

[172] Before a documentary evidence or a real evidence is admitted, it must be proved that the evidence is what it is purported to be. This is what is called laying the foundation. Park, *et. al*., *supra* note 75, at 501 *ff*. Laying the foundation, however, has a wider application than authentication. For instance, before a secondary evidence is admitted, the proponent must prove the primary evidence is lost (E.g., Civ. C., Art. 2003). Authentication and laying the foundation are preconditions to the admissibility of an item of evidence. G. Weissenberger, *Federal Evidence*: 1996 Courtroom Manual (Cincinnati: Anderson Publishing Co.), at 244; also see FRE rule 901 *Requirement of Authentication or Identification*.

his alleged handwriting or signature in a non-authenticated document (Civ. C., Art 2007(1)) or where heirs "declare that they do not recognize the writing or signature of their ascendant" who is deceased. (Civ. C., Art 2007(2)). Likewise, Section 104 of the Indian Evidence Act provides that "[t]he burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence."

There are also other reasons why the public prosecutor has the burden of proof of propriety in confession cases. First, the public prosecutor has a constitutional duty to see to it that the rights of the suspect under Chapter Three of the Constitution are respected and enforced.[173] Among various fundamental rights, the suspect is entitled to the protection against any form of cruel, inhuman and degrading treatment[174] and the presumption of innocence.[175] Thus, when the public prosecutor presents the alleged confession as evidence against the defendant, he is also asserting the affirmative that, the confession is obtained respecting the constitutional rights of the suspect/accused and that the public prosecutor has discharged its constitutional duties to enforce and protect those rights.

Second, a distinction should be made between statements made to the police (under Article 27(2) of the Criminal Procedure Code) as extra-judicial admissions or evidential admissions[176] and the judicial admissions that are made before the court (based on Articles 35, 132, etc of the Criminal Procedure Code). As the court judicially notices the fact of making the latter admissions and their contents, judicial admissions need not be proved. Extra-judicial admissions are, on the other hand, made outside the court, to whomever they are made. In such instances, the facts stated in such confession and their content must be proved to the court.[177] One such confession is the one made to the police based on Crim. P. C., Art 27(2). This is called laying the foundation before evidence is admitted.

Furthermore, it is the state that chooses the place, time and setting for investigation and interrogation. Defendant has very little choice, if any, during interrogation. It is difficult, if not impossible, for a defendant to prove that he was coerced while being interrogated by the police. Where the state makes it

[173] FDRE Const., Art 13(1).
[174] Art 18.
[175] Art 20(3).
[176] Giannelli, *supra* note 139, at 434, 435.
[177] There are two aspects of challenge to extra-judicial admissions: the hearsay aspect and the constitutionality aspect. What is relevant here is the constitutionality aspect of the challenge.

difficult for the individual to prove propriety during confession, then it is on the public prosecutor to prove that the confession is obtained lawfully.[178]

Concluding Remarks

There are several manifestations of the rights of a person to be presumed innocent until proven guilty. One such manifestation is the duty of the public prosecutor to prove all the elements constituting the crime beyond a reasonable doubt. The defendant on the other hand, does not have to participate in the proof against him. There are, however, several ways by which the principle of presumption of innocence is violated in our criminal justice administration. First, there are provisions in the Criminal Code that establish the existence of an element of the crime, including intention/knowledge by presumption. When such presumption is rebuttable presumption, both the evidential and the legal burdens are shifted to the defendant in violation of the constitutional principle of the presumption of innocence and the notion of fundamental fairness in the administration of the criminal justice. And where the presumption is irrebuttable, it entirely nullifies the constitutional right of the accused to present evidence in his defence.

The newly adopted Criminal Justice Administration Policy contemplates shifting the burden of proof to the defendant in few serious crimes, such as, crimes against the constitution and the constitutional order, terrorism and organised crime. The nature of the presumption and the elements of the crime that can be proved by presumption are yet to be defined by the law. While the government, with all the resources and specialized justice institutions, is said to have found it difficult to prove the elements that constitute such crimes, it is clearly unfair to expect a defendant to be able to effectively submit his defence once such element is presumed to exist. Moreover, it is a consistent practice that when a defendant challenges the admissibility of the confessions obtained during interrogation because of police misconduct, the courts require him to prove coercion.

The presumptions in the Criminal Code operate in several crimes each of which constitutes and element of a serious offence. The crimes wherein proof by presumption is contemplated in the Criminal Justice Administration Policy are more serious and entail severe penalties. The fact that these crimes are mostly non-bailable and severely punished should have been taken as a deterrent not to use presumptions as proof in such matters. The additional predicament relates to

[178] This argument on difficulty of proof of facts cuts two ways - both for and against defendant. However, the difficulty of proving coercion emanates from the state's choice of the place, time and manner of interrogation. The individual suspect does not choose where to be interrogated.

the lack of physical freedom of the defendant in order to gather evidence under a setting whereby the Public Defender's Office is almost non-existent. Even if courts may grant a defendant the opportunity for movement in order to obtain evidence and to contact witnesses, such permission by the court is not even as half effective as being released on bail to defend oneself. Such laws, policy and practices clearly nullify the principle of *presumption of innocence* enshrined in the Ethiopian Constitution and its constitutional values. ■

INTERDISCIPLINARY RESEARCH PAPERS

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AMBIGUITIES AND INCONSISTENCIES IN THE 'PRESCRIPTIONS' TOWARD 'DEVELOPMENT'

Elias N. Stebek ♣

Abstract

Ethiopia's Investment Proclamation states that *accelerated economic development* and *improved living standards* of the Ethiopian people are the objectives of investment promotion. Moreover, the 1995 Ethiopian Constitution guarantees "the right to *improved living standards* and to *sustainable development*." This paper deals with the ambiguities and inconsistencies in the path towards achieving one of the expectations enshrined in these laws, i.e., the aspiration to bring about *development*. It discusses the various notions of *development* that have influenced Ethiopia's policies and further examines the challenges thereof in clarity, consistency and effectiveness.

Key words:

Development, investment promotion, development theories, institutional capabilities, Ethiopia

DOI http://dx.doi.org/10.4314/mlr.v6i2.5

Introduction

The Preamble of Ethiopia's Investment Proclamation (Proclamation No. 769/2012) states the need to encourage and promote investment "so as to strengthen the domestic production capacity and thereby *accelerate the economic development* of the country and to *improve the living standards of its peoples*." Article 5 of the Proclamation further states that "the objectives of the investment policy of Ethiopia are designed to *improve the living standards* of the peoples of Ethiopia through the realization of *sustainable economic and social development*". Sub-Articles 1 to 8 of this provision state the specific

♣ Dean School of Graduate Studies, St. Mary's University College; This paper includes some of the themes in the first chapter of the author's unpublished PhD thesis (University of Warwick Law School, June 2012, Final version 9 December 2012). The paper is simultaneously submitted to the Proceedings of SMUC's Fourth Multi-Disciplinary Seminar and to the Inter-disciplinary Research Papers column of *Mizan Law Review*.

objectives of Ethiopia's investment policy which, *inter alia*, include, accelerated economic development, foreign exchange earnings through export expansion in volume and variety, saving 'foreign exchange through production of import substituting products,' encouraging 'balanced development and integrated economic activity among the Regions and strengthening the inter-sectoral linkages of the economy'. Towards this end, Article 5 envisages the enhancement of 'the role of the private sector' and foreign investment.

The package of specific investment incentives that are available to both domestic and foreign investors are embodied in Regulations No.270/2012. They include customs duty exemption for capital goods and construction materials[1] for all investments other that four spheres of activities stated under Schedules 7, 11, 14 and 15 of the Regulations. Moreover, income tax exemption for the number of years stated in the Regulations is provided for various sectors. The incentives further include income tax exemption for expansion or upgrading, loss carry forward, remittance of fund, land allocation at modest leasehold payment rates, bank loan incentives and facilitating infrastructure and utilities.

However, there are ambiguities and inconsistencies in the path towards achieving the expectations enshrined in Ethiopia's laws that aspire to promote investment which, *inter alia*, is meant to bring about development. This paper briefly inquires into these ambiguities and challenges. The first two sections highlight the setbacks in the pursuit of the linear modernization theory and the evolution of development doctrines from the 1950s to the 1990s. The role of institutions, free trade, infant industry protection and FDI-led takeoff as factors in development are briefly discussed in Sections 3 and 4, followed by the various alternative paths highlighted in Sections 5 to 7. And finally, the last section forwards a synthesis on Ethiopia's development pursuits and setbacks.

1. Aspirations toward 'Linear Modernization' and Setbacks

In the 1950s and 1960's, the theory of *modernization* envisaged that economic development will go through *linear stages* from 'traditional' societies with agrarian subsistence economies to the interim phase of '*pre conditions of takeoff*' followed by the '*take off*' (i.e. *industrialization*) phase which will then lead to *maturity* (sustained level of productivity and international network) and ultimately to the replacement of basic subsistence needs by '*mass consumption*.'[2] Kaldor, for example, believed that "there can be little doubt that the kind of economic growth which involves the use of modern technology and

[1] Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulations No.270/2012, Article 13.

[2] W. W. Rostow, *The Stages of Economic Growth: A Non-Communist Manifesto* (3rd Ed. 1991), pp 4 *ff*.

which eventuates in high real income per capita, is inconceivable without industrialization".[3] The '*take-off*' phase was presumed to lead to industrialization and entrepreneurial classes "as they did in Britain in the nineteenth century", [4] and it was assumed that during the phase of '*maturity*' "steady economic growth outstrips population growth" after which the '*final stage*' unfolds "when high mass consumption allows the emergence of social welfare".[5] This theory assumed that modernizing the law and legal institutions would facilitate development, surplus capital and then investment capital.

The waves of codification of laws in Ethiopia in the late 1950s and early 1960's clearly show efforts to enhance development through legal and institutional reform. In 1964, Emperor Haile Selassie remarked: "In a real sense, the development of the nation depends upon the development of our legal institutions".[6] With regard to the role of legal education in development, the Emperor gave emphasis to the role of the administration of justice in a modern state which "demands well trained qualified persons at every level"[7] and underlined that "Ethiopia needs a modern legal profession just as she needs the modern legal system …."[8]

The preamble of the 1960 Commercial Code of Ethiopia reads "… the progress of Our Empire in the field of commerce requires the codification of our Commercial Laws…" Moreover, the preface of the Commercial Code, paragraph 3, states that the Code "will assist in the swift and orderly development of Ethiopia's economic life." Similarly, the preamble of the 1960 Civil Code of Ethiopia states the significance of the Code for the "orderly development of the legal system". The preface of the Civil Code (paragraph 1) further relates its promulgation with the "modernization of the legal framework of [Ethiopia's] social framework so as to keep pace with changing circumstances of the world" and "in order to consolidate the progress already achieved and facilitate yet further growth and development."

A strong link was envisaged between '*law and development*' in the preambles and prefaces of the Ethiopian Commercial Code and Civil Code

[3] N. Kaldor (1966) *The Causes of the Slow Rate of Growth in the United Kingdom*, Cambridge: Cambridge University Press. P. 54 (in Peter Sheehan (May 2008) "Beyond Industrialization": New Approaches to Development Strategy Based on the Service Sector "*UNU Wider*, Research Paper No. 2008/60.

[4] Baker (2006), *Sustainable Development* (London: Routledge), p. 2.

[5] *Ibid, citing* (Pepper 1996).

[6] Emperor Haile Sellasie's speech for the First Law Extension program Graduating Class. HSIU, 4 November 1964, *Journal of Ethiopian Law*, Vol. II, No.1 (1965), page iii.

[7] *Ibid* p. ii.

[8] *Ibid.*

promulgated in 1960. Both had the objectives of '*modernizing*' Ethiopia's legal system and legal institutions through reforming the law and modernizing legal institutions along the footprints of western legal systems and institutions. As the Emperor's speech cited earlier indicates, focus was given to legal education and the legal profession which were believed to be inseparable from the reform of laws and legal institutions. In short, the enactment of many Ethiopian Codes of Laws in the 1960s, the establishment of Haile Selassie I University Faculty of Law (currently Addis Ababa University School of Law) in 1963 and the subsequent efforts and international support clearly reflect the views, aspirations and commitment of those decades.

Max Weber's explanation[9] regarding the "role of modern legal system in the emergence of Western civilization" shows that legal development occurred simultaneously with "political and economic transformation" and he regarded these legal, political and economic factors as 'mutually causative' which led to "the industrial system and the centralized nation-state".[10] Weber admits that Europe's rational legal system had positive contributions toward the development of capitalism and industrialization in Europe. However, modernizing a legal system, according to Trubek's analysis of Weber's theory, does not on its own "*produce* economic development," but "merely helps structure the free market system".[11]

Unlike the assumption of the 'linear development theory', the findings of Hans W. Singer and Raúl Prebisch indicated the gradual deterioration of terms of trade between exports of primary product (e.g. food) and industrial products. This was so because income from export of industrial products has elastic demand while the demand for primary products is inelastic. The *Singer-Prebisch* thesis also indicated the wild fluctuation in export price of agricultural products and advocated *structural reform* which, *inter alia*, needs "restructured international economy on historically different terms".[12] The theory called for infrastructural development to enhance intra-regional trade, border region development, and ultimate regional integration among developing economies.[13] This theory has influenced the domestic laws of many countries and the

[9] Max Weber, (1978, Guenther Ross & Claus Wittich, eds.) *Economy and Society* (Berkley: University of California Press).

[10] David M. Trubek (1972) "Toward a Social Theory of Law: An Essay on the Study of Law and Development" The *Yale Law Journal* Volume 82 No. 1 (82 Yale L. J. 1) at 12.

[11] *Ibid*, 15.

[12] Lan Cao (1997) (1997) "Law and Economic Development: A New Beginning?" Book Review, *Texas International Law Journal*, Vol. 32, p. 555.

[13] Jose A. Ocampo, (2001) "Raúl Prebisch and the development agenda at the dawn of the 21st Century", *CEPAC Review* 76, at 35-37.

international legal regime as can be noted in "structural accommodations for certain developing country preferences" within international trade regimes.[14] Moreover, it has encouraged sub-regional and regional custom unions and free trade areas among developing countries.

The critique forwarded by the *structuralist* model against the *modernization* theory of development was further sharpened by the *dependency theory* which, among other things, advocated *Import Substitution Industrialization* (ISI). Supporters of the '*dependency*' theory[15] argued that the 'core' world economy would not allow developing countries to go through the western path of economic development because they are passive 'peripheries' of the centre to which they serve as suppliers of raw materials and recipients of mass production. Dependency theory "sees international economic relations in a world capitalist system as contributing to the underdevelopment or distorted (dependent) development of states in the periphery".[16] According to Tamrat Zerihun, the failure of the dependency theory to offer the promises it had made is mainly attributable to the failure of agriculture "to provide the necessary industrial capital".[17]

In contrast to the theories above, the '*human capital*' development theory gives prime focus to education, health and other human development indicators.[18] This theory contends that poverty alleviation and various aspects of economic and social justice ought to be focal points of development, and that resources allocated for education (for example) fall within the domain of investment and not consumption. The influence of this conception is apparent in literature and reports (of various international organizations and transnational institutions) such as UNDP Human Development Reports.

It is, however, to be noted that, in spheres of development such as education, focus on quantity rather than quality and standards is detrimental to human development. This is because human development does not arise from hasty expansion in the number of universities and graduates (which obviously pushes up a country's ranking in Human Development Index/ HDI), but from real development in education with effective thresholds in quality and standards.

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[14] Lan Cao, *supra* note 12, p. 556.

[15] For example: Andre Gunder Frank (1967) *Capitalism and Underdevelopment in Latin America*, London: Monthly Review Press.

[16] David F. Greenberg (1980) "Law and Development in Light of Dependency Theory" *Research in Law and Sociology*, Volume 3, page 138 [in *Law and Development*, Edited by Antony Carty, Dartmouth Publishing Co., 1992] p.98.

[17] Tamrat Zerihun, (1988) "The Development-Underdevelopment Controversy: Comparative Highlights" *Birritu*, No. 38; 18.

[18] Theodore W. Shultz (1979) "Nobel Lecture: The Economics of Being Poor" *Journal of Political Economy*, 1980, Volume 88, No. 41, pp. 639- 651.

Human development presupposes '*to be*' and '*to do*' what the graduate profile envisages in the domains of competence, behaviour and attitudes rather than the mere '*having*' of degrees and diplomas of various nomenclature under a setting of a meteorically rising numbers with compromised quality and standards. It is the real achievements attained in education and training services and not sheer numbers that can augment a country's institutional capabilities and human capital which are decisive in the pursuit of knowledge-based economic development.

In spite of their differences, the various theories of development considered the third world as a bloc and regarded the theories as applicable to all members of the third world. Moreover, the theories optimistically contended that progress was achievable and regarded the law as a tool towards development and the state as a political entity that can actively facilitate the process. According to Schuurman, Post World War II developmental paradigms shared at least three characteristics:

- "The essentialisation of the Third World and its inhabitants as homogeneous entities;
- The unconditional belief in the concept of progress and in the makeability of society;
- The importance of the (nation) state as an analytical frame of reference and a political and scientific confidence in the role of the state to realise progress".[19]

In spite of the variation in policies and the underlying theories thereof, the post-war period until 1970 can be regarded as "*The Age of Regulation*", in contrast to the "*Transition Period*" of the seventies and "*The Age of Deregulation*" from the eighties until the present.[20] These periods can further be classified into the decades which represent distinct concepts and notions of development.

2. Evolution of the Development Doctrine: 1950's to 1990's

Thorbecke analyzes the evolution of the development doctrine (from 1950 to 2005) by classifying the periods into decades. "The development economists' tool kit in the *fifties* contained such theories and concepts as the 'big push' (Rosenstein-Rodan 1943), 'balanced growth' (Nurkse 1953), 'take-off into sustained growth' (Rostow 1956) and 'critical minimum effort thesis'

[19] Frans J. Schuurman (2000). "Paradigms lost, paradigms regained? Development studies in the twenty-first century" *Third World Quarterly*, Vol. 21, p. 8.

[20] Ha-Joon Chang (2003) *Globalisation, Economic Development and the Role of the State* (London & NY: Zed Books) pp. 159, 165, 170.

(Leibenstein 1957)".[21] During the fifties, the emphasis on large-scale investment "was strongly influenced by the relatively successful development model and performance of the Soviet Union between 1928 and 1940".[22] During this period, industrialization was considered as "the engine of growth which would pull the rest of the economy along behind it" and the industrial sector "was assigned the dynamic role in contrast to the agricultural which was, typically, looked at as a passive sector to be 'squeezed' and discriminated against".[23] Development was perceived from the context of modernisation "and, in turn, modernisation was equated with westernisation".[24]

During the decade that followed, i.e. the *sixties*, 'economic dualism' was influential and the role of agriculture was recognized "as a supplier of resources by being an active and co-equal partner with modern industry". This period was marked by "[t]he success of South Korea and Taiwan in nurturing their agricultural sector and using the agricultural surplus to achieve a successful industrial take-off ..." [25] As Hettne observes, the strategy of development during the 1950s and 1960s "was country-based and the state the main agent, supposedly guided by development theory. Often this guidance was based on 'development ideology'."[26]

In the *1970s*, the increasingly worsening economic situation in low-income economies resulted in lesser reliance on "GNP as a dominant all-encompassing objective".[27] Development was redefined "as a process that should have as simultaneous objectives: growth and poverty alleviation".[28] The role of the informal sector and traditional agriculture in the process of development were

[21] Erik Thorbecke (2007). "The Evolution of the Development Doctrine, 1950 – 2005", in *Advancing Development: Core Themes in Global Commons,* Mavrotas & Shorrocks, Editors (New York: Palgrave Macmillan), page 5.
These concepts equated growth with development and viewed growth in low-income economies "as essentially a discontinuous process requiring a large and discrete injection of investment", and the 'big push' hypothesis emphasized "the importance of economies of scale in overhead facilities and basic industries" (p.5). The '*take-off*' principle required "a minimum threshold of the investment to GNP ratio … given the prevailing capital--output ratio" and "the '*critical minimum effect* thesis' called for a large discrete addition to investment to trigger a cumulative process within which the induced income-growth forces dominate induced income-depressing forces"(pp. 5-6).

[22] *Ibid*, p. 6.

[23] *Ibid*.

[24] Jennifer A. Elliot (2006). *An Introduction to Sustainable Development*, 3rd Ed. (London: Routeledge), page 15.

[25] Thorbecke, *supra* note 21, pp. 8, 11.

[26] Björn Hettne (2009). *Thinking about development* (Zed Books), p. 2.

[27] *Thorbecke*, *supra* note 21, p. 11.

[28] *Ibid*, p. 12.

also recognized. *The decade of 1980s* was converted into the 'lost development decade' and was predominated by stabilization and structural adjustment policies owing to the debt crisis.[29] This period witnessed a "strong sentiment to do away with aid altogether and have private capital flows substitute for it".[30]

The 1990s was increasingly dominated "by the neoliberal policies of the World Bank (WB) and the International Monetary Fund (IMF)" and they were considered as appropriate policies to enable many developing countries to come out of severe balance of payments difficulties that grew worse since the 1980s and "that were considered to threaten the international financial system as a whole".[31] This period was marked by the structural adjustment programs (SAP) of the IMF and World Bank that aimed at modifying "the structure of an economy so that it can maintain both its growth rate and the viability of its balance of payments in the medium term' (Reed, 1996: 41), i.e. to address issues of debt".[32]

This decade of neoliberal economic doctrines and structural adjustment programmes naturally came up with prescriptions of trade liberalization and privatization in Ethiopia. The economy had combined the dual features of 'underdevelopment' (which it shares with other Sub-Saharan African countries) and that of a 'transitional' economy due to the features that it shared with Eastern European economies thereby augmenting the complexity of the path.

3. The Role of Institutions in Development: Reciprocal Causal Relations

The role of good governance and institutions in development is awarded attention since the 1990s. The word institution should not be conflated with the term 'organization'[33] because it represents a wider concept than organizations. As Douglass North points out "[i]nstitutions are the humanly devised constraints

[29] *Ibid*, p. 15.
The 1980s also witnessed ideological changes influenced by Reagan's and Thatcher's administrations during which "developing countries were strongly encouraged - if not forced - to rely on the operation of market forces and in the process to minimize government activities in most spheres - not just productive activities" at a time when a strong state was required to effectively balance conflicting measures such as stabilizing balance of payments and simultaneously liberalizing trade. (p. 19)

[30] *Ibid, p. 19.*

[31] Elliot, *supra* note 24, page 24.

[32] *Ibid*, pp. 24, 25.

[33] John Vogler (2003), "Taking Institutions Seriously: How Regime Analysis can be Relevant to Multilevel Environmental Governance", *Global Environmental Politics*, Volume 3, Number 2, May 2003, p.26.

that structure political, economic and social interaction"[34] which may be informal such as "sanctions, taboos, customs, traditions, and codes of conduct" or formal[35] enforceable legal rules such as contracts and property rights. North notes "the evolution of political and economic institutions that create an economic environment that induces increasing productivity".[36] He argues that the development of institutions is incremental and they "provide the incentive structure of an economy" because as the structure evolves "it shapes the direction of economic change towards growth, stagnation, or decline.[37]

Chang observes that institutions refer to both "the *forms* of institutions (such as democracy, independent judiciary, etc.) and the *functions* that they perform (such as rule of law, respect for private property, government effectiveness, enforceability of contracts, maintenance of price stability, the restraint on corruption)".[38] Chang identifies two categories of theoretical problems in the dominant discourse on institutions and development. He criticizes the assumption "that the causality runs from institutions to economic development, ignoring the important possibility that economic development changes institutions".[39] Secondly he criticizes the manner in which "the relationship is theorized in a rather simplistic, linear, and static way".[40] Chang does not deny the role of institutions in development but envisages a dual and reciprocal relationship between economic and institutional development:

> Economic development changes institutions through a number of channels. First, increased wealth due to growth may create higher demands for higher-quality institutions (e.g., demands for political institutions with greater transparency and accountability). Second, greater wealth also makes better institutions more affordable. Institutions are costly to establish and run, and the higher their quality, the more 'expensive' they become. Third, economic development creates new agents of change, demanding new institutions.[41]

[34] Douglass C. North (1991), "Institutions", *The Journal of Economic Perspectives*, Vol. 5, No. 1. (Winter, 1991), p. 97.
[35] *Ibid*.
[36] *Ibid*, p. 98.
[37] *Ibid*, p. 97.
[38] Ha-Joon Chang (2010), "Institutions and Economic Development: theory, policy and history", *Journal of Institutional Economics* (2011), 7:4, p. 485.
[39] *Ibid*, p. 476.
[40] *Ibid*.
[41] *Ibid*.

Chang further clarifies his position that his views should not be misconstrued as saying institutions do not matter.[42] Developing countries cannot have ready-made and full-fledged institutional competencies and capabilities at the threshold of 'Global Standard Institutions'. This is because institutional development presupposes incremental progress and is reinforced by other dimensions of development which in return shape and facilitate the direction and pace of economic and social development.

Although most of Chang's core arguments are plausible, it is difficult, in the context of Sub-Saharan Africa, to assert that "the causality may be stronger" in the direction of "economic development improving institutions" than "better institutions promoting economic development".[43] First, this argument solely refers to formal institutions and does not consider the strong informal institutions such as what Max Weber states as 'the protestant *work ethic*' that preceded and accompanied Europe's industrial revolution. Secondly, the experience in Sub-Saharan Africa (in the context of the current global system (which gives primacy to 'free trade' rather than 'fair trade') differs from the earlier experience in other economies which managed to take-off despite relatively modest levels of institutional development. Thus, a Sub-Saharan African country which, for example, is under civil war or political instability ought to resolve its institutional problems (at least to a certain level of peace, stability and functional institutions) before any meaningful economic development can be achieved.

4. 'Free' Trade, Infant Industry Protection and FDI-led Takeoff

Although the United Nations had declared the 1970s as the 'decade of development', it "turned out to be a very bad decade for most of the countries of the South".[44] The earlier period of national and social movements that pursued a spectrum of optimistic policies and ideologies was followed by "the period 1970–2000 which saw the downfall of most of these movements in power, or at least a drastic revision in their policies" as a result of "the period of the flourishing of globalization" and the resultant disillusionment. [45]

[42] Ha-Joon Chang (2011), "Reply to the comments on 'Institutions and Economic Development: Theory, Policy and History' ", *Journal of Institutional Economics* (2011), Volume 7: 4, p. 597.
[43] Chang (2010), *supra* note 38, p. 476.
[44] Immanuel Wallerstein, "After Developmentalism and Globalization, What?" (Keynote address at conference, 'Development Challenges for the 21st Century,' Cornell University, Oct. 1, 2004), *Social Forces*, March 2005, 83(3) p. 1264 .
[45] *Ibid*, pp. 1268, 1269.

Since the 1980's, *neo-classical* liberal theories of development promoted free markets and trade liberalization in developing countries. Yet, low-income economies have encountered problems in the course of liberalization and globalization. The Asian Financial Crisis of 1997, for example, demonstrated that "the poor in an era of globalization tend to be more vulnerable to external (essentially macro-economic shocks)" thereby making it "important to design and implement a set of safety nets and structural measures that would reduce their vulnerability".[46]

Thorbecke contends that globalization is not a reliable substitute for a domestic development strategy and suggests that developing countries should pursue both active liberalization and active domestic development policies rather than passively wait for "the market forces of globalization to pull them on a fast development track".[47] He notes that passive liberalization, may lead to marginalization and countries "need to strengthen institutions as well as to invest in agriculture in order to reach the take-off-point for structural transformation of their economies to proceed".[48]

The prescriptions of free trade and liberalization clearly benefit developed countries and newly industrialized economies. As Chang duly notes, "the developed countries did not get where they are now through the policies and the institutions that they recommend to developing countries today".[49] The mercantilist policies of Britain gave way to Adam Smith's notions of free trade at a time when it was Europe's leading industrial power. Most of the current developed countries "actively used ... policies, such as infant industry protection and export subsidies – practices that these days are frowned upon ..."[50]

Chang supports the arguments forwarded by Friedrich List (1789-1846) "commonly known as the father of the infant industry argument, namely, the view that in the presence of more developed countries, backward countries cannot develop new industries without state intervention, especially tariff protection".[51] List recalls Britain's restrictions[52] and argues that in the absence of such schemes "their newly established native manufacturers could never hope to succeed in free competition with the old and long-established manufacturers of foreigners" whom Chang lists out as the "Italians, the Hansards, the Belgians,

[46] *Thorbecke, supra* note 21, p.31.
[47] *Ibid.*
[48] *Ibid*.
[49] Ha-Joon Chang (2003), *Kicking Away the Ladder*: Development Strategy in Historical Perspective (Anthem Press), p. 2.
[50] *Ibid*.
[51] *Ibid*, p. 3.
[52] *Ibid*, p. 4.

and the Dutch".[53] List argues that "free trade is beneficial among countries at similar levels of industrial development" and "that free trade benefits Britain but not the less developed economies". [54]

> Any nation which by means of protective duties and restrictions ... has raised her manufacturing power ... to such a degree of development that no other nation can sustain free competition with her, can do nothing wiser than *to throw away these ladders* of her greatness, to preach to other nations the benefits of free trade, and to declare in pertinent tones that she has hitherto wandered the path of error, and has now for the first time succeeded in discovery the truth.[55]

List recalls Adam Smith's prescription of 'free trade' to the USA at a time when it was not yet adequately industrialized. The warning given by Adam Smith to Americans regarding the risk involved in restricting imports from European manufactures was that it "would retard instead of accelerating their future increase in the value of their annual produce, and would obstruct instead of promoting the progress of their country towards real wealth and greatness.[56]

However, "the Americans firmly rejected Smith's analysis in favour of 'common sense' and 'the instinct of what was necessary for the nation', proceeding to protect their infant industries with great success after 1816".[57] As Chang points out, US protectionism continued until it emerged as the world's leading industrial superpower after which it became the vanguard for free trade although it "acquired such supremacy through the nationalistic use of heavy protectionism".[58]

Globalization has considerably narrowed down the policy space towards infant industry protection (IIP) strategies. Primarily, global pressures against such policies are strong. And secondly, cultural globalization has enhanced consumerism thereby creating strong pull factors toward legally and illegally imported merchandises of consumption and affluence. Thirdly, the current influx of low-price goods from China and other newly industrializing countries and their competitive price despite tariffs further exacerbates the pressures on local infant industries, in effect, rendering the effective protection of infant industries difficult. This does not, however, justify neo-liberal free ride against the interest of developing economies but rather shows the extent to which developing countries find it difficult to climb up the ladder towards

[53] *Ibid*.
[54] *Ibid*.
[55] List, in *Ibid*, pp. 4, 5.
[56] List in *ibid*, p. 5.
[57] List in *ibid*.
[58] *Ibid*.

industrialization even if it had not been kicked away by the developed economies that used it while they were developing.

As Ozawa recalls, "post-war Japan effectively pursued the Hamilton-List IIP [Infant Industry Protection] strategy in modernizing its capital-intensive industries (e.g., steel, machinery, automobiles) by borrowing and improving on Western technologies".[59] Even if the Second World War had devastated Japan, it "re-started *first* with then-comparatively advantaged, labor-intensive light industries and quickly redeveloped exports (e.g., toys, textiles). Japan's light industries did not need – and in fact, *avoided* – investments by foreign multinational enterprises (MNEs)".[60]

In contrast to the infant industry protection paths undergone by Britain, Germany, USA and Japan during their initial take-off in industrialization, FDI-led kick-off seeks to use foreign investment as "a *new* jump-starter of industrialization and a more expedient alternative to the inward-looking IIP strategy".[61] To this end, Singapore, Taiwan and South Korea "had to set up export-processing zones to attract labor-seeking FDI in the 1960s-70s, since they lacked the experience of producing manufactured exports".[62] These countries "succeeded in attracting labor-intensive manufacturing, the *first* step to industrial modernization" while China "[opened] up for trade and FDI in 1978" and "China's special economic zones and low-wage labor enticed foreign MNEs to build China's low-cost, export-driven manufacturing, swiftly alleviating poverty".[63] Such FDI-led takeoff at "the *beginning* stage of catch-up" has been effective in these "labor-abundant emerging economies" subject to the caveat that advanced industrialization depends "increasingly on knowledge" and demands "more sophisticated approaches".[64]

In the Ethiopian context, neo-liberal prescriptions are not only against infant industry protection (a scheme which is indeed difficult under the current global system), but do not also bring about FDI-led take-off unless FDI is accompanied by various endogenous and exogenous variables that are analogous and comparable to the economies that benefitted from it. This is because FDI-led take-off involves active (and not passive) liberalization to attract foreign investment in spheres where the host economy has a competitive advantage which presupposes national and sector-level competitiveness.

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[59] Terutomo Ozawa (2012), "FDI, catch-up growth stages and stage-focused strategies", *Columbia FDI Perspectives*, No. 70 (May 28, 2012).
[60] *Ibid*.
[61] *Ibid*.
[62] *Ibid*.
[63] *Ibid*.
[64] *Ibid*.

5. Informal Institutions and Poverty Reduction

Craig and Porter state the three central dimensions of Poverty Reduction Strategy Papers (PRSP), i.e. economy, governance, poverty, and they provide critical accounts particularly in relation with the dimension of local governance in Uganda's poverty reduction program. They note Rodrik's observation that "Global integration has become, for all practical purposes, a substitute for a development strategy" despite its "shaky empirical ground" and the distortion it entails in prioritizing policies.[65] They further underline that "closer studies of globalization typically refer to very uneven and differentiated processes highly dependent on particular local and economic initiative".[66] The concerns expressed by Craig and Porter include "low rates of growth in high reform countries, unevenness in integration, high adjustment costs and political fallout, and the rise of concerns about longer term path dependence of growth and inequalities".[67]

They explain the experience gained in Uganda with regard to poverty eradication plans and criticize "the plethora of financial stability and integration best practice 'rules' considered necessary for the 'accountable' delivery of resources to areas of local need according to globally determined standards." Instead, they suggest "decentralized, participatory democracies" which (as verified by cross-national studies) not only enhance "economic growth, greater predictability and stability", but are also "more resilient to shocks, and deliver superior distributional outcomes".[68] However, they note that "[d]ecentralization done with merely technical objectives in mind can merely decentralize tyranny, inadvertently politicize the local executive, and also greatly increase volatility".[69]

Craig and Porter indicate that "[g]lobalization pushes and depends on a progressive shift from informal to formal institutions" and this displaces many locally attuned social norms and rules of conduct with formally specified, globally legible and legally binding norms.[70] They admit the significance of macro-stability but underline that ultimately it is the "much more specific and local dimensions of polity, society and economy linked to global change that will determine outcomes for many poor".[71] They conclude that International

[65] David Craig and Doug Porter (2003), "Poverty Reduction Strategy Papers: A New Convergence", *World Development* Vol. 31, No. 1 (Elsevier Science Ltd.) p. 56.
[66] *Ibid* (citing (Held, McGrew, Goldblatt, & Perraton: 1999).
[67] *Ibid*. p. 56 (citing Rodrik, 2000).
[68] *Ibid*. p. 66.
[69] *Ibid*, (citing Porter & Craig, 2002).
[70] *Ibid*. p. 66.
[71] *Ibid*.

Financial Institutions need to avoid 'narrow blueprints' in both peripheral and semi-peripheral economies, and "still be within a legitimate comprehensive frame", while local governments ought to "be able to send strong signals to IFIs about where specific sectors and places are likely to be disruptively impacted by particular frameworks".[72] The lessons that Ethiopia can draw in this regard is the role that various (but not all) informal institutions and social norms play in development and the need to make sure that they are not hastily displaced by formal norms and rules.

6. Post-development Critics and Alternative Paths of Development

Critics contend that "the post-World War II discourse of development is firmly entrenched in Western modernity and economy".[73] According to Escobar, the conception of 'alternatives of development' requires "a theoretico-practical transformation of the notions of development, modernity and economy".[74] Escobar notes that "the peoples of Asia, Africa and Latin America did not always see themselves in terms of 'development' and that [this] goes back only as far as the early post-World War II period" when a whole new political economy - different from that of the colonial or pre-war period - was set into place.[75]

Post-development critics contend that the notion of development has become "obsolete and bankrupt" thereby invoking "alternatives to development".[76] According to Matthews, the "environmental destruction which the post World War II development project appears to bring about" and other factors such as broken post-World War II promises and western cultural homogenization [77] are the causes for the rise of 'post-development' literature. These critics forward, *inter alia*, 'relativist' conception of development dependent upon the values and cultures of communities in developing countries.

The current post-modern conception considers development as "an imposition of institutions and values by the West on areas deemed to be in need of development, guided by an over-ambitious, all-explanatory development

[72] *Ibid*, p. 67.
[73] Arturo Escobar (1992) "Imagining a Post-Development Era? Critical Thought, Development and Social Movements," *Social Text, No. 31/32, Third World and Post-Colonial Issues* (Duke University Press), p. 22.
[74] *Ibid*.
[75] *Ibid*, 23, 24.
[76] Sally Matthews (2004) "Post-development theory and the question of alternatives: A view from Africa" *Third World Quarterly*, Vol. 25, No. 2, page 373
[77] *Ibid*, 377.

theory".[78] This post-modern conception considers low-income economies "as legitimate objects for development intervention, more often that not of a harmful kind".[79] Pieterse criticizes the recipes of development policies that are regarded as "relevant across countries and regions"[80] and regards developmentalism as "the theorization (or rather ideologization)" of the path pursued by the western world.[81] According to Pieterse, "[t]he crisis of developmentalism as a paradigm manifests itself as a crisis of modernism in the west and the crisis of development in the south".[82]

Hettne believes that "this harsh assessment is not completely groundless, but nevertheless somewhat exaggerated." On the positive front, he admits that development thinking has a rich tradition "encompassing important theoretical debates on the dynamics of social change, as well as an ambition to represent a global experience of empirical conditions in different local corners of the world". He suggests that "[t]his rather healthy baby must therefore, in spite of all criticism of the 'modern project', not be thrown away with the bath water, but allowed to grow up into 'global social theory'."[83]

Most post-development critics do not refute the need for development pursuits in developing countries, but they envisage multi-modal perspectives depending upon the particular realties of a given country in lieu of a monolithic conception of development. As Cox notes, "[t]he issue for the future structure of world order had become universal globalization versus alternative paths of economic, social and cultural development; or one all-absorbing civilization versus a coexistence of several civilizations". [84]

> Globalization says: There is no alternative. In the thinking of globalization, societies will inevitably be shaped to conform to the requirements of economic competition which means they will become more and more alike. Those who contest globalization affirm the possibility of alternatives that embody values both derived from their past and imagined as more desirable futures. ... There are signs that rampant individualism may have passed the point at which it serves as a dynamic of economic competition to become a threat to social cohesion.[85]

[78] Hettne, *supra* note 26, p. 2.
[79] *Ibid*.
[80] Jan Nederveen Pieterse (2010), *Development Theory* (London: Sage), pp. 13, 29.
[81] *Ibid*, p. 17.
[82] *Ibid*, p. 28.
[83] Hettne, *supra* note 26, p. 2.
[84] Robert W. Cox (2000), "Thinking about Civilizations", *Review of International Studies*, Vol. 26, p. 219.
[85] *Ibid*, p. 225.

In the context of Sub-Sarharn Africa, there is growing disempowerment of the states trapped in debts and deficits. This phenomenon is currently unfolding in a global system with a relatively narrow segment of benefactors and nascent levels of corporate responsibility. The coalescence and refinement of global development inevitably encounters challenges as was the case during the various phases in the consolidation of the nation state. As nation states had their darkest periods in history particularly during their earlier centuries, 'globalization' likely continues to facilitate the interest of centres of global power and finance until it eventually reaches at the cosmopolitan height envisaged by various thinkers such as Kant. As Sachs observes:

> … 'mankind', for the Enlightenment, was not just an empirical concept meaning the inhabitants of the globe; it had a time arrow built in. 'Mankind', in effect, was something yet to come, a task to be realized as man moves along the path of progress, successively shedding the ties of authority and superstition until autonomy [as an element of social cohesion] and reason would reign.[86]

7. The Notion of the Developmental State

Woo-Cumings points out that the developmental state is "shorthand for the seamless web of political, bureaucratic, and moneyed influences that structures economic life in capitalist Northeast Asia.[87] Evans regards the concept of the developmental state as neo-utilitarianism and contrasts it with the predatory state. Developmental states take up tasks that go beyond regulatory functions and also undertake entrepreneurial activities as a necessary part of economic transformation.[88] States, according to Evans, may be developmental or predatory depending upon "the way in which they affect development".[89] He uses the qualifier 'predatory' where "[t]hose who control the state apparatus seem to plunder without any more regard for the welfare of the citizenry than a predator has for the welfare of its prey." Developmental states "foster long-term entrepreneurial perspectives among private elites by increasing incentives to engage in transformative investments and lowering the risks involved in such investments" and the consequences of their actions promote rather than impede

[86] Wolfgang Sachs (1992), "One World" in *The Development Dictionary*, A Guide to Knowledge as Power, W. Sachs, Editor (London & New Jersey: Zed Books Ltd), p. 103.

[87] Meredith Woo-Cumings, Ed. (1999) *The Developmental State* (Cornell University Press) p. 1.

[88] Peter B. Evans (1989), 'Predatory, Developmental and other Apparatuses: A Comparative Political Economy Perspective on the Third World State," *Sociological Forum*, Vol. 4, No. 4, p. 562.

[89] *Ibid.*

transformation and development.[90] Evans cites the East Asian NICs as examples of a developmental state, Zaire [of the late 1980s] as a predatory state, and Brazil [of the late 1980s] as the illustrative 'intermediary' case[91] between a predatory and a developmental state.

According to Vartiainen, three salient features of a successful developmental state distinguish developmental states from post-colonial states that pursued various development policies. *Primarily*, the developmental state must be strong to impose its collective developmental objectives, be meritocratic and ought to be "insulated from both the market and the logic of individual utility maximization". *Secondly*, the state should have "thick external ties [*embeddedness*] to the economy's organized agents such as corporations, industrialists, associations and trade unions." And *thirdly*, there must be "a relationship of *mutual dependence* or *mutual balance* between the state and the rest of the economy" in such a manner that the state can be "able to 'discipline' economic actors such as firms and trade unions, while appreciating that their privileged positions ultimately depend on the success of the economy."[92]

Amsden holds a similar view when she states that the two major features of a developmental state are the capacity to discipline big business and dispensing assistance to the business sector. She cites Korea, Japan and Taiwan as examples for more effective industrialization in comparison with other late industrializing countries. These achievements, according to Amsden, are attributable to the state's "power to discipline big business, and thereby to dispense subsidies to big business according to a more effective set of allocative principles." [93]

As Chang points out, there are certain problematic features that we can observe regarding the free market economic system that 'free-marketers' do not tell us about.[94] Equally important is the need to distinguish between the level of intervention of a predatory state from that of a developmental state. The latter empowers and monitors economic actors, and to this end, it requires meritocratic institutions that monitor economic actors towards the country's developmental strategic objectives. Developmental states are thus drastically different from predatory states that are not only considerably corrupt but also

[90] *Ibid*, pp. 562, 563.
[91] *Ibid*, p. 563.
[92] Juhana Vartiainen, "The Economics of Successful State Intervention in Industrial Transformation" in *The Developmental State* (1999), Edited by Meredith Woo-Cumings (Cornell University Press) pp. 218-219.
[93] A. H. Amsden (1989), *Asia's Next Grant: South Korea and Late Industrialization*, New York: Oxford University Press, p. 144.
[94] Ha-Joon Chang (2010), *23 Things they don't tell you about capitalism*, (London: Allen Lane , Penguin group).

make use of coercive institutions that scare economic actors and intimidate entrepreneurs in the guise of regulatory intervention.

8. Synopsis of Ethiopia's Development Pursuits and Setbacks

Ethiopia has a long history of settled agriculture which dates back over 2000 years, and its ancient civilization is marked by social institutions, obelisks, churches, mosques, palaces, literature and music. However, handicraftsmen (such as goldsmiths, tanners, potters, etc.) were looked down upon until very recently. This seems to have impact on the mainstream mindset which has yet to march towards a strong work ethic, innovation and entrepreneurship.

The religious tradition (both Christian and Islam) gave primacy to religious, moral, social and cultural pursuits rather than economic endeavours. It was during the reign of Emperor Menelik (1844-1913) that various endeavours of '*modernization*', in the economic sense of the term, started to bear fruit. This momentum was enhanced during the reign of Emperor Haile Sellassie I (1892-1975) under whose government, the pursuits of 'modernization' continued until the Italian Invasion in 1935, and thereafter.

The last three decades of Emperor Haile Selassie's reign coincide with the decades during which the doctrines of development evolved through aspirations of the '*big push*' (such as intensive investment and industrialization) to the doctrine of '*dualism*' of agriculture and industry in the path to development. During the 1960s and early 1970s for example, there was progress in modern agriculture. The steady growth of oil seed farming in commercial farms towards the Ziway road, cotton farms in the Awash Valley, etc. were cases in point.

Reservoirs were planned to be built at the headwaters of the Blue Nile based on the studies conducted (in 1958) by Ethiopia in collaboration with the US Bureau of Reclamation in the Department of Interior. This could have enabled Ethiopia to use irrigable land at the size of about "17 % of the current land under cultivation in Egypt"[95] which would have required "six billion cubic meters of the Nile River" and these dams could have saved over fifteen billion cubic meters per year that are lost due to evaporation and seepage at Aswan High Dam.[96] These projects could also have reduced "flooding and sedimentation in

[95] Robert O. Collins (1990), *The Waters of the Nile: Hydropolitics and the Jonglei Canal* (Oxford University Press), p. 279.

[96] Eyal Benvenisti, Collective Action in the Utilization of Shared Fresh Waters (*American Journal of International Law*, July 1996), p. 409, [cited in *Mizan Law Review*, Vol. 1, No. 1, (June 2007) p. 57].

the downstream countries" and enabled hydro-electric generation to the mutual benefit of Ethiopia and downstream users. [97]

This was a lost opportunity for Ethiopia's economic take-off that could have also made watershed management and environmental preservation in the Blue Nile Basin possible, thereby positively serving the long-term interests of preserving the Nile watercourse itself. Unfortunately, the hydro-politics related with the Blue Nile, reluctance of the regime to allow political and land reform, failure of the regime to allow federal empowerment to Eritrea, and the series of civil wars that escalated since the 1960s took Ethiopia back into turmoil and political instability analogous to its long history of civil wars, palace power struggles and inter-region conflicts.

The global economic crisis which had its impact in Ethiopia, the 1974 drought, and the political realities of the early 1970s led to a revolution, which attempted to transpose Marxist ideology into policies and laws. The modernization theory of economic development (which was already being criticized since the late 1960s), entirely gave way to the dependency model in its Marxist version. Post-revolution policies largely pursued a combination of policies which encouraged the Soviet and Chinese hybrid models of industrialization, state farms, collectivization of villages, cooperative farms, self-reliance and import substitution.

However, these policies did not lead to intensive investment and economic take-off that had transformed the Soviet economy in the 1930's. Instead, political instability and civil wars continued at an enhanced and steadily increasing pace and magnitude. Nor could the regime implement the Chinese path to development partly because the Ethiopian Marxist leadership was an ensemble of Marxist political groups who were restructured top-down as opposed to the Chinese Communist Party that had a strong mass base, committed membership and decades of embryonic development since the 1920s with ample experience, loyalty and fortitude that was nurtured through the thick and thin.

Ethiopia's development strategies of the late 1970s and the 1980's pursued the East European and Soviet models. However, a largely agrarian Ethiopia (with its subsistence economy) could not attain the objectives aspired, and state farms were largely inefficient and subsidized. Policies that were largely influenced by the dependency theory and import-substitution policies could not lead to significant economic development. Yet, the efforts and achievements in the realm of reforestation and environment protection were showing positive results in the 1980s.

[97] Kefyalew Mekonnen (2002), cited in *Mizan Law Review*, Vol 1, No, 1 (June 2007) at 57.

The Reagan-Thatcherite global policies and balance of power during the 1980s had its impact in Ethiopia. A policy of mixed-economy was issued during the late 1980s although it did not live up to the expectations and needs of the private sector and the society at large. The l990s witnessed change of government, privatization and a significant revival of the private sector. Pursuits toward market economy cohabited with certain aspects of the earlier features of the economy such as the land law regime. The salient feature of this period seems to be the alternating influence of various development doctrines and policies that include IMF-World Bank prescribed privatization, structural adjustment, institutional restructuring, state ownership of land and the notion of the developmental state.

In the realm of human development, there is indeed a considerable achievement that has widened access to education at all levels. Yet, the figures of achievement need to be examined in light of the actual number of graduates who have in fact acquired the thresholds and standards of *competence* and *capabilities* that the transcripts and testimonials represent. There are commendable achievements in infrastructure, economic growth and integration with the global economy, subject to the *caveat* that the real yardsticks lie in 'sustainable development' rather than 'growth', and in social wellbeing with a broader mass-base rather than elite affluence.

Concluding Remarks

Contemporary development thinking seeks to give order to the development process as in the case of addressing the destructive dimensions which include "poverty and unemployment of the potential productive power".[98] Current conceptions of development and the pursuits thereof are thus directed to the negative and positive qualities of development and are "founded upon the antinomies of positive and negative as much as positive and normative".[99] From this perspective, "intentional development is inseparable from the whole process of development" and expresses "the intent to compensate for what is regarded as being deficient" and at the same time "offers the prospect of an aspiration for an improved future".[100]

Due attention is thus necessary to make sure that every investment project serves the objectives of '*development*' and '*improved living standards*' of people as envisaged under the Ethiopian Constitution and the Investment Proclamation. Cowen and Shenton believe that the desire for improvement is

[98] M. P. Cowen & R. W. Shenton (1996), *Doctrines of Development* (London & New York: Routledge), p. ix
[99] *Ibid*, p. 445.
[100] *Ibid.*

usually "a desire grounded as a reaction to the past deficiency of development with respect to the present, not merely a speculative prospect of a future from the present".[101] They hold that post-development malcontents "recreate a very much pre-modernist prognosis for development".[102] The concluding paragraph of their book suggests that we ought to have visions that emanate from the future and they should be "visions of free development and not doctrines of development".[103]

Such 'visions' of free development can still be as vague and complex as doctrines of development. Without thus disregarding the need for a synthesis of doctrines that can inform policies and laws, there is the need to take the twin objectives of Ethiopia's investment law (i.e. development and rising standards of living) into account whenever investment projects are accorded licence, allocated land and offered with various incentives that can easily be usurped and misused by speculators (both foreign and local) who travel in the bandwagon of "investment".

As the experience of other countries has proven, quick-fixes based on 'doctrines of development' and mere good intentions to raise standards of living usually fail, in the absence of institutional capabilities (which *inter alia* include the requisite knowledge base, work ethic, level of trust in the society, the culture of saving and investment, conducive laws and policies, good governance, and meritocratic job assignments). These institutional factors have always been *sine qua non* conditions for effective developmental pursuits and for the corresponding rise in standards of living.

In the absence of such institutional capabilities, mere endowment with abundant natural resources merely creates what is known as the 'resource curse' as the rent and interest gathered from natural capital (as experienced in various African countries) merely beefs up the foreign bank accounts of corrupt members of the political and 'business' elite. Nor is global integration the magical cure, because the realization of the promises of the integration in the form of economic and social benefits is directly proportional to the level of institutional capabilities. The solution towards addressing these challenges does not thus seem to lie in conducting 'business as usual', but in the courage of citizens and policy makers to admit and address visible facts that speak louder than misleading statistical figures of 'economic growth.' ■

[101] *Ibid*, p. 456.
[102] *Ibid*, p. 476.
[103] *Ibid.*

COMMENT ON ETHNIC MINORITY RIGHTS UNDER THE ETHIOPIAN FEDERAL STRUCTURE

Beza Dessalegn ♣

Ethiopia is a multi-ethnic, multi-linguistic and multi-cultural country with diverse ethnic, linguistic and religious groups. In this sense, the country can appropriately be described as a mosaic of different cultures and ethno-linguistic groups, although this was not legally and politically recognized until recently.

The 1995 Ethiopian Constitution expressly recognizes the ethnic diversity of the population. This was initiated in 1991 under the Transitional Charter of Ethiopia,[1] and it was a departure from the unitary state paradigm in nation-state building policies of former regimes. The Ethiopian government now accepts the notion of ethnic diversity and aspires to build the nation by using ethnicity as a starting point. This approach was further institutionalized in the current Federal Democratic Republic of Ethiopia (FDRE) Constitution. [2]

The various units of the Federation, i.e. the regional states are carved out along ethno-linguistic lines. As a result, some writers regard Ethiopia's federation as an 'ethnic Federation'.[3] One of the consequences of the definition of the federation on the basis of ethnicity is the creation of regional states dominated by particular ethnic groups. The creation of such ethnic based regional states holds serious dangers for the position of ethnic minority groups; groups which differ from the regionally dominant ethnic majority. The danger exists that the members of the regionally dominant ethnic group which consider the region as their exclusive dominion threaten both the universal and group specific rights of ethnic minorities within the region. This would not have been a

♣ LLB Haramaya University 2006, LLM Addis Ababa University 2010, currently working as a lecturer at Hawassa University College of law and Governance, Law School.

[1] See, The Transitional period Charter of Ethiopia, Proclamation No 1, *Negarit Gazeta* 50th year Addis Ababa, 22nd July 1991.

[2] See, Preamble of the New Constitution, Proclamation No. 1/1995, Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia.

[3] See Generally, David Turton (2006), Introduction in David Turton (ed.) *Ethnic Federalism: The Ethiopian Experience in Comparative perspective* (James Curry, Oxford); See also, Endrias Eshete (2003), *Ethnic Federalism: New Frontiers in Ethiopian politics*, paper presented at the 1st National Conference on Federalism conflict and peace building May 5-7, 2003 Addis Ababa.

problem if all the ethnically organized regional states were inhabited by a homogenous ethnic population. However, ethnic minorities live in all Ethiopian regions and this sparks the legitimate concern for the exercise of their fundamental rights including their right to self determination.

The first section of the comment discusses the turning point in the Ethiopian state arrangement in which the country under the Transitional Charter embarked upon the experiment of ethnic federalism. Section 2 highlights the consolidation of ethnic federalism upon the promulgation of the FDRE Constitution and its ramifications. The Ethiopian federal structure is revisited in the third section by addressing issues such as the carving out of the regional states, the division of powers between the federal and state governments as well as the provisions on the amendment of the Constitution. The last section articulates the content and context of self determination with a view to identifying the right holders and the political dynamic in which such a right is to be exercised within the country.

1. The Transitional Period Charter: The Prelude to Ethnic Federalism

Attempts to centralize the Ethiopian state came to an end by the year 1991 when the EPRDF forces established a transitional government in Addis Ababa. The competing ethno-nationalist claims for an equitable share of power and resources gained attention. The transitional period Charter provided for the establishment of local and regional councils for local administrative purposes to be defined on the basis of nationality.[4] The subsequent proclamation providing for the establishment of national/regional self governments also set forth the same requirement[5] which made it clear that the future of the country's restructuring is to be based on ethnicity.[6]

The Transitional Charter used ethnic based decentralization and the administrative map of the country was redrawn along linguistic and/or ethnic lines. The Transitional Charter that was signed by 27 representatives of political movements, of which the majority were predominantly ethnic-based,[7] provided

[4] See, The Transitional Period Charter, *supra* note 1, Article 13.

[5] Proclamation No 7/1992, A Proclamation to Provide for the Establishment of National /Regional Self-governments.

[6] For a discussion of the transitional period Charter on the establishment of regional and national self governments See, Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, (2007), Rev.edn, Addis Ababa Artistic Printing Enterprise), 49-54.

[7] Yacob Arsano (2007), People's Choice and Political power in Ethiopia: Elections and Representations During Three Regimes in Kassahun Berhanu *et.al*.(eds.), *Electoral*

the political and legal framework for the creation of an 87 seat council of representatives. It incorporated an important principle in Article 2 of the Transitional Period Charter which is the right of "nations, nationalities and peoples to self-determination." This provision further outlined a nation/nationality based framework for a federal like structure of local governments where each unit would administer its own local affairs.[8] The Charter's major political program was primarily centered on promulgating a new Constitution and holding national elections.[9] The establishment of the self-governing units was realized by Proclamation No. 7/1992, which laid down the legal basis for the creation of regional self-governments consisting of 14 regions.[10]

During the five years of the transitional period, three elections were held: the June 21, 1992 regional and local elections, the June 5, 1994 elections of the Constituent Assembly, and the May 7, 1995 elections to the federal parliament and regional councils.[11] Of these major elections, especially the 1994 election to the Constituent Assembly was aimed at electing representatives for the purpose of drafting the new Constitution. The EPRDF won a majority seat in the Constituent Assembly, which was vested with the power of drafting the new Constitution. Many controversial articles in the draft Constitution such as the right to self-determination including secession, ethnic-based federal structure of government, continued government ownership of land, were all approved without a serious debate.[12] The new "national Constitution" was then approved in December 1994 with only a few dissenting voices.[13] It proclaimed the country as the Federal Democratic Republic of Ethiopia.

Politics, Decentralized Governance and Constitutionalism in Ethiopia (Addis Ababa University press, 2007), 169-175.

[8] Tafesse Olika and Aklilu Abraham (2007), Legislation, Institutions and the Post 1991 Elections in Ethiopia in Kassahun Berhanu et.al.(eds.), *Electoral politics, Decentralized Governance and Constitutionalism in Ethiopia* (Addis Ababa University press, 2007) 93-94.

[9] See, The transitional Charter, *supra* note 1, Article 10, 11, 12 and 13.

[10] For a discussion on the creation of the 14 regions of the time see, Merera Gudina (2003), *Ethiopia: Competing Ethnic Nationalism and the Quest for Democracy 1960-2000* (Shaker publishing), 122-123.

[11] Tafesse and Aklilu, *supra* note 8, p. 94.

[12] Merera Gudina (2003), *supra* note 10, p. 127.

[13] Merera Gudina (2007), Party Politics and Elections in Ethiopia: 1991-2005 in Kassahun Berhanu et.al (eds.), *Electoral politics, Decentralized Governance and Constitutionalism in Ethiopia* (Addis Ababa University press, 2007), 132.

2. The New Constitution and the Issue of Minority Rights

Even though the Transitional Period Charter did not spell the word federalism, it employed a federation type of arrangement.[14] This ambiguity was cleared upon the promulgation of the new Constitution.[15] Ethiopia was, in effect, fully transformed from a centralized unitary state to an ethnic federation, which recognizes the rights of nations, nationalities, and peoples to self-determination up to and including secession.[16]

The new Constitution was intended to solve the problem of the 'national question' by presenting federalism as a solution.[17] Whether this ethnic-federalism has provided the appropriate solution to the country has however been subject to debate. For instance, scholars like Minasse Haile argue that, the new Ethiopian Constitution instead of resolving ethnic problems has on the contrary exacerbated them and concludes that it has brought about a zero sum progress.[18] He states that ethnic federations have not been generally successful in large polities except perhaps, when they have been supplemented by other institutional arrangements, by peculiar societal facts or by threat or use of force, to constrain the centrifugal forces inherent in such federations but none of these are present in the current Ethiopian federation which makes it an unstable one.[19]

Furthermore, the act of drawing regional boundaries based on major ethnic groups, *ipso facto*, creates minority ethnic groups in each region, which are condemned to be permanent minorities without any hope of obtaining political power.[20] Hence, the formation of such type of federation provides further grounds for the political parties to be formed along ethnic territorial units as they advocate the exclusive concerns of their respective constituencies

[14] See, Fasil Nahum (1997), *Constitution for a Nation of Nations: The Ethiopian Prospect*, (The Red Sea Press, Inc.), 44.

[15] Article 1 of the FDRE Constitution states that 'this Constitution establishes a federal and democratic state structure. Accordingly, the Ethiopian state shall be known as the Federal Democratic Republic of Ethiopia.

[16] Asnake Kefale and Hussein Jemma (2007), Ethnicity as a Basis of Federalism in Ethiopia: Cases of the Harari National Regional State (HNRS) and Dire Dawa Administrative council (DDA), in Kassahun Berhanu et.al. (eds.), *Electoral politics, Decentralized Governance and Constitutionalism in Ethiopia* (Addis Ababa University press, 2007), 70.

[17] Ibid

[18] See generally, Minasse Haile (1996), "The New Ethiopian Constitution: Its Impact upon Unity, Human Rights and Development", 20 *Sulfolk Transnational Law Rev.*1.

[19] *Ibid*, p. 11.

[20] *Ibid*, it is worth noting here that the Constitution only creates nine regional states while the country is inhabited by more than eighty ethnic groups.

regardless of the consequences on the national interest.[21] Minassie Haile generally concludes that such type of ethnic federation is inconsistent with the aim of nation building in peace and tranquility.[22]

To the contrary, some consider the ethnic federalism experiment as a success story despite some inherent drawbacks. Cognizant of the situation in which the country had been at the time when various liberation movements and ethnic strife engulfed Ethiopia, the commitment to national self-determination and the establishment of regional governments based on nationality have, according to this view, ensured the survival of the Ethiopian state.[23] They consider that the federal system has served as a conflict regulating device, by creating relatively homogenous states.[24]

Surely, one can speak of the ethnic federal experiment to have brought a considerable change towards the accommodation of diversity (especially at the federal level of government) and to this effect it can be said that it is relatively of a success story. But if one looks at federalism at the regional level it is a different story. The relative diversity that may be present at the regional level has not been taken into consideration by the drafters of the Federal Constitution and the Constitution has not set any kind of mechanism for regulating tensions that may arise due to the competing claims of the different ethnic groups.

Moreover, the Constitutions of the various regional states, except for few, have not addressed the issue of their diversity. They simply ignore the reality of their population and consider the region to have been inhabited only by the majority and/or dominant ethnic group/s. This is seriously at odds with the principle of federalism and 'the accommodation of diversity'. In this regard, federalism at the regional level poses a serious danger to the stability of the federation in general and to the regional states in particular.

3. The Federal Structure

The federal Constitution defines the country's structure as a multicultural federation based on ethno-national representation. It stipulates that Ethiopia is of a 'federal and democratic state.[25] In line with the federal tradition, the respective powers of member states and the federal government are distributed by the

[21] *Ibid*.
[22] *Ibid*.
[23] Assefa Fiseha (2006), "Theory Versus Practice in the Implementation of Ethiopia's Ethnic Federalism", in David Turton (ed.) *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (James Curry, Oxford 2006) 135.
[24] *Ibid*.
[25] See Article 1of the FDRE Constitution.

federal Constitution.[26] The federal government, with a bicameral parliament, is entrusted with the responsibility of national defense, foreign relations, monetary policies and foreign investment and the establishment and implementation of national standards on health, education, science and technology.[27] The states have all powers not given expressly to the federal government alone or concurrently to the federal government and the states.[28] Since the Constitution does not provide for a list of concurrent powers, one has to go through the whole body of the text in search of such powers to identify the powers reserved to the states.[29]

The horizontal relationship between member states in the federation can be described as symmetrical because member states are constitutionally guaranteed equal rights and powers.[30] The Constitution institutes a bicameral parliament, the House of People's Representatives (HPR) and the House of the Federation (HoF).[31] The highest authority in the federal state is that of the HPR while the HoF, a non-legislative house is vested with authority to interpret the Constitution.[32] It is composed of representatives from nations, nationalities and peoples of Ethiopia.[33] It is also entrusted with the task of determining issues related to the rights of ethnic groups to self-determination including secession, finding solutions to disputes between states and ascertaining the division of joint federal and state revenues and the federal subsidies to the states.[34]

It can generally be argued that the Constitution adequately recognizes the multiethnic nature of the country. This can be discerned from the following instances. The preamble of the Constitution begins with the wordings "we, the nations, nationalities and peoples of Ethiopia."[35] It also vests all sovereign power in the nations, nationalities and peoples of Ethiopia.[36] All Ethiopian languages are accorded equal recognition and members of the federation may by law determine their respective working languages.[37]

[26] Article 51 and 52 of the FDRE Constitution.
[27] See, *Ibid*.
[28] Article 52 of the FDRE Constitution.
[29] Assefa Fiseha (2006), *supra* note 23, p. 133.
[30] Article 47(4) of the FDRE Constitution.
[31] Article 53 of the FDRE Constitution.
[32] See Articles 62,83 and 84 of the FDRE Constitution.
[33] Article 61(1) of the FDRE Constitution.
[34] Article 67 of the FDRE Constitution.
[35] Preamble of the FDRE Constitution.
[36] Article 8(1) of the FDRE Constitution.
[37] Article 5(1)(3) of the FDRE Constitution.

The Constitution establishes nine regional states that are largely delimited along ethno-linguistic criteria.[38] States of the federation are to be formed on the basis of the settlement patterns, language, identity and consent of the people concerned.[39] The Constitution also provides for a guaranteed representation for minority nationalities and peoples by stipulating that at least 20 seats are reserved for these minority nationalities and peoples out of the maximum number of 550 seats in the HPR.[40] The Constitution is the supreme law of the land, and it stipulates that any law customary practice or a decision of an organ of state or a public official which contravenes the Constitution shall be of no effect.[41]

For the purpose of amending the Constitution, it is stated that except for the rights specified in chapter three, amendment may only be effected when the HPR and the HoF, in a joint session approve a proposed amendment by a two-third majority vote; and when two-thirds of the councils of the member states of the federation approve the proposed amendment by majority votes.[42] Article 105 of the Constitution embodies an additional stringent requirement for the purpose of amendment of the Constitution.[43] Hence, generally speaking the procedure for approving amendments to the Ethiopian Constitution is very rigid.

4. Self-Determination: Subjects, Context and the Dilemma

The content, right holders and the scope of the right to self-determination have been themes of debate among scholars. The principle of self-determination generally has two applications referred to as external and internal self-determination. External self-determination applies to colonial situations in which territorial divisions of the state will be effected in forming an independent nation. Internal self-determination is, on the other hand, concerned with the right of peoples within a state to choose their political status, the extent of their political participation and the form of their government.[44]

[38] See Article 47 of the FDRE Constitution.
[39] Article 46(2) of the FDRE Constitution.
[40] Article 54(3) of the FDRE Constitution.
[41] Article 9(1) of the FDRE Constitution.
[42] Article 105 (2) (a) and (b) of the FDRE Constitution.
[43] See, Article 105(1) (a),(b),& (c) of the FDRE Constitution.
[44] D. Raic (2002), *Statehood and the Law of Self-Determination*, (Martinus Nijhoff Publishers), 238-240.

4.1. Subjects of Self-Determination: Nations, Nationalities and Peoples

The FDRE Constitution has adopted the language 'Nations, Nationalities and Peoples' (NNP) as a standard expression to designate ethnic groups. NNP for the purpose of the Constitution has been defined as 'a group of people who have or share a large measure of a common culture or similar custom, mutual intelligibility of language, belief in a common or related identities, a common psychological makeup, and who inhibit an identifiable, predominantly contiguous territory'.[45]

From this definition one can discern that to be regarded as a NNP (ethnic group) both subjective and objective criteria should be met.[46] The subjective criteria are belief in common or related identity and psychological makeup, while the objective ones are language, culture and territory. However, the Constitution or other subsidiary laws have not expressly indicated the list of groups, which qualify as NNP and those which do not. If one looks at the composition of the HoF, it may be possible to check indirectly which groups qualify as NNP, because the HoF is composed of representatives of each ethnic group. But this shall not mean that every NNP (ethnic group) in the country has a representative in the HoF. Thus the ethnic groups that can be said to have been recognized are the ones which are now represented in the HoF.[47]

4.2. The Context or Content of Self-Determination in the FDRE Constitution

The Constitution can be said to have adopted three modalities in the exercise of the right to self-determination.[48] These are the right to secede (external self-determination)[49], the right to promote one's language, culture and history

[45] Article 39(5) of the FDRE Constitution.

[46] Generally speaking Article 39(5) simply lumps together many factors together in designating Nations, Nationalities and Peoples but a closer look at the requirements reveals that some of them need factual determination while some simply are to be deduced subjectively upon the wishes of the specific group. See, Abate Nikodimos Alemayehu (2004), *Ethnic Federalism in Ethiopia: Challenges and Opportunities*, (Master Thesis, Fall 2004) Available at <www.addisvoice.com/wp-content/uploads/2010/03/ethnic-federalism-.pdf>, 55-57, accessed on December 23, 2012.

[47] In this regard one can mention the "Kemant" people found in the Amhara Regional State who have filed a petition to the HoF to be recognized as a separate ethnic group.

[48] See, Fasil Nahum, *supra* note 14, pp., 53,154.

[49] Article 39(2) and (4) of the FDRE Constitution.

(cultural self-determination)[50] and right to self government and regional autonomy (political self-determination).[51] The right of every NNP in Ethiopia to the unconditional right to self-determination, including the right to secession has been included so that if the federal government abuses the rights of these constituent units, then they will be entitled to reassert their powers of sovereignty by withdrawing from the federation.[52] This right is not even subject to derogation during national emergency.[53]

The right to promote one's language, culture and history seems to have been framed for the purpose of ending cultural domination. The third and most important aspect of self-determination is that of the political one. Political self-determination aims at equitable and fair representation in the state as well as in the federal government. This is the most important aspect of the right to self-determination in multiethnic societies like that of Ethiopia. The Constitution has guaranteed that every NNP has the right to full measure of self-government which includes the right to establish institutions of government in the territory it inhabits and to equitable representation in the state and federal government.

4.3. The Dilemma in the Exercise of the Right to Self-Determination

As stated earlier, every NNP (ethnic group) is guaranteed the right to self-determination without any condition attached to it.[54] Although this guarantee, at face value, seems to provide a wide range of rights, its application is bundled with a lot of problems and it is hardly realizable. An example in this regard is whether an ethnic group can assert itself as a NNP in a regional state in which it is a minority and exercise its right to political self-determination. Secondly, there can be a question whether an ethnic group can assert itself as NNP outside of its mother state while it has been considered as a NNP within its own regional state. The third dilemma in the exercise of the right to self-determination relates to ethnic groups that do not have their own mother states.

Apart from seeking answers to these questions from the FDRE Constitution, one has to look at the political context which seems to have a far reaching

[50] Article 39(2) of the FDRE Constitution.
[51] Article 39(3) of the FDRE Constitution.
[52] Assefa Fiseha (2006), *supra* note 23, p. 132. See also, Matthew J. Mc Cracken, *Abusing Self-Determination and Democracy: How the TPLF is looting Ethiopia*, 36 Case W. Res. J. Int'l .L. (2004).
[53] Article 93 of the FDRE Constitution.
[54] Since Article 39(1) states that 'Every Nation, Nationality and People in Ethiopia have the unconditional right of self-determination …' one may argue that no condition can be attached for the exercise of such right.

impact on the federal structure. This can be tackled from two angles. Constitutionally there are two mechanisms employed to protect the rights of different ethnic groups. The first relates to the right of the different ethnic groups to the unconditional right of self-determination including the right of secession. From a practical point of view, even if the secession of Eritrea was recognized through a similar principle under the Transitional Period Charter, the Ethiopian government does not seem to be in favor of secession for the current nations, nationalities and peoples of Ethiopia (NNP). Hence one may argue here that politically speaking, secession is not an option to an ethnic group.

The second perspective is related with the constitutional right of an ethnic group (NNP) to establish, at any time, its own sate (outside the current regional state) within the federal framework.[55] This too does not seem to be acceptable as it can be discerned from the fact that a number of ethnic groups have demanded that they be granted the status of statehood (especially ethnic groups of the Southern Nations Nationalities and Peoples regional state).[56] No separate regional state has been established other than the nine regional states stated under the FDRE Constitution.

The House of the Federation, which is entrusted with the task of constitutional interpretation, has not yet come up with decisions for the purpose of protecting such rights of ethnic groups. Therefore, one may safely conclude that the competing interests of different ethnic groups residing in the different parts of the regions is to be entertained only within the context of the nine regional states.

The regional states have been constitutionally designed as entities in which the different ethnic groups (NNP) can profess their diversity and live in harmony. This is mainly attributable to the political commitment of the government to address the problem of ethnicity in the country. On the one hand, the formation of the regional states is a response to the call for appropriate ethnic accommodation, and is meant to solve the problem of ethnic rivalries and competing interests. To this end, the Ethiopian federal arrangement can be viewed as a success, while at the same time it is also embedded with serious problems from the perspectives of the different ethno-linguistic groups within the regional states. The other challenge relates to the pace of nation building in the context of a larger Ethiopian identity beyond ethnic and religious identities.

The federal arrangement can indeed be regarded as a success story because it was a response to the civil wars that continued for decades particularly in the

[55] See, Article 47(2) of the FDRE Constitution.

[56] A number of ethnic groups have submitted demands to the HoF that they be given separate regional statehood. To this effect, one can mention the demands by the Sidama and the Berta ethnic groups.

northern part of the country. On the other side, it has been a problematic approach mainly due to the problems that are arising out of the issues of federalism at the regional level. This is due to the fact that ethnic homogeneity could not be achieved in the regional states. Some regions are multiethnic and not ethnically homogenous.

For example, in the regional state of Beneshangul Gumuz, the non-indigenous minorities in the region were underrepresented in the state's legislative council. This is mainly attributable to the lack of adequate mechanisms (in the regional state's Constitution) to accommodate diversity and guarantee representation. In this regard, the electoral law of the country has played its role especially in the regional state of Benishangul by exacerbating the tension between indigenous and non-indigenous identities.

The federal Constitution has not formulated any mechanism that can regulate such tensions that may arise in the exercise of the right to political self-determination between the different ethnic groups within a given regional state. One may be tempted, at this point, to ask whether this is a simple oversight by the drafters of the Constitution.

Conclusion

The federal arrangement between the nine regional states was a response to the right to self-determination of the NNP inhabiting in each regional state. In practice, however, this has resulted in the creation of the majority/dominant ethnic group hegemony in heterogeneously inhabited region states. This has not only resulted in the creation of minority ethnic groups within a given regional state but the minority ethnic group loses its constitutionally guaranteed right of self-determination in favor of the majority and/or dominant ethnic group.

The right to political self-determination stipulated in the Constitution under the current political context and its practical application thus seem to suggest that the right will only apply to an ethnic group where that ethnic group inhabits only in one of the nine regional states in which it is either a majority or the dominant ethnic group.[57] This is the core problem encountered by minorities at the regional level in asserting their constitutionally guaranteed right to self determination.

[57] Here I am not concluding that no ethnic group has so far exercised the right to political self-determination outside its own regional state. The Amhara regional state in this regard might be of a good experience, by which it has created 'Nationality Administrations' for its Oromo and Agew nationalities, in which they are a minority within the regional state. But the practice seems to suggest that regional minorities are relegated to an inferior position in which their political rights are severely curtailed.

The remedies should thus be sought at a broad political and policy levels.[58] The formation of the nine regional states under the FDRE Constitution does not in any way signify that the regions are the sole dominions of the dominant ethnic group/s. The federal arrangement should not also be misconstrued to allow the dominant ethnic group/s, in whatsoever manner, to exercise their rights without due recognition of the ethnic minorities in the regional state. These problems require solutions beyond declarations of intention and normative stipulations because political practices can be different from constitutional and other stipulations.

In particular, the politically empowered ethnic group/s within a given regional state should not deprive regional minorities of their right to be represented in the state's regional council. This envisages their right to establish institutions by which they can exercise self-rule. Therefore, remedies based on the context of a given regional state are mandatory with a view to bringing about solutions at broader political and policy levels. ■

[58] See generally, Assefa Fisseha (2006), *supra* note 23.

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)**

Address:
Mizan Law Review
St. Mary's University College, Faculty of Law
Center for Law in Sustainable Development (CLiSD)
P. O. Box: 18490, Addis Ababa, Ethiopia

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Printed by SMUC Printing Press