የኢትዮጵያ ሕግ መጽሄት
JOURNAL OF ETHIOPIAN LAW

23ኛ ቮልዩም	በዓመት ቢያንስ አንድ ጊዜ የሚታተም	Vol. XXIII No. 1
ነሐሴ 2001 ዓ.ም	Published at least once annually	August, 2009

In This Issue:

የፍርድ ጉዳዮች፣
Case Reports
Case Comments

Articles

የኢትዮጵያ ሕግ መጽሄት
JOURNAL OF ETHIOPIAN LAW

23ኛ ቮልዩም	በዓመት ቢያንስ አንድ ጊዜ የሚታተም	Vol. XXIII No. 1
ነሐሴ 2001 ዓ.ም	Published at least once annually	August, 2009

In This Issue:

JOURNAL OF ETHIOPIAN LAW

Published at least once a year by the Faculty of Law
Addis Ababa University
Founded in 1965
(to be cited as 23 J. Eth.L.No.1)

ADDIS ABABA UNIVERSITY

FACULTY OF LAW

Faculty
2008/09 Academic Year

Aberra Degefa	-	LL.B, LL.M; Lecturer
Aman Assefa	-	LL.B, LL.M; Lecturer
Andreas Eshete	-	B.A, M.A, Ph.D.; Professor and President of A.A.U
Blen Asemire	-	LL.B; Graduate Assistant II
FikreMarkos Merso	-	LL.B, LL.M, Ph.D.; Assistant Professor & Dean
Gedion Timothewos	-	LL.B., LL.M; Assistant Lecturer
Getachew Assefa	-	LL.B, LL.M; Assistant Professor & Associate Dean
Girmachew Alemu	-	LL.B, M.A, Ph.D., Assistant Professor
Khushal Vibhute	-	Ph.D.; Professor
Mandefro Eshete	-	LL.B, LL.M, Dr. Iur.; Assistant Professor
Martha Belete	-	LL.B, LL.M; Lecturer & Assistant Dean
Mehari Redae	-	LL.B, LL.M; Assistant Professor
Mekete Bekele	-	LL.B, LL.M; Assistant Professor
Mohammed Habib	-	LL.B, LL.M; Assistant Professor
Molla Mengistu	-	LL.B, M.A, LL.M; Lecturer
Muradu Abdo	-	LL.B, LL.M; Assistant Professor
Seyoum Yohannes	-	LL.B, LL.M; Lecturer
Tadesse Lencho	-	LL.B, LL.M; Lecturer
Tilahun Teshome	-	LL.B; Associate Professor
Tsehay Wada	-	LL.B, LL.M; Assistant Professor
Vaibhv Goel	-	LL.M., Ph.D.; Assistant Professor
Wondowssen Demissie	-	LL.B, LL.M; Lecturer
Yazachew Belew	-	LL.B, LL.M; Lecturer
Yonas Birmeta	-	LL.B, M.A; Lecturer
Zekarias Keneaa	-	LLB, LL.M; Assistant Professor

Part-Time Faculty

Abebe Abebayehu	-	LL.B, LL.M; Lecturer
Abebe Teklehaymanot	-	LL.B, LL.M; Lecturer
Abraham Ayalew	-	LL.B,LL.M; Lecturer
Aschalew Ashagrie	-	LL.B, LL.M**;** Lecturer
Assefa Fisseha	-	LL.B**,** LL.M**,** Ph.D**;** Associate Professor
Chernet Wordofa	-	LL.B, Lecturer
Imiru Tamrat	-	LL.B, LL.M**;** Assistant Professor
Filipos Aynalem	-	LL.B, Lecturer
Getahun Kassa	-	LL.B, LL.M; Lecturer
Kalkidan Negash	-	LL.B**,** Assistant Lecturer
Melesse Damtie	-	LL.B, LL.M**;** Assistant Professor
Nuru Seid	-	LL.B, LL.M; Lecturer
Solomon Abay	-	LL.B, LL.M**;** Assistant Professor
Solomon Emiru	-	LL.B, Lecturer
Solomon Negus	-	LL.B., LL.M., PhD ; Assistant Professor
Tewodros Mihret	-	LL.B, LL.M**;** Lecturer
Tsegaye Regassa	-	LL.B**,** LL.M**;** (PhD Candidate)
Woldemichael Missebo	-	LL.B**,** LL.M**;** Lecturer
Yosef Aymero	-	LL.B, Lecturer
Wondimagegn Tadesse	-	LL.B, LL.M; Lecturer
Yared legesse	-	LL.B, LL.M; (PhD Candidate)

JOURNAL OF ETHIOPIAN LAW

Is a scholarly publication devoted to the legal, political and social issues arising in relation to Ethiopian Law and related international Law.

The Journal invites the submission of unsolicited articles, essays, case comments, book reviews and comments on law/legislation. The Journal also invites letters in response to articles, essays, Case and legislation comments, book reviews and notes appearing in the Journal within the last year. Correspondence should be brief (about 3 pages). Selected letters will be edited with the cooperation of the author and published.

Our Address is: The Editor – in – Chief
Journal of Ethiopian Law
Faculty of Law, Addis Ababa University
P.O.Box 1176
Addis Ababa, Ethiopia
Tel., 0111239757

The Journal is distributed by the Book Centre of Addis Ababa University. If you wish to subscribe, please address correspondence to:
The Book Centre, Addis Ababa University,
P.O.Box 1176, Addis Ababa, Ethiopia.

ማ ው ጫ

የፍርድ ቤት ውሣኔዎችና ትችቶች
Cases and Case Comments

TABLE OF CONTENTS

የሰበር መዝገብ ቁጥር 24643

ሐምሌ 29 ቀን 2000 ዓ.ም

ዳኞች፡- መንበረፀሐይ ታደሰ

ዓብዱልቃድር መሐመድ

ሐጎስ ወልዱ

መስፍን ዕቁበዮናስ

ታፈሰ ይርጋ

አመልካች፡- ወ/ሮ አስናቀች ወ/ማርያም -

ተጠሪ፡- አቶ አለማየሁ አህመድ -

<u>ፍ ር ድ፣</u>

ለሰበር አቤቱታው ምክንያት የሆነው ጉዳይ የተጀመረው በፌ/መ/ደረጃ ፍ/ቤት ሲሆን አመልካች በሥር ፍ/ቤት ባረቀቡት ክስ፣ የስር 3ኛ ተከሣሽ የነበሩት የሠ/ቁ 3-03657 የሆነ መኪና ሲያሽከረክሩ ምናሴ ከበደ የተባለውን ልጃችውን ገጭተው በመግደላቸው በወንጀል ተከሠው ተፈርዶባቸዋል፡፡ መኪናውን የሥር 2ኛ ተከሣሽ ገዝተው የባለቤትነት ስሙ በስማቸው ባይተላለፍም በይዞታቸው ሥር ነበር፤ የአሁኑ ተጠሪም የመኪናው የባለቤትነት ስም በስማቸው በመሆኑ የመኪናው ባለቤት ናቸው፡፡ በመሆኑም ሶስቱም ተከሣሾች ለደረሠው አደጋ ኃላፊነት ስላለባቸው የጉዳት ካሣ ይክፈሉኝ በማለት ጠይቀዋል፡፡

ፍ/ቤቱም የግራ ቀኙን ክርክር ሰምቶ የአሁኑ ተጠሪ መኪናውን ለሥር 2ኛ ተከሣሽ ሸጠው ኃላፊነቱ ለ2ኛ ተከሣሽ የተላለፈ በመሆኑ ሊጠየቁ አይገባም በማለት የሥር 2ኛ እና 3ኛ ተከሳሾች ብቻ ለደረሰው ጉዳት ኃላፊ በመሆናቸው የጉዳት ካሣውን ይክፈሉ ሲል ወስኗል፡፡ አመልካችም ተጠሪ ኃላፊ ሊሆኑ አይገባም በማለት በተሰጠው ውሳኔ ላይ የይግባኝ ቅሬታ ለፌ/ከፍተኛ ፍ/ቤት አቅርበው ቅሬታቸው ተቀባይነት ሳያገኝ ቀርቷል፡፡

የአሁኑ የሰበር አቤቱታ የቀረበው በዚህ ውሣኔ ላይ ነው፡፡ ይህ የሰበር ችሎትም ጉዳት ያደረሰው መኪና የባለቤትነት ስም በተጠሪው ስም በመሆኑ ተጠሪው በኃላፊነት ሊጠየቁ ይገባል ወይስ አይገባም የሚለውን ጭብጥ ለመመርመር አቤቱታው ለሰበር ችሎት እንዲቀርብ አድርጓል፡፡ ግራ ቀኙም ክርክራቸውን በጽሁፍ አቅርበዋል፡፡ ይህ ችሎትም መዝገቡን እንደሚከተለው መርምሯል፡፡

በዚህ ጉዳይ መልስ ማግኘት ያለበት ጭብጥ የአንድ መኪና ወይም ባለሞተር ተሽከርካሪ ባለሃብትነት ወደ ሌላ ሰው ተላለፈ የሚባለው መቼ ነው? መኪኖች እና ባለሞተር ተሽከርካሪዎች ከውል ውጭ ባሉ ግንኙነቶች ለሚያደርሱት ጉዳት በኃላፊነት የሚጠየቀው ማነው? የሚሉት ይሆናሉ፡፡ ለተያዘው ጭብጥ መልስ ለመስጠት የተንቀሳቃሽ ንብረት ባለሃብትነት የሚተላለፍበትን መንገድ የሚመለከቱትን የሕጉ ድንጋጌዎች መመልከቱ ጠቃሚ ነው፡፡ በተለይ በዚህ ጉዳይ ክርክር የተነሳበት ሀብት መኪና በመሆኑ፣ ግዙፍነት ያላቸው ተንቀሳቃሽ ንብረቶች ልዩ ከሆኑ አንዳንድ የሚንቀሣቀሱ ንብረቶችን በሚመለከት የተደነገጉትን የሕግ ድንጋጌዎች መመልከት ተገቢነት ይኖረዋል፡፡

በፍትሐብሄር ሕግ ቁጥር 1186 “**ግዙፍነት** ያላቸው ተንቀሳቃሽ ንብረቶች ባለሀብትነት፣ ንብረቱን በመግዛት ወይም በሌላ አኳኋን ያገኘው ወይም በኑዛዜ የተሰጠው ሰው ንብረቱን እጁ ባደረገ ጊዜ የተላለፈለት ይሆናል” በማለት ይደነግጋል፡፡ በዚህ የሕግ ድንጋጌ መሠረትም የአንድ የሚንቀሣቀስ ንብረት ባለሀብት ለመሆን ሌላ ተጨማሪ ሁኔታ ማሟላት ሣያስፈልግ ንብረቱን በመግዛት ወይም በሌላ አኳኋን ንብረቱን አግኝቶ በእጅ በማድረግ ብቻ ባለሀብት ሊሆን የሚቻል መሆኑን መረዳት ይቻላል፡፡

ሆኖም ይህ ድንጋጌ ልዩ የሆኑ አንዳንድ ተንቀሳቃሽ ንብረቶችን ባለሀብትነት ለማስተላለፍ በተለይ የተመለከቱትን የሕግ ድንጋጌዎች የማያጠቃልል መሆኑን በፍትሐብሔር ሕግ ቁጥር 1186(2) ላይ በግልጽ ተመልክቷል፡፡ በዚህ መሠረት የምዝገባና ባለሀብትነት ማስተላለፊያ ሥርዐትን በመከታል ብቻ ባለሀብትነት ከሚተላለፍባቸው ግዙፍነት ካላቸው ተንቀሳቃሽ ንብረቶች መካከል መኪናና ባለሞተር ተሽከርካሪዎች ዋነኞቹ ስለመሆናቸው በመንገዶች ላይ ጉዞንና ማመላለሻን

ለመቆጣጠርና ለመወሰን የወጣውን አዋጅ 256/1960ን ተክትሎ የወጣውንና የተለያዩ ክፍሎች በየጊዜው የተሻሻሉትና እንደአግባብነቱ ተፈፃሚነት ያለውን የሕግ ክፍል ማስታወቂያ ቁጥር 360/1961 መመርመሩ አስፈላጊ ነው፡፡ በቅድሚያ የፍጥነት ወሰኑ በሰአት ከ20 ኪሎ ሜትር ከማይበልጥ ልዩ ተሽከርካሪ መሣሪያዎች በስተቀር ማናቸውም ባለሞተር ተሽከርካሪ የማስመዝገብ ግዴታ በአስገዳጅነት በሕጉ የተጣለ መሆኑን አዋጅ ቁጥር 256/1960 አንቀጽ 6ን እንደአግባብነቱ ካሻሻለውና የሚኒስቴሩን መ/ቤት በአዲስ ካቋቋመው አዋጅ ቁጥር 468/1997 አንቀጽ 21 መረዳት ይቻላል፡፡

ባለሞተር ተሽከርካሪን ከማስመዝገብ ግዴታ ጋር ተያይዞ ማንም ሰው በደንብ ቁጥር 360/1961 አንቀጽ 6 መሠረት የባለንብረትነት መታወቂያ ደብተር አያስፈልጋቸውም ተብለው ከተመለከቱት ተሽከርካሪዎች ውጭ ያሉ ተሽከርካሪዎችን ለአገልግሎት ከተላለፈበት ጊዜ ጀምሮ በ30 ቀናት ውስጥ የባለንብረትነት መታወቂያ ደብተር እንዲሰጠው ለአዋጅ አስፈፃሚ መ/ቤት ማመልከቻቸውን ማቅረብ የሚገባው መሆኑን በደንቡ ቁጥር 7 ላይ ተመልክቷል፡፡ በማንኛውም መንገድ ተሽከርካሪው ለአገልግሎት የተላለፈለት ሰው በስሙ የባለንብረትነት መታወቂያ ደብተር እንዲሰጠው ከሚያቀርበው ማመልከቻ ጋርም የንብረቱን ባለሀብትነት ያገኘበትን አግባብ የሚያረጋግጡ ሰነዶችን ማቅረብ የሚገባው መሆኑን ተመልክቷል፡፡ በዚህም መሠረት የተሽከርካሪው ባለሀብትነት የተገኘው ከቀድሞው ባለቤት ላይ ከሆነ ከቀድሞው ባለቤት የባለንብረትነት መታወቂያ ደብተር፣ ወይም ማመልከቻው የሚመለከተው ከዚህ በፊት በውጭ ሀገር የተመዘገበን ተሽከርካሪ እንደሆነ በተባለው አገር የተሰጠ የባለንብረት መታወቂያ ሰነድ ወይም የተሽከርካሪውን ባለንብረትነት ለማወቅ ለሚኒስቴሩ መ/ቤት አስፈላጊ ናቸው የሚባሉትን ማንኛውንም ሰነዶችና መረጃዎችን አያይዞ ማቅረብ የሚገባ መሆኑን በደንቡ ቁጥር 7 (1) እና (3) ላይ ተደንግጓል፡፡ይህ የደንቡ ክፍል በአዲስ የተገዙትን፣ በውጭ አገር አገልግሎት ሰጥተው ወደ አገር ውስጥ የሚገቡትን እና በአገር ውስጥ ያገለገሉ ተሽከርካሪዎች ከአንዱ ወደ ሌላው በተለያየ ምክንያት ሲተላለፍ ተሽከርካሪው ለአገልግሎት የተላለፈለት ሰው የባለንብረትነት መታወቂያ ደብተር እንዲሰጠው ከማመልከቻው

ጋር በማያያዝ ሊያቀርብ የሚገባቸው ሰነዶች የትኞቹ እንደሆነ የሚያመለክቱ ናቸው፡፡ ከዚህ ተጨማሪ በአገር ውስጥ የሠራ ተሽከርካሪ ለአገልግሎት ከአንዱ ወደ ሌላው ሲተላለፍ የተላለፈለት ሰው የአስተላለፈውን የባለንብረትነት መታወቂያ ደብተር እንዲረከብና ሁለቱ ወገኖች በደብተሩ ውስጥ የሚገኘውን የባለንብረትነት መታወቂያ ገጽ በሚገባ ሞልተው እና ፈርመው ማቅረብ የሚገባቸው መሆኑን በደንቡ ቁጠር 8 እና 11(1) ላይ ተመልክቷል፡፡ በመጨረሻም የሚኒስቴሩ መ/ቤት ማመልከቻው እውነተኛና ትክክለኛ መሆኑን ካረጋገጠ ማመልከቻ አቅራቡው የተሽከርካሪው ባለቤት ነው እንዲባል አንድ የባለንብረት መታወቂያ ደብተር የሚሰጠው መሆኑን በቁጥር 9 ላይ ተመልክቷል፡፡

ከፍ ብለው ከተመለከቱት የደንቡ ድግጋጌዎች መረዳት የሚቻለው ነገር ቢኖር፣ የፍጥነት ወሰናቸው በደንቡ ላይ የተመለከቱት ተሽከርካሪዎች ከአንዱ ወደ ሌላ በሽያጭ፣ በስጦታ ወይም በሌሎች መንገዶች ተላልፈው ሲገኙ እንደ አብዛኛዎቹ ግዙፍነት ያላቸው ተንቀሳቃሽ ንብረቶች ዋጋ ሰጥቶ ንብረቱን በእጅ በማድረግ ብቻ የባለሀብትነት መብት የማይተላለፍ መሆኑን፣ ይልቁንም ልዩ የሆኑትን እነዚህን ግዙፍነት ያላቸውን ተንቀሳቃሽ ንብረቶች ባለሀብት ሆኖ ለመገኘት ሻጭ እና የሆኑትን ገዥ ወይም ስጦታ አድራጊና ስጦታ ተቀባይ ከሚያደርጉዋቸው የተሳኩ የውል ስምምነቶች ባሻገር ከፍ ብለው በደንቡ በተመለከተው እንኳን የተሽከርካሪውን ባሀብትነት ከአስተላላፊው ወደ ተላለፈለት ሰው የሚዘዋወርበት ስርአት በሚኒስቴር መ/ቤት መጠናቀቅ የግድ መሆኑን ነው፡፡ ሌላው ቀርቶ ባለንብረትነቱ የታወቀለት ሰው ተሽከርካሪው ከጥቅም ውጭ ሆኖ በወላለቀና ጨርሶ በወደመ ጊዜ እንኳን ይህንኑ ሁኔታ በ30 ቀናት ውስጥ ለሚኒስቴሩ መ/ቤት አሳውቆ በስሙ የተመዘገበው የባለቤትነት ደብተር እንዲሰረዝና ከመዝገብ እንዲፋቅ ካላስደረገ በቀር ባለሀብቱ ስሙ በመታወቂያ ደብተሩ ላይ የተመዘገበው ሰው ሆኖ እንደሚቀጥል ከደንቡ ቁጥር 42 እስከ 45 እና በቁጥር 11(2) የተመለከቱትን ድንጋጌዎች በመመርመር መረዳት ይቻላል፡፡

ባለሞተር ተሽከርካሪዎች በሰው ልጆች ማህበራዊና ኢኮኖሚያዊ ግንኙነት ውስጥ የሚኖራቸው ጠቀሜታ ከፍተኛ የመሆኑ ያህል እነዚህ ማሽኖችና ተሳቢዎች

ጉዳናዎች ላይ በሚሽከረከሩበት ጊዜ በሰውና በንብረት ላይ ሊያደርሱ የሚችሉት የጉዳት መጠን የዛኑ ያህል ከፍተኛ በመሆኑ እነዚህ ልዩ ተንቀሳቃሽ ንብረቶች ወደ አገር ውስጥ ሲገቡም ሆነ በቴክኒክ ረገድ ብቃት ኖሯቸው በጉዳናዎች ላይ ሲሽከረከሩ፤ እንዲሁም በተለያዩ ሁኔታዎች ንብረቶቹ ከአንዱ ወደ ሌላው ሲተላለፉም ሆነ ከአገልግሎት ውጭ ሆነው ጨርሶ ሲወድሙ ልዩ የምዝገባና የቁጥጥር ሥርዐት እንዲደረግባቸው ማድረጉ ማህበራዊ ደህንነትን ከመጠበቅ አኳያ ጠቀሜታው ከፍተኛ በመሆኑ ኢትዮጵያን ጨምሮ በርካታ አገሮች ባለሞተር ተሽከርካሪዎች እና ተሳቢዎቻቸውን ከሞላ ጎደል ተመሣሣይነት ባላቸው ልዩ ደንቦች እንዲመሩ የሚያደርጉ መሆኑን የተለያዩ አገሮችን ልምድ በመዳሰስ ለመረዳት ተችሏል፡፡

የመኪና እና ባለሞተር ተሽከራካሪ ባለሀብትነት የሚገኘው ከፍ ብለን በገለጽነው ሥርዓት ብቻ መሆኑ ከታወቀ በመቀጠል ሊነሳ የሚገባው ጭብጥ የባለሀብትነት ዝውውር ሥርዐቱ ደንቡ በሚጠይቀው አኳኋን ሳይከናወን አንድ መኪና ወይም ባለሞተር ተሽከርካሪ ከሻጭ ወደ ገዥ ወይም ከስጦታ አድራጊ ወደ ስጦታ ተቀባይ ይዞታው ተላልፎ በነበረበት ጊዜ መኪናው ወይም ባለሞተር ተሽከርካሪው በሰውም ሆነ በንብረት ላይ ጉዳት አድርሶ ቢገኝ ኃላፊው ንብረቱ በስሙ የሚገኘው ሰው ነው ወይስ ንብረቱን በእጁ አድርጎ ሲገለገልበት የነበረው ሰው የሚለው ይሆናል፡፡ እነዚህን ጭብጦች ለመመለስ እንድንችል መዝገቡን አሁን ከተያዘው ጉዳይ ጋር መመርመሩ ተገቢነት ይኖረዋል፡፡

ወደያዝነው ጉዳይ ስንመለስ የአሁኑ አመልካች ክሳቸውን ሲመሠርቱ የስር 3ኛ ተከሳሽ የነበረው ሾፌር የሠ/ቁ. 3-03657 የሆነውን መኪና እያሽከረከሩ ጉዳት በማድረሳቸው ለደረሰው ጉዳት ሀላፊ እንዲባሉ፤ የስር 2ኛ ተከሳሽ ጉዳት ያደረሰውን መኪና ገዝተው በይዞታቸው ሥር እያለ ጉዳት በማድረሱ 2ኛ ተከሳሽም ኃላፊ እንዲባሉ፣ የመኪናው የባለቤትነት ስም ደግሞ በስር 1ኛ ተከሳሽ በነበሩት በአሁኑ ተጠሪ ስም በመሆኑ ተጠሪው የመኪናው ባለቤት በመሆናቸው ለደረሰው ጉዳት ኃላፊ እንዲሆኑ ጠይቀዋል፡፡ ከመዝገቡም የስር 3ኛ ተከሳሽ በቸልተኝነት ሰው መግደል ወንጀል ጥፋተኛ የተባለ መሆኑን፣ ጉዳት ያደረሰውን መኪና የሥር 2ኛ

ተከሳሽ ገዝተው የተረከቡ መሆኑን ነገር ግን የባለንብረትነት መታወቂያ ደብተሩ በአሁኑ ተጠሪ ስም መሆኑን መረዳት ተችላል፡፡

በዚህ መሠረት ለጭብጦቹ ምላሽ ለማግኘት በቅድሚያ በፍትሐብሔር ሕጉ ውስጥ የሚገኙትን ከውል ውጭ ስለሚደርስ ኃላፊነት የተደነገጉትን ድንጋጌዎች መፈተሹ አግባብነት ይኖረዋል፡፡

በፍትሐብሔር ሕግ ቁጥር 2081(1) መሠረት የአንድ መኪና ወይም ባለሞተር ተሽከርካሪ ባለቤት የሆነ ሰው ንብረቱ ተሰርቆ በነበረበት ጊዜ ለደረሰው አደጋ ከተጠያቂነት ነጻ ከሚሆን በስተቀር መኪናውን ወይም ባለሞተር ተሽከርካሪውን ለመንዳት ባልተፈቀደለት ሰው እንኳን ተነድቶ ጉዳት አድርሶ ቢገኝ የመኪናው መይም የባለሞተር ተሽከርካሪው ባለቤት ለደረሰው ጉዳት ኃላፊ እንደሚሆን ተመልክቷል፡፡ የአንድ መኪና ወይም ባለሞተር ተሽከርካሪ ባለቤት ከውል ውጭ በሚደርሱ ኃላፊነቶች ውስጥ በፍትሐብሔር ሕጉ አጥፊ ሳይሆን አላፊ ከሚባሉት ምድቦች ውስጥ የሚመደብ በመሆኑ መኪናው ወይም ባለሞተር ተሽከርካሪው ላደረሰው ጉዳት ባለቤቱ ኃላፊ ነው፡፡

ይህ ማለት ግን ስሙ በባለቤትነት ያልተመዘገበ መኪናውን ወይም ባለሞተር ተሽከርካሪውን ለግል ጥቅሙ ሲገለገልበትና ሊጠቀምበት የነበረው ሰው መኪናው ወይም ባለሞተር ተሽከርካሪው በእጁ በነበረበት ጊዜ ለደረሰው ጉዳት ከተጠያቂነት ነጽ ይሆናል ማለት አለመሆኑን ከፍትሐብሔር ሕግ ቁጥር 2082(1) መረዳት ይቻላል፡፡ በዚህ መነሻነት በአንድ መኪና ወይም ባለሞተር ተሽከርካሪ ጉዳት የደረሰበት ሰው የመኪናውን ወይም የባለሞተር ተሽከርካሪውን ባለቤት ወይም በንብረቱ ተገልጋይ የነበረውን ማንኛውም ሰው በአንድነትም ሆነ በተናጠል ከሶ ለደረሰበት ጉዳት ካሣ ለመጠየቅ በፍትሐብሔር ሕግ ቁጥር 2081(1) እና 2082(1) መሠረት መብት ያለውን ያህል የመኪናው ወይም የባለሞተር ተሽከርካሪው ባለቤት ተብሎ የሚታወቀው ሰው የንብረቱ ባለቤት በመሆኑ ብቻ ተበዳይን ተገዶ ክሳሰ በኋላ መኪናውን በእጁ አድርጎ ሲገለገል የነበረውን ማንኛውም ሰው የከፈለውን ገንዘብ እንዲከፍለው የመጠየቅ መብት ያለው መሆኑ በፍትሐብሔር ሕግ ቁ. 2083(1) ተመልክቷል፡፡

ከዚህ ድንጋጌ መረዳት የሚቻለው ነገር ደንቡ የሚጠይቀውን የመኪና ወይም የባለሞተር ተሽከርካሪ ባለቤትነት የማስተላለፍ ሥርዐት ባልተከናወነበት ጊዜ ሁሉ በመኪናው ወይም በባለሞተር ተሽከርካሪው ለሚደርስ አደጋ ስመ በባለቤትነት የሚታወቀው ሰው የንብረቱ ባለቤት በመሆኑ ብቻ የሚጠየቅ መሆኑን እና ንብረቱን በማናቸውም መንገድ በእጁ አድርጉ ለግል ጥቅሙ ሲገለገልበት የነበረ ሰው ለደረሰው ጉዳት ምንጊዜም የመጨረሻው ኃላፊነት የማይቀርለት መሆኑን ነው፡፡ ከዚህ ሌላ ስለባለቤቱ ወይም ስለሌላ ሰው ሆኖ በአንድ መኪና ወይም ባለሞተር ተሽከርካሪ ላይ ይሠራ የነበረ ታዛዥ መኪናው ወይም ባለሞተር ተሽከርካሪው ጉዳት አድርሶ የተገኘው በራሱ ጥፋት ምክንያት ካልሆነ በቀር እንደ ባለቤቱ ወይም እንደ ንብረቱ ተገልጋይ ሰው ለደረሰው ጉዳት ኃላፊ እንደማይሆን የፍትሐብሔር ሕግ ቁጥር 2082(2) ይደነግጋል፡፡ በዚህ ጉዳይ ግን የሥር 3ኛ ተከሳሽ የነበረው ሾፌር በወንጀል ክስ ቀርቦበት ጥፋተኛ ሆኖ በመገኘቱ በፍትሐብሔር ሕግ ቁ. 2082(2) መሠረት ለጉዳቱ ኃላፊ ነው መባሉ ተገቢ ነው፡፡

ባጠቃላይ የአሁኑ ተጠሪ ጉዳት ያደረሰውን ተሽከርካራ በሽያጭ ለስር 2ኛ ተከሳሽ ለነበሩት ሰው በማስተላለፋቸው ብቻ በፍትሐብሔር ሕግ ቁጥር 2324(1) በተመለከተው አኳኋን የጉዳት ኃላፊነቱ ሙሉ በሙሉ ወደ ገዢው ብቻ ተላልፏል ለማለት አይቻልም፡፡ መኪና ወይም ባለሞተር ተሽከርካሪ ልዩ የምዝገባና የባለሀብትነት ስም ዝውውር የሚሻ ንብረት በመሆኑ እንደአብዛኛዎቹ ግዙፍነት ያላቸው ተንቀሳቃሽ ንብረቶች ዋጋ ሰጥቶ ንብረቱን በእጅ በማድረግ ብቻ ባለሀብትነት የሚተላለፍ አይደለም፡፡

በፍትሐብሔር ሕግ ቁጥር 2267(2) በተደነገገው መሠረት አንዳንድ ግዙፍነት ያላቸው ተንቀሳቃሽ ንብረቶችን የሚመለከቱ ልዩ ሕጎች ውስጥ የሚገኙ ድንጋጌዎች በፍትሐብሔር ሕጉ ውስጥ ስለሽያጭ በተጻፈ ደንቦች አይነኩም በማለት የተደነገገውም ይህንን የሚያጠናክር ነው፡፡

በመሆኑም የተሽከርካሪው የባለሀብትነት ስም ዝውውር ደንቡ በሚጠይቀው አግባብ ባልተጠናቀቀበት ሁኔታ የሥር ፍርድ ቤቶች የአሁኑ ተጠሪ ተሽከርካሪውን

ለሥር 2ኛ ተከሳሽ በሽያጭ አስተላልፏል በሚል ብቻ ተጠሪ ኃላፊ ሊሆኑ አይገባም ብለው መወሰናቸው መሠረታዊ የሕግ ሥህተት ሆኖ አግኝተነዋል፡፡

<u>ውሣኔ፣</u>

1. የመኪናው ባለንብትነት በስሙ የሚታወቀው በስር 1ኛ ተከሻሽ የነበረው የአሁኑ ተጠሪ፣ በንብረቱ አማካኝነት ለደረሰው የሞት አደጋ ንብረቱን ለግል ጥቅሙ ሲገለገልበት ከነበረው ከሥር 2ኛ ተከሳሽ እና ስለ 2ኛ ተከሳሽ ሆኖ በመኪናው ይሥራበት ከነበረው እና በጥፋቱ ኃላፊ ከተባለው ከሥር 3ኛ ተከሳሽ ጋር በአንድነት ኃላፊ ናቸው ብለናል፡፡
2. የፌደራል መጀመሪያ ደረጃ ፍ/ቤት የአሁኑ አመልካች በልጃቸው ሞት ምክንያት እንዲከፈላቸው የተወሰነውን ብር 71887.50/ሰባ አንድ ሺህ ስምንት መቶ ሰማኒያ ሰባት ብር ከሃምሳ ሳንቲም/ ከሥር 2ኛ እና 3ኛ ተከሳሾች በተጨማሪ የአሁኑ ተጠሪ በአንድነትና በነጠላ ለአመልካች እንዲከፍሉ ተወስኗል፡፡ ተጠሪ የከፈሉትን የጉዳት ካሣ ከሥር 2ኛ እና 3ኛ ተከሳሾች ለመጠየቅ ይችላሉ፡፡
3. የፌዴራል መጀመሪያ ደረጃ ፍ/ቤት በ5/8/97 በመ/ቁ 03696 በተሰጠው ፍርድ እና የፌ/ክ/ፍ/ቤት የካቲት 8 ቀን 1998 በቁጥር 40410 በሰጠው ትዕዛዝ ላይ የአሁኑ ተጠሪ ከተጠያቂነት ነጻ ናቸው በማለት የሰጡት የውሳኔ ክፍል ብቻ በፍ/ሕ/ሥ/ሥ/ቁ. 348(1) መሠረት ተሽሯል፡፡
4. የዚህን ፍ/ቤት ወጪና ኪሳራ ግራ ቀኙ ይቻቻሉ፡፡
5. መዝገቡ ያለቀለት ስለሆነ ወደ መዝገብ ቤት ይመለስ፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት፡፡

Federal Cassation File No. 24643
July 29, 2000[*]

Justices:

Menberetsehai Tadesse
Abdulqadir Mohammed
Hagos Woldu
Mesfin Equbayonas
Tafese Yirga

Asnakech W/Mariam: Petitioner
Alemayehu Ahmed: Respondent

Summary of the Judgment

This matter has started at the Federal First Instance Court by the suit the present petitioner instituted claiming compensation jointly from three defendants for the death of her son, Menasie Kebede, who was killed in a car accident. At the time of the accident, the car was found registered in the name of the present respondent, 1st defendant at court below. The 2nd defendant had bought this car from the respondent and was in possession at the time the damage was caused though the formality requirements for transfer of title in relation to the vehicle was yet to be completed. The driver of the car, the 3rd defendant was criminally convicted for the death he caused.

The trial court held the 2nd and the 3rd defendants liable, but exonerated the present respondent on the ground that he sold the car to the 2nd defendant, hence liability was transferred to the latter. The Federal High Court rejected the appeal of the present petitioner that challenged part of the judgment, which relieved the present respondent from liability.

The present petition has been brought against this decision. The issues that need resolution in this matter are: When is it that the ownership of a motor vehicle is said to have been transferred from the owner to another person and who is liable for a damage caused by motor vehicles in an extra-contractual relationship?

[*] All the dates are according to Ethiopian Calendar.

Article 1186(1) of the Civil Code provides that "The ownership of corporeal chattel shall be transferred to the purchaser or to the legatee or to someone who in some way acquires the chattel at the time when he takes possession thereof." Pursuant to this provision, whether a person purchased the chattel or got it by any other lawful manner possessing the chattel itself alone is sufficient to become its owner

Nevertheless, it is clearly stated under Article 1186(2) that this rule shall not affect the provision of special laws governing the transfer of ownership of special kinds of corporeal chattels. Accordingly, to establish that motor vehicles are the main among those corporeal chattels in which ownership shall be transferred only by complying with the rules of registration of title, it is important to consider the relevant provisions of Legal Notice No.360/1961 enacted pursuant to Proclamation No. 256/1960 which is still in force even if amended at different times. Primarily, it is possible to understand from Article 21 of Proclamation No.486/1997 that amended Article 6 of Proclamation No. 256/1960 and reestablished the Ministry of Transport and Communication, that the law, save for special vehicles whose speed limit is not beyond 20 km/hr, has made it mandatory to have any motor vehicle registered.

Related to the obligation of causing the registration of motor vehicles, except those vehicles for which title deed is not a requirement as per Article 6 of Legal Notice No. 360/1961, it is clearly provided under Article 7 that whosoever acquires a motor vehicle shall within 30 days of his acquisition apply for title deed to the concerned authority. It is also stated that a person to whom a motor vehicle has been transferred in any [lawful] manner shall attach to his application for title deed documents that prove his ownership thereof.

Accordingly, Article 7(1) and (3) of the Legal Notice provides that the person has to attach with his application the title deed issued to the former owner if ownership is transferred to him from a previous owner of the vehicle, or the title deed issued in a foreign country if the vehicle has already been registered in such a country together with any document necessary to evidence his ownership.

These provisions indicate the kinds of documents a transferee of a vehicle has to attach with his application for a title deed when imported used cars or those already in use at home are transferred from one person to the other. In addition to this, it is stated under Articles 8 and 11(1) of the Legal Notice that the transferee of a secondhand car already in use at home shall take possession of

the title deed belonging to the transferor, and both parties shall complete and sign the title deed page in the title booklet and submit same to the authority. Finally, per Article 9 the authority shall, upon verifying the genuineness of the application issue to the applicant a title deed so that he shall be considered the owner of the vehicle.

What is to be discerned from the above provisions is that where vehicles whose speed limit is indicated in the Legal Notice are transferred from one person to the other by sale, donation or any other [lawful] manner ownership thereof is not transferred, unlike the case for the majority of other corporeal chattels, by mere possession for value. Rather, to become the owner of these special corporeal chattels, beyond a valid contract concluded between the seller and the buyer or between the donor and the donee, the formalities for transferring the ownership from the transferor to the transferee of the vehicle as required under the Legal Notice must be completed by the concerned authority. By examining Articles 42 to 45 and Article 11(2) of the Legal Notice one can understand that even when the vehicle is totally damaged and out of use, the person whose name appears in the title deed continues to be considered the owner thereof unless within 30 days he notifies the concerned authority of such loss and have his name deregistered.

If it is established that the ownership of a motor vehicle is transferred only in the manner described above, the issue that flows next is who, the person in whose name the property was found registered or the one who was in possession and enjoyment of the property, is liable when the vehicle causes damage where possession has been transferred from the seller to the buyer or from the donor to the donee, but the rules of transferring ownership as required by the law are not complied with.

It is provided under Article 2081(1) of the Civil Code that the owner of a motor vehicle shall, except where the damage was caused while the property was stolen from him, be liable for any damage caused by the vehicle even if a person who was not authorized to drive the vehicle caused the damage. The liability of the owner of a motor vehicle belongs to the category of extra-contractual liability in which the owner is liable under the Civil Code for the damage caused by the vehicle even if he himself was not at fault. This does, as is gatherable from Article 2082(1) of the Civil Code, not mean that a person in whose name the motor vehicle is not registered but who was possessing and enjoying it for his personal benefit would incur no liability for a damage caused while the vehicle was in his possession. In view of this, a person who

sustained damage by a motor vehicle has the right, per Articles 2081(1) and 2082(1), to sue jointly or severally the owner of the motor vehicle or any person who was possessing and enjoying it claiming compensation. Likewise, pursuant to Article 2083(1) the owner of the motor vehicle once forced to compensate the victim merely because he is the owner, has the right to ask any person, who at the time of the damage was in possession and enjoyment of the vehicle, to indemnify him that amount of compensation he paid the victim.

What is to be deduced from this provision is that in all cases where the formality required by the law for the transfer of ownership of a motor vehicle is not complied with, the person whose name is registered as the owner shall be held liable for the damage caused by the vehicle merely because he is the owner thereof; and that the person who, at the time of damage, was in possession and enjoyment of the vehicle cannot avoid the ultimate liability.

In conclusion, merely because the present respondent transferred by sale [the possession of] the vehicle that caused damage to a person who was the 2nd defendant at court below it cannot be said that liability was transferred the buyer alone and in whole. For a motor vehicle is a property subject to special rules of registration and transfer of title, ownership unlike the case for the majority of corporeal chattels, does not transfer by mere possession for value. It is to strengthen this view that Article 2267(2) of the Civil Code states that the provisions of special laws relating to the sale of certain kinds of corporeal chattels shall not be affected by provisions of the Code dealing with sale in general.

Thus, we found that the lower courts have committed a fundamental mistake of the law in holding that the present respondent was not liable on the mere ground that he had sold and transferred the vehicle to the 2nd defendant while transfer of ownership of the vehicle was not complete as required by the law.

የሰ/መ/ቁ. 35627

ሐምሌ 8 ቀን 2000 ዓ.ም

ዳኞች፡- አቶ ዓብዳልቃድር መሐመድ

አቶ ሐጐስ ወልዱ

አቶ ታፈሰ ይርጋ

አቶ መድሕን ኪሮስ

አቶ በላቸው አንሺሶ

አመልካች፡- የአማራ ብ/ክ/መ/ፍ/ቢሮ - ቀረቡ

ተጠሪ፡- የ$ አለቃ መኮንን ነጋሽ - አልቀረበም

መዝገቡ ተመርምሮ ቀጥሎ የተመለከተው ፍርድ ተሰጥቷል፡፡

<u>ፍርድ</u>

ይህ ጉዳይ ዋስትናን የሚመለከት ሲሆን ተጠሪ በተጠረጠረበት ወንጀል በፖሊስ በኩል ምርመራው ቀጥሎ የዋስትና መብት ይፈቀድልኝ በማለት አቤቱታውን በሰሜን ጐንደር መስተዳደር ለጭልጋ ወረዳ ፍ/ቤት አቅርቦ ፍ/ቤቱም ከፖሊስ በተሰጠው አስተያየት መሠረት ተጠሪ የተጠረጠረበት ወንጀል ከወ/መ/ሕ/ሥ/ሥ/ቁ/ 63 አኳያ የዋስትና መብት የሚፈቀድለት ስላልሆነ የዋስትና ጥያቄው ተቀባይነት የለውም በማለት ትዕዛዝ ሰጥቷል፡፡

ጉዳዮን በይግባኝ የተመለከተውም የሰሜን ጐንደር መስተዳደር ዞን ከፍተኛ ፍ/ቤት በበኩሉ ጐዳዮን መርምሮ ተጠሪ የተጠረጠረበት ወንጀል በቸልተኝነት ሰው መግደል ሲሆን በወ/መ/ሕ/ሥ/ሥ/ቁ/ 63 መሠረት የዋስትና መብት የማይከለክል ከመሆኑም በላይ በቁጥር 67 መሠረትም ዋስትና ለመከልከል የሚያበቃ ሁኔታ ስለመኖሩ ያልተረጋገጠ ስለሆነ የወረዳው ፍ/ቤት ተጠርጣሪው የዋስትና መብት

ሊጠበቅለት አይገባም በማለት በአብላጫ ድምጽ ትዕዛዝ ያለአግባብ ነው በማለት ሽሮ ተጠሪ በዋስ ሆኖ ሊከራከር ይገባል በማለት በአብላጫ ድምጽ ትዕዛዝ ሠጥቷል፡፡

ከዚህ በኋላም የአሁን አመልካች በዚሁ ትዕዛዝ ቅሬታ አድሮበት የይግባኝ ቅሬታውን በበኩሉ ለክልሉ ጠቅላይ ፍ/ቤት አቅርቦ ፍ/ቤቱም ይግባኙን መርምሮ ለአንድ ተጠርጣሪ የዋስትና መብት ሲፈቀድለት ዓቃቤ ሕግ ይግባኝ የማቅረብ መብት ያለው ስለመሆኑ አከራካሪነቱ እንዳለ ሆኖ ነገር ግን የዋስትና ጥያቄውን ከፍተኛ ፍ/ቤት በይግባኝ አይቶ በሰጠው ብይን ላይ ለ2ኛ ጊዜ ይግባኝ ማቅረብ ስለማይቻል የአቤቱታውን ይዘት መመርመር ስለማያስፈልግ ተቀባይነት የለውም በማለት መዝገቡን ዘግቷል፡፡

የሰበር አቤቱታው የቀረበው ይህንኑ በመቃወም ሲሆን ይህም ችሎት አቤቱታውን መርምሮ አመልካች ዋስትናውን በመቃወም ለክልሉ ጠቅላይ ፍ/ቤት ያቀረበው የይግባኝ ቅሬታ ከላይ በተገለፀው አኳኋን ተቀባይነት ሳያገኝ መቅረቱ ተጠሪ ባለበት በሰበር ችሎት ቀርቦ ሊጣራ እንደሚገባው በማመኑ ተጠሪን ጠርቷል፡፡ ሆኖም የፍ/ቤቱን መጥሪያ ተጠሪ ለመቀበል ፈቃደኛ እንዳልሆነ በመረጋገጡ መልስ የመስጠት መብቱ ታልፏል፡፡

በአጠቃላይ የክርክሩ ይዘት ከላይ የተመለከተው ሲሆን አቤቱታውም እንደሚከተለው ተመርምሯል፡፡

አንድ ተጠርጣሪ በተጠረጠረበት ወይንም በተከሰሰበት ወንጀል የዋስትና መብት ያልተፈቀደለት ከሆነ በ20 ቀን ጊዜ ውስጥ የይግባኝ ቅሬታውን ቀጥሎ ለሚገኘው ፍ/ቤት ማቅረብ እንደሚችል በወንጀለኛ መ/ሕ/ሥ/ሥ/ቁ 75/1/ ላይ የተመለከተ ሲሆን ይግባኝ ሰሚው ፍ/ቤትም የይግባኙን ማመልከቻ ከመረመረ በኋላ አቤቱታውን አልቀበልም ለማለት ወይንም በዋስትና ወረቀት መልቀቅ እንደሚችል በዚሁ የወ/መ/ሕ/ሥ/ሥ/ቁ/ 75(2) ላይ ተመልክቷል፡፡

ይህ ድንጋጌ በዋስትና ጉዳይ የይግባኝ መብት የፈቀደው ዋስትና ለተከለከለ ተጠርጣሪ ወይንም ተከሳሽ መሆኑን መገንዘብ ቢቻልም አመሳስሎ መተርጐም (Analogical interpretation) ተቀባልነት የማይኖረው ተከሳሹን ይጐዳል ተብሎ በሚታመነው በዋናው ሕግ (Substantive law) የተቀመጠን ድግጋጌን እንጂ የሥነ

ሥርዓት ድንጋጌን በሚመለከት ስላልሆነ በዚሁ መሠረትም ሥነ ሥርዓት ሕጉን ለተከሳሹ የዋስትና ይግባኝ እስከፈቀድ ድረስ በዚህ የትርጉም መርህ መሠረት ለሌላው ተከራካሪ ወገን ማለትም ለዓቃቤ ሕግም የይግባኝ መብት እነደተፈቀደለት መገንዘብ ይቻላል፡፡

በተያዘውም ጉዳይ ዓ/ሕግ የከፍተኛው ፍ/ቤት ተጠሪ ዋስትና ሊፈቀድለት አይገባም ነበር በማለት ለክልሉ ጠ/ፍ/ቤት ይግባኝ ማቅረቡ የሕግ ድጋፍ ያለው ሆኖ አግኝተነዋል፡፡

በሌላ በኩልም ይግባኝ ሰሚው ፍ/ቤት በሚሰጠው ትዕዛዝ ላይ ይግባኝ ለማለት እንደማይቻል በወ/መ/ሕ/ሥ/ሥ/ቁ/ 75/2/ የተደነገገውን በተመለከተ ሕጉ በቀጥታ የደነገገው ዋስትና ሳይፈቀድ በቀረ ጊዜ ተከሳሹ ይግባኝ ለማለት የሚችልበትን ሁኔታ ስለሆነ በይግባኝ ሰሚው ፍ/ቤት ዋስትናው ተቀባይነት ሳያገኝ ቢቀር ለ2ኛ ጊዜ ይግባኝ ለማለት የማይቻል መሆኑን በተመለከተ እንጂ ዋስትናው ከተፈቀደ ሌላው ወገን ይግባኝ ለማለት የማይችል መሆኑን በተመለከተ ስላልሆነ የክልሉ ጠቅላይ ፍ/ቤት ይግባኝ ሊባልበት አይችልም በማለት ይግባኙን ሳይቀበል መቅረቱ የሕግ ስህተት የተፈፀመበት ሆኖ አግኝተነዋል፡፡

ውሣኔ

1. የአማራ ክልል ጠ/ፍ/ቤት በመ/ቁ. 14770 በ3/4/2000 ዓ.ም የሰጠው ትዕዛዝ መሠረታዊ የሕግ ስህተት ያለበት ስለሆነ ሽረነዋል፡፡
2. አመልካች ይግባኝ የማለት መብት ያለው ስለሆነ የአማራ ክልል ጠ/ፍ/ቤት በዋስትናው ላይ የቀረበውን ይግባኝ መርምሮ የበኩሉን ትዕዛዝ እንዲሰጥበት ጉዳዩ ተመልሶለታል፡፡
3. ግራ ቀኙ ወጭና ኪሣራ ይቻቻሉ፡፡
4. መዝገቡ ተዘግቶ ወደ መ/ቤት ተመልሷል፡፡

የማይነበብ የሶስት ዳኞች ፊርማ አለበት፡፡

Federal Supreme Court Cassation Bench: File No. 35627
Justices: Ato Abdulkadir Mehamed
Ato Hagos Woldu
Ato Tafesse Yirga
Ato Medhin Kiros
Ato Belachew Anshiso

Petitioner: Amhara National Regional State Justice Bureau
Respondent: Sergeant Mekonnen Negash
July 15, 2008

Criminal Procedure-- appeal by the public prosecutor where bail is granted: Article 75 Criminal Procedure Code (hereafter the Code).
Held: Public prosecutor can appeal where first instance court grants bail. The prosecutor can appeal where the appellate court reversed the lower court's ruling and grants bail.

Summary of Judgment

1. Background of the Case

The respondent, who is arrested on suspicion that he committed negligent homicide, requested the *Woreda* Court in *Chilga*[1] to allow him to be released on bail while investigation of his case is pending. The court ruled against Negash's application on the ground that the offence he is suspected of is non bailable under Article 63 of the Code. Negash appealed to the North Gonder Zonal High Court.

Stating that Article 63 of the Code does not prohibit bail to one who is suspected of negligent homicide nor is there an indication as to the existence of any of the conditions envisaged under Article 67 of the Code, the appellate court, by a majority, reversed the ruling of the *Woreda* Court. Dissatisfied by the High Court's decision, the zonal public prosecutor took the case before the Supreme Court of the State of Amhara.

The State Supreme Court, after noting that whether or not the ruling of the court granting bail is appeal able is controversial, rejected the prosecution's appeal on the ground that another appeal is not allowed once the ruling by the

[1] It is one of the districts in North Gonder of the Amhara State.

first instance court is reviewed by the next superior court. The petitioner brought his application to the Cassation Bench of the Federal Supreme Court objecting the ruling of the State Supreme Court.

2. Holding of the Cassation Bench of the Federal Supreme Court

2.1. On whether the public prosecutor can appeal

Article 75(1) of the Code allows a suspect who is denied bail to appeal to the superior court which may, as per Article 75 (2) of the Code, dismiss the application or accept it and grant bail. Though it is understood that Article 75 of the Code provides for the right to appeal of a suspect who is denied bail, the provision can be interpreted by analogy so as to mean that it allows the public prosecutor to appeal where s/he does not agree with the bail decision. Analogy, for being thought to be prejudicial to the accused, is unacceptable only in relation to interpreting provisions of substantive criminal law

2.2. On whether or not the public prosecutor, in this particular case, is allowed to appeal

By stating that no appeal shall lie against a decision given by the court of appeal, Article 75(2) of the Code prohibits the suspect from lodging a second appeal following dismissal of his application by the first appellate court. The provision does not indicate that the public prosecutor can not appeal where the first appellate court reversed the lower court's ruling and grant bail. Hence, the ruling of the State Supreme Court that the prosecutor cannot appeal once a decision by the court of appeal envisaged under Article 75 (1) of the Code is made contains basic error of law. The State Supreme Court is ordered to accept the application of the petitioner and decide on its

የከተማ ቦታ ይዞታ መብት ሕግ አተረጓጐም

ፊልጶስ ዓይናለም*

(በፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት ፍርድ ላይ የተደረገ ምልከታ)

1. መግቢያ፡- ፍርድ ቤቶች በሕገ መንግሥትና አግባብነት ባላቸው ዝርዝር ሕጎች በተሰጣቸው የፍትሐብሔርና የወንጀል የዳኝነት ሥልጣን የዜጐችን ሕገ መንግሥታዊ መሠረታዊ መብቶችና ነፃነቶችን በማክበርና በማስከበር፣ የሕግ የበላይነትን በማስከበር እንዲሁም በጥቅሉ የሀገሪቱን ኢኮኖሚያዊ፣ ማህበራዊ፣ ፖለቲካዊና ባህላዊ ሥርዓትን ለማስከበር ከፍተኛ ኃላፊነት የተጣለባቸው ከሦስቱ የመንግሥት የሥልጣን አካላት መካከል አንደኛው አካል ናቸው፡፡ ፍ/ቤቶች የተሰጣቸውን ሥልጣንና ኃላፊነት ከግቡ የሚያደርሱት በዋናነት በሕግ ተርጓሚነት ተግባራቸው ሲሆን፣ ለዚሁም እንደ ዋና መሳሪያ የሚያገለግላቸው በክርክር መጨረሻ የሚሰጡት ውሳኔ (ፍርድ) ነው፡፡

ፍርድ ከተጻፈና ለተከራካሪ ወገኖች ከተነገረ በኋላ እንደ የሕዝብ ሰነድ የሚቆጠር ነው፡፡ የመስኩ ሊቃውንት ፍርዶች፣ ከሁለት ወገኖች መሠረታዊ ምልከታዎች/ ትችቶች እንደሚጠብቃቸው ያስረዳሉ፡፡ እነዚህም ትችቶች፣ የመጀመሪያው የፍርዱ ውጤት በቀጥታም ሆነ በተዘዋዋሪ መብታቸውን ከሚነካባቸው ወገኖች ሲሆን ፣ሁለተኛው ደግሞ ከሕግ ማኅበረሰቡ ወይም ከፍርዱ አንባቢዎች /ተጠቃሚዎች/ Audiences) በፍርዱ ቴክኒካል/ሙያዊ ብቃት ላይ ተመስርቶ የሚደረግ ምልከታ ነው፡፡በፍርዶች ላይ የሚደረጉ ምልከታዎችና ምርምሮች ለፍ/ቤቶች ውጤታማነት፣ ነፃነት፣ ተጠያቂነትና የሕግ ትርጉም ተገማችነት እንዲሁም ለሕግ ሳይንሱ እድገት ከፍተኛ አስተዋጽኦ እንደሚኖረው ይታመንበታል፡፡በዚህም ጽሑፍ የሚደረገው ምልከታ ይህንን ራዕይ ያለመ ነው፡፡ በሀገራችን የሕግ ሥርዓት የፌ/ጠ/ፍ/ቤት ሰበር ሰሚ ችሎት በአዋጅ ቁጥር 454/1997 በተሰጠው ሥልጣን መሠረት ከአምስት ያላነሱ ዳኞች በተሰየሙበት የሰበር ችሎት የሚሰጠው የሕግ ትርጉም በየትኛውም ደረጃ ላይ በሚገኝ የፌደራል ወይም የክልል ፍርድ ቤት ላይ አስገዳጅነት የሚኖረው በመሆኑ የሚሰጠው ፍርድ /የሕግ አተረጓጐም እንደ ፍርዱ ይዘትና ብቃት በሕግ/ፍትሕ ሥርዓቱ ላይ ከፍተኛ አወንታዊ/ አሉታዊ ውጤት እንደሚኖረው ግልጽ ነው፡፡

የፍርዶችን ጠንካራና ደካማ ጐኖችን በመመርመርና በማጥናት ምልከታን ማንፀባረቅ የሁሉም የሕግ ማኅበረሰብ መብትና ግዴታም ነው፡፡ ይህንን መርሕና ግብ መሠረት በማድረግ በዚህ ጽሑፍ የሰበር ሰሚ ችሎቱ በውርስ ክርክር ጉዳይ የከተማ ቦታ የይዞታ መብትን በተመለከተ የተሰጠውን የሕግ አተረጓጐም በያዘው ፍርድ ላይ አነስተኛ ምልከታ የሚደረግበት ይሆናል፡፡ በዚህ ጽሑፍ ምልከታ በሰበር ሰሚው ችሎት የተሰጠው የሕግ ትርጉም ከሐገራችን የንብረት ሕግ፣ ከአዋጅ ቁጥር 47/1967፣ ከፌደራሉ ሕገ መንግስት፣ከቤተሰብ ሕጉ እና ከሌሎች ከጭብጡ ጋር ተዛማጅነት ካላቸው ሕጐች ድንጋጌዎች ጋር በማነፃፀር የሚታይ ይሆናል፡፡

---

* LL.B, LL.M; Part-time Lecturer, Addis Ababa University, Faculty of Law.

2. ለጽሑፉ መነሻ የሆነው ፍርድ ይዘት

ሀ. ይህ ፍርድ በአመልካች የወ/ሮ አመለወርቅ ገለቱ ወራሾች እና በመልስ ሰጭዎች እነ አቶ ቢሻው አሻሜ /4 ሰዎች/ መካከል በፌ/ጠ/ፍ/ቤት ሰበር ሰሚ ችሎት በሰበር መዝገብ ቁ. 19479 በመጋቢት 20 ቀን 1999 ዓ.ም. የተሰጠ ነው፡፡

ለ. የግራቀኙ ክርክር በአጭሩ አመልካቾች «በሥር ፍ/ቤቶች ቦታውን የመልስ ሰጭዎች የግል ነው፣ የቤቱን ግምት ብቻ ተካፈሉ ተብሎ የተሰጠው ፍርድ የከተማ ቤትና ትርፍ ቤትን የመንግስት ያደረገውን አዋጅ ቁጥር 47/1967 እና የሕገ መንግሥቱን ድንጋጌዎች የሚጥስ በመሆኑ የሕግ ስህተት ተፈጽሟል» በማለት ቦታውን የመ/ሰጭዎች አውራሽ አስቀድሞ ቢይዙትም ቤቱን አውራሻቸው እንደ አዲስ በጋራ ስለሰሩ የቤቱን ግምት ብቻ ሳይሆን ከነቦታው እኩል ልንካፈል ይገባል ሲሉ ክርክራቸውን አቅርበዋል፡፡ መልስ ሰጭዎች ደግሞ «አዋጅ ቁጥር 47/1967 በከተማ ቦታ ይዞታ ላይ የግል /የቤተሰብ የይዞታ መብትን አላስቀረም/ አልከለከልም የአመልካቾች አውራሽ የቦታው የይዞታ መብት የሌላቸው በመሆኑ የቤቱን ግምት ብቻ ይካፈላሉ» በማለት በሥር ፍ/ቤቶች የተሰጠው ፍርድ የሕግ ስህተት የለበትም በማለት ተከራክረዋል፡፡

ሐ. የክርክሩ ጭብጥ፡- የመልስ ሰጭዎች አውራሽ (የባል) የግል ይዞታ በሆነ የከተማ ቦታ /ከጋብቻ በፊት በግል በተያዘ/ ላይ የአመልካቾች አውራሽ በነበራቸው የጋብቻ ግንኙነት ለውርስ ሃብት ክፍፍል እና ክርክር ምክንያት የሆነውን ቤት በጋራ እንደ አዲስ በመስረታቸው የባልና ሚስቱ የግል ወራሾች የሚከፋፈሉት ቤቱን ከነ ከተማ ቦታ ይዞታው ወይስ የአመልካቾች ድርሻ በቤቱ ግምት ላይ ብቻ ነው? የሚለው ነጥብ ነው፡፡

መ. የሰበር ሰሚ ችሎት ፍርድ «የስር ፍ/ቤቶች (የፌደራል የመጀመሪያ ደረጃና የፌደራል ከፍተኛ ፍ/ቤቶች) ቤቱ ያረፈበት ቦታ የመልስ ሰጭዎች አውራሽ የግል ይዞታ በመሆኑ አይከፋፈልም ቤቱ ግን የጋራ በመሆኑ ለአመልካች የቤቱን ግምት ብቻ ይከፈላል ያሉበት ውሳኔ ባለጉዳዮች ያደረጉትን ክርክር መሠረት ያደረገ አይደለም፡፡ የከተማ ቦታና ትርፍ ቤትን የመንግሥት ለማድረግ የወጣው አዋጅ ቁጥር 47/1967 በከተማ ቦታ ላይ የግል ባለሃብትነት ማስቀረቱን ግንዛቤ የወሰደ ውሳኔ ሆኖ አላገኘነውም አከራካሪ የሆነው ቤት የግልም ይሁን የጋራ ቤቱ ያረፈበት ቦታ የመንግስት በመሆኑ ከቤቱ ተነጥሎ እንዲገመትና አስፈላጊም ከሆነ እንዲሸጥ የሚያደርገው ውሳኔ መሬትን የመንግስት ለማድረግ የወጣውን ሕግ የሚፃረር ነው አከራካሪው ቤትና ቦታ በግራቀኙ ስምምነት እኩል ይከፋፈል፣ በስምምነት መከፋፈል ካልቻለ በሐራጅ ተሸጦ ገንዘቡን እኩል ይካፈሉ» የሚል ነው፡፡ በዚህም መሠረት የፌደራል ከፍተኛ ፍ/ቤት

ጉዳዩ በይግባኝ ሲቀርብለት አያስቀርብም ብሎ መዝጋቱ አግባብ አለመሆኑን በመተቸት የፌ/መ/ደ/ፍ/ቤትን ፍርድ በመሻር ውሳኔ ሰጥቷል።

3. የከተማ ቦታ ይዞታ መብት ከፍትሐብሔሩ የንብረት ሕግ አንፃር

በኢትዮጵያ የሕግ ሥርዓት ስለ ንብረቶች የሚመለከተው የመጀመሪያው ዘመናዊ ሕግ በፍትሐብሔሩ ሕግ ሦስተኛ መጽሐፍ በአንቀጽ ስድስት «ስለ ንብረት በጠቅላላውና ስለ ይዞታ» ከፍ/ብ/ሕ/ቁ 1026 - 1674 የተደነገጉትን የያዘው ነው። ይህ ሕግ ጠቅለል ባለሁኔታ ሲቃኝ ስለ ንብረት በጠቅላላውና ስለይዞታ፣ ስለ ግል ሃብት፣ሃብት ስለሚገኝበት ሁኔታ፣ ሃብትን ስለማስተላለፍና ሃብት ስለሚቀርበት፣ ስለባለሃበቱ መብቶችና ግዴታዎች፣ መብትን ስለሚመለከት የውል ስምምነት. . . ድንጋጌዎችን አካትቷል።

በሕጉ ግዙፍነት ያላቸው ንብረቶች ተንቀሳቃሽ የሆኑና ወይም የማይንቀሳቀሱ መሆናቸውን በአንቀጽ 1126 ተደንግንጓል። ስለ «ይዞታ ትርጓሜ» በሚለው ክፍል ይዞታ ማለት አንድ ሰው አንድን ነገር በእጁ አድርጐ በእውነት የሚያዝበት ሆኖ ሲገኝ መሆኑን፣ ይዞታ መድን ያለው ስለመሆኑም በሕጉ ተመልክቷል። በተጠቀሰው ሕግ አንቀጽ 1148 እና 1149 መሰረት ባለይዞታ የሆነ ሰው ይዞታውን ለመንጠቅ ወይም በይዞታው ላይ ሁከት ለማንሳት የሚያደርገውን ማንኛውንም ኃይል ለመከላከልና ለመመለስ መብት አለው። እንዲሁም ይዞታው የተወሰደበት ወይም በይዞታው ላይ ሁከት የተነሳበት ሰው የተወሰደበት ነገር እንዲመለስለት ወይም የተነሳው ሁከት እንዲወገድለትና ስለደረሰበት ጉዳትም ኪሳራ እንዲሰጠው ለመጠየቅ ይችላል። የባለይዞታነት መብት በማይንቀሳቀስ ንብረት ላይም ያለ ስለመሆኑ ከሕጉ አንቀጾች 1168፣ 1178 እና 1179 ለመረዳት ይቻላል።

በሌላ ሰው መሬት/ቦታ ላይ ባለመሬቱ በግልጽ እየተቃወመ ማንም ሰው ሕንፃ/ቤት የሠራ እንደሆነ በዚሁ ሕንፃ ላይ አንዳችም መብት እንደማይኖረውና ያለ ኪሳራ እንደሚለቅ ወይም አፍርሶ እንዲሄድ ሊደረግ እንደሚችልም በሕጉ ተመልክቷል። ባለመሬቱ ሳይቃወም በሌላ ሰው መሬት ሕንፃ የሰራ ሰው ደግሞ የዚሁ ህንፃ ባለሃብት እንደሆነ የአንቀጽ 1179 ድንጋጌ ያስረዳል። ባለመሬቱ ሳይቃወም በሌላ ሰው መሬት ሕንፃ የሠራ ሰው ባለመሬቱ ከባለ ሕንፃው ጋር የተስማማውን ግምት በመክፈል (በስምምነት ካልተቻለ በሕጉ መሠረት እንዲገመት በማድረግ) ባለመሬቱ ሕንፃውን ለማስለቀቅ ወይም የሕንፃው ባለሃብት በማናቸውም ጊዜ በራሱ ኪሳራ ሕንፃውን አፍርሶ ለመሄድ መብት እንዳላቸውም በግልጽ ተደንግጓል። በአንቀጽ 1195 በተደነገገው መሠረት በአስተዳደር ክፍል የሚሰጠው የባለሃብትነት የምስክር ወረቀትም የሚያረጋግጠው ባለሃብቱ ወይም ባለይዞታው ያለውን ሕጋዊ መብት ነው። በዚህ ማስረጃነትም የማይንቀሳቀስ ንብረት ባለሃብት/ባለይዞታ የሆነውና ያልሆነው ሰው የሚታወቅ ይሆናል።

እነዚህ በሀገራችን ቀዳሚ የሆነው ዘመናዊ የንብረት ሕግ ጥቂት ድንጋጌዎች ግለሰቦች በማይንቀሳቀስ ንብረት በከተማ ቦታም ሆነ በገጠር መሬት ላይ በሕግ ዕውቅና የሚሰጠውና

የሕግ ጥበቃ የሚደረግለት የይዞታና የባለሃብትነት መብት ያላቸው መሆኑን ያረጋግጣሉ፡፡ ይሁንና የዚህ ንብረት ሕግ ድንጋጌዎች አተረጓጐም የተሟላ የሚሆነው በአዋጅ ቁጥር 47/1967 የተደረጉትን ለውጦች /የሕግ መሻሻል) ከግንዛቤ በማስገባት መሆኑን ሊታወስ የሚገባው ነጥብ ነው፡፡ ነገር ግን አዋጁ የንብረት ሕጉን ሙሉ ድንጋጌዎች ያልሻረና ያልተካው በመሆኑ ከአዋጁ ጋር እስካልተቃረኑ ድረስ የንብረት ሕጉ አግባብነት ያላቸው ድንጋጌዎች በከተማ ቦታ ይዞታ መብት ክርክር ተፈፃሚነት አላቸው፡፡

የንብረት ሕጉ ለንብረት ነክ ክርክር አግባብነት ያላቸውን መሠረታዊ መርሖችና ድንጋጌዎችንም የያዘ በመሆኑ ለክርክሮች አወሳሰን ከግምት ሊወሰዱ ይገባል፡፡ ከዚህ አንፃር ከላይ የተጠቀሰው የሰበር ሰሚ ችሎቱ ፍርድ ሕግ አተረጓጐም በሥራ ላይ ካለው የንብረት ሕጉ መሠረታዊ ድንጋጌዎች ጋር ይስማማልን? የሚለው ነጥብ ምልከታ የሚያስፈልገው ነው፡፡ በፍ/ቤቱ «የሕግ ስህተት ተፈጽሟል» በሚል የተነሳው ክርክር በከተማ ቦታ ቀዳሚ የይዞታ መብትንና በግል የቦታ ይዞታ ላይ የተሠራን ቤት ክፍፍል አስመልክቶ ነው፡፡ ፍ/ቤቱ የወሰነው የከተማ ቦታን/መሬትን ይዞታና የቤት ባለ ሃብትነት ለያይቶ ለማየት እንደማይቻል የሕግ ትርጉም በመስጠት ነው፡፡ የንብረት ሕጉ ድንጋጌዎች አንቀጽ 1178 እና 1179 ግን የመሬት ይዞታ/ባለሃብትነትና የቤት/ህንፃ ባለሃብትነት በመርሕነትና በመብትነትም ተለያይተው ሊታዩ እንደሚችሉና የተለያዩ መብቶች መሆናቸውን ነው፡፡ የዚህን የሕግ አተረጓጐም አቋም የተሟላ ለማድረግ ግን አዋጅ ቁጥር 47/67 በማይንቀሳቀስ ንብረት ላይ የይዞታ መብትን አስቀርቷል? ወይስ ያስቀረው የባለሃብትነትን መብት ብቻ ነው? የሚለው ጭብጥ በቅድሚያ ምላሽ ማግኘት ይኖርበታል፡፡ በመሆኑም ቀጥሎ ይኸው ነጥብ ምልከታ ይደረግበታል፡፡

4. የከተማ ቦታ ይዞታ መብት ከአዋጅ ቁጥር 47/1967 አንፃር

ይህ አዋጅ ከላይ በቁጥር «3» ምልከታ ከተደረገበት የንብረት ሕግ ስለ ከተማ ቦታ ባለ ሃብትነትና ትርፍ ቤት የተመለከቱትን ድንጋጌዎች አሻሽሎ የከተማ ቦታና ትርፍ ቤትን የመንግስት ሃብት አድርጐታል፡፡ ነገር ግን አዋጁ በከተማ ቦታ ላይ የሚኖርን የግለሰብ/የቤተሰብ የከተማ ቦታ ይዞታ መብትንና ትርፍ ባልሆነ ቤት ላይ የሚኖረውን የባለ ሃብትነት መብት አስቀርቷልን? የሚለው ጭብጥ ጥልቅ ፍተሻ የሚያስፈልገውና በጥንቃቄ ሊታይ የሚገባው ጉዳይ ነው፡፡ ይህንንም ሁኔታ ከአዋጁ ዓላማ፣ መግቢያና ዝርዝር ድንጋጌዎቹ ለመረዳት ይቻላል፡፡

የአዋጁ ዓላማ የከተማ ቦታዎችና ቤቶች በጥቂት መሳፍንት፣ መኳንንት፣ ከፍተኛ የመንግስት ባለስልጣኖችና በከበርቴዎች በመያዛቸው ሰው ሰራሽ የከተማ ቦታ እጥረት በመፈጠሩና ለብዙኃኑ የከተማ ነዋሪ ሕዝብ የኑሮ መሻሻል ከፍተኛ እንቅፋት በመሆኑ የኢኮኖሚ፣ የፖለቲካና የሶሻል መብትን በእኩልነት ለማጐናጸፍ ለከተማው ነዋሪ ለመኖሪያም ሆነ ለመሥሪያ ቤት መሥሪያ የሚሆነውን ቦታ በመስጠት የኑሮውን ሁኔታ ለማሻሻል . . . የከተማ ቦታና ትርፍ ቤት የመንግሥት ንብረት /Government owner ship/ እንዲሆን በማስፈለጉ መሆኑን በአዋጁ መግቢያ ተመልክቷል፡፡ አዋጁ ከፀናበት ቀን ጀምሮ የከተማ ቦታ የመንግስት ንብረት መሆኑን ማንኛውም ቤተሰብ፣ ግለሰብ ወይም ድርጅት የከተማ ቦታን

በግል ባለሃብትነት ለመያዝ እንደማይችል በአንቀጽ 3 ተደንግጓል። በእግሊዘኛው ንባብም Private ownership በሕጉ የተከለከለ መሆኑን ያስረዳል። የአዋጁ አንቀጽ 5 እስከ 7 ደግሞ ስለ የከተማ ቦታ የይዞታ መብት ይናገራሉ። በዚሁ መሠረት አንድ ቤተሰብ ወይም ግለሰብ ለመኖሪያ ቤት መሥሪያ የሚያውለው እስከ አምስት መቶ ካሬ ሜትር የሚደርስ የከተማ ቦታ በይዞታ ሊሰጠው እንደሚችል፣ ባለይዞታው ሲሞት የሚች ሚስት ወይም ባል ወይም ልጆች በይዞታው ተተክተው የመጠቀም መብት እንደሚኖራቸው ተደንግጓል።

በአዋጁ በከተማ ባለ ርስትነትና በከተማ ጭሰኛ መካከል ያለውን ግንኙነትም በማቋረጥ ማንኛውም ጭሰኛ በያዘው የከተማ ቦታ ላይ የይዞታ መብት እንደሚኖረው ተመልክቷል። ከአዋጁ መውጣት በፊት የከተማ ቦታ ያለው ቤተሰብ ወይም ግለሰብ ሌላ የመኖሪያ ቤት ከሌለው በቦታው ላይ ሚኒስቴሩ በሚወስነው መጠን የቅድሚያ መብት እንደሚኖረውም በአንቀጽ 7 ተደንግጓል።

እነዚህ በአዋጁ የተካተቱት ለምሳሌነት የተጠቀሱት ድንጋጌዎች የሚያስረዱት አዋጁ የግለሰብን/ የቤተሰብን የከተማ ቦታ ይዞታ መጠን ከመገደብ አልፎ መብትን ያልገፈፈና የይዞታ መብትን ለመንግስት ብቻ ያልገደበ መሆኑን ነው። የአዋጁ ርዕስም የከተማ ቦታና ትርፍ ቤት የመንግስት ንብረት ለማድረግ የወጣ አዋጅ በእንግሊዘኛው "Government ownership of urban lands and Extra houses proclamation" በሚል መቀረጹ ከባለ ይዞታነት መብት የሰፋውን መብት ለመንግስት ማድረጉን እንጅ ዜጐች በከተማ ቦታ ላይ ምንም ዓይነት በሕግ ፊት ዋጋ ያለው፣ የሚከላከሉት፣የሚያወርሱት፣ የሚያስተላልፉትና የሚያዙበት የይዞታ መብት የሌላቸው መሆኑን አይደለም። ይልቁኑ በተቃራኒው አዋጁ መሬት/ የከተማ ቦታ በጥቂቶች ተይዞ ብዙሃኑ የገጠርና የከተማ ጭሰኛ እየሆነ መድህን በሌለው ሁኔታ በግለሰቦች ይሁንታና ፈቃድ በመሬት/ቦታ የሚጠቀምበትንና የሚነቀልበትን ሥርዓት ያስቀረ ለሕዝብ ጥቅም ተብሎ በሕግ መሠረት ካልሆነ በስተቀር ማንኛውም ሰው የይዞታ መብቱን የማያጣበትና በነፃነት የሚጠቀምበትን ሥርዓት ያመቻቸና ለከተማ ቦታ ይዞታ መብትም የበለጠ ማረጋገጫ ዋስትና ነው። በመሆኑም አዋጁ የግለሰብ/ቤተሰብ የመሬት/ቦታ ባለሃብትነትን መብት እንጅ የባለ ይዞታነት መብትን ያስቀረ/ የከለከለ ተደርጐ መተርጐሙ በዜጐች መብት ላይ አሉታዊ ውጤት ያለው ሲሆን አሳማኝም አይሆንም። ከአዋጁም ዓላማና መንፈስ የወጣ ነው።

ከአዋጅ ቁጥር 47/67 አንፃር የሰበር ሰሚ ችሎቱ የሕግ አተረጓጐም ምክንያት ሲፈተሽ፣ የግለሰቦችን/ የቤተሰብን የከተማ ቦታ ይዞታ መብትን ከባለሃብትነት መብት ጋር ያቀላቀለና ልዩነት ያላበጀ ሆኖ ይስተዋላል። የቀረበለት የሕግ ስህተት ክርክር የከተማ ቦታ ይዞታን የሚመለከት ሆኖ እያለ በከተማ ቦታ ባለሃብትነት ጭብጥ ላይ የተሰጠ ፍርድ በመሆኑ የከተማ ቦታ ይዞታ መብት እንደሌለ አቋም የወሰደበት ይመስላል። የተከራካሪ ወገኖቹ የውርስ ክርክር ግን በግልጽ በፍርዱ እንደተመዘገበው የከተማ ቦታ ቅድሚያ የይዞታ መብትን መሠረት ያደረገ እንጅ የመሬት/ቦታ ባለሃብትንትን መሠረት ያደረገ አይደለም። የባለ ሃብትነት መብት ክርክር የተነሳው በጋራ በተሠራው ቤት ላይ ብቻ ነው።

5. የከተማ ቦታ ይዞታ መብት ከኢፌዴሪ ሕገ መንግስት አንፃር

በፌዴራሉም ሆነ በክልሎች ሕገጋተ መንግስት ዲሞክራሲያዊ መብቶች ተብለው ከተካተቱት መሠረታዊ መብቶች መካከል በፌደራሉ ሕገ መንግስት አነቀጽ 40 የተደነገገው የንብረት መብት አንደኛው መሠረታዊ መብት ነው፡፡ ይህ ድንጋጌ የገጠርም ሆነ የከተማ መሬት ባለቤትነት መብት የመንግስትና የሕዝብ ብቻ መሆኑን ያስረዳል፡፡ ባለቤትነትን በተመለከተ መብቱ የመንግስት/የሕዝብ መሆኑ አያከራክርም፡፡ ምልከታ የሚያስፈልገው ጥያቄ የዜጐች/ ግለሰቦች በመሬት ላይ ያለ የንብረት መብትስ ምንድን ነው? የሚለው ነው፡፡ይህንን ጥያቄ ሕገመንግስቱ ራሱ ይመልሰዋል፡፡ ሕገመንግስቱ «ማንኛውም የኢትዮጵያ ዜጋ የግል ንብረት ባለቤት መሆኑ/መሆኗ ይከበርለታል/ይከበርላታል፡፡ይህ መብት የሕዝብን ጥቅም ለመጠበቅ በሌላ ሁኔታ በሕግ እስካልተወሰነ ድረስ ንብረት የመያዝና በንብረት የመጠቀም ወይም የሌሎችን ዜጐች መብቶች እስካልተቃረነ ድረስ ንብረትን የመሸጥ፣ የማውረስ ወይም በሌላ መንገድ የማስተላለፍ መብቶችን ያካትታል . . .» በማለት በመሬት/ቦታ ላይ ስለሚኖር የንብረት ሕገ መንግስታዊ መብት በዝርዝር አካትቶታል፡፡ ሕገመንግስቱ በመሬት የመጠቀምን፣ በመሬት ላይ ለሚገነባው ቋሚ ንብረት ሙሉ መብትን፣ ቦታውን ሲለቀቅ ካሳ የመጠየቅን... የመሳሰሉትን መብቶችም አካትቷል፡፡

ይህም የሚያስረዳው ሕገ መንግስቱ ለመንግስት ብቻ የገደበው የገጠርና የከተማ መሬትን ባለቤትነት መብት (Ownership right) ብቻ እንጅ የይዞታ መብቱን (Possession right) ከሌሎች ሕጐች የበለጠ የሚጠብቅ፣ የማይገፍ፣ የሚያስከብርና በንብረት መብትነት ያካተተው መሆኑን ነው፡፡ ከውጤቱም አንጻር ሲታይ ሕገ መንግስቱ ለዜጐች ያልተገደበ የመሬት የይዞታ መብትን አጐናጽፏል፡፡ እንዲሁም የመሬት ባለቤትነት ስሙ የመንግስት/የሕዝብ ይሁን እንጅ ዜጐችም ከባለቤትነት ተመጣጣኝ የሆነ የመጠቀምና የማስተላለፍ መብት እንደተሰጣቸው ሕገ መንግስቱም ሆነ ተግባራዊ እውነታዎች ያረጋግጣሉ፡፡

የንብረት መብት የኢትዮጵያ ሕግ አካል በሆኑት በዓለም አቀፍ የመብቶች ሰነዶቹ የተካተተ አንደኛው መሠረታዊ መብትም ነው፡፡ስለ መሠረታዊ መብቶችና ነፃነቶች አተረጓጐም ከዓለም አቀፍ ሰነዶቹ መካከል የኢኮኖሚ፣ የማህበራዊና የባህላዊ እና የሲቪልና የፖለቲካ መብቶች ዓለም አቀፍ ቃልኪዳናት በሁለቱም በአንቀጽ 5/1/ ድንጋጌያቸው የትኞቹንም መብቶችና ነፃነቶች ሕጉ ከሚፈቅደው ወሰን ውጭ እንዲነፈጉ ወይም እንዲገደቡ እንደሚፈቅድ ተደርጐ አይተረጐምም በማለት የአተረጓጐም መሠረታዊ መርሕ አካትተዋል፡፡ ይህንን መርሕ መሠረት በማድረግ ግለሰቦች /ዜጐች የከተማ ቦታ ይዞታ መብት አላቸው ? ወይስ የላቸውም? የቦታ ባለይዞታው ከይዞታ መብቱ በኋላ በውል፣ በውርስ ወይም በጋብቻ ግንኙነት ባለይዞታ ያልሆነ ሰው በባለይዞታው ቦታ ላይ በግልም ሆነ በጋራ ቤት /ሕንፃ ቢሰራ ባለይዞታው ከስምምነቱ ውጭ የይዞታ መብቱን ያጣል ? በሌላስ ሁኔታ ለሕዝብ ጥቅም ሲባል

በህግ ካልሆነ በስተቀር መሬት የመንግሥት ሃብት በመሆኑ ምክንያት ግለሰቦች ለቦታው የሚተካ መብት እንደሌላቸው ተደርጐ መተርጐም ይኖርበታልን በሚሉት አከራካሪ ጭብጦች ሁሉ መብቱ እንደማይገደብና እንደሚጠበቅ ተደርጐ በአንፃሩ ደግሞ ገደቡ በጠባቡ መተርጐም እንዳለበት ነው፡፡

ከሕገመንግሥቱና ከሌሎች ዝርዝር ሕግጋት ለመረዳት እንደሚቻለውም ግለሰቦች የከተማ ቦታ ይዞታ መብትን በነፃ የሚያገኙት ሳይሆን በልዩ ልዩ መንገድ በሊዝ ሥሪት፣ በምሪት፣ በውርስ፣ በስጦታና፣ በውል፣ በመሳሰሉት የሚገኝ የይዞታ መብቱን ለማግኘት በአብዛኛው ዋጋ የሚያስወጣ፣ መብቱም ኢኮኖሚያዊ ዋጋ ሚያወጣ ነው ። በመሆኑም የከተማ ቦታ ይዞታ መብት ያለውና የሌለው ሰው በጋብቻም ሆነ በሌላ ግንኙነት በቦታው ላይ በጋራ ቤት ቢሠሩ በቦታው የይዞታ መብት ላይ በሕግ ፊት ልዩነት የለም ብሎ መረዳቱና መሬት የመንግሥት ስለሆነ በቦታው ላይ ግለሰብ በሕግ ቅድሚያ የሚሰጠው መብት እንደሌለው አድርጎ መተርጐም ከሕገመንግሥቱ ጋር የሚስማማ ስለመሆኑ አከራካሪ ነው፡፡

፩. የከተማ ቦታ ይዞታ መብት ከሌሎች ሕጎች አንፃር

ከላይ ምልከታ ከተደረገባቸው መሰረታዊ የንብረት ሕግጋትና ሕገመንግሥት በተጨማሪ የከተማም ሆነ የገጠር መሬት ይዞታ መብትን የሚመለከቱት ሌሎች ሕጎችም የግለሰብን /የቤተሰብን የቦታ ይዞታ መብት የሚያስጠብቁና የሚያከብሩ ከህገመንግሥቱ ጋር የሚስማሙ ድንጋጌዎችን ያካተቱ መኖራቸው ይታወቃል፡፡ ለዚህ ጽሑፍ ተዛማጅነት ያላቸውን የከተማ ቦታ በሊዝ ስለመያዝ ለመደንገግ የወጣውን አዋጅ እና ለሕዝብ ጥቅም ሲባል የመሬት ይዞታ የሚለቀቅበትንና ለንብረት ካሣ የሚከፈልበትን ሁኔታ ለመወሰን የወጣውን በምሳሌነት መመልከቱ በቂ ይሆናል፡፡

ሀ. የከተማ ቦታ በሊዝ ስለመያዝ ለመደንገግ የወጣው አዋጁ ቁጥር 272/1994

ይህ አዋጅ የከተማ መሬትን የመጠቀም መብትን ለተጠቃሚዎች ለማስተላለፍ ሊዝ ዋነኛ የመሬት ይዞታ ሥሪት እንዲሆን መመረጡንና የከተማ ቦታ የመጠቀም መብት በውል የሚተላለፍ ወይም የሚያዝ መሆኑን፣ የከተማ ቦታ ለመኖሪያ ቤት እንዲያዝ የሚፈቀድ መሆኑን አካትቷል፡፡ የከተማ ቦታ በሊዝ የተፈቀደለት ሰውም የሊዝ ይዞታ ማረጋገጫ ምሥክር ወረቀት እንደሚሰጠው፣ ዘመኑም እንደ አገልግሎቱ ዓይነት ሊለያይ የሚችል ስለመሆኑ ተደንግጓል፡፡ ለመኖሪያ ቤት እስከ 99 ኣመታት የይዞታና የመጠቀም መብት የተጠበቀ ሲሆን ዘመኑ ሲያልቅም ውል የማደስ ዕድል ተፈቅዷል፡፡

አዋጁ ግለሰቦች /ቤተሰብ የከተማ ቦታ ይዞታ መብት የሚኖራቸው መሆኑንና ለዚሁም የይዞታ ማረጋገጫ ምስክር ወረቀት የሚሰጣቸው መሆኑን ያረጋግጣል፡፡ የቦታ ይዞታ ማረጋገጫ ሠርተፊኬት ያለውና የሌለው በቦታው ይዞታ ላይ በግል ወይም በጋራ ንብረት አስፍረው ቢገኙ ቦታው የመንግሥት ሃብት ስለሆነ ማናቸውም የግል መብት አይኖራቸውም ብሎ ትርጉም መስጠት አዋጁ ከሰጠውም መብት ጋር የሚጋጭ ይሆናል፡፡

ለ. ለሕዝብ ጥቅም ሲባል የመሬት ይዞታ የሚለቀቅበትንና ለንብረት ካሣ የሚከፈልበትን ሁኔታ ለመወሰን የወጣው አዋጁ ቁጥር 455/1997

ይህ አዋጅ የመሬት ይዞታ ለሕዝብ ጥቅም ሲባል በሕግ መሠረት እንዲለቀቅ ሲደረግ ለባለይዞታው ካሣ እንደሚከፈል ካሣውም በዓይነት ወይም በገንዘብ ወይም በሁለቱም የሚከፈል ሊሆን እንደሚችል በዝርዝር ያስረዳል፡፡ "የመሬት ባለይዞታ" ማለትን ሲተረጉም ደግሞ ሕጋዊ ባለይዞታነት ያለው ማንኛውም አካል መሆኑን ያመለክታል፡፡ ይህ አዋጅ ስለካሣ አወሳሰን የካሣ መሠረትን መጠኑንና ስለ መፈናቀያ ካሣ በተደነገጉት አንቀጾቹ /ቁ 7 እና 8 / ካሣ የሚከፈለው የመሬት ባለይዞታው በመሬቱ ላይ ላሰፈረው ንብረት ቋሚ መሻሻል ጉልበት ታስቦ መሆኑንና ከሚከፈለው ካሣ በተጨማሪ የመኖሪያ ቤት መሥሪያ ምትክ የከተማ መሬት እንደሚሰጠው የኪራይም ግምት እንደሚያካትት ደንግጓል፡፡ የገጠርን መሬት ይዞታ ለሚለቅም የመፈናቀያ ካሣ የማግኘት መብት ስለመኖሩ አካትቷል፡፡ በአጭሩ የዚህ አዋጅ ዓላማና ዝርዝር ድንጋጌዎቹ ግለሰቦች/ዜጎች በከተማ ቦታ ላይ ኢኮኖሚያዊ ዋጋ ያለውና የሕግ ጥበቃ የሚደረግለት የይዞታ መብት ያላቸው መሆኑን ያረጋግጣል፡፡

7. የከተማ ቦታ ይዞታ መብት ከውርስና የቤተሰብ ሕግጋት አንፃር

ለዚህ ጽሑፍ ምልከታ ምክንያት የሆነው ፍርድ የተሰጠው ጋብቻቸው በሞት በፈረሰ ባልና ሚስት የግል ወራሾች መካከል የተደረገ ክርክር ነው፡፡ የወራሽነት መብት ከሕግ እና ወይም ከኑዛዜ የሚገኝ ስለመሆኑ የውረስ ሕጉ ያስረዳል፡፡ መብቱም አውራሹ ያለውን መብት መሠረት አድርጎ የሚተረጉም ነው፡፡ በተጠቀሰው ጉዳይ የባልና ሚስቱ ወራሾች መብት መሰረት ያደረገው ከላይ በክፍል 2 ሥር እንደተገለጸው የባልና ሚስትን የጋራና የግል ንብረትን ክፍፍል ነው(የጉዳዩን ይዘት ይመልከቱ)፡፡

የግራ ቀኙ ክርክር የወራሽነትን መብት መነሻ ያደረገ ቢመስልም ለመብታቸው ቀዳሚ ምንጩ ግን ጋብቻ በንብረት በኩል የሚያስከትለውን ውጤት ሕግ መሠረት ያደረገ ነው፡፡ በመሆኑም ሊፈተሽ ሚገባው ከውርስ ሕጉ ይልቅ የቤተሰብ ሕጉ ይሆናል፡፡ ጋብቻ በተጋቢዎች በንብረት በኩል ስለሚኖረው ውጤት በተሻሻለው የቤተሰብ ሕግ አዋጅ ቁጥር 213/92 በዝርዝር ተደንግጓል፡፡ ተጋቢዎች ጋብቻቸው በንብረት በኩል ስለሚኖረው ውጤት በጋብቻ ውል የመወሰን መብትና ሥልጣን ተሰጥቷቸዋል፡፡ የጋብቻ ውል በሌለ ጊዜ ወይም የጋብቻ ውል ቢኖርም በሕግ ሳይጸና የቀረ እንደሆነ ደግሞ የቤተሰብ ሕጉ ድንጋጌዎች ተፈጻሚ እንደሚሆኑ በአንቀጽ 48 ተደንግጓል፡፡ በዚሁ መሰረት ባልና ሚስት ጋብቻቸውን በሚፈጽሙበት ጊዜ በየግል የነበራቸው ንብረቶች ወይም ከጋብቻ በኋላ በውርስ ወይም በስጦታ ለየግላቸው ያገኟቸው ንብረቶች የግል ንብረቶቻቸው ሆነው እንደሚቀሩ በአንቀጽ 57 በግልጽና በአስገዳጅነት ተደንግጓል፡፡ የዚህን ድንጋጌ ውጤት መለወጥ የሚቻለው በጋብቻ ውል ብቻ ነው፡፡ ከጋብቻ በኋላ የተገኙ ንብረቶች ደግሞ በፍ/ቤት ውሣኔ የግል እስካልተባሉ ድረስ /የአንቀጽ 57 ድንጋጌ እንደተጠበቀ ሆኖ/ የጋራ ለመሆናቸው የሕግ ግምት ይወሰድባቸዋል፡፡

የከተማ ቦታ ይዞታ መብት ከላይ ከቁጥር 2-6 በዝርዝር እንደተመለከተው አንደኛው መሰረታዊና ሕገመንግሥታዊ የንብረት መብት ነው፡፡ ስለሆነም ጋብቻቸው በፈረሰ ባልና ሚስት ወይም በወራሾቻቸው መካከል የንብረት ክፍፍል ክርክር በሚነሳ ጊዜ ሁሉ ከክፍፍሉ

ሥርዓት በፊት የግልና የጋራ የሆነው የንብረት መብቶቻቸው መለየት ይገበዋል። የቤተሰቡም ሆነ የውርስ ሕግጋቱ ያንደኛውን የግል ንብረት /መብት ያለ ስምምነት አሳልፎ ለሌላኛው የሚሰጥ ድንጋጌዎችን አላካተቱም። የውርስና የቤተሰብ ሕግጋቱ አተረጓጎም ከሌሎች ሕጎችና ከሕገ መንግሥቱ ጋር በተጣጠመ መንገድ ሊሆን ግድ ይላል።

በሰበር ሰሚ ችሎቱ የተሰጠው የህግ ትርጉም በቤተሰብና በውርስ ሕግጋቱም መለኪያነት ቢሆን ሲመዘን፣ አሳማኝነት ይጐድለዋል። በፍርዱ የተሰጠው የሕግ አተረጓጎም ተቀባይነት የሚኖረው፣ የከተማ ቦታ ይዞታ መብት እንደንብረት መብት አይቆጠርም የሚባል ከሆነ ብቻ ነው። ይህ ግዙፍ መብት ደግሞ በሚንቀሳቀስም ሆነ በማይንቀሳቀስ ንብረቶች ላይ ዕውቅናና ጥበቃ የተሰጠው ነው።

8. ማጠቃለያ፡-

የፌ/ጠ/ፍ/ቤት ሰበር ሰሚ ችሎት የግለሰቦችን /የቤተሰብን የከተማ ቦታ ይዞታ መብት ከቦታ /መሬት የመንግሥት ባለሃብትነት ጋር ልዩነት ሳያደርግ የሕግ ትርጉም ሰጥቶበታል። ይህ አቋም ግለሰቦች /ቤተሰብ በንብረት ላይ ያላቸውን የተለያዩ ዓይነት መብቶች እንደ የይዞታ፣ የመጠቀም፣ በውርስ ወይም በሌላ ሁኔታ የማስተላለፍ የመሳሰሉትና ከመሬት/ቦታ ባለሃብትነት በመለስ ያሉትን ሕገመንግሥታዊና ኢኮኖሚያዊ መብቶችን ያላገናዘበ ነው። በከተማ ቦታ ይዞታ የመጠቀም፣ የማውረስ፣ የማስተላለፍ መብት ለመኖሩም የበላይ ህግ በሆነው የሕገመንግስቱ አንቀጽ 40 የተደነገገ መሆኑ አያከራክርም።

በመሠረቱ ከንብረት ሕግ ሥርዓትና መርሕ አንፃር፣ የባለ ሃብትነት መብት/Ownership right/ እና የባለ ይዞታነት መብት /Possession right/ ልዩነት ያላቸውና ራሳቸውን የቻሉ ተለያይተው የሚታዩ መብቶች መሆናቸውን ትኩረት የሚፈልግ ጭብጥ ነው። በሰበር ሰሚ ችሎት በከተማ ቦታ ይዞታ መብት የተሰጠው የሕግ ትርጉም ከሕገመንግሥቱ አንቀጽ 40 ድንጋጌ ፣ከንብረት ሕጉ፣ ከአዋጁ ቁጥር 47/67 እና ከሌሎችም ሕጎች ጋር የሚስማማ አይደለም። የበታች ፍ/ቤቶችንም ሆነ የፍርዱን ተጠቃሚዎችና አንባቢዎች / Audiences/ ሁሉ የማሳመን አቅሙ በእጅጉ አነስተኛ ነው።

በሕግ አተረጓጎም /Legal reasoning or interpretation/ ታዋቂ የሆነው ሊቅ ኔይል ማክ ኮርሚክ /Neil Mac Cormick/ አንድ ሕግ ሲተረጐም ከሌሎች ሕጐች ጋር ያለው ወጥነት፣ ከሕግ ሥርዓቱ /መርሖዎች ጋር የሚስማማ መሆን እና በዜጐች መብት ላይ የሚኖረው ውጤት /Consistency, coherence and consequence/ ሁል ጊዜ ከግምት መግባት እንዳለባቸው በመርሕነት መቀበል እንደሚገባ ያሳስባል።

የፌ/ጠ/ፍ/ቤት ሰበር ሰሚ ችሎትም የሚሰጣቸው የሕግ ትርጉሞች እነዚህን ሦስቱን መለኪያዎች ከወዲሁ የሚተነብይ ከሆነ ለሀገራችን የፍትሕ ስርዓትና የሕግ ሣይንስ ዕድገት፣ እንዲሁም ለፍ/ቤቶች ፍርድ አሰጣጥ ውጤታማነት፣ ቅልጥፍናና ተገማችነት ዕድገት ከፍተኛ ሚና እንደሚኖረው ይታመናል።

TRANSFER OF OWNERSHIP OVER MOTOR VEHICLES

Muradu Abdo*

Introduction

Motor vehicles fall obviously within the domain of movable things in the scheme of division of things under the Ethiopian Civil Code (the Code).[1] More specifically, they belong to the sub-domain of special movables.[2] This Case Comment seeks to address the question: what are the conditions required for the valid transfer of ownership over a motor vehicle under the property law of Ethiopia? The treatment of this issue requires the answer to the more general question of the requirements for the valid transfer[3] of ownership in respect of

---

* LL.B., LL.M., Assistant Professor of Law, Addis Ababa University.

[1]Article 1127 of the Code defines a corporeal movable as a thing which has material existence and moves by itself or be moved by man without losing its individual character.

[2]Recognition of the division of movable things into ordinary and special can be inferred from Articles 1186/2, 2267/2 and 3047/2 of the Code. Special movables may be corporeal (e.g. motor vehicles) or incorporeal (e.g. business). The basis of this dichotomy of movable things into special and ordinary seems to hinge entirely on the wishes of the legislature. When the legislature deems it appropriate to single out a movable thing and put it in the category of special movable, that is all to it. See Article 124 of the Commercial Code of Ethiopia which treats business as a special movable. There are other laws which give special treatment to some movables. For example, TV sets, motor vehicles, construction machinery and arms are considered by separate laws as special movables. For the purposes of transfer, ships, vessels and airplanes are assimilated to immovable property in France and Louisiana. See A. N. Yiannoplous, ``Movables and Immovables in Louisiana and Comparative Law,`` 22L.L.R. (1961-1962) at 561. Special movables are limited in number under Ethiopian property law. Business, motor vehicles, construction machinery, ships, and non-negotiable instruments, patent and trademarks are special movables in Ethiopia. See also Articles 150-205 of the Commercial Code of Ethiopia; Motor Vehicle and Trailer Regulation, Legal Notice, 1969, No 360, Year 28 No 9; Registration and Control of Construction Machinery, Article 4/1, 1999, No 177 Year 29 No 61. A ship must be registered. For the valid transfer of property rights in a ship with Ethiopian nationality, the instrument which establishes such rights must be ``drawn up in a recognized legal form`` and registered with ship registers. Publication must take place as well in order to set up such agreements against third parties. See Maritime Code of the Empire of Ethiopia, Articles 7-8, 45, and 50, Proc. No 164, 1960, Neg. Gaz. Year 19, Extraordinary Issue No 1. Article 341 of the Commercial Code provides that the effective transfer of registered shares requires registration. See also Articles 722 & 723 of the same Code. See Inventions, Minor Inventions and Industrial Designs, Articles 14 & 15, Proc. No 123, 1995, *Nega. Gaz.*, No 25 Year 54. The designation of a movable as special although which ordinary movable joins the category of special movable appears to be dictated by a variety of other interests. Some movables are seen by the lawmaker as deserving special treatment because of a combination of many factors such as their economic value (e.g. aircrafts and ships), security reasons (e.g. arms) and the need to ensure continued enjoyment by debtors after such things are given in the form of security (e.g. construction machinery).

[3]Transfer of ownership implies the flow of a series of rights from one person to another. The series of powers a person may have over a thing includes the right to use, the right to collect fruits and the right to dispose. The term `transfer` rather means enabling the transferee to enjoy the series of rights the transferor (the owner) has been enjoying over the thing to a new owner. Transfer is a matter of empowering the transferee. The use of the term transfer excludes from the scope of this Case Comment

special movables under the extant Ethiopian property law. Part I outlines the conditions necessary for the legitimate transfer of ownership over special movables. The next part explains the legal consequences of division of movables into special movables and ordinary movables under the Ethiopian property law. The third part comments on two Supreme Court cases. Finally, conclusion and recommendation follow.

I. Requirements

The legal conditions necessary for the transfer of ownership over special movable are:

1) There should first be a cause, meaning the justification for transfer of ownership[4] as exemplified by a contract of sale[5] or donation[6] or a testament[7] or an order made by a court of law following court attachment or winding up of intestate succession or an expropriation order.[8]
2) The cause of the transfer of ownership shall be reduced into writing. This requirement that contracts pertaining to special movables must be reduced into writing is made patent no where in the Code. In our contract law, form is an exception; written formality is required only if the law or the parties require so.[9] Yet there are reasons to argue that written contract is mandatory in relation to juridical acts pertaining to transfer of motor vehicles. First, reducing transactions over motor vehicles among those who involve in such transactions has become a settled practice in the sense that it is followed by at least the overwhelming majority of community of car dealers and owners, which has been observed repeatedly and regularly over a long period of time. These features, I think, have elevated such practice to the status of customary rule. If this is the case, the making of a contract pertaining to transfer of motor vehicles in writing must be a term of such

---

discussion about obtaining of ownership over special movables through acquisition, which is acquiring ownership via means others than transfer, for example, through the passage of time. See Article 1192 of the Code.

[4]Notice that the term used by the Amharic version of Article 1184 of the Code may be translated as ``juridical act`` while the English version makes mention of one type of juridical act namely an agreement.

[5]See Article 1184 of the Code

[6] Id.

[7] Id.

[8]Id, Article 1467/2 of the Code; though written having in mind expropriation of immovable property, this sub-article should apply to the expropriation of special movable, with the necessary change.

[9] Id., Article 1719.

contract dictated by custom by virtue of Article 1713 of the Code.[10] In the second place, there is at least one occasion whereby administrative authorities require parties to a contract in connection with transfer of motor vehicles to produce a written contract. Contracts in connection with motor vehicles are required to be authenticated by law. Such act of authentication obviously requires the production of a written document.[11] Thus, special law and custom require that the making of contracts concluded to transfer ownership over motor vehicles must be made in a written form.

3) The third condition of transfer of ownership over motor vehicles is authentication of the written contract. The written contract which is intended to transfer ownership must be authenticated means: an authorized public notary officer witnesses the singing of a document by the person who has prepared such document and followed by singing and affixing a seal by the same public notary officer or the same public notary officer signs and affixes a seal on a document signed in his absence by ascertaining its authenticity through an affidavit or specimen signature and/or seal.[12] Thus, written contracts in respect of transfer of ownership over motor vehicles must be authenticated in either of these two methods.
4) Issuance of certificate of title by the relevant government authority is the step which completes the transfer process. The previous title certificate issued in the name of the transferor should be surrendered to the authority for cancellation by such authority, and a new title certificate in the name of the transferee shall be issued and the car must subsequently be registered by the authority in the name of the transferee.[13] The authority does this

[10] This provision stipulates that parties to a contract are bound, among others, by such incidental effects as are attached to the obligations by custom.

[11] See Article 2/2 of Proc. 334/2003, *Fed. Neg. Gaz*. No. 54 Year 9, which defines a document any written matter submitted for authentication and registration. See also Article 15 of the same Proclamation. See also Articles 1727/2 and 1728/1 of the Code, which require that the written contract shall be signed by the parties and attested by at least two witnesses.

[12] See Article 2/1 of Proc. No. 334/2003.

[13] See Article 9 of Legal Notice No 360/69. As a matter of practice, the seller (or her heirs) and the buyer have to appear in person or via their agents, before the authority in charge of registering motor vehicles, and request the cancellation of the name of the former and enter in the register of motor vehicles the name of the buyer. The pertinent law, however, does not require appearance in person of parties to transactions over motor vehicles. As matter of law, in the case of conventional transfer of title in respect of a motor vehicle, the two parties fill out and sign a form called Title Transfer Page. The buyer alone may deliver the completed Title Transfer Page along with the Car Booklet Title bearing the name of the seller to the concerned authority. Then, the concerned public authority verifies the signature of the seller; cancels the old title certificate and then issues a new title in favor of the buyer. The requirement of personal appearance has on many occasions complicated title transfer process because sellers in some cases refuse to accompany the buyer. In that case, buyers ask the concerned authority to effect them the transfer but in vain. The buyer sues the seller requesting the court to compel him to appear in person before the proper authority to facilitate the transfer process. Some five years ago, this type of litigation

upon the submission of the appropriate documents (e.g. authenticated contract, court decision or expropriation order or auction upon the completion of foreclosure sale). Once the transferee secures a car booklet title in his name, he becomes the master of the motor vehicles described in such title certificate; afterwards, it is immaterial whether or not he has secured possession of the car.

Therefore, under the existing law of Ethiopia, valid transfer of ownership over special movables generally and motor vehicles particularly requires these cumulative conditions: written, authenticated cause plus the issuance of title certificate (in the name of the transferee) by the pertinent government authority. This Comment will consider this last condition of transfer of ownership of motor vehicles because it is in connection with this requirement court litigation is often triggered.

II. Legal Effects

But before one starts considering the cases, one may want to know about some of the implications of the requirement of title certificate.[14] In a sharp contrast with the case of special movables, the law greatly simplifies the requirements of transfer of ownership over ordinary movables. Unlike special movables, the conclusion of a contract or testament followed by delivery completes transfer

---

generated a huge controversy between courts and practitioners. Some judges took the stance that the buyer had to request the authority in charge of registration of motor vehicles and should it refuse to do so, she had to file a suit against authority in a court of law; the practitioners, on the other hand, insisted that the courts had to order the seller to personally appear before the authority to effect the transfer. Some courts however accepted plaintiffs plea and ordered defendants (sellers) to make a personal appearance to speed up title transfer. See Shiferaw Tsegaye V. Wendemu Bekele (Sup. Ct., Civil File No 800/81 (Yekatit, 1981E.C. Unpublished); Lema Kebede V. Muluneh Becheri and Tadele Beyene (Sup. Ct., Civil File 185/89, Tahesasse 1991 E.C., Unpublished) Esmail Nur V. Fikremarkos Teklu (Federal First Instance Ct., Civil File No 1000/89, Tahessase, 1991 E.C., Unpublished)

[14]There are other distinctions which emanate from the division of movables into ordinary and special. One cannot acquire the ownership of special movables through possession in good faith. The belief on the part of an acquirer in the fact that the person from whom she concludes a sale contract holds title or is legitimate person to make transfer is destroyed by publicity which raises a presumption of knowledge on the part of the buyer. It appears that Articles 1161-1167 of the Code should not be invoked with regard to special movables for publicity destroys any claim of good faith on the party of a third party. Special movables are to be subjected to mortgage while ordinary movables are to be charged with pledge**.** See Kebedech Tesfa V. Yoseph Andu, (Sup. Ct. Civil File No. 1286/74, Ginbot 16, 1975 E.C., Unpublished) where the Court held that a creditor who extends loan to an owner of a motor vehicle shall have priority right, as real security holder, to be paid out of the proceeds of such motor vehicles provided the debtor-motor vehicle owner handed over to the creditor the possession of the car booklet title to evidence the real security as per their contract of loan. Simply stated, to the Court, a creditor who possesses a car booklet title bearing the name of his debtor pursuant to a contract shall be deemed to have a real security right in the car.

of ownership in respect of ordinary movables.[15]Yet, mere possession of a special movable alone does not make one an owner thereof.[16] As a corollary, one cannot establish the ownership of a special movable by proving mere possession. He who alleges the ownership of a given special movable must establish it by producing a certificate of tile. For example, Ato K owns an automobile. He sells the car to W/rt S. W/rt S pays the full price of the car. Ato K surrenders the possession of the car to her together with a certificate of title bearing his name. W/rt S has not obtained a title certificate in respect of the car in her name. Ato K still owns the car while W/rt S is a possessor of the car. If the car causes damage to a third party, the third party may petition for the attachment of the car on the theory that the car is till part of the patrimony of Ato K. If Ato K defaults his tax or contractual obligations, his creditors may legitimately seek to attach the car he has already sold to W/rt S. Ato K may transfer, for free or consideration, the ownership of the car in question to a third party, say W/ro L In doing so he, of course, risks a right in *personam* law suit from the first buyer. W/ro L can obtain ownership over the car provided the transfer requirements are fully complied with. In the event of the death of Ato K, his off springs may legitimately be tempted to treat such car as part and parcel of the hereditary estate of their late father. Finally, if one follows the principle that risk transfers with the transfer of ownership, the risks associated with the car Ato K sold to W/rt S remains with him. This hypo captures disputes over motor vehicles which often arise in our courts as illustrated in the two court cases examined below.

III. Case Analysis

In the case between *Habtab Tekle v. Esayas Leke and Bezabeh Kelele*,[17] the issue was whether or not transfer of ownership relating to a certain car was transferred to the appellant. Bezabeh imported a car duty free. After using such car for a while, he sold it to Habtab. The contract of sale was made in writing, signed by the parties and attested by the required number of witnesses. Moreover, the contract was authenticated by and deposited with the

[15]See Articles 1184, 1186/1 and 1183/1 of the Code. The law desires their speedier movement in the market. A requirement to pass through longer and rigorous steps in the process of transfer of ordinary movables would be impractical and unnecessary; and that would impede their flow in commerce given their volume, number and frequent exchange of hands in a market.

[16]See Ditu Tufa V. Jemal Shita (Sup. Ct., Civil File No 666/82, Sene 1982 E.C. Unpublished); Colonel Belayneh Mengistu V. Mugyb Seid, Sup. Ct., Civil File No 305/86, Hidar 1987E.C. Unpublished); Hagbes PLC V. Colonel Mulugeta (Sup. Ct., 1986 E.C. Unpublished)

[17]Supreme Court, Civil File No. 570/80 (Sene 22, 1980 E.C.) See Getaneh Agonafer V. Fantu Gutema (High Ct., Civil File No 369/78 (Miazia, 1980 E.C. Unpublished); Eteneh Tadele V. Berta Construction (High Ct., Civil File No 285/80 (Gnbot 1980 E.C., Unpublished) .

appropriate government authority. The buyer paid the whole price to the seller and took delivery of the care as well as the car booklet title yet bearing the name of Bezabeh. In the meantime, Esayas, a creditor of Bezabeh secured a judgment against the latter. And Esayas in trying to enforce this judgment sought to attach the car Bezabeh sold to Habtab as such car at that time was registered in the name of his judgment debtor, Bezabeh. This led a law suit essentially between Esayas and Habtab at the High Court.

The High Court decided that the car in dispute was owned by Bezabeh, the second respondent, reasoning that in relation to special movables transfer was equivalent to the transfer of immovable property and that the person in whose name a special movable such as a car was registered and title certificate was issued was the owner thereof. As, thus, the title deed concerning the car in dispute bore the name of Bezabhe, he was the owner of the car and thus the car could be attached to satisfy the claim of the first respondent, Esayas.

Habtab appealed. The appellant (Habtab) argued that he was the owner of a car as he bought it from the second respondent (Bezabeh) paying the full price, making the contract of sale in writing, having it authenticated and deposited with the proper authority and entering into possession of the car. Habtab, the appellant, thus, claimed that the ownership of the car was transferred to him even if the title certificate relating to the car was not issued in his own name as the transfer of ownership relating to the motor vehicle was not completed because of circumstances beyond his control in particular because the second respondent was not willing to pay tax on the car in question. To the appellant, the creditors of Bezabeh such as Esayas could not attach the car to satisfy their claims for the property in dispute was withdrawn from the patrimony of Bezabeh and became part of his own patrimony. Esayas, the first respondent, on the other hand, argued that the car was attached to satisfy the debt of Bezabeh after ascertaining that the title deed still bore the name of the second appellant and that the car had to be sold to satisfy his claim against Bezabeh.

The Supreme Court reversed this decision. As per Articles 1186/2 and 1195 of the Code, the Supreme Court reasoned that he who possesses a title certificate pertaining to a special movable in his own name is presumed to be the owner. The Supreme Court proceeded to reason that the presumption laid down under Article 1195 of the Code can be set aside by contrary evidence. To the Court, under certain situations, he who is in possession of a certificate of ownership, even in his name, relating to a special movable might not be treated as an owner of such movable. To the Supreme Court, the contrary evidence is one of

the grounds mentioned in Article 1196, i.e., the title deed was not issued in accordance with the law or was issued by an authority having no jurisdiction; or the title deed was issued on the basis of an invalid act or the plaintiff acquired the ownership of the immovable after the day on which the title deed was issued. The Court stated that the appellant would have completed the process of transfer that progressed well if the second respondent had paid the required tax. The second respondent did not pay the tax on the car, which he imported duty free and which upon transfer of such type of property was required to be paid. Further, the Court stated that the contract of sale of the car took place a year before Esayas instituted debt recovery suit against Bezabeh showing that the appellant had bought the car from the second respondent well before the attachment order. Based on these considerations, the court thought that the ownership of the car had to go to the appellant.

It is submitted that the decision of the Supreme Court is wrong because the appellant did not rebut the presumption that that car belonged to Bezabhe who was in possession of the car booklet title bearing his name within the meaning of Articles 1195 and 1196 of the Code. In the decision, none of the three factors envisaged and indicated above to rebut the presumption of ownership under Article 1195 was shown to have existed. The Court considered the failure to pay tax by Bezabhe as a good cause that had to go into the determination of rebuttal factors. It was true that the failure to pay tax on the part of Bezabeh to the authorities prevented the completion of the transfer of title in respect of the car in controversy to the appellant. But that was not a pertinent element to rebut the presumption of ownership in favor of the person who is in possession of a car booklet title indicative of ownership. A judgment delivered in the absence of such rebuttal factors would contravene a straightforward legal rule; it would obviously cast doubt on the predictability of court decisions. On the top of that, the fact that the appellant bought the car in dispute from the second respondent well before the attachment order does not have any legal consequence as state of mind of an acquirer is not relevant in the case of special movables. The car in dispute was still owned by the Bezabeh in whose name it was registered with the pertinent authority. The Supreme Court should however be praised for recognizing the rule that for the purpose of transfer, special movables are similar to immovable property and that the rules designed to regulate the latter may apply, with the necessary changes, to the transfer of the former.

In, *Asnakech W/Mariam V. Alemayehu Ahmed*,[18]the respondent sold his car to another person. The contract of sale of the car was duly made in writing, signed by the parties, attested by witnesses as well as authenticated by and deposited with the proper authority. Buyer paid the price of the car to the seller, perhaps, too. Alemayehu delivered the possession of the care as well as the necessary documents including the title certificate bearing his name to the buyer. The employee of the buyer caused fatal accident against the son of the applicant, Asnakech, with the car under consideration.

Asnakech sued Alemayehu, among two other parties, at the Federal First Instance Court on the basis of Article 2081/1 of the Code which, in part, stipulates: *The owner of a … motor vehicle shall be liable for any damage caused by the … vehicle, notwithstanding that the damage was caused by a person who was not authorized to … drive the vehicle.* What is envisaged here is liability irrespective fault; strict liability is the basis of this sub-article. The only thing that a person should do to be liable under this clause is to be an owner of a motor vehicle. The ownership test is the condition required to tag him as tortuously liable. Asnakech wanted the Court to hold Aleamyehu liable for the death of her son and pay damages as claimed. This first instance court held that Alemayehu should not be held liable as he transferred liability associated with the car to the buyer at the time of the sale of such car which caused the accident. Unhappy with this decision, Asnakech appealed to the Federal High Court, which confirmed the decision of the lower court.

Then the woman filed a petition for cassation with the Federal Supreme Court. One of the main issues framed by the Supreme Court was: who was the owner of the car that caused the accident at the relevant time (the moment of the accident), the seller or the buyer? The Supreme Court held that transfer of ownership in relation to motor vehicles is not complete until a car booklet title is issued in the name of the buyer. To the Supreme Court mere possession of a motor vehicle does not make one an owner of the same under Ethiopian law. The car sold to a third party being registered in the name of Alemayehu at the critical time, he shall be treated at the true owner of such car. Transfer of ownership over the car was initiated and advanced to some stages but not completed at the time of the occurrence of the accident. The Court held that if Alehayehu was taken as the owner of the motor vehicle, the principle of strict liability should apply to his case pursuant to Article 2081/1 of the Code.

---

[18]*Chilot Zena Mestehet,* Vol. 1 No. 2 (Sup. Ct. Cassation File No. 24643, Hamle 29, 2000 E.C.) at 9-10.

It is submitted that the decision of the Supreme Court in the second case considered above is correct both seen in light of the letter and spirit of the existing legal regime on the matter. The reasoning of the Supreme Court is quite instructive as it carefully documents the various pertinent laws in the area of transfer of ownership over motor vehicles. The decision also has clarified the rationale behind the special treatment the law accords to motor vehicles. And more generally the judgment is pertinent for the appreciation of the basis of and rationale behind the division of movables into special and ordinary in the legal system of our country.

Conclusion

Our courts should bear in mind the full implications of the dichotomy of movables into special movables and ordinary movables built implicitly in the Code and explicitly in special laws. Legislative intervention might be appropriate to consolidate and clearly state the various rules pertaining to transfer of special movables particularity and special movables generally. In this connection, it has been suggested as follows: *The acute problem regarding the right of the non-complying buyer and that of the levying creditors of the seller can easily be remedies if the legislature takes a clear position. It should not leave this delicate issue open to absolute court discretion lest it may lead to arbitrariness and abuse since courts decisions are found to be inconsistent even with the same jurisdiction. Total reliance on courts` interpretation of Leg. Not. No 360/69 does not seem to be a lasting solution. The legislature either has to clearly rule that the buyer of a motor vehicle can not acquire a right which can be raised as a defense against third parties unless the right is evidence by title certificate book or it has to provide that the contract of sale of motor vehicles does not produce effect as against third parties unless it is registered*[19]

[19]Yazachew Belew, The Law and the Practice Relating to Sale of Motor Vehicles in Ethiopia, Addis Ababa University, Faculty of Law, April, 1998, Law library, Unpublished) at 63-66.

CIVIL LIABILITY FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW: THE JURISPRUDENCE OF THE ERITREA-ETHIOPIA CLAIMS COMMISSION IN THE HAGUE

Won Kidane*

I. INTRODUCTION

Violations of international humanitarian law[1] are compensable by a state causing the

* LL.B., LL.M., J.D., Assistant Professor of Law, Seattle University School of Law. The article was originally published by the *Wisconsin International Law Journal*, Vol. 25 No.23 (2008).

[1] The term "international humanitarian law" or jus in bello represents in its current usage all rules of international law designed to govern the treatment of human persons, civilian or military, active, inactive, sick or wounded in armed conflict. Hans-Peter Gasser writes that International Humanitarian law is not "a cohesive body of law, but a category of separate legal proscriptions." M. Cherif Bassiouni & Peter Manikas, The Law of International Criminal Tribunal for the Former Yugoslavia 441 (1996) (citing Hans-Peter Gasser, International Humanitarian Law, in Hans Haug, Humanity for All 1, 3 (1993)). Most rules of current importance are contained in the Four Geneva Conventions of 1949: Geneva Convention I for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field arts. 31-83, entered into force Oct. 21, 1950, 75 U.N.T.S. 1950; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea arts. 85-133, entered into force Oct. 21, 1950, 75 U.N.T.S. 1950; Geneva Convention III Relevant to the Treatment of Prisoners of War arts. 135-285, entered into force Oct. 21, 1950, 75 U.N.T.S. 1950; Geneva Convention IV Relevant to the Protection of Civilian Persons in Time of War arts. 287-417, entered into force Oct. 21, 1950, 75 U.N.T.S. 1950; and the two Additional Protocols of 1977: Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 3-608, entered into force Dec. 7, 1978, 1125 U.N.T.S. 1979 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict 609-99, entered into force Dec. 7, 1978, 1125 U.N.T.S. 1979. This also comprises a set of rules formerly known as the Laws of War contained in the Hague Conventions of 1907: Hague Convention IV Respecting the Laws and Customs of War on Land, entered into force Jan. 26, 1910, reprinted in Adam Roberts & Richard Guelfee, Documents in the Laws of War 67-84 (3d ed. 2000) [hereinafter Hague Convention IV]; Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, entered into force Jan. 26, 1910, reprinted in Adam Roberts & Richard Guelfee, Documents in the Laws of War 87-94 (3d ed. 2000); Hague Convention VII Relating to the Conversion of Merchant Ships into Warships, entered into force Jan. 26, 1910, reprinted in Adam Roberts & Richard Guelfee, Documents in the Laws of War 97-104 (3d ed. 2000); Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines, entered into force Jan. 26, 1910, reprinted in Adam Roberts & Richard Guelfee, Documents in the Laws of War 105-10 (3d ed. 2000); Hague Convention IX Concerning Bombardment by Naval Forces in Time of War, entered into force Jan. 26, 1910, reprinted in Adam Roberts & Richard Guelfee, Documents in the Laws of War 112-17 (3d ed. 2000); 1907

violations.[2] The roots of this obligation can be traced to Article 3 of Hague Convention IV, which states that a party to the conflict "which violates the provisions of [international humanitarian law] shall . . . be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."[3] A similar rule is also contained in Protocol I Additional to the 1949 Geneva Conventions.[4]

In practice, the enforcement of this important provision of international humanitarian law has remained a matter of rarity, particularly in terms of civil-rather than criminal-liability.[5] However, a recent exception is the Eritrea-Ethiopia Claims Commission in

---

Hague Convention XI Relevant to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, entered into force Jan. 26, 1910, reprinted in Adam Roberts & Richard Guelfee, Documents in the Laws of War 121-25 (3d ed. 2000); Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War, entered into force Jan. 26, 1910, reprinted in Adam Roberts & Richard Guelfee, Documents in the Laws of War 127-37 (3d ed. 2000). More recent instruments include the Inhumane Weapons Convention of 1980: U.N. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects arts. 137-255, entered into force Dec. 2, 1983, 1342 U.N.T.S. 1983; and related norms of customary international law. This set of rules is distinct from a body of rules governing the legitimacy of the resort to force, often referred to as the jus ad bellum, which is essentially based on Article 2 paragraph 4 and Chapter VII of the United Nations Charter. See U.N. Charter ch. VII, art. 2, ¶ 4. See generally International Committee of the Red Cross, Basic Rules of the Geneva Conventions and their Additional Protocols (1983); Frits Kalshoven & Liesbeth Zegveld, Constraints on the Waging of War: An Introduction to International Humanitarian Law (Int'l Comm. of the Red Cross 2001) (1987); George Aldrich, The Law of War on Land, 94 Am. J. Int'l L. 42-63 (2000).

[2] The closest philosophical underpinning of this obligation can be linked to the early contributions of Hugo Grotius, who wrote that "restitution is due, from authors of the war, for all evils inflicted: and for anything unusual which they have done, or not prevented when they could." Hugo Grotius, De Jure Belli ac Pacis Libri Tres, Vol. II, 719 (Francis W. Kelsey trans., Oxford Univ. Press 1925) (1646).

[3] Hague Convention IV, supra note 1, art. 3.

[4] Protocol I, supra note 1, art. 91.

[5] See The Handbook of Humanitarian Law in Armed Conflict 542-543 (Dieter Fleck ed., 1995). Traditionally, enforcement methods include retaliation, reprisals, and self defense. Measures taken under these headings include demand for compensation and punishment of individuals for crimes associated with violations of law. Id. at 518. For a discussion of these and other methods of enforcement, see generally id. at 517-549. Investigations of crimes and criminal prosecutions have been the most preferred and frequent methods of enforcement of violations of international humanitarian law. For example, since 1919, there have been five international investigative commissions (the 1919 Commission on the Responsibilities of the

The Hague (the "Claims Commission" or the "Commission"). The Claims Commission was established pursuant to a peace agreement signed by Eritrea and Ethiopia in Algiers, Algeria, on December 12, 2000, ending a devastating war fought between the two countries from May 1998 to December 2000.[6]

The Commission was charged with the duty of deciding, through binding arbitration, all claims by one party or citizens of that party against the other party for loss, damage, or injury resulting from violations of international law (mainly violations of international humanitarian law that occurred during the war).[7] The Commission

---

Authors of the War and Enforcement of Penalties, the 1943 United Nations War Crimes Commission, the 1946 Far Eastern Commission, the 1992 Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) to Investigate War Crimes and Other Violations of International Humanitarian Law in the Former Yugoslavia, and the 1994 Independent Commission of Experts Established Pursuant to Security Council Resolution 935 (1994) to Investigate Grave Violations of International Humanitarian Law in the Territory of Rwanda); four ad hoc international criminal tribunals (the 1945 International Military Tribunal to Prosecute the Major War Criminals of the European Theater, the 1946 International Military Tribunal to Prosecute the Major War Criminals of the Far East, the 1993 International Criminal Tribunal for the Former Yugoslavia, and the 1994 International Criminal Tribunal for Rwanda); and three prosecutions mandated internationally (the 1921-23 Prosecutions by the German Supreme Court Pursuant to Allied Requests Based on the Treaty of Versailles, the 1946-1955 Prosecutions by the Four Major Allies in the European Theater Pursuant to Control Council Law No. 10 (CCL 10), and the 1946-51 Military Prosecutions by Allied Powers in the Far East Pursuant to Directives of the 1946 Far Eastern Commission). See M. Cherif Bassiouni, From Versailles to Rwanda in Seventy-five Years: The Need to Establish a Permanent Criminal Court, 10 Harv. Hum. Rts. J. 11, 13 (1997). For a comprehensive treatment of civil liability as an alternative to criminal prosecutions, see generally John F. Murphy, Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution, 12 Harv. Hum. Rts. J. 1 (1999).

[6] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea art. 5, Dec. 12, 2000, 40 I.L.M. 260 (2001), available at http://www.pca-cpa.org/showpage.asp?pag_ id=1151 (last visited June 15, 2007) [hereinafter Algiers Agreement]. See infra Section II.A. (briefly discussing the genesis of the conflict).

[7] The Algiers Agreement states that:
Consistent with the Framework Agreement, in which the parties commit themselves to addressing the negative socio-economic impact of the crisis on the civilian population, including the impact on those persons who have been deported, a neutral Claims Commission shall be established. The mandate of the Commission is to decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law. The

commenced its work in March 2001[8] and decided to consider the claims of the parties in two different phases of the proceedings: a liability phase and a damages phase. The Commission rendered the final decisions of the liability phase on December 19, 2005. The damages phase is still being conducted, although no decisions have been rendered by the Commission to date as part of that phase. Thus, this Article exclusively focuses on the Commission's work as it relates to the completed liability phase.

Following this introduction, the second section assesses the Commission's overall adjudicative procedures and efficiency with a view to discerning aspects that can be used as models for future claims litigations involving violations of international humanitarian law. In this light, a comparison is made with the experiences of the Iran-United States Claims Tribunal (IUSCT)[9] and the United Nations Compensation Commission (UNCC).[10] The third section is devoted to a description and analysis of

---

Commission shall not 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 involve violations of international humanitarian law.

Algiers Agreement, supra note 6, art. 5 ¶ 1.

[8] Hans Van Houtte, Progress Report of the Secretary General on Ethiopia and Eritrea, Annex II, ¶ 3, U.N. Doc. S/2001/608 (June 19, 2001), available at http://pca-cpa.org/PDF/UN%20Report%2019-06-01.pdf.

[9] The Iran-United States Claims Tribunal was established by the Claims Settlement Declaration agreed to by Iran and the United States to settle claims of nationals of the United States against Iran and claims of nationals of Iran against the United States. Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran of 19 January 1981, reprinted in 1 Iran-U.S. Cl. Trib. Rep 9 art. II ¶ 1 (Cambridge Univ. Press 1993) (1983) [hereinafter Claims Settlement Declaration]. The Claims Settlement Declaration was one of many instruments agreed to between Iran and the United States following lengthy negotiations relating to the November 1979 seizure of the U.S. Embassy in Tehran (commonly known as the "hostage crisis") and related economic measures. See generally George H. Aldrich, The Jurisprudence of the Iran-United States Claims Tribunal 1-43 (1996) (discussing the background and formation of the Iran-United States Claims Tribunal); Wayne Mapp, The Iran-United States Claims Tribunal, The First Ten Years 1981-1991, An Assessment of the Tribunal's Jurisprudence and its Contributions to International Arbitration 1-49 (1993) (discussing the background and the formation of the Iran-United States Claims Tribunal). See also, e.g., Declaration of the Government of the Democratic and Popular Republic of Algeria of 19 January 1981, reprinted in 1 Iran-U.S. Cl. Trib. Rep. 3 (Cambridge Univ. Press 1993) (1983) [hereinafter General Declaration].

[10] The UNCC was established by the United Nations Security Council to adjudicate claims arising out of the Iraqi invasion of Kuwait. S.C. Res. 687, ¶ 18, U.N. Doc S/Res/687 (Apr. 8, 1991). The Security Council determined that Iraq "is liable, under international law, for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait." Id. ¶ 16. Describing the nature of the UNCC, the Secretary General

the Commission's jurisdiction, the laws it applied, the evidentiary standards it adopted, and the remedies it granted. By so doing, this section addresses the Commission's contributions to the jurisprudence of a very important but rare aspect of international humanitarian law enforcement, namely, civil liability. The fourth and final section summarizes the Commission's contributions to the development of enforcement of international humanitarian law, particularly in the civil liability context.

II. STRUCTURE AND ADJUDICATIVE SCHEME: A COMPARATIVE ANALYSIS

Although unique in many respects, the Eritrea-Ethiopia Claims Commission shares some commonality with the IUSCT and the UNCC. Indeed, it can fairly be said that the pre-existence of these models of international claims adjudication greatly contributed to the very conception of the Claims Commission, and their experience has remarkably assisted in streamlining the Claims Commission's proceedings. Nonetheless, the Commission has had to struggle with novel issues given the unique set of circumstances that necessitated its own creation. This section addresses the structure and adjudicative schemes of these respective tribunals and offers a comparative analysis.

A. Circumstances Giving Rise to the Claims and the Creation of the Commission: The Genesis of the Conflict

From 1889 to 1941 Eritrea was an Italian colony.[11] From 1941 to 1952 Eritrea was a protectorate of Great Britain.[12] In 1952 it was federated with Ethiopia.[13] Thereafter, elements within Eritrea, including the Eritrean People's Liberation Front (EPLF), the

---

of the United Nations said:

> The Commission is not a court or an arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims; it is only in this last respect that a quasi-judicial function may be involved.

The Secretary-General, Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687 (1991), ¶ 20, Distr. S/22559 (May 2, 1991).

[11] Eritrea-Ethiopia Claims Comm'n, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 6 (Perm. Ct. Arb. 2004) [hereinafter EECC] (all EECC Claims available at http://www.pca-cpa.org/showpage.asp?pag_id=1151 (last visited June 15, 2007)).

[12] Id.

[13] Id.

precursor of the People's Front for Democracy and Justice, the current ruling party in Eritrea, soon commenced what would become a thirty-year movement for independence.[14] Relations between the province of Eritrea and the Ethiopian government further worsened after the Marxist regime known as the "Derg" came to power in Ethiopia in 1974.[15]

In 1991 a joint military operation of the EPLF and the Ethiopian People's Revolutionary Democratic Front (EPRDF), which later spearheaded the political change in Ethiopia, overthrew the Derg, and the EPRDF and other smaller resistance groups constituted a new government in Ethiopia.[16] Meanwhile, Eritrea became formally independent in 1993 following a referendum.[17] Although some economic and boundary issues would come to present challenges to relations between the countries over the following years, relations between Ethiopia and Eritrea were generally viewed as good over the next several years.[18]

In May 1998, however, an armed conflict commenced between Eritrea and Ethiopia in the western part of their common boundary.[19] Within approximately one month, fighting had spread to encompass almost the entire border between the two countries,[20] including air attacks that would leave dozens of civilians killed or wounded.[21] The fighting soon subsided, however, due in part to the advent of the rainy season, resulting in a World War I-style trench-based standoff.[22] Hostilities picked up again in February 1999 and again in May 2000 when Ethiopia undertook a comprehensive counter-offensive that resulted in the retreat of Eritrean forces from territories that had been administered by Ethiopia prior to the commencement of the conflict.[23] A cessation of hostilities agreement was signed between the two countries

---

[14] See Harold G. Marcus, A History of Ethiopia 174-76, 178, 194-95, 246 (2002).
[15] Id. at 187-89, 199.
[16] Id. at 221.
[17] EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 7 (2004). See Marcus, supra note 14, at 238-39, 246-53.
[18] See Marcus, supra note 14, at 246-53.
[19] The circumstances leading up to the commencement of the armed conflict have been a subject of immense controversy. According to the Claims Commission, the conflict started when Eritrean forces attacked Ethiopian administered territory in the western region of the border between the two countries. See, e.g., EECC, Jus Ad Bellum, Ethiopia's Claims 1-8, ¶¶ 14, 16 (2004).
[20] See, e.g., EECC, Central Front, Ethiopia's Claim 2, ¶¶ 24, 26 (2004).
[21] EECC, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13,14, 21, 25 & 26, ¶ 96 (2005); EECC, Central Front, Ethiopia's Claims 2, ¶¶ 32, 101 (2004).
[22] EECC, Central Front, Ethiopia's Claims 2, ¶ 26 (2004); EECC, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, ¶¶ 30, 32 (2004). See Marcus, supra note 14, at 254.
[23] EECC, Western and Eastern Fronts, Ethiopia's Claims 1 & 3, ¶ 27 (2005); EECC, Central Front, Ethiopia's Claim 2, ¶ 26 (2004).

in June 2000,[24] and a comprehensive agreement was signed on December 12, 2000, bringing a formal end to the conflict.[25] The Claims Commission was established as an important part of the Algiers Agreement to address matters of compensation.[26]

B. Structure, Timetable, and Proceedings of the Commission

Structurally, the Eritrea-Ethiopia Claims Commission is similar in many respects to the IUSCT. The Commission is comprised of five members.[27] Each party nominated two commissioners and a president was mutually elected by the party-appointed commissioners. Similarly, the Iran-United States Claims Tribunal is composed of nine commissioners, with each party nominating a third of the commissioners and the remaining third mutually selected by the seated commissioners.[28] The Permanent Court of Arbitration located at the Peace Palace in The Hague serves as the registry for both the IUSCT and the Eritrea-Ethiopia Claims Commission. Given the general complexity of the situation that the Iran-United States Claims Tribunal had to resolve and the longevity of its operation, there were several challenges of commissioners on different grounds and resignations.[29] In the six years of its operation, the Eritrea-Ethiopia Claims Commission has had only one commissioner resign, and this occurred within months of the commissioner's initial appointment.[30]

While the Iran-United States Claims Tribunal and the Eritrea-Ethiopia Claims Commissions have adopted an arbitral model, the UNCC adopted a unique method that is neither arbitral nor pure reparation, i.e., it is a quasi-reparation model.[31] This approach was adopted because the issue of liability had already been determined by the Security Council, and the primary task was merely the evaluation of losses. The UNCC is also structurally different from the Iran-United States Claims Tribunal and

---

[24] Agreement on Cessation of Hostilities Between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia (June 18, 2000) available at be http://www.pca-cpa.org/ENGLISH/RPC/EEBC/E-E%20Agreement.html [hereinafter Cessation of Hostilities Agreement].

[25] Algiers Agreement, supra note 6, art. 1.

[26] Id. art. 5.

[27] Id. art. 5 ¶ 2.

[28] Claims Settlement Declaration, supra note 9, art. III ¶ 1e. Two commissioners were appointed by each side (Commissioners George H. Aldrich and James C.N. Paul were appointed by Ethiopia, and Commissioners John R. Crook and Lucy Reed were appointed by Eritrea), and a president (Professor Hans Van Houtte) was chosen by the party-appointed commissioners. Van Houtte, supra note 8, Annex II ¶ 2.

[29] See generally Aldrich, supra note 1, at 6-31 (providing a general discussion of such instances).

[30] Van Houtte, supra note 8, Annex II ¶ 2.

[31] See supra note 10. Reparation is traditionally understood as a demand by the victor for a lump sum payment of compensate from the defeated without due regard to specific violations of international law. See Handbook of Humanitarian Law in Armed Conflicts, supra note 5, § 1214.

the Eritrea-Ethiopia Claims Commission. The UNCC is composed of three bodies, namely the Governing Council, the Commissioners, and the Secretariat.[32] The Governing Council oversees the works of the Commissioners, sets forth guidelines and approves compensation recommended by the Commissioners.[33] The Commissioners adjudicate the claims, and the Secretariat services the Governing Council and the panel of commissioners by providing administrative, legal, and technical support.[34]

The Iran-United States Claims Tribunal's rules of procedure are primarily based on the United Nations Commission on International Trade Law (UNCITRAL) rules.[35] Because most of the claims have been of a commercial nature, UNCITRAL rules have been compatible.[36] The Eritrea-Ethiopia Claims Commission, on the other hand, adopted its own rules of procedure and evidence based on the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States ("PCA Rules").[37] Although the PCA Rules are themselves based on the UNCITRAL rules, they are modified to "reflect the public international law character of disputes between States, and diplomatic practice appropriate to such disputes."[38]

The Commission's rules are divided into three chapters.[39] The first chapter, which applies to all proceedings, contains, inter alia, provisions on (1) the appointment, challenge, and replacement of arbitrators; (2) arbitral proceedings, including detailed rules on the conduct of the hearings; and (3) issues of evidence and applicable law.[40]

---

[32] See The UNCC at a Glance, http://www2.unog.ch/uncc/ataglance.htm (last visited June 15, 2007).

[33] Id.

[34] Id.

[35] Claims Settlement Declaration, supra note 9, art. III ¶ 2.

[36] See Mapp, supra note 9, at 42; see generally Aldrich, supra note 1, at 412-58 (providing a comprehensive discussion of procedural matters of the Iran-United States Claims Tribunal).

[37] EECC, Rules of Procedure, art. 1 ¶ 1, available at http://www.pca-cpa.org/ENGLISH/RPC/EECC/Rules%20of%20Procedure.PDF [hereinafter EECC Rules of Procedure].

[38] See Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Sates, Introduction, available at http://www.pca-cpa.org/ENGLISH/BD/BDEN/2STATENG.pdf. The PCA Rules are made even more compatible to inter-state disputes because they provide for enormous flexibility and autonomy to the parties with respect to, among other things, choice of arbiters and also provide for the UN Secretary General to designate an appointing authority in case the parties fail to agree on a particular one. See id.

[39] See EECC Rules of Procedure, supra note 37.

[40] See id. These rules contain no notable peculiarities. However, owing to the nature of the proceedings and sensitivities of some types of evidence, the Commission's rule on adverse inference for failure to produce evidence played an important role in the various proceedings. This rule states that "[a]t any time, the Commission may request the parties to produce documents, exhibits or other evidence within a specified time. The Commission

The second chapter relates exclusively to claims to be adjudicated individually. It provides procedures for filing claims and defenses.[41] The third chapter addresses mass claims procedures and sets forth the different subject-matter categories and sub-categories of the mass claims.[42]

Another important similarity between the two tribunals is the finality of the awards. Although most arbitral awards are binding, but not necessarily final, the decisions and awards of both the Iran-United States Claims Tribunal and the Eritrea-Ethiopia Claims Commission are final and binding without any possibility of appeal on any substantive or procedural grounds.[43] As such, the responsibility of the arbitrators has been considerable. In this regard the Iran-United States Claims Tribunal and Eritrea Claims Commission, though they follow the arbitral model, are like the quasi-reparations model of the UNCC, the Governing Council decisions of which are final and binding without any possibility of appeal.

The Commission began operation in March 2001 and completed the liability phase in December 2005.[44] Thus, the process of determining liability took nearly five years. During this time, the Commission considered claims under several different categories and sub-categories[45] and rendered fifteen different awards.[46]

---

shall take note of any failure to do so, as well as any reason given for such failure. Where circumstances warrant, the Commission may draw adverse inferences from any failure by a party to produce evidence." Id. art. 14 ¶ 4.

[41] EECC Rules of Procedure, supra note 37, arts. 23-29.

[42] Id. arts. 30-33.

[43] See Claims Settlement Declaration, supra note 9, art. VI ¶ 1 ("All decisions and awards of the Tribunal shall be final and binding."); see also Algiers Agreement, supra note 6, art. 5 ¶ 17 ("Decisions and awards of the commission shall be final and binding. The parties agree to honor all decisions and to pay any monetary awards rendered against them promptly.").

[44] See Eritrea-Ethiopia Claims Commission, http://www.pca-cpa.org/showpage.asp?pag_id=1151 (last visited June 15, 2007) [hereinafter Summary Report]; see also Algiers Agreement, supra note 6, at 5 (stating that the Commission shall endeavor to complete its work within three years of the filing of the claims). This target date has proven overly optimistic.

[45] Eritrea presented thirty-two claims, and Ethiopia presented eight claims within the framework of the six major subject-matter categories established by the Commission. See Summary Report, supra note 44 (the differences in the number of claims stemmed from organizational differences rather than the volume of alleged violations).

[46] Eritrea's awards, which followed its sub-categorization of claims included the following EECC Partial Awards: Prisoners of War, Eritrea's Claim 17; Central Front, Eritrea's Claim 4; Civilians Claims, Eritrea's Claims 15, 16, 23, & 27-32; Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26; Final Award, Pensions, Eritrea's Claims 15, 19 & 23; Diplomatic Claim, Eritrea's Claim 20; and Loss of Property in Ethiopia Owned by Non-Residents, Eritrea's Claim 24. Ethiopia's awards, which followed its categorization, included the following Eritrea-Ethiopia Claims Commission Partial Awards: Prisoners of War, Ethiopia's Claim 4; Central Front, Ethiopia's Claim 2; Civilians Claims,

All of the Commission's hearings were held in camera following extensive filings by the parties.[47] The first round of filings involved Statements of Claims filed on December 12, 2001.[48] Statements of Defense responding to the allegations contained in the Statements of Claims were filed in February 2002.[49] Following these filings, the Commission set the order for the first three rounds of claims as follows: Prisoners of War Claims, Central Front Claims, and Civilian Claims.[50] Thereafter, the parties filed Memorials detailing the alleged violations under each claim category and including volumes of evidence. The evidence included, inter alia, hundreds of sworn affidavits, documents, claims forms, expert reports, satellite imagery, photographs, charts, news reports, statements of officials, administrative and court documents, and bomb fragments. Each party responded to the allegations of the other through Counter-Memorials for each category of claim. The Counter-Memorials also contained different types of evidence in support of the responding party's defense. With respect to the Central Front and Civilians Claims, and all other remaining claims, the Commission allowed a third round of filings for the rebuttal of evidence contained in the Counter-Memorials.

The Commission held its first hearing on substantive claims, involving the treatment of prisoners of war, in December 2002, at the Peace Palace in The Hague.[51] The Commission rendered partial awards with respect to the prisoner of war claims on July 1, 2003,[52] in which it found violations of humanitarian law on both sides.[53] The

---

Ethiopia's Claim 5; Western and Eastern Fronts, Ethiopia's Claims 1 & 3; Final Award, Ports, Ethiopia's Claim 6; Economic Loss Throughout Ethiopia, Ethiopia's Claim 7; Diplomatic Claim, Ethiopia's Claim 8; and Jus Ad Bellum, Ethiopia's Claims 1-8. All awards available at http://www.pca-cpa.org/showpage.asp?pag_id=1151 (last visited June 15, 2007).

[47] See generally id.

[48] EECC Rules of Procedure, supra note 37, art. 24 ¶ 1. According to the Commission's Rules of Procedure, Statements of Claim shall contain the following particulars:

> (a) The names and address of the parties; (b) If the claimant is a government of a Party or an agency of such government, whether the claim is solely of that government or agency or whether it includes the claims of persons, and, if the latter, the identification of such persons, including their names, places of residence and nationalities; (c) A statement of the facts supporting the claim or claims; (d) The violation or violations of international law on the basis of which the claim or claims are alleged to have arisen; (e) any other points at issue; (f) The relief or remedy sought; (g) The Commission's jurisdiction over the claim or claims; [and] (h) Whether the claim or claims have been filed in any other forum.

Id. art. 24 ¶ 3.

[49] Summary Report, supra note 44.

[50] Id. All remaining claims were later heard during a fourth round of proceedings. Id.

[51] Summary Report, supra note 44.

[52] EECC, Prisoners of War Claims, Eritrea's Claim 17 (2004); EECC, Ethiopia's Prisoners of War Claim 4 (2004). The awards are "partial" in that they do not become final until after the subsequent damages phase.

Commission held its second hearing on substantive claims, which involved the Central Front Claims, in November 2003 in the same venue.[54] It rendered partial awards with respect to the Central Front Claims on April 28, 2004,[55] again finding violations of humanitarian law on both sides.[56] The Commission held its third hearing on substantive claims, which involved the Civilian Claims, in December 2004 in the same venue.[57] It rendered partial awards with respect to these claims on December 17, 2004,[58] finding violations of international humanitarian law on both sides.[59] All remaining claims were thereafter addressed in a final round of filings and hearings. These claims included Eritrea's Western Front, Aerial Bombardment, Pensions, Diplomatic, and Non-Resident Property Loss Claims, and Ethiopia's Western and Eastern Front, Port, Economic Loss, Diplomatic, and Jus ad Bellum Claims.[60] Following the filing of Memorials and Counter-Memorials addressing each claim, the Commission held hearings in April 2005 in The Hague.[61] The Commission rendered awards with respect to all of these claims on December 19, 2005.[62] It dismissed some of the claims for various reasons such as lack of evidence[63] but found violations of international law on both sides.[64]

Despite the sheer volume of cases involving claims concerning hundreds of thousands of individuals, the Commission completed the liability phase in approximately five years.[65] Given the caseload and the complexity of the matters involved, the speed of the Commission's adjudicative work was perhaps unprecedented. However, it is to be noted that some serious matters of contention are left for the damages phase.[66]

---

[53] EECC, Prisoners of War, Eritrea's Claim 17, ¶¶ 11, 12 (2003); EECC, Prisoners of War, Ethiopia's Claim 4, ¶¶ 12, 13 (2003).
[54] Summary Report, supra note 44
[55]. Id.
[56] EECC, Central Front, Eritrea's Claim 2, 4, 6, 7, 8 & 22 (2004); EECC, Central Front, Ethiopia's Claim 2.
[57] Summary Report, supra note 44.
[58] Id.
[59] EECC, Central Front, Eritrea's Claim 2, 4, 6, 7, 8 & 22 (2004); EECC, Central Front, Ethiopia's Claim 2.
[60] Summary Report, supra note 44.
[61] Id.
[62] Id.
[63] See, e.g., EECC, Final Award, Ports, Ethiopia's Claim 6, ¶¶ 19, 20 (2004).
[64] E.g., EECC, Jus Ad Bellum, Ethiopia's Claims 1-8, ¶¶ 16, 20; EECC, Loss of Property in Ethiopia Owned by Non-Residents, Eritrea's Claim 24, § V.B (2004).
[65] See Summary Report, supra note 44. The Algiers Agreement provides that the Commission shall endeavor to complete its adjudication within three years after the commencement of its work. Algiers Agreement, supra note 6, art. 5 ¶ 12.
[66] For example, in its Jus Ad Bellum Awards, the Commission held that Eritrea is liable for violating the jus ad bellum; however, it left the extent of Eritrea's liability for further proceeding during the damages phase. EECC, Jus Ad Bellum, Ethiopia's Claims 1-8, ¶ 20 (2005).

Nonetheless, the Commission's overall approach to the liability phase was done with efficacy and care.

C. Categories of Claims

As indicated in Section II.A. above, during the more than two years of armed conflict between Ethiopia and Eritrea, tens of thousands of people were killed, injured, expelled or displaced, and property worth billions of dollars was damaged or destroyed in different ways. The Claims Commission had to design a method to systematically address the various claims of loss, damages, and injury linked to the war. Accordingly, in its Decision Number 2, the Commission ruled that claims could be filed under six different categories.[67] These categories include:

> *Category 1: claims of natural persons for unlawful expulsion from the country of their residence; Category 2: claims of natural persons for unlawful displacement from their residence; Category 3: claims of prisoners of war for injuries suffered from unlawful treatment; Category 4: claims of civilians for unlawful detention and injuries suffered from unlawful treatment during detention; Category 5: claims of persons for loss, damage, or injury other than those covered by other categories; and Category 6: claims of the two party governments for loss, damage, or injury.*[68]

All of the claims ultimately filed by the parties, however, were government-to-government claims under Category 6 with the exception of six claims filed by Eritrea on behalf of six individuals expelled from Ethiopia.[69] These individual claims would presumably have been claims brought under Category 1, although the Commission never referred to them as such.

Decision Number 2 also required the claimants to group all cases that arose out of the same violations of international law and/or the same events into the same category.[70] In addition, the decision established a mass claims process through which a fixed amount of compensation could be adjudicated,[71] although it did not foreclose the possibility of pursuing claims for actual damages.[72] The Commission established two tiers of fixed compensation.[73] Depending on several considerations, including whether

---

[67] EECC, Decision Number 2, Claims Categories, Forms and Procedures, § A (2004).
[68] Id.
[69] See EECC, Civilians Claims, Eritrea's Claim 15, 16, 23 & 27-32, ¶ 18 (2004).
[70] EECC, Decision No. 2, Claims Categories, Forms and Procedures, § B (2004).
[71] Id.
[72] Id. The decision also did not foreclose the possibility of filing claims for one individual under different categories. See generally EECC, Decision Number 5 (2004).
[73] EECC, Decision No. 2, § B (2001).

an individual's claim was adjudicated under more than one category, the first tier was fixed at $500 and the second tier at $1,500 per individual.[74] Given that the Commission has only recently completed the liability phase of its proceedings, it has not had the opportunity to develop the parameters of the mass claims process in any further detail.

With respect to the categorization of claims and the mass claims adjudication process, although notable differences exist, the Commission benefited from the experiences of the UNCC and the Iran-United States Claims Tribunal. The claims categorization of each of these tribunals is discussed in turn.

The UNCC considered claims in six different categories.[75] Category A included claims by individuals for departure from Kuwait following Iraq's invasion.[76] The amount of compensation was fixed at $2,500 for individuals and $5,000 for families.[77] Category B included claims by individuals for personal injury, including death.[78] The amount of compensation was fixed at $2,500 for individuals and up to $10,000 for families.[79] Category C and D claims included twenty-one different kinds of losses such as personal injury, displacement, pain and suffering, loss of property interests, and business losses.[80] The only difference between Categories C and D was the amount of compensation sought, i.e., while claims for losses less than $100,000 would be filed under Category C, claims for more than that amount would be adjudicated

[74] EECC, Decision No. 5, §§ B-C (2001) (also noting that to account for compensation for mass claims, the Commission used a multiplier of three when considering household claims).

[75] See generally U.N. Comp. Comm'n, Claims Processing, available at http://www2.unog.ch/uncc/clmsproc.htm (last visited June 15, 2007).

[76] U.N. Comp. Comm'n, Category "A" Claims, available at http:// www2.unog.ch/uncc/claims/a_claims.htm (last visited June 15, 2007).

[77] The United Nations Compensation Commission "received approximately 920,000 category 'A' claims... seeking a total of approximately US $3.6 billion in compensation... [i]n total, the Governing Council has approved the payment of more than US $3.2 billion in compensation for over 860,000 successful category 'A' claimants." Id.

[78] U.N. Comp. Comm'n, Category "B" Claims, available at http:// www2.unog.ch/uncc/claims/b_claims.htm (last visited June 15, 2007).

[79] The United Nations Compensation Commission adjudicated "approximately 6,000 category 'B' claims... [and] [p]ayment of US $13,450,000 in compensation was made available... for distribution to 3,945 successful claimants." Id.

[80] A total of approximately $9 billion was sought under category "C" claims. U.N. Comp. Comm'n, Category "C" Claims, available at http:// www2.unog.ch/uncc/claims/c_claims.htm (last visited June 15, 2007). To date, "[t]he Governing Council approved the payment of more than US $4.9 billion to successful category 'C' claimants." Id. With respect to category "D" claims, $10 billion was sought in compensation. Information is not available as to the amount of compensation awarded to successful claimants. U.N. Comp. Comm'n, Category "D" Claims, available at http://www2.unog.ch/uncc/claims/d_ claims.htm (last visited June 15, 2007).

under Category D.[81] Categories E and F included claims by business entities and governments respectively.[82]

The claims were categorized with a view to ensuring "uniformity in the treatment of similar claims" taking into account "the type or size of the claims and similarity of legal and factual issues."[83] The Eritrea-Ethiopia Claims Commission's categorization of claims generally followed this principle. Although it adopted the same standard, it had to design its own classifications to deal with the unique circumstances it needed to resolve.

In many ways, the UNCC and the Claims Commission had to deal with similar circumstances, i.e., post-interstate conflict claims for loss, damage, or injury sustained as a result of violations of international law. The major distinction was that the Claims Commission had to determine whether violations of international law had occurred in each case, whereas the UNCC already had that issue determined for it by the UN Security Council and arguably admitted by Iraq, the violating party.[84] As indicated above, the UNCC was established unilaterally by the Security Council without any involvement by Iraq.[85] Iraq's lack of participation in any determination of liability or damages was another important distinction between it and the Eritrea-Ethiopia Claims Commission, which was created by the contribution of both parties in

---

[81] See U.N. Comp. Comm'n, Category "D" Claims, supra note 80.

[82] U.N. Comp. Comm'n, Category "E" Claims, available at http:// www2.unog.ch/uncc/claims/e_claims.htm (last visited June 15, 2007); U.N. Comp. Comm'n, Category "F" Claims, available at http://www2.unog.ch/uncc/claims/f_ claims.htm (last visited June 15, 2007). With respect to category "E" claims, "[t]he Commission received approximately 5,800... claims submitted by seventy Governments seeking a total of approximately US $80 billion in compensation." U.N. Comp. Comm'n, Category "E" Claims, supra. Category "E" was further subdivided into four sub-categories. Id. Subcategory "E1" included claims for the oil sector and payment of $610,048,547 was approved under this subcategory. Id. Subcategory "E2" included claims for non-Kuwaiti entities that did not fall under any of the other subcategories and $12 billion in compensation was sought under this category, but information as to the disposition of these claims is not available. Id. Subcategory "E3" included claims for non-Kuwaiti corporations in the construction-related business, excluding oil-related work, and claims amounting to $10 billion were filed in this subcategory. Id. Subcategory "E4" included claims for all Kuwaiti corporations, excluding oil companies, and claims were filed for $11 billion under this subcategory. Id.

[83] U.N.S.C., Comp. Comm'n Governing Council, Decision Taken by the Governing Council of the United Nations Compensation Commission at the 27th Meeting art. 17, U.N. Doc. S/AC.26/1992/10 (June 26, 1992), available at http://www2.unog.ch/uncc/decision/dec_10.pdf [hereinafter Compensation Commission Decision].

[84] See S.C. Res. 687, supra note 10, ¶ 16.

[85] See generally U.N. Comp. Comm'n, Introduction, available at http:// www2.unog.ch/uncc/introduc.htm (last visited June 15, 2007).

determining the resolution model for their disputes.[86]

In this regard, there is an obvious similarity between the Claims Commission and the Iran-United States Claims Tribunal in that Ethiopia and Eritrea mutually agreed to have their respective claims adjudicated by an independent claims tribunal just like Iran and the United States had done.[87] Because of the parties' participation in formulating the models of adjudication, the Eritrea-Ethiopia Claims Commission and the Iran-United States Claims Tribunal did not attract the criticism that the UNCC has due to of Iraq's lack of involvement. Indeed, the lack of political will on the part of Iraq has had serious consequences with respect to the effectiveness of the UNCC in its initial phase.[88] By contrast, for the last six years, the Claims Commission has had the full cooperation of the parties and its operations have been relatively smooth.[89]

Unlike the UNCC, which received and adjudicated millions of claims by individuals and enterprises,[90] only the party governments were allowed to present claims directly to the Claims Commission.[91] This is an important distinction dictated by the very

---

[86] See generally Algiers Agreement, supra note 6.

[87] Roger P. Alford, The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance, 94 Am. Soc'y Int'l L. Proc. 160, 163 (2000) ("The Iran-U.S. Tribunal arguably exists because Iran calculated that the political costs of not cooperating were far outweighed by the benefits of unfreezing Iranian assets and terminating U.S. court litigation.").

[88] Id. at 164 ("[T]he coercive model of placing the Iraqi oil industry under UN receivership and skimming off 30 percent of the oil revenues was wholly ineffective for many years because Saddam Hussein simply refused to pump oil.").

[89] Id.

[90] Some individual claimants were deemed to have been better represented privately, given the volume of foreign investment in Kuwait and the predetermination of liability. For example, individual claimants had more autonomy and responsibility in selecting the type of claims they wanted to file. This enhanced individual autonomy has been praised "as possibly the most significant contribution of the UNCC to the development of international law in the field of claims settlement." Andrea Gattini, The UN Compensation Commission: Old Rules, New Procedures on War Reparations, 13 Eur. J. Int'l L. 161, 170 (2002).

[91] See Algiers Agreement, supra note 6, art. 5, ¶ 8 ("Claims shall be submitted to the Commission by each of the parties on its own behalf and on behalf of its nationals, including both natural and juridical persons."). In what seems to be an unprecedented decision, the Algiers Agreement gave each party the ability to seek compensation on behalf of citizens of the other party. The Agreement states that "[i]n appropriate cases, each party may file claims on behalf of persons of Ethiopian or Eritrean origin who may not be its nationals. Such claims shall be considered by the Commission on the same basis as claims submitted on behalf of the party's nationals." Id. art. 5, ¶ 9. This provision later became very controversial. See infra Section III.A.4. (discussing the Commission's application and interpretation of this provision). See Compensation Commission Decision, supra note 83, art. 5 ¶ 1(a) ("A Government may submit claims on behalf of its nationals and, at its discretion, of other persons resident in its territory. In the case of Governments existing in the territory of a former federal state, one such Government may submit claims on behalf of

nature of the transactions that gave rise to the claims. While the Iraq-Kuwait war has directly affected virtually every inhabitant of Kuwait, including foreign individuals and entities, the direct impact of the Ethiopia-Eritrea war was limited to the nationals and entities of the two countries.

The Claims Commission has also benefited from the claims categorization of the Iran-United States Claims Tribunal, which considered claims in two broad categories.[92] The Dispute Settlement Declaration, which set up the Iran-United States Claims Tribunal, states that "[c]laims of nationals of the United States and Iran that are within the scope of this Agreement shall be presented to the Tribunal either by claimants themselves or, in the case of claims of less than [$]250,000, by the government of such national."[93] Thus, the first category included property claims[94] of nationals of the United States against the Government of Iran and nationals of Iran against the Government of the United States.[95] The second category included the direct claims of the two governments against each other for contractual losses on behalf of their nationals relating to the exchange of goods and services.[96]

With respect to legal standing, however, the Eritrea-Ethiopia Claims Commission differed from both the UNCC and the Iran-United States Claims Tribunal. As indicated above, the exclusion of direct private claims was dictated by the Algiers Agreement.[97] The effects of this decision will be more apparent at the damages phase during which the Commission will have to assess the precise amounts of compensation due to each individual or family-- either fixed or actual amounts--based on the awards rendered during the liability phase.

Although Article 5, paragraph 8 of the Algiers Agreement provided that the Claims Commission was to be the only forum for adjudicating claims arising from the armed conflict between Ethiopia and Eritrea, it made an exception for claims filed in another forum prior to the effective date of the agreement.[98] This exception is another important distinction with the Iran-United States Claims Tribunal, which was

---

nationals, corporations or other entities of another such Government, if both Governments agree.").

[92] See Claims Settlement Declaration, supra note 9, art. II.

[93] See id. art. III, ¶ 3.

[94] These claims include debts, contracts, transactions subject to letters of credit or bank guarantees, and expropriation claims. Mapp, supra note 9, at 18. Some claims, however, were excluded from the jurisdiction of the Tribunal. Id. These were mainly claims arising out of contracts that expressly provide for the exclusive jurisdiction of the Iranian courts. Id.

[95] See Claims Settlement Declaration, supra note 9, art. II.

[96] See id. art. II, ¶ 2.

[97] See Algiers Agreement, supra note 6, art. 5, ¶ 8 ("Claims shall be submitted to the Commission by each of the parties on its own behalf and on behalf of its nationals, including both natural and juridical persons.").

[98] Id.

necessitated as a result of multiple cases filed in U.S. courts based on the events leading to the 1979 hostage crisis and the counter-economic measures that followed.[99] Because the Algiers Agreement between Ethiopia and Eritrea did not provide for the consolidation of all claims,[100] several cases arising out of the same events have been litigated in Ethiopian, regional, and U.S. courts. However, the proceedings of the Claims Commission have had significant impacts on these proceedings.

For example, in 1999, while the war was still being fought, Ethiopia brought a claim against Eritrea before the Court of Justice for the Common Market for Eastern and Southern Africa (COMESA) seeking the release of and damages for Ethiopian-owned property at the Eritrean ports of Assab and Massawa.[101] Eritrea objected on the

---

[99] The events giving rise to the litigation began on November 4, 1979, when Iranian militants held sixty-one U.S. diplomats in Tehran as hostages; two more senior diplomats were also detained at Iranian Ministry of Foreign Affairs the same day. See Mapp, supra note 9, at 5. The next day, Iranian revolutionary Ayatollah Khomeni endorsed the actions, and diplomatic efforts failed to resolve the crisis. Id. at 5.

On November 12, 1979 the United States President ordered the cessation of all oil purchases from Iran. As a consequence, Iran gave notice that it would take further action to damage the interests of the United States....

On November 14, 1979 the President executed an order blocking all dealings in any property and any interests in property of Iran and Iranian governmental entities.... As a result, all Iranian bank accounts in United States banks, irrespective of the country in which the funds were located, were frozen. Some $12 billion was affected by this action....

....

... On November 26, 1979 the Treasury, acting under delegated authority, granted a general license authorising judicial proceedings against Iran....

Id. at 6-7. As the crisis intensified, the United States increased regulatory efforts against Iran.

In April 1980 the President executed orders blocking all commerce and travel between the United States and Iran.... Thus by April 1980 there was in force a complete freeze on Iranian assets....

....

... The hostage crisis brought a new wave of litigants to the United States courts seeking compensation from Iran. By 1980 more than 400 actions against Iran had been filed in United States courts....

....

Iran therefore faced the prospect of its frozen assets being used to satisfy United States claims....

Id. at 6-7. The hostage crisis lasted for 444 days and finally came to an end on January 19, 1981, with the implementation of two major declarations--the General Declaration and Claims Settlement Declaration--collectively known as the Algiers Declarations. Id. at 13-14. One of the most important objectives of the General Declaration was the termination of all litigation in U.S. courts and the resolution of the same by the Iran-United States Claims Tribunal, which was established by the Claims Settlement Declaration. Id. at 14-15.

[100] See Algiers Agreement, supra note 6.

[101] See Case 1/99, Ethiopia v. Eritrea, Ct. of Justice of the Common Mkt. for E. and S. Afr.

grounds that the claim was an abuse of the process of the court and argued that it was not a matter that arose from the treaty that would grant the court jurisdiction to adjudicate the claim.[102] Following the establishment of the Eritrea-Ethiopia Claims Commission, however, the parties sought to stay the COMESA proceedings in favor of the Claims Commission, and the Court of Justice of COMESA did so accordingly without addressing any of the substantive issues raised in the matter.[103]

Similarly, the Claims Commission proceedings have played an important role in Nemariam v. Federal Democratic Republic of Ethiopia.[104] Nemariam was brought before the U.S. District Court for the District of Columbia on June 12, 2000, by several individuals of Eritrean origin expelled from Ethiopia during the conflict against the Government of Ethiopia and the Commercial Bank of Ethiopia for the alleged unlawful takings of the plaintiffs' property in violation of international law.[105] A pivotal issue in the early proceedings of the case was whether it should be dismissed on forum non conveniens grounds in favor of the Eritrea-Ethiopia Claims Commission.[106] The District Court concluded that the case should be dismissed on those grounds, but its decision was overturned by the U.S. Court of Appeals for the District of Columbia Circuit.[107] The D.C. Circuit Court noted that the forum non conveniens issue was "a close one,"[108] but concluded that the Eritrea-Ethiopia Claims Commission was an inadequate forum for the plaintiffs' claims because of its "inability to make an award directly" to the plaintiffs and because of Eritrea's ability to set off the plaintiffs' claims against any claims that Ethiopia might have against Eritrea.[109] The D.C. Circuit's findings touch on the important issue of how effective

---

(2001), available at http://www.comesa.int/ (follow "Institutions" hyperlink; then follow "Court of Justice" hyperlink; then follow "Precedents" hyperlink; then follow "Judgements" [sic] hyperlink; then follow "Ethiopia v. Eritrea. IA. 1/2000." hyperlink) (last visited June 15, 2007).

[102] See id.

[103] See id.

[104] See Nemariam v. Federal Democratic Republic of Ethiopia, 315 F.3d 390, 391-92 (D.C. Cir. 2003).

[105] See id. The action was brought under § 1605(a)(3) of the Foreign Sovereign Immunities Act [FSIA], which vests U.S. courts with jurisdiction in cases "in which rights in property taken in violation of international law are in issue" and where certain other requirements are met. 28 U.S.C. § 1605(a)(3) (2006). See Nemariam, 315 F.3d at 392.

[106] See Nemariam, 315 F.3d at 392-93.

[107] See id. at 393-95.

[108] Id. at 395.

[109] Id. Following the reversal by the U.S. Court of Appeals for the District of Columbia Circuit, the case returned to the District Court where it has had "a protracted history." Nemariam v. Federal Democratic Republic of Ethiopia, 400 F. Supp. 2d 76, 78 n.1 (D.D.C. 2005). As of the writing of this article, the lawsuit was again on appeal in the D.C. Circuit Court of Appeals after having been dismissed for a second time by the District Court on the grounds that the expropriation exception of the FSIA established subject matter jurisdiction only in cases where tangible property rights were at issue. Id. at 81-83. The District Court found

the imposition of civil liability for violations of international humanitarian law is if the victims of violations are not directly compensated.

III. JURISDICTION, APPLICABLE LAW, AND EVIDENCE

This section discusses the Commission's jurisdiction, the laws it applied, the evidentiary matters it addressed, and the remedies it granted. The Commission addressed all of these issues in its various decisions. In discussing these issues, this section makes extensive reference to these various decisions.

A. Jurisdiction

The source of the Claims Commission's jurisdiction is Article 5(1) of the Algiers Agreement. It states that the Commission's jurisdiction extends to:

> *All claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party . . . that are (a) related to the conflict . . . and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.*[110]

In its very first decision, the Commission interpreted the scope of its jurisdiction. In doing so, the Commission addressed several areas of contention and paid particular attention to the Commission's supervisory jurisdiction, i.e., the power of the Commission to interpret or implement the Algiers Agreement, and temporal jurisdiction.[111] In the subsequent partial awards that the Commission issued with respect to the parties' substantive claims, the Commission expanded on these two issues and addressed other important jurisdictional questions. Discussion of the Commission's key jurisdictional findings is contained in the following sections.

1. Supervisory Jurisdiction

The Claims Commission ruled that it could not imply supervisory jurisdiction to

---

that the rights relevant to jurisdiction in the Nemariam proceedings were intangible contractual rights to withdraw money from bank accounts at the Commercial Bank of Ethiopia. Id. at 83-84. The District Court further held that jurisdiction was lacking under the expropriation exception to immunity because the Commercial Bank of Ethiopia did not own or operate the bank accounts, which is one of the requirements of the FSIA's expropriation exception. Id. at 84-86.

[110] Algiers Agreement, supra note 6, art. 5, ¶ 1.

[111] See EECC, Decision No. 1, §§ A-D (Perm. Ct. Arb. 2001), available at http://www.pca-cpa.org/showpage.asp?pag_id=1151 (last visited June 15, 2007).

interpret the Algiers Agreement from Article 5(1) of that agreement.[112] The Commission concluded that if the parties had envisioned the grant of supervisory authority, they would have expressly provided for it.[113] The Commission contrasted this approach with the jurisdiction of the Iran-United States Claims Tribunal, which was given express authority to decide disputes regarding the interpretation and application of the Claims Settlement Declaration agreed to by Iran and United States.[114] This decision left the issue of authority to interpret the Algiers Agreement as it relates to the Claims Commission's work an open question.

However, the Commission's subsequent decisions make clear that it did not completely refrain from filling this gap. One such example is its decision on Ethiopia's jus ad bellum claim.[115] In that case, Eritrea argued that the Commission lacked jurisdiction because the Algiers Agreement assigned the authority to determine the "origins of the conflict"--and, thus, a party's resort to force--to an independent investigative body.[116] Eritrea relied on Article 3 of the agreement, which states that "[i]n order to determine the origins of the conflict, an investigation will be carried out on the incidents of 6 May 1998 and on any other incident prior to that date which could have contributed to a misunderstanding between the parties regarding their common border, including the incidents of July and August 1997."[117] In interpreting this provision, the Commission held that the terms "origins of the conflict" and "misunderstanding between the parties regarding their common border" did not refer to the legal issue of whether Eritrea unlawfully resorted to the use of force.[118] More importantly, the Commission stated that "it seems clear that Article 3 was carefully drafted to direct the impartial body to inquire into matters of fact, not to make any determinations of law. This Commission is the only body assigned by the Agreement with the duty of deciding claims of liability for violations of international law."[119] Thus, this decision provides an example of the Commission's assertion of interpretive authority despite its decision regarding supervisory jurisdiction. However, such authority was indeed vital for the proper disposition of cases brought under the

[112] See id. § A.
[113] See id.
[114] See Claims Settlement Declaration, supra note 9, art. II, ¶ 3 ("The Tribunal shall have jurisdiction, as specified in Paragraphs 16-17 of the Declaration of the Government of Algeria of January 19, 1981, over any dispute as to the interpretation or performance of any provision of that Declaration.").
[115] Ethiopia's jus ad bellum claim is one of several claims that it presented against Eritrea. Although Eritrea also presented several independent claims based on alleged violations of international humanitarian law, it did not have a jus ad bellum claim against Ethiopia. The parties' most important claims based on alleged violations of international humanitarian law are discussed under different headings in Part III. See infra Part III.
[116] See EECC, Jus Ad Bellum, Ethiopia's Claims 1-8, ¶ 3 (2005).
[117] Algiers Agreement, supra note 6, art. 3, ¶ 1.
[118] EECC, Jus Ad Bellum, Ethiopia's Claims 1-8, ¶ 4 (2005).
[119] Id. ¶ 4.

Algiers Agreement.

2. Temporal Jurisdiction

The Commission defined the scope of its temporal jurisdiction in the first decision it rendered, concluding:

> *[T]he central reference point for determining the scope of [the Commission's] mandate under Article (5)1 of the Agreement is the conflict between the parties. In the overall context of the relevant documents cited in Article (5)1, the Commission understands this to mean the armed conflict that began in May 1998 and was formally brought to an end by the Agreement on December 12, 2000. There is a presumption that claims arising during this period "relate to" the conflict and are within the Commission's jurisdiction.*[120]

The Commission went on to conclude:

> *[C]ertain claims associated with events after December 12, 2000, may also "relate to" the conflict, if a party can demonstrate that those claims arose as a result of the armed conflict between the parties, or occurred in the course of measures to disengage contending forces or otherwise to end the military confrontation between the two sides.*[121]

As an example, the Commission cited claims that could potentially arise for violations of international humanitarian law that might have occurred as the military forces were withdrawing from occupied territory after December 12, 2000.[122] In its later partial awards, the Commission noted that this principle was "in harmony with important international humanitarian law principles, which continue to provide protection throughout the complex process of disengaging forces and addressing the immediate aftermath of armed conflict."[123]

The Commission's temporal jurisdiction was tested during the prisoner of war proceedings, the first round of claims heard by the Commission. During these proceedings, the issue arose whether Eritrea's claim of alleged mistreatment of

---

[120] EECC, Decision No. 1, § B (2001).
[121] Id. ¶ C.
[122] Id.
[123] EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 15 (2004) (citing Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 6, Aug. 12, 1949, 6 U.S.T. 3517, 3522) ("Protected persons whose release, repatriation or re-establishment may take place after [the general close of military operations]... shall meanwhile continue to benefit by the present Convention.").

prisoners of war, including a delay in repatriation of prisoners following the signing of the Algiers Agreement on December 12, 2000, was sufficiently related to the conflict to be within the Commission's jurisdiction.[124] Ethiopia maintained that the Commission did not have jurisdiction over such claims,[125] and, having taken this position, made no repatriation or related claims.[126] Ethiopia further argued that the repatriation issue was governed by Article 2 of the Algiers Agreement, which provided that "[i]n fulfilling their obligations under international humanitarian law . . . the parties shall without delay release and repatriate all prisoners of war,"[127] rather than Article 118 of Geneva Convention III.[128] As such, Ethiopia argued that the Claims Commission could not decide the repatriation issue because doing so would require it to entertain a claim concerning "the interpretation or implementation of the [Algiers] Agreement," which, as discussed in the preceding section, the Commission had earlier found it was not empowered to do.[129]

The Commission concluded that it had jurisdiction to address the repatriation claim and other claims of mistreatment arising after the signing of the Algiers Agreement.[130] The Commission stated that "the timely release and repatriation of POWs is clearly among the types of measures associated with disengaging contending forces and ending the military confrontation between the two Parties that fall within the scope" of its jurisdiction.[131] The Commission further rejected Ethiopia's argument that the Commission was prevented from addressing the repatriation claim because doing so would require it to interpret the Algiers Agreement.[132] The Commission observed that Article 118 of Geneva Convention III was still in play and that "[i]t frequently occurs in international law that a party finds itself subject to cumulative obligations arising independently from multiple sources."[133] The Commission went on to hold Ethiopia liable for the delayed repatriation of Eritrean POWs.[134]

The Commission was not as sympathetic to Eritrea's claim that "the alleged forcible expulsion from Ethiopia of 722 persons in July 2001" was a claim related to the

---

[124] See EECC, Prisoners of War, Eritrea's Claim 17, §§ III, V.A.; EECC, Prisoners of War, Ethiopia's Claim 4, §§ III, V.A.

[125] E.g., EECC, Prisoners of War, Eritrea's Claim 17, ¶ 16 (2003). The final repatriation of prisoners of war by Eritrea did not occur until August 2002, and Ethiopian repatriation occurred in November 2002. See, e.g., id. ¶ 10.

[126] E.g., id. ¶ 16.

[127] Id. ¶ 17 (citing Algiers Agreement, supra note 6, art. 2).

[128] See id. ¶¶ 18, 22.

[129] Id. ¶ 18.

[130] Id.

[131] Id. ¶ 20.

[132] See id. ¶ 22.

[133] See id. (citing Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 174-178 (June 27)).

[134] Id. ¶ 163.

conflict and, thus, fell within the Commission's temporal jurisdiction.[135] With no discussion of the evidence presented on the issue, the Commission concluded that "the record did not establish that this event was related to the disengagement of forces or otherwise fell within the scope of the Commission's jurisdiction pursuant to Decision No. 1."[136]

The Commission also took a more limited approach to its temporal jurisdiction with respect to Eritrea's claim against Ethiopia for allegedly preventing displaced Eritreans from returning to their homes in territory under the continued occupation of Ethiopia in violation of Article 49 of Geneva Convention IV.[137] Eritrea argued that because the original displacement of these individuals occurred during the conflict, their inability to return home "related to the conflict."[138] Eritrea relied on the Commission's earlier decision regarding temporal jurisdiction in the prisoners of war proceedings by seeking to analogize the position of these individuals with the prisoners of war whose repatriation was delayed.[139] The Commission, however, did not agree with the analogy and concluded that Eritrea's claim for the alleged prevention of the displaced persons' return did not meet the requirements of Decision No. 1.[140] The Commission stated that the requirement to repatriate prisoners of war was "an explicit element of an integrated body of law, Geneva Convention III of 1949, brought into operation by the war,"[141] whereas "Geneva Convention IV creates no corresponding duty with respect to the return of displaced civilians."[142] The Commission observed that it "appreciates the importance of the resettlement of displaced persons after the close of hostilities, but claims relating to these matters fall outside of the restricted temporal scope of its jurisdiction under the Agreement. Indeed, return or resettlement is likely to require considerable time and resources, extending long after the conflict's end."[143]

---

[135] EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 16 (2004).

[136] Id.

[137] See EECC, Western Front, Arial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26, ¶¶ 122-130 (2005). The Commission observed that "it became clear in the further pleadings that the claim was directed at events that occurred after the conclusion of the Agreement in the Temporary Security Zone and in areas south of that zone that were determined by the Boundary Commission in 2002 to be on the Eritrean side of the border." Id. ¶ 122.

[138] Id. ¶ 126.

[139] See id.; see also EECC, Prisoners of War, Eritrea's Claim 17, ¶ 146 (2003).

[140] EECC, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26, ¶ 127 (2005).

[141] Id.

[142] Id. ¶ 128.

[143] Id. The Commission noted that the preamble to the Algiers Agreement specifically noted that the Organization of African Unity (now the African Union) and the United Nations were committed to "work[ing] closely with the international community to mobilize resources for the resettlement of displaced persons." Id. (citation omitted). The Commission also noted that its limited supervisory jurisdiction precluded it from adjudicating any aspect of the claim relating to the Temporary Security Zone because this

Thus, although the Commission indicated a willingness in the first round of proceedings to take a somewhat expansive interpretation of its temporal jurisdiction, it took a more limited approach in later proceedings. Although the Commission's discussion of why the alleged expulsion of individuals in July 2001 was not related to the conflict was rather cursory, its later discussion regarding the alleged prevention of displaced persons from returning to occupied territory involved a much more thorough discussion of the applicable law and facts.

3. Extinguishing of Claims Not Filed By December 12, 2001

The Commission found that several claims that were not filed by December 12, 2001, were extinguished pursuant to Article 5, paragraph 8 of the Algiers Agreement for not having been timely filed.[144] During the prisoner of war proceedings, the Commission found three such claims filed by Eritrea.[145] Eritrea argued that it had not discovered the violation at issue in one of these claims until after the filing deadline, but the Commission rejected this argument.[146] With respect to the other two claims that were extinguished, the Commission recognized "[t]hat, during the proceedings, the Parties

---

zone was established in the Cessation of Hostilities Agreement. Id. ¶ 129.

[144] EECC, Diplomatic Claim, Ethiopia's Claim 8, ¶¶ 10-13 (2005); EECC, Diplomatic Claim, Eritrea's Claim 20, ¶¶ 9-12 (2005); EECC, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26, ¶¶ 86-87 (2005); EECC, Civilians Claims, Ethiopia's Claim 5, ¶¶ 19-21 (2004); EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 22 (2004); EECC, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, ¶¶ 11-17 (2004); EECC, Prisoners of War, Eritrea's Claim 17, ¶¶ 23-29 (2003); EECC, Prisoners of War, Ethiopia's Claim 4, ¶¶ 19-21 (2003). The Algiers Agreement states that "[a]ll claims submitted to the Commission shall be filed no later than one year from the effective date of this agreement.... [S]uch claims that could have been and were not submitted by that deadline shall be extinguished, in accordance with international law." Algiers Agreement, supra note 6, art. 5, ¶ 8.

[145] EECC, Prisoners of War, Eritrea's Claim 17, ¶ 25 (2003). These included the following: (1) the claim that Eritrean prisoners of war "were subjected to insults and public curiosity" in violation of Article 13 of Geneva Convention III; (2) the claim that female Eritrean prisoners of war "were accorded inappropriate housing and sanitation conditions" in violation of Articles 25 and 29 of Geneva Convention III; and (3) the claim that Eritrean prisoners of war "were mistreated during transfers between camps" in violation of Article 46 of Geneva Convention III. Id. ¶ 24. Eritrea's claim that its civilians were detained in camps with prisoners of war was deferred to the Civilians Claims proceedings during which the Commission ultimately concluded that Ethiopia was not liable for this alleged violation. Id. ¶¶ 24, 28; EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶¶ 119-22 (2004).

[146] See EECC, Prisoners of War, Eritrea's Claim 17, ¶ 26 (2003) (Eritrea explained that it did not discover a website operated by Ethiopia containing photographs and personal information about Eritrean prisoners of war, which Eritrea contended subjected the prisoners of war to "insults and public curiosity," until after the deadline had passed.).

may wish to refine their legal theories or present more detailed or accurate portrayals of the underlying facts."[147] Nonetheless, the Commission concluded that these two claims were not "identified with the degree of clarity required to permit balanced and informed proceedings."[148] The Commission also found that one claim filed by Ethiopia--the repatriation claim discussed above--was extinguished, which followed from the position taken by Ethiopia that such a claim was outside the temporal scope of the Commission's jurisdiction.[149]

The Commission also dismissed several claims filed by Eritrea during the proceedings for the Central Front on the grounds that they were not timely filed. Four of these claims were dismissed summarily for not having been included in Eritrea's statements of claim: (1) "[a]lleged violations of international law by Ethiopia occurring after March 2001;" (2) "[a]lleged continuing unlawful occupation that occurred after March 2001;" (3) "[a]lleged unlawful use of landmines by Ethiopia" in one geographic area; and (4) "[a]lleged conduct by Ethiopia of unlawful "political re-education" classes in one geographic area.[150]

Two other claims pursued by Eritrea were also dismissed in whole or in part, but they prompted further discussion by the Commission. The first claim was Eritrea's allegation that Ethiopia had unlawfully failed or refused to stop illegal action by Ethiopian soldiers in two geographic areas in Eritrea.[151] The Commission observed that Eritrea's statement of claim for one of the geographic areas had made a reference to an Ethiopian officer ignoring rape complaints.[152] The Commission observed, however, that the particular statement of claim did "not include in its list of relevant treaty articles any dealing with the responsibility of commanders; nor, more importantly, [did] it include any reference to the failure of commanders to stop illegal conduct by the troops under their command when it lists the violations of international law" upon which Eritrea based its claims for that geographic area.[153] As such, the Commission concluded that this claim was not stated with the degree of specificity required and found that it was extinguished pursuant to Article 5, paragraph 8.[154] The Commission made a similar finding with respect to the other geographic area addressed by Eritrea as part of this claim, observing that Eritrea had made no reference to the failure or refusal of Ethiopian commanders in this geographic area to stop the illegal conduct of soldiers serving under them.[155]

---

[147] See id. ¶ 27.
[148] See id. ¶ 26.
[149] See EECC, Prisoners of War, Ethiopia's Claim 4, ¶ 20 (2003).
[150] EECC, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, ¶ 13-14 (2004).
[151] See id. ¶¶ 15-16.
[152] Id. ¶ 15.
[153] Id.
[154] See id. The Commission noted, however, that this finding did "not affect Eritrea's claims that Ethiopia is liable for illegal conduct by members of its armed forces." Id.
[155] See id. ¶ 16 (noting that with respect to this geographic area, all of the violations alleged by

The second claim that the Commission explored in more detail before finding that part of it was extinguished was Eritrea's claim concerning alleged violations of Protocol II to the 1980 Convention on Certain Conventional Weapons and Protocol I to Geneva Convention IV.[156] The Commission concluded that although its Rules of Procedure required a "'precise statement' of 'the violation or violations of international law on the basis of which the claim or claims are alleged to have arisen,' [they did] not require that the Statement of Claim specify every treaty article that might be relevant to a claimed illegal act."[157] The Commission went on to explain that what was "required is adequate notice to the Respondent of the act that gives rise to the claim and the assertion that it was in violation of applicable international law."[158] Thus, the Commission concluded, for example, that "where illegal use of mines or booby-traps is alleged in [Eritrea's] Statement of Claim, the claim is not extinguished simply because no reference is made to Protocol II of 1980."[159] On the other hand, the Commission concluded that Eritrea's claim with respect to "undefended localities" under Article 59 of Protocol I was extinguished because Eritrea had not referred to "undefended localities" in its Statements of Claim.[160] Although the Commission did not articulate the precise contours of its findings, it appears that failure by a party to state the factual basis for its claims in its Statements of Claim was more likely to lead to that claim being extinguished than any omission of the legal grounds for the claim.

Ethiopia likewise fell victim to claim extinguishment during the proceedings related to the civilian claims.[161] During these proceedings, Eritrea argued that eighteen specific claims being pursued by Ethiopia had not been properly identified in Ethiopia's

---

Eritrea were "intentional or deliberate actions by the Ethiopian army" and not done by omission).

[156] See id. ¶ 17.

[157] Id. The Commission built on this statement in a later partial award when it observed that "the Commission does not regard references to additional international legal authorities or legal arguments to support a claim presented in the Statements of Claim as constituting impermissible new claims." EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 22 (2004).

[158] EECC, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, ¶ 17 (2004).

[159] Id. (referring to Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Oct. 10, 1980, 1342 U.N.T.S. 168, reprinted in 19 I.L.M. 1529).

[160] See id.

[161] EECC, Civilians Claims, Ethiopia's Claim 5, ¶¶ 20-21 (2004). Ethiopia also made timeliness challenges to some of the claims Eritrea pursued during the "Civilians Claims" proceedings and the "Western Front, Aerial Bombardment and Related Claims" proceedings; however, these challenges were rejected by the Commission. EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 22; EECC, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26, ¶¶ 86-87 (2005). Challenges were also made successfully by both parties during the "Diplomatic Claims" proceedings. EECC, Diplomatic Claim, Ethiopia's Claim 8, ¶¶ 10-13 (2005); EECC, Diplomatic Claim, Eritrea's Claim 20, ¶¶ 9-12 (2005).

statements of claim.[162] The Commission found that three of these claims had not been timely raised: (1) failure to provide proper transport conditions to or among detention camps; (2) exposure of Ethiopian detainees and internees to public curiosity; and (3) forcing Ethiopians to donate blood.[163] The Commission noted that many of the remaining challenged claims were part of more general claims such as Ethiopia's claim for "unlawful treatment and conditions of confinement," that had been sufficiently articulated in Ethiopia's Statements of Claim.[164]

4. Claims on Behalf of Non-Nationals

When claims are asserted by states on behalf of individuals against another state, nationality is often the single most important factor for the determination of legal standing.[165] This issue was one of the most difficult adjudicatory challenges that the Eritrea-Ethiopia Claims Commission faced. The issue had distinct peculiarity because it emanated from a remarkably unique and complex set of circumstances. These circumstances are briefly described as follows.

Eritrea claimed that all inhabitants of present-day Eritrea and persons of Eritrean descent who had never acquired another nationality were nationals of Ethiopia until Eritrean independence in 1993.[166] The issue of nationality remained unresolved

---

[162] EECC, Civilians Claims, Ethiopia's Claim 5, ¶ 20 (2004). The claims were that Eritrea did the following:

> 1. Interned Ethiopians at the Massawa Naval Base; 2. Did not provide proper conditions of transport to detention or between supposed detention sites; 3. Interrogated Ethiopians; 4. Exposed Ethiopian detainees/internees to public curiosity; 5. Subjected Ethiopians to curfew; 6. Subjected Ethiopians to house arrest; 7. Rounded up Ethiopian street children; 8. Did not allow Ethiopians to congregate in public places; 9. Did not provide separate quarters for women held in detention; 10. Housed Ethiopian detainees with criminals; 11. Housed healthy detainees with those who were infirm; 12. Improperly denied relations with the exterior to Ethiopian detainees/internees; 13. Interfered with detainees'/internees' freedom of religion; 14. Improperly failed to post camp regulations; 15. Allowed children to be beaten in Eritrean schools, both by Eritrean teachers and by Eritrean students; 16. Prohibited employers from paying Ethiopian workers; 17. Conducted "sweeps" of the street of Assab to collect young Ethiopian men; and 18. Forced Ethiopians to donate blood.
>
> Id.

[163] Id. ¶¶ 20-21.

[164] See id. ¶ 21.

[165] Id. For example, the issue of nationality figured prominently in the jurisdictional issues presented during the Iran-United States Claims Tribunal. See, e.g., Rahmatullah Khan, The Iran-United States Claims Tribunal: Controversies, Cases and Contributions 120-145 (1990).

[166] See EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 39 (2004).

following Eritrea's independence and became further complicated when the two parties went to war in 1998.[167]

The most important dispute between the parties regarding nationality related to the manner of Eritrea's independence. Eritrea's official independence in May 1993[168] followed a referendum held pursuant to a proclamation that the Eritrean Provisional Government issued in April 1992.[169] The provisional administration had been established in May 1991 following the EPLF's gaining of control over the territory of present-day Eritrea.[170] Eritrea's legal status between May 1991 and May 1993 was ambiguous and, as such, was a disputed fact.[171]

Following the start of the conflict between Ethiopia and Eritrea in May 1998, Ethiopia expelled thousands of persons of Eritrean origin on national security grounds.[172] Eritrea argued that Ethiopia's expulsion was contrary to international law because, among other things, it amounted to a denationalization of Ethiopian nationals because of their Eritrean descent.[173] Ethiopia, on the other hand, argued that the expelled individuals had acquired Eritrean nationality as of the time of the Eritrean referendum by operation of (1) the Eritrean proclamation that set forth the requirements for the referendum[174] and (2) Ethiopia's own nationality law.[175] Under the referendum proclamation, every individual taking part in the referendum had to be able to demonstrate that he or she was an Eritrean national.[176] And, according to Ethiopia's

---

[167] See id. ¶¶ 46-47.

[168] See id. ¶¶ 7, 39.

[169] See Proclamation No. 21/1992 of the Provisional Government of Eritrea (April 6, 1992) (setting forth several requirements for acquiring Eritrean citizenship, which include birth, marriage and naturalization) available at http://www.unhcr.org/home/RSDLEGAL/3ae6b4e026.html (last visited June 15, 2007), cited in EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 40 (2004).

[170] See EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶¶ 6, 7 (2004).

[171] See id. ¶ 45.

[172] See id. ¶¶ 65, 79-80.

[173] See id. ¶¶ 79-80.

[174] See id. ¶ 45.

[175] See id. ¶ 43.

[176] See Proclamation No. 22/1992 of the Provisional Government of Eritrea (Apr. 7, 1992) (setting forth the procedures for participating in the Referendum), cited in EECC, Civilians Claims, Eritrea's Claim 15, 16, 23 & 27-32, ¶ 41 (2004). The text of the relevant provision reads:

> Any person having Eritrean citizenship pursuant to Proclamation No. 21/1992 on the date of his application for registration and who was of the age of 18 years or older or would attain such age at any time during the registration period, and who further possessed an Identification Card issued by the Department of Internal Affairs, shall be qualified for registration.

Id. ¶ 41 (citing Proclamation No. 21/1992 of the Provisional Government of Eritrea (Apr. 7, 1992)).

nationality law, anyone who acquired another nationality lost his or her Ethiopian nationality by operation of law.[177]

This argument was complicated by Ethiopia's continued treatment of these individuals--i.e., persons of Eritrean descent who had taken part in the Eritrean referendum--like its own nationals from 1993 to 1998, including the issuance of passports and granting of all citizenship privileges pursuant to an agreement made between the two parties.[178] The agreement, which was in the form of meeting minutes signed by high-ranking officials of the two governments in 1996, provided that "on the question of nationality, it was agreed that Eritreans who have so far been enjoying Ethiopian citizenship should be made to choose and abide by their choice."[179]

The two major issues that arose were (1) whether registering to vote for the Eritrean referendum, which required one to possess Eritrean nationality as set forth under the Eritrean nationality law issued by the provisional government of Eritrea, amounted to the acquisition of Eritrean nationality before the Eritrean state was formally established,[180] and (2) whether Ethiopia's continued treatment of individuals as its own citizens who qualified under the Eritrean nationality law as Eritrean nationals amounted to the recognition of the continuity of their Ethiopian nationality.[181]

The Commission came up with a creative resolution commensurate with its arbitral role. It held that registering for the Eritrean referendum could not have been done without legal consequences.[182] At the same time, however, the Commission concluded that continued treatment of individuals as nationals, including issuance of passports, "is an internationally significant act, not a casual courtesy."[183] Consequently, "the Commission conclude [d] that those who qualified to participate in the Referendum in fact acquired dual nationality. They became citizens of the new State of Eritrea pursuant to Eritrea's Proclamation No. 21/1992, but at the same time, Ethiopia continued to regard them as its own nationals."[184]

---

[177] EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 46 (2004).

[178] See id. ¶¶ 46-50.

[179] Id. ¶ 52. The Commission concluded that it was unnecessary to determine whether the minutes constituted a binding treaty between the two states because, regardless of the document's legal status, it showed the parties' intentions. Id. ¶ 53.

[180] See id. ¶ 44.

[181] See id. ¶ 46.

[182] See id. ¶ 48.

[183] Id. ¶ 49.

[184] Id. ¶ 51. The Commission made this ruling despite Eritrea's argument that it could not have conferred Eritrean nationality prior to its formal existence. Id. ¶ 44. The Commission said that Eritrea enacted its nationality law prior to its formal recognition. Id. ¶ 48. The authorities exercised effective control over a defined territory and population, undertook complex international relations and, as such, had de facto existence. Id. See generally Ian Brownlie, Principles of Public International Law 70-72 (6th ed. 2003)

In its determination, the Commission did not rely on international precedent because it had to resolve an unprecedented set of issues. In this case, the issues of nationality and a state's legal standing to claim on behalf of individuals arose in a manner that clearly diverged from the manner in which these issues had traditionally arisen in the context of international disputes.

The standing of dual nationals in international law has long been a subject of immense controversy.[185] International tribunals often consider two competing theories: the theory of non-responsibility and the theory of dominant-and-effective nationality.[186] The theory of non-responsibility "is based on the principle of sovereign equality of states"[187] because the determination of nationality has always been considered the exclusive prerogative of the state.[188] Under this theory, if two states consider the same

---

(describing the legal criteria of statehood); Akehurst's Modern Introduction to International Law 75-81 (Peter Malanczuk ed., 7th rev. ed. 1997) (describing the definition of a state for purposes of international law).

[185] E.g., Khan, supra note 165, at 122. Although there is still some controversy regarding whether dual nationals can bring claim against one of the states of their nationality, the question seems to be increasingly answered in the affirmative. See id. at 122-23. See generally Peter E. Mahoney, The Standing of Dual Nationals before the Iran-United States Claims Tribunal, 24 Va. J. Int'l L. 695 (1984); Notes, Claims of Dual Nationals in the Modern Era: The Iran-United States Claims Tribunal, 83 Mich. L. Rev. 597 (1984). This controversy, however, relates only to situations where the two states are parties to the dispute. There is little controversy when the respondent is a third state because of the existence of a relatively clear rule. See, e.g., Convention on Certain Questions Relating to the Conflict of Nationality Laws art. 5, reprinted in 11 League of Nations Official J. 847 (1930):

> Within a third state, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, a third State shall, of the nationalities which any such person possesses, recognise exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected.

Id. But see Nissim Bar-Yaacov, Dual Nationality, in 54 Libr. World Aff. 214-17 (George W. Keeton & George Schwarzenberger eds., 1961); L. Oppenheim, International Law 348 (H. Lauterpacht ed., 8th ed. 1955) (contending that dual nationals could not bring claims against either of their states of nationality).

[186] Khan, supra note 165, at 122.

[187] Id.

[188] See, e.g., Convention on Certain Questions Relating to the Conflict of Nationality Laws, supra note 185, art. 1 ("It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality."). See generally Brownlie, supra note 184.

individual to be their national, any choice between the two by an international tribunal is considered a preference for the nationality laws of one nation over the other.[189] This is believed to negate the principle of sovereign equality of nations.[190]

The theory of dominant-and-effective nationality, on the other hand, is based primarily on the seminal Nottebohm case decided by the International Court of Justice (ICJ) in 1955.[191] In that case, the ICJ held that nationality is:

> [*A] legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridicial expression of the fact that the individual upon whom it is conferred, either directly by law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.*[192]

The ICJ also said that in cases where a preference needs to be made as to "the real and effective nationality," arbitrators look at "the habitual residence of the individual . . . the centre of his interests, his family ties, his participation in public life, [and] attachment shown by him for a given country and inculcated in his children . . . ."[193] Despite its recent origin, the theory of dominant-and-effective nationality has been

---

[189] See Khan, supra note 165, at 122.

[190] Id. at 122-123. For example, Guy I.F. Leigh argues that:

> [I]f both nationalities are valid, then to permit one state to represent the individual against his other state would be given greater effect to the nationality of the claimant state, thus denying this sovereign equality. Therefore, neither state of which the individual is a national may represent him against the other state whose nationality he possesses.

Guy I.F. Leigh, Nationality and Diplomatic Protection, 20 Int'l & Comp. L.Q. 453, 460 (1971) quoted in Khan, supra note 165, at 122-123. Under this theory, the practical difficulties associated with dual nationality are emphasized as follows:

> [T]he State of one of his nationalities can never give him, or his interests, diplomatic protection or support, or bring an international claim on his behalf, against the State of his other nationality even if he is not at the time resident in that State, and is resident in the territory of the State desiring to claim. If this were not so, a dual national having a grievance against the authorities of one of his countries, in which he was resident, would only have to remove to the other in order to be able to obtain foreign support.

Gerald Fitzmaurice, The General Principles of International Law Considered from the Standpoint of the Rule of Law, 92 Recueil des Cours 1, 193 (1957), quoted in Khan, supra note 165, at 123.

[191] Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6).

[192] Id. at 23.

[193] Id. at 22.

recognized as a general principle of international law,[194] unlike the principle of non-responsibility.

As indicated above, in resolving the nationality issue between Eritrea and Ethiopia, the Claims Commission concluded that some individuals did indeed acquire dual nationality.[195] However, the Commission did not deem it necessary to determine the dominant-and-effective nationality of the dual nationals, mainly because the issue of legal standing had already been determined by the Algiers Agreement.[196] Rather, the Commission followed a completely different, perhaps unprecedented, line of inquiry because the issue was whether Ethiopia had in fact engaged in unlawful denationalization of its own nationals.[197] Ironically, the claimant was another state

---

[194] Although the theory of dominant-and-effective nationality is generally recognized, there is some dispute as to whether it has acquired the status of customary law. Ian Brownlie, for example, argues that the theory of dominant-and-effective nationality is a general principle of international law and should be recognized as such. See Brownlie, supra note 184, at 19. Others offer a more cautious endorsement. See, e.g., Mahoney, supra note 185, at 728. Case No. A/18 of the Iran-United States Claims Tribunal "represents the most affirmative statement to date that the applicable rule of international law with regard to dual nationals is that of dominant and effective nationality." Notes, supra note 185, at 622 (citing Iran-United States Claims Tribunal: Decision in Case No. A/18, 23 I.L.M., 489, 497-99). In Esphahanian v. Bank Tejarat, the Iran-United States Claims Tribunal held that "the Tribunal had jurisdiction (a) over claims against Iran by dual Iran-United States nationals when the dominant and effective nationality of the Claimant is that of the United States and (b) over claims against the United States by dual Iran-United States nationals when the dominant and effective nationality of the Claimant is that of Iran." Award No. 31-157-2 (Mar. 29, 1983), reprinted in 2 Iran-U.S. Cl. Trib. Rep. 157, 166 (1983). In fact, the Tribunal added a "caveat" to this principle because it recognized that some claimants might attempt to seek redress as U.S. nationals for rights that they had acquired solely because of their Iranian nationality. Nancy Amoury Combs, Toward A New Understanding of Abuse of Nationality in Claims Before the Iran-United States Claims Tribunal, 10 Am. Rev. Int'l Arb. 27, 28 (1999). In such instances, the Tribunal looked at two fundamental questions: (1) whether the ownership of the property in question was reserved by law to Iranian nationals and (2) the manner of the claimant's acquisition of such property. Id.

[195] EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 51 (2004). The Commission considered the effects of this determination to be in two different groups: persons who were expelled from urban and rural areas and persons who chose to join family members who were expelled. See id. ¶¶ 80-97.

[196] See Algiers Agreement, supra note 6, art. 5, ¶ 9 ("In appropriate cases, each party may file claims on behalf of persons of Ethiopian or Eritrean origin who may not be its nationals. Such claims shall be considered by the Commission on the same basis as claims submitted on behalf of that party's nationals."). In arbitral proceedings, parties ordinarily agree to certain jurisdictional matters. Though unprecedented, this provision was endorsed by the Commission. In fact, even the doctrine of non-responsibility recognizes waiver by mutual consent. See H. Lauterpacht, The Subjects of the Law of Nations, 63 L.Q. Rev. 438, 457 (1947), cited in Khan, supra note 165, at 123.

[197] See EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶¶ 57-58.

whose nationality was held by the represented individuals.[198] If it were not for the Algiers Agreement, under international law discussed above, Eritrea would have had to prove that it was the source of the dominant-and-effective nationality in order to present a claim against Ethiopia. Even then, the claim would have been exceedingly strange because it would have to allege that, Eritrea, as the repository of the dominant-and-effective nationality, would seek compensation on behalf of the same individuals who were deprived of their non-dominant nationality by Ethiopia. That strange option was foreclosed by the Algiers Agreement. The facts of this case were unprecedented, and as indicated above, in determining the issues that arose out of these facts, the Commission engaged in a creative application of existing norms and contributed its own methods of resolving claims against a state on behalf of individual claimants whose nationality was at issue.

B. Applicable Law

The Algiers Agreement provides that the Commission shall adjudicate claims that "result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law."[199] The Agreement excludes from the Commission's jurisdiction "claims arising from the cost of military operations, preparing for military operations, or the use of force, except to the extent that such claims involve violations of international humanitarian law."[200] The Algiers Agreement further mandates that "[i]n considering claims, the Commission shall apply relevant rules of international law."[201] Relying on Article 38, paragraph 1, of the Statute of the International Court of Justice, the Commission's rules of procedure identified the relevant rules as:

> (1) International conventions, whether general or particular, establishing rules ex pressly recognized by the parties;
> (2) International custom, as evidence of a general practice accepted as law;
> (3) The general principles of law recognized by civilized nations; [and]
> (4) Judicial and arbitral decisions and the teachings of the most highly qualified public cists of the various nations, as subsidiary means for the determination of rules of law.[202]

In addition, the parties did not dispute that the armed conflict that occurred between them was an international armed conflict and that the applicable laws relating to

---

[198] Id. ¶ 63.
[199] Algiers Agreement, supra note 6, art. 5 ¶ 1.
[200] Id. art. 5 ¶ 1.
[201] Id. art. 5 ¶ 13. It is important to note that as described above, in Eritrea's Civilians Claims, the Commission in fact looked at Ethiopia's 1930 nationality law in reaching its conclusion. See EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶¶ 43, 46, 59 (2004).
[202] See EECC, Prisoners of War, Eritrea's Claim 17, ¶ 31 (2003).

international armed conflicts applied.[203] During the proceedings, international humanitarian law would prove to be the key source of law.[204]

By way of comparison, the applicable substantive rules of the Iran-United States Claims Tribunal are stated more generally as "[t]he Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances."[205] Thus, in terms of the applicable law, it appears that the Iran-United States Claims Tribunal enjoys more latitude and flexibility than the Eritrea-Ethiopia Claims Commission because the Tribunal was essentially empowered to determine the law that applied. Indeed, in interpreting the provision dealing with the applicable law, the Iran-United States Claims Tribunal stated that it was given extraordinary latitude in choosing from among a variety of sources of law, including municipal laws and general principles of international public and private laws.[206]

With respect to the applicable law for the adjudication of claims by the UNCC, the Governing Council Rules state that

> *In considering the claims, Commissioners will apply Security Council Resolution 867 (1991) and other relevant Security Council resolutions, the criteria established by the Governing Council for particular categories of claims, and any pertinent decisions of the Governing Council. In addition, where necessary, Commissioners shall apply other relevant rules of international law.*[207]

Thus, although general principles of international law are important sources of law for all three tribunals, there is a clear emphasis on international humanitarian law, particularly the Geneva Conventions, in the establishment of the Eritrea-Ethiopia Claims Commission.

---

[203] EECC, Central Front, Ethiopia's Claim 2, ¶¶ 13, 14 (2004); EECC, Civilians Claims, Ethiopia's Claim 5, ¶ 22 (2004).

[204] See EECC, Civilians Claims, Ethiopia's Claim 5, ¶ 24 (2004) (Norms derived from international humanitarian law "were the central element of the Parties' legal relationships during the conflict, and both Parties drew upon them heavily in framing their cases.").

[205] Claims Settlement Declaration, supra note 9, art. V.

[206] David J. Bederman, The Glorious Past and Uncertain Future of International Claims Tribunals, in International Courts for the Twenty-First Century 161, 176 (Mark W. Janis ed., 1992).

[207] U.N. Comp. Comm'n, Governing Council, Decision Taken by the Governing Council of the United Nations Compensation Commission at the 27th Meeting, Sixth Session Held on 26 June 1992 art. 31, U.N. Doc. S/AC.26/1992/10 (June 26, 1992), available at http://www2.unog.ch/uncc/.

Several issues arose during the proceedings concerning applicable-law issues. Three of the key issues are addressed below, namely the Commission's findings that (1) customary international law as reflected by the Geneva Conventions was the primary source of law for the proceedings; (2) recently developed international landmine conventions create only treaty obligations and do not yet reflect customary international law; and (3) international humanitarian law and international human rights law concurrently apply during armed conflict. Each of these issues is discussed in turn below.

1. Customary Law As Reflected by the Geneva Conventions

A significant issue arose regarding the applicable law in the prisoner-of-war proceedings. Although the most obvious source of law concerning the treatment of prisoners of war was Geneva Convention III, and both Eritrea and Ethiopia relied on and cited this instrument extensively during the proceedings,[208] Eritrea did not accede to the Geneva Convention until August 14, 2000, well after active hostilities had come to an end.[209] This timing led to disagreement between the parties over its applicability.[210]

Eritrea had been part of Ethiopia when the latter signed all four of the Geneva Conventions in 1949 and ratified them in 1969.[211] As such, the conventions were in force in Ethiopia when Eritrea achieved its independence in 1993.[212] The Commission, however, found that Eritrea had not automatically succeeded to the Geneva Conventions "desirable though such succession would be as a general matter" given that "senior Eritrean officials made clear that Eritrea did not consider itself bound by the Geneva Conventions" following independence.[213] This finding was buttressed by the fact that the International Committee of the Red Cross (ICRC) also did not consider Eritrea to be bound by the Geneva Conventions prior to its accession to those treaties in 2000[214] and that Eritrea did not permit the ICRC to access its prisoner-of-war camps.[215] For the same reasons, the Commission further held that Eritrea was not bound by the Geneva Conventions by virtue of Article 2 (common to the four conventions), which provides that a party to the Geneva Conventions "shall . . . be bound by the Convention in relation to the [party not bound by the conventions], if the latter accepts and applies the provisions thereof."[216]

---

[208] See EECC, Prisoners of War, Eritrea's Claim 17, ¶ 32 (2004).
[209] Accession to the Four Geneva Conventions of 12 August 1949 by Eritrea, http://www.icrc.org/web/eng/siteeng0.nsf/html/57JQQH (last visited June 15, 2007).
[210] See EECC, Prisoners of War, Eritrea's Claim 17, ¶ 32 (2004).
[211] Id. ¶ 33.
[212] Id.
[213] Id.
[214] Id. ¶ 34.
[215] See id. ¶ 37.
[216] See id. ¶¶ 36-37. The Commission also rejected an argument set forth by Ethiopia that

Rather than finding no applicable law, however, the Commission concluded that customary international law governed the relations between Eritrea and Ethiopia with respect to prisoners of war during the conflict and that "for most purposes, 'the distinction between customary law regarding POWs and the Geneva Convention III is not significant.'"[217] The Commission noted that the question of "the extent to which the[] provisions [of the Geneva Conventions] have become part of customary international law arises today only rarely" but observed that the Geneva Conventions were "concluded for the purpose of creating a treaty law for the parties to the convention and for the related purpose of codifying and developing customary international law that is applicable to all nations."[218] The Commission found support for the conclusion that the Geneva Conventions had "largely become expressions of customary international law" in the Nuclear Weapons decision of the International Court of Justice, UN documents, and the writings of preeminent international legal scholars.[219] The Commission noted that this proposition had achieved "nearly universal acceptance" and that there was authority for the general proposition that rules pertaining to international humanitarian law achieved customary status more rapidly than other rules.[220] Having found that the Geneva Conventions largely reflected customary international law, the Commission concluded that "[w]henever either Party asserts that a particular relevant provision of those Conventions should not be considered part of customary international law at the relevant time, the Commission will decide that question, and the burden of proof will be on the asserting Party."[221]

One of the specific claims in which this finding played a significant role was Ethiopia's claim against Eritrea for refusing to allow the ICRC to send delegates to visit Ethiopian prisoner-of-war camps in Eritrea during the conflict, including the

---

Eritrea's accession to the Geneva Conventions was made retroactive to the period covering the conflict by virtue of Article 5, Paragraph 1, of the Algiers Agreement, which referenced the application of the Geneva Conventions to the proceedings of the Claims Commission. Id. ¶ 42.

[217] Id. ¶ 38 (quoting Eritrea's Claim 17, Prisoners of War, Counter Memorial to Eritrea's Claim 17 Memorial at 19); EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 28 (2003). See generally Theodor Meron, Revival of Customary Humanitarian Law, 99 Am. J. Int'l L. 817, 818 (2005) (discussing customary international law issues).

[218] EECC, Prisoners of War, Eritrea's Claim 17, ¶ 39 (2003). The Commission's observation regarding the rarity of the issue finds support from other authorities, but this point makes the Commission's finding regarding the applicability of customary international law all the more remarkable. See, e.g., Meron, supra note 217, at 817 ("In an era when international legal principles are increasingly codified in multilateral conventions, the overall importance of customary law has arguably eroded.").

[219] EECC, Prisoners of War, Eritrea's Claim 17, ¶ 40 (2003) (citing Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, ¶ 79 (July 8)).

[220] Id.

[221] Id. ¶ 41. See also Meron, supra note 195, at 819 n.19.

period prior to Eritrea's accession to the Geneva Conventions in August 2000.[222] Although Eritrea argued that ICRC visits were a treaty-based right stemming from Geneva Convention III and that such rights were procedural and had not attained customary status,[223] the Commission observed that not only did the ICRC not agree with this position, "the ICRC 'has played an indispensable humanitarian role in every armed conflict for more than a century.'"[224] As such, the Commission concluded that:

> *[It could not] agree with Eritrea's argument that provisions of the Convention requiring external scrutiny of the treatment of POWs and access to POWs by the ICRC are mere details or simply implementing procedural provisions that have not, in half a century, become part of customary international law. These provisions are an essential part of the regime for protecting POWs that has developed in international practice, as reflected in Geneva Convention III. These requirements are, indeed, "treaty-based" in the sense that they are articulated in the Convention; but, as such, they incorporate past practices that had standing of their own in customary law, and they are of such importance for the prospects of compliance with the law that it would be irresponsible for the Commission to consider them inapplicable as customary international law.*[225]

Consequently, the Commission held Eritrea liable for failing to permit ICRC visits prior to August 2000 even though it had not yet ratified Geneva Convention III.[226]

The Commission continued to apply the provisions of the Geneva Conventions as a reflection of customary international law throughout the course of the proceedings and expanded this approach to other international legal instruments. In consideration of the parties' War Front claims, the Commission found that (1) the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907 and its annexed Regulations and (2) the Additional Protocol I to the Geneva Conventions of 1977 had achieved customary international law status.[227] Although it had no practical

---

[222] EECC, Prisoners of War, Ethiopia's Claim 4, ¶¶ 55-62 (2003).
[223] Id. ¶ 56.
[224] Id. ¶¶ 57, 60 (quoting Howard S. Levie, Prisoners of War in International Armed Conflict 312 (1978)).
[225] Id. ¶ 61.
[226] See id. ¶ 62. This violation also included Eritrea's refusal to permit the ICRC to register prisoners of war, to interview them without witnesses present, and to provide them with customary relief and services. Id.
[227] See, e.g., EECC, Central Front, Ethiopia's Claim 2, ¶ 16, 17 (2004); EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 29 (2004); EECC, Civilians Claims, Ethiopia's Claim 5, ¶ 25 (2004).

consequence with respect to the matters pending before the Commission, the Commission was slightly more circumspect regarding the customary status of Protocol I, observing that "most" but not all "of the provisions of Protocol I were expressions of customary international humanitarian law."[228] However, the Commission confirmed in one award that it believed that Article 75 of Protocol I, which "articulates fundamental guarantees applicable to all 'persons who are in the power of a Party to the conflict who do not benefit from more favorable treatment under the Conventions or under this Protocol,'" had achieved customary status.[229] Similarly, the Commission noted that provisions of Protocol I relating to aerial bombardments--Articles 48, 51, 52, 57, and 58--had similarly become customary norms of international law:

> *The provisions of Geneva Protocol I [relating to aerial bombardments] cited by the Parties represent the best and most recent efforts of the international community to state the law on the protection of the civilian population against the effects of hostilities. The Commission believes that those provisions reflect a generally shared view that some of the practices of the Second World War, such as target area bombing of cities, should be outlawed for the future, and the Commission considers them to express customary international humanitarian law.*[230]

There was only one example of a party arguing that a specific provision of an international legal instrument had not attained customary status following the Commission's handling of the issue in the prisoner-of-war proceedings. Ethiopia argued in its defense to an aerial bombardment claim, made by Eritrea for the targeting of a water reservoir, that Article 54 of Protocol I (which provides for the protection of objects indispensable to the survival of the civilian population) "was a new development in 1977 that had not become a part of customary international humanitarian law by the 1998-2000 war."[231] The Commission rejected this argument, observing that:

> *The Commission recognizes the difficulty it faces in deciding this question, as there have been less than three decades for State practice relating to Article 54 to develop since its adoption in 1977. Article 54 represented a significant advance in the prior*

[228] EECC, Civilians Claims, Ethiopia's Claim 5, ¶ 25 (2004).
[229] EECC, Civilians Claims, Eritrea's Claim 15, 16, 23 & 27-32, ¶ 30 (2004).
[230] EECC, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26, ¶ 95 (2005). See also EECC, Western & Eastern Fronts, Ethiopia's Claims 1 & 3, ¶ 25 (2005); EECC, Central Front, Ethiopia's Claim 2, ¶ 110 (2004).
[231] EECC, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26, ¶ 103 (2005).

> *law when it was included in the Protocol in 1977, so it cannot be presumed that it had become part of customary international humanitarian law more than 20 years later. However, the Commission also notes the compelling humanitarian nature of that limited prohibition, as well as States' increased emphasis on avoiding unnecessary injury and suffering by civilians resulting from armed conflict. The Commission also considers highly significant the fact that none of the 160 States that have become Parties to the Protocol has made any reservation or statement of interpretation rejecting or limiting the binding nature of that prohibition . . . . The United States has not yet ratified Geneva Protocol I, but the Commission notes with interest that the United States Annotated Supplement (1997) to its Naval Handbook (1995) makes the significant comment that the rule prohibiting the intentional destruction of objects indispensable to the survival of the civilian population for the specific purpose of denying the civilian population of their use is a "customary rule" accepted by the United States and codified by Article 54, paragraph 2, of Protocol I. While the Protocol had not attained universal acceptance by the time these attacks occurred in 1999 and 2000, it had been very widely accepted. The Commission believes that, in those circumstances, a treaty provision of a compelling humanitarian nature that has not been questioned by any statements of reservation or interpretation and is not inconsistent with general State practice in the two decades since the conclusion of the treaty may reasonably be considered to have come to reflect customary international humanitarian law.*[232]

Another example of the Commission's consideration of customary law as reflected in international legal instruments was its imposition of liability on Ethiopia for the destruction of an obelisk named the Stela of Matara, believed to be about 2,500 years old.[233] The Commission concluded that Ethiopia, as the occupying power of the area around the obelisk when it was destroyed, was responsible for the damage,[234] and based its decision on customary humanitarian law because the 1954 Hague

---

[232] EECC, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26, ¶¶ 104-105 (2005). Although it found Ethiopia liable for targeting the water reservoir, the Commission concluded that the finding of liability was sufficient satisfaction for the violation because no the reservoir was not hit and no damage occurred. See id. ¶ 105; see also ICRC, Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law (2005) (concluding that a broader prohibition than the one stated in Article 54(2) has become customary law).

[233] EECC, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, ¶¶ 107-114 (2004).

[234] Id. ¶ 112.

Convention on the Protection of Cultural Property was not applicable between the parties.[235] The Commission noted that the deliberate destruction of historic monuments is a violation of Article 56 of the Hague Regulations, which, as discussed above, the Commission characterized as a customary norm of international law.[236] Moreover, the Commission stated that the obelisk was civilian property protected under Article 53 of Geneva Convention IV and Article 52 of Protocol I.[237]

2. Landmines: Treaty Based Obligations

In contrast to its findings with respect to the Geneva Conventions, Hague Conventions and Regulations, and Protocol I, the Commission held that (1) the Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects; (2) the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby- Traps and Other Devices ("Protocol II of 1980"), and that Protocol as amended on May 3, 1996; and (3) the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction had not achieved status as customary norms of international law because these "treaties have been concluded so recently and the practice of States has been so varied and episodic that it is impossible to hold that any of the resulting treaties constituted an expression of customary international humanitarian law applicable during the armed conflict between the

---

[235] Id. ¶ 113.

[236] Id. See Hague Convention IV, supra note 1, art. 56 ("All seizures of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.").

[237] EECC, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, ¶ 113; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War art. 53, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or other public authorities, or social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."); see also Protocol I, supra note 1, art. 52 ("Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives...."). The Commission further noted that the application of Article 53 of Protocol I, which provides for the protection of cultural objects and places of worship, was uncertain because its negotiating history suggested that it was intended to protect only a few monuments of particular significance such as the Acropolis in Athens and St. Peter's Basilica in Rome. EECC, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, ¶ 113 (2004);see also Protocol I, supra note 1, art. 53 ("[I]t is prohibited: (a) To commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; (b) To use such objects in support of the military effort; (c) To make such objects the object of reprisals."). The language of this provision does not, however, contain any suggestion that its applicability is limited by geography or historical prominence. Ultimately, it is not clear from the Commission's decision whether it found a violation of this provision.

Parties."[238] As such, they are not applicable in the absence of treaty obligation. As neither of the parties were parties to these conventions, the Commission held that the obligations that they set forth were not operational between them.[239]

Nonetheless, recognizing the substantial harm that even the lawful defensive use of landmines can cause, the Commission emphasized the importance of the rapid development of these international conventions restricting or prohibiting the future use of landmines.[240] The Commission also observed that some provisions of Protocol II did express customary international law norms, including the provisions relating to the recording of mine fields and the indiscriminate use of mines.[241]

3. Concurrent Application of International Humanitarian Law and International Human Rights Law

The concurrent application of humanitarian law and human rights law[242] is often necessary when human rights issues arise in conflict situations that are mainly regulated by humanitarian law.[243] The two sets of norms have significant commonality because they both concern the protection of individuals.[244] There are, however, important distinctions. In simplistic terms, while human rights law is designed to regulate peacetime circumstances, humanitarian law is designed to regulate wartime circumstances.[245] Inevitably, however, certain wartime circumstances demand the application of human rights norms. A good example of the concurrent application of these norms in wartime circumstances is the set of denationalization and unlawful expulsion claims that Eritrea brought against Ethiopia.[246]

---

[238] EECC, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, ¶ 24 (2004).
[239] Id.
[240] EECC, Central Front, Ethiopia's Claim 2, ¶ 51 (2004).
[241] EECC, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, ¶ 24 (2004). Without specifying any relevant provision of an international legal instrument, the Commission also concluded that the use of landmines to protect fixed positions was a lawful use of these weapons under customary international law. EECC, Central Front, Ethiopia's Claim 2, ¶ 50 (2004).
[242] Some experts argue that there is a close relationship between human rights and humanitarian law norms and they in fact overlap to a large extent. See, e.g., Dale Stephens, Human Rights and Armed Conflict--The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case, 4 Yale Hum. Rts. & Dev. L. J. 1 (2001); Meron, supra note 217. See also Michael Matheson, The Opinion of the International Court of Justice on the Threat or Use of Nuclear Weapons, 91 Am. J. Int'l L. 417, 423 (1997) (explaining the view that the two sets of rules have fundamental philosophical distinctions, and that such distinctions must be maintained).
[243] See Handbook of Humanitarian Law in Armed Conflict, supra note 5, at 9.
[244] Id.
[245] Id.
[246] EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32 (2004).

As discussed in Section III.A.4. above, the Commission determined that the affected individuals were dual nationals of both Eritrea and Ethiopia. The next question for the Commission was whether Ethiopia's expulsion of some of the dual nationals was lawful.[247] To answer this question, the Commission had to weigh rights and duties enshrined under both human rights and humanitarian laws.[248]

The arguments set forth by the parties are summarized as follows: Ethiopia argued that customary international law (presumably including human rights law) gave it the authority to revoke Ethiopian nationality from individuals who had acquired another nationality.[249] Eritrea, on the other hand, argued that such a prerogative is not without limitations and relied on Article 15 of the Universal Declaration of Human Rights,[250] which prohibits the arbitrary deprivation of nationality.[251] The Commission acknowledged the applicability of the laws cited by both parties; however, it stated that the question would be whether Ethiopia's actions were arbitrary in light of the wartime circumstances,[252] which are governed by international humanitarian law.

The Commission observed that in determining whether the deprivation of nationality and subsequent expulsion was arbitrary it would look at several factors, including "whether the action had a basis in law; whether it resulted in persons being rendered stateless; and whether there were legitimate reasons for it to be taken given the totality of the circumstances."[253]

With respect to the basis in law, the Commission concluded that Ethiopia's 1930 Nationality Law was legally sufficient because its provisions were comparable to the laws of many nations and not contrary to international law,[254] essentially human rights law. The Commission added that the application of this law does not generally result in statelessness because its application depends on acquisition of another nationality.[255] Most importantly, however, the Commission held that Ethiopia's deprivation of its nationality to those who also held Eritrean nationality and showed some allegiance to Eritrea was not unlawful.[256] In reaching this conclusion, the Commission weighed the totality of the wartime circumstances.[257] It concluded that the evidence showed that some dual nationals were considered threats to national

[247] Id. art. VII.
[248] See id. ¶ 57.
[249] Id.
[250] Id.
[251] Universal Declaration of Human Rights, G.A. Res. 217A, at 74, U.N GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).
[252] EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 58-64 (2004).
[253] Id. ¶ 60.
[254] See id. ¶ 61.
[255] Id. ¶ 62.
[256] Id. ¶ 72.
[257] Id. ¶¶ 65-71.

security by Ethiopian authorities because of their participation in Eritrean organizations and collection of funds for the Eritrean state.[258] It also said that Ethiopia's screening process, although it fell short of recognized standards, was not arbitrary or contrary to international law given the exceptional wartime circumstances.[259]

Thus, it is apparent that the Commission applied a combination of human rights and humanitarian law principles in arriving at this conclusion. Human rights law allows derogations from the general principles under limited circumstances, but, even then, it provides for important safeguards.[260] For example, in case of deprivation of

---

[258] The court said that:

> The first [organization] was the Popular Front for Democracy and Justice ("PFDJ"). The evidence showed that the PFDJ was the ruling political party in Eritrea, but it was more than a western-style political party.... The evidence showed that the PFDJ maintained a structure of local groups at numerous locations in Ethiopia, which were used to promote the interests of Eritrea.

Id. ¶ 67. See also id. ¶ 68 ("Ethiopia's screening process also focused on persons active in the Eritrean Community Associations. The Community Associations were less overtly political than the PFDJ. Nevertheless, the evidence showed that they raised funds to support Eritrea and promoted nationalistic solidarity among their members.").

[259] Id. ¶ 72. See id. ¶ 70 ("Eritrea's evidence was consistent with Ethiopia's claim that the process involved deliberation and selection of individuals. Eritrean witnesses regularly described Ethiopian security personnel coming to their residences or places of work seeking them individually by name."). Compare with the following:

> The process was hurried. Detainees received no written notification, and some claimed they were never told what was happening. Ethiopia contended that detainees could orally apply to security officials seeking release. The record includes some declaration of persons who were released, but it also includes senior Ethiopian witnesses' statements suggesting that there were few appeals.

Id. ¶ 71.

[260] These derogations and safeguards include:

> 1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
>
> ....
>
> 3) Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

nationality, there must be a fair hearing by an independent and impartial agency.[261] The issue of the sufficiency of such legal process would essentially be a factual issue. It is, however, argued generally that under humanitarian law there is no express prohibition of the expulsion of enemy aliens when it occurs for security reasons.[262]

International Covenant on Civil and Political Rights [ICCPR] art.4, Dec. 19, 1966, 999 U.N.T.S. 171. See also European Convention for the Protection of Rights and Fundamental Freedoms art. 15, Sept. 3, 1953, 213 U.N.T.S. 221 (providing for similar derogations from international obligations); American Convention on Human Rights art. 27, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (providing for similar derogation of international obligations).

[261] See, e.g., Universal Declaration of Human Rights [UDHR] art. 8, G.A. Res. 217A at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."); id. art. 10 ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.").

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

ICCPR, supra note 260, art. 13. See also Convention on the Reduction of Statelessness art. 8(4), 989 U.N.T.S. 175, entered into force Dec. 13, 1975 ("A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.").

[262] See, e.g., Gerald Draper, The Red Cross Conventions 36 (1958) (noting that the customary right of a state to expel all enemy aliens at the outset of a conflict was not abrogated by the Geneva Civilians Convention of 1949 and that such expulsion is not condemned by customary international law). Compare with ICRC Commentary on Article 45 of Geneva Convention IV, which states:

> Any movement of protected persons to another State, carried out by the Detaining Power on an individual or collective basis, is considered as a transfer for the purposes of Article 45. The term 'transfer', for example, may mean internment in the territory of another Power, repatriation, the returning of protected persons to their country of residence or their extradition. The Convention makes provision for all these possibilities. On the other hand there is no provision concerning deportation (in French expulsion), the measure taken by a State to remove an undesirable foreigner from its territory. In the absence of any clause stating that deportation is to be regarded as a form of transfer, this Article would not appear to raise any obstacle to the right of Parties to the conflict to deport aliens in individual cases when State security demands such action. However, practice and theory both make this right a limited one: the mass deportation at the beginning of a war, of all the foreigners in the territory of a belligerent cannot, for instance, be permitted.

The Geneva Conventions of 12 August 1949, Commentary IV, Geneva Convention

Agreeing with this proposition, the Commission stated that international humanitarian law "gives belligerents broad power to expel nationals of the enemy State from their territory during a conflict."[263] In reaching its conclusion, the Commission analyzed the circumstances surrounding the conflict in light of the standards set forth by both human rights and humanitarian laws and determined that Ethiopia's expedited procedures fell short of human rights standards but were justified under humanitarian law because of the wartime exigencies.[264] Indeed, the set of unique issues presented in this case offered an excellent opportunity for the analysis of the simultaneous application of these important bodies of law.

C. Evidentiary Issues

As discussed above, the Commission adopted its own rules of procedure and evidence

---

Relative to the Protection of Civilian Persons in Time of War 266 (Jean S. Pictet ed., International Committee of the Red Cross 1958).

[263] The Commission noted:

> The right of states to expel aliens is generally recognized. It matters not whether the alien is on a temporary visit or has settled down for professional, business or other purposes on its territory, having established his domicile there. On the other hand, while a state has a broad discretion in exercising its right to expel an alien, its discretion is not absolute. Thus, by customary international law it must not abuse its right by acting arbitrarily in taking its decision to expel an alien, and it must act reasonably in the manner in which it effects an expulsion. Beyond this, however, customary international law provides no detailed rules regarding expulsion and everything accordingly depends upon the merits of the individual case. Theory and practice correctly make a distinction between expulsion in time of hostilities and in time of peace. A belligerent may consider it convenient to expel all hostile nationals residing, or temporarily staying, within its territory: although such a measure may be very hard on individual aliens, it is generally accepted that such expulsion is justifiable.

EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 81 (2004) (quoting Oppenheim's International Law § 413 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1997)).

[264] The dual application of human rights and humanitarian law was important because the right to expel enemy aliens is dependent on the ability to accord them due process. The right to expel during wartime emanates from humanitarian law but the safeguard mainly emanates from human rights law. For example, the Humanitarian Law Handbook, on which the Commission relied, states:

> Art. 45, para. 4 GC IV contains a universally applicable principle of international law. In this connection, attention is drawn to Article 13 of the International Covenant on Civil and Political Rights, which stipulates an orderly procedure for expulsion of aliens and in particular a procedure enabling the persons concerned to present their own case. This rule should be applied generally.

Handbook of Humanitarian Law in Armed Conflict, supra note 5, § 589.4 at 287.

based on the Permanent Court of Arbitration Rules of Procedure and Evidence.[265] This section discusses the Commission's resolution of evidentiary issues in its various proceedings.

1. Standard of Proof

The Commission adopted a high standard of evidentiary proof for the proceedings before it, concluding that the parties must establish facts with clear and convincing evidence based on the totality of the evidence and show that violations occurred in a frequent or pervasive manner. With respect to one important set of claims, i.e., allegations of rape, the Commission worked within this standard to produce a slightly altered approach that took into account characteristics of this violation that likely would not be accounted for under the general standard.

a. Clear and Convincing Evidence of Violations That Occurred on a Frequent or Pervasive Basis Based on the Totality of the Evidence

Although the Commission's Rules of Procedure state that "[e]ach party shall have the burden of proving the facts it relies on to support its claim or defense" and that "[t]he Commission shall determine the admissibility, relevance, materiality and weight of the evidence offered,"[266] the rules do not "articulate the quantum or degree of proof that a party must present to meet this burden of proof."[267] The Commission noted that these characteristics of the rules were "reflect[ive of] common international practice.[268] Thus, the Commission was left with the challenge of articulating the applicable evidentiary standards that it would apply.

The Commission found that the standards argued for by both of the parties during the first round of proceedings were high standards that took into account the seriousness of the violations at issue and the fact that states--not individuals or corporate entities--were parties to the proceedings.[269] As such, the Commission concluded that "[p]articularly in light of the gravity of some of the claims advanced, the Commission will require clear and convincing evidence in support of its findings."[270] Thus, the standard was set somewhere between the standard of probability common in civil court proceedings in the United States and the standard of "beyond a reasonable doubt" common in U.S. criminal proceedings. Indeed, the Commission specifically noted that although some of the allegations might amount to criminal acts if proven, the Commission was not a criminal court and would not adopt an evidentiary standard

[265] Infra Part II.B.
[266] EECC Rules of Procedure, supra note 38, art. 14.
[267] EECC, Prisoners of War, Eritrea's Claim 17, ¶ 44 (2003).
[268] Id.
[269] See id. ¶ 45.
[270] EECC, Prisoners of War, Eritrea's Claim 17, ¶ 46 (2003) (emphasis added). See, e.g., EECC, Central Front, Ethiopia's Claim 2, ¶ 20 (2004).

appropriate for criminal proceedings.[271] Accordingly, the Commission observed that "[t]he possibility that particular findings may involve very serious matters does not change the international law rules to be applied or fundamentally transform the quantum of evidence required."[272] On the other hand, the Commission noted in subsequent decisions that it "recognizes that this standard of proof and the existence of conflicting evidence may result in fewer findings of liability than either Party expects. The Awards on these Claims must be understood in that unavoidable context."[273]

Consistent with this view of its function, the Commission also concluded that the parties must establish that violations occurred not on an individual and isolated basis but in a "frequent or pervasive" manner.[274] Specifically, the Commission stated that it "does not see its task to be the determination of liability of a Party for each individual incident of illegality suggested by the evidence. Rather, it is to determine liability for serious violations of the law by the Parties, which are usually illegal acts or omissions that were frequent or pervasive and consequently affected significant numbers of victims."[275] The Commission concluded that "[t]hese parameters are dictated by the limit of what is feasible for the two Parties to brief and argue and for the Commission to determine in light of the time and resources made available by the Parties."[276] The Algiers Agreement imposed several restrictions on the proceedings that likely influenced the Commission's finding. For example, the Algiers Agreement stipulates that the commission must "endeavor" to complete the proceedings within three years of the closing date for filing the claims or four years of the enactment of the agreement.[277] As discussed in the following section, however, the Commission did not find the "frequent or pervasive" standard to be "an invariable requirement."[278]

In articulating its evidentiary standards, the Commission also stressed the importance of the cumulative weight or totality of the evidence. In this regard, the Commission observed that:

---

[271] E.g., EECC, Prisoners of War, Ethiopia's Claim 4, ¶ 38 (2003).
[272] Id.
[273] EECC, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, ¶ 7 (2004). See, e.g., EECC, Civilians Claims, Eritrea's Claim 15, 16, 23 & 27-32, ¶ 35 (2004).
[274] EECC, Prisoners of War, Ethiopia's Claim 4, ¶ 54 (2003); EECC, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26, ¶ 91 (2005).
[275] EECC, Prisoners of War, Ethiopia's Claim 4, ¶ 54 (2003).
[276] Id.
[277] Algiers Agreement, supra note 6, art. 5(12). Notably, this requirement was stated in suggestive terms rather than mandatory terms. The liability phase itself has taken more than three years to complete.
[278] EECC, Central Front, Ethiopia's Claim 2, ¶ 37 (2004); EECC, Civilians Claims, Ethiopia's Claim 5, ¶ 85 (2004).

> *The consistent and cumulative character of much of the Parties' evidence was of significant value to the Commission in making its factual judgments. When the totality of the evidence offered by the Claimant provided clear and convincing evidence of a violation --i.e., a prima facie case-- the Commission carefully examined the evidence offered by the Respondent (usually in the form of a declaration or camp records) to determine whether it effectively rebutted the Claimant's proof.* [279]

This approach appears to be a sound one given the general reliability of corroborating evidence. In some respects, the Commission's standards are in accord with the standards used by other international tribunals, but in other respects, it diverges from them. For example, the Commission's "clear and convincing" standard appears to comport with the standard adopted by the International Court of Justice in the Congo case, where the ICJ stated that "[t]he Court must first establish which relevant facts it regards as having been convincingly established by the evidence . . . ."[280] In contrast, however, a cumulative-weight approach does not appear to have been adopted by the ICJ in the Congo case.[281]

The Iran-United States Claims tribunal adopted the UNCITRAL rules of evidence in its totality because of the commercial nature of most of the claims.[282] The application of the UNCITRAL rules of evidence often leads to the common evidentiary standard of "preponderance of the evidence" . Accordingly, this was the standard adopted by the Iran-United States Claims Tribunal, which has faced serious problems with respect to the scarcity of direct evidence.[283] Thus, the manner in which it handled this challenge was fundamentally different from the manner in which the Eritrea-Ethiopia Claims Tribunal handled the same issue. While the Eritrea-Ethiopia Claims Commission effectively raised the standards of proof--or at least adopted the baseline standard--for findings of liability as discussed above, the Iran-United States Claims Tribunal lowered the standard of proof in the face of scarcity.[284] As such, among other

---

[279] EECC, Prisoners of War, Ethiopia's Claim 4, ¶ 43 (2003). Although the Commission occasionally referred to the parties' burden to establish a prima facie case based on the cumulative weight of the evidence throughout the proceedings, this standard was articulated only in the partial awards regarding prisoners of war. See id.

[280] See Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda) (Judgment of Dec. 19, 2005), ¶ 72 (emphasis added), available at http://www.icj-cij.org/icjwww/idocket/ico/ico_judgments/ico_ judgment_20051219.pdf.

[281] See, e.g., id.

[282] See Iran-U.S. Cl. Trib., Rules of Procedure, art. 24, available at http://www.iusct.org/tribunal-rules.pdf (cited in aldrich, supra note 1, at 332).

[283] See Aldrich, supra note 1, at 332 ("In practice, the Tribunal was conscious of the practical difficulties facing the parties in finding and producing evidence.").

[284] For example, in R.J. Reynolds Tobacco Co. v. Gov. of the Islamic Rep. of Iran, the

principles, the IUSCT relied on presumptions, inferences, and burden shifting under different circumstances.[285]

b. The Rape Exception

One of the most serious allegations that attracted the Commission's attention was rape, which drew separate and general comments by the Commission each time it was addressed.[286] Although the Commission commended both parties for the absence of any suggestion of rape being used as an "instrument of war,"[287] the Commission nonetheless found both parties liable for certain limited violations concerning rape.[288] The Commission began its analysis by recognizing that there was no disagreement between the parties that rape is a violation of customary international humanitarian law as enshrined in the Geneva Conventions.[289] The Commission then proceeded to

---

Tribunal held that if a purchaser fails to object to the invoiced amount within a reasonable time following receipt, and not until the proceedings are instituted, the burden shifted to the buyer to prove that it did not owe the amount of the invoices. Partial Award No. 145-35-3, ¶ 17 (Aug. 6, 1984), reprinted in 7 Iran-U.S. Cl. Trib. Rep. 181, 190-91 (cited in Aldrich, supra note 1, at 334).

[285] See generally Aldrich, supra note 1, at 333.

[286] See EECC, Prisoners of War, Eritrea's Claim 17, ¶¶ 139-142 (2003); see also EECC, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, ¶¶ 36-43 (2004); EECC, Central Front, Ethopia's Claim 2, ¶¶ 34-40 (2004); EECC, Civilians Claims, Ethopia's Claim 5, ¶¶ 83-90 (2004); EECC, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26, ¶¶ 74-84 (2005); EECC, Western and Eastern Fronts, Ethiopia's Claims 1, 3, ¶¶ 49-56, 68-69 (2005).

[287] E.g., EECC, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, ¶ 36 (2004).

[288] Eritrea was held liable for failing to take effective measures to prevent rape in Irob Wereda on the Central Front. EECC, Central Front, Ethiopia's Claim 2, ¶ 39 (2004). Eritrea was also held liable for failure to prevent rape in Elidar and Dalul Weredas on the Eastern Front. EECC, Western and Eastern Fronts, Ethiopia's Claims 1, 3, ¶¶68-70 (2005). Ethiopia was held liable for the same violation in Senafe Town on the Central Front. EECC, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, ¶ 42, 80-8 (2004). Ethiopia was also held liable for violations in Barentu and Tesseney Towns on the Western Front. EECC, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26, ¶ 83 (2005).

[289] E.g., EECC, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, ¶ 37 (2004). The Commission cited to the following provisions. The first is Common Article 3(1), which, inter alia, prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, torture... outrage on personal dignity, in particular humiliating and degrading treatment...." Protocol I, supra note 1, art. 3 ¶ 1. The second provision is Article 27 of Geneva Convention IV, which states that:

> Protected Persons are entitled, in all circumstances, to respect for their persons, their honour, their families rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. Women shall be especially protected against any attack on

address the evidentiary challenges that arose given the nature of this violation.[290] The Commission observed that heightened cultural sensitivities in both Eritrea and Ethiopia made it less likely that victims would come forward to communicate the rape or sexual abuse they endured, resulting in available evidence that is "likely to be far less detailed and explicit than for non-sexual offenses."[291] The Commission accepted such sensitivities as an objective reality and took them into account when considering the evidence because, in the words of the Commission, "[t]o do otherwise would be to subscribe to the school of thought, now fortunately eroding, that rape is inevitable collateral damage in armed conflict."[292]

In undertaking this approach to the evidence, the Commission observed that its earlier enunciated requirement that violations be shown to have occurred on a frequent or pervasive basis did not apply across the board.[293] The Commission quoted its earlier language, stressing that its duty was to "determine liability for serious violations . . . which are usually illegal acts or omissions that were frequent or pervasive . . . ."[294] In other words, the Commission concluded that rape was of a sufficiently serious nature to warrant liability without a showing that it occurred in a frequent or pervasive manner.[295] As the Commission put it:

> *Rape, which by definition involves intentional and grievous harm to an individual civilian victim, is an illegal act that need not be frequent to support State responsibility. This is not to say that the Commission, which is not a criminal tribunal, could or has assessed government liability for isolated individual rapes or on the basis of entirely hearsay accounts. What the Commission has done is look for clear and convincing evidence of several rapes in specific geographic areas under specific circumstances.*[296]

The Commission explained that the specific areas in which it found evidence of rapes having occurred were those "where large numbers of opposing troops were in closest proximity to civilian populations (disproportionately women, children and the elderly)

---

their honour in particular against rape, enforced prostitution or any form of indecent assault.

Id. art. 27. The third provision is Article 76.1 of Protocol I, which states that "[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault." Id. art. 76.

[290] EECC, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, ¶ 39 (2004).

[291] E.g., id.

[292] E.g., id.

[293] E.g., id. ¶ 40. As the Commission put it, the frequent-or-pervasive requirement was not "an invariable requirement." Id.

[294] E.g., id.

[295] Id. ¶ 41.

[296] E.g., id.

for the longest periods of time."[297] The Commission concluded that military officials were obligated to take special care in such situations: "[k]nowing, as they must, that such areas pose the greatest risk of opportunistic sexual violence by troops, Eritrea and Ethiopia were obliged to impose effective measures, as required by international humanitarian law, to prevent rape of civilian women."[298]

Thus, the Commission was faced with a situation where there was clear and convincing evidence of incidents of rape in territories occupied by both parties,[299] but the evidence did not show that incidents were frequent or pervasive.[300] It compensated for this shortcoming, which, as discussed above, stemmed from the cultural sensitivities inherent in the region,[301] not by adopting a new standard or altering the existing standard, but by operating within the standard already enunciated.[302] This approach provides an effective means of addressing a difficult and important issue and will undoubtedly prove to be one of the most significant contributions of the Commission to the growth of international humanitarian law.

2. Evidence Used to Prove Facts

The primary source of evidence that the parties relied on was a significant number of signed affidavits from persons with personal knowledge of the events that transpired during the more than two years of conflict.[303] In evaluating the evidence, the

---

[297] E.g., id. ¶ 42.

[298] Id. While the Commission found both parties responsible for not taking measures to prevent rape in some specific geographic areas, it did not find such failure in other areas. Id. ¶¶ 42-43. However, the Commission said that in those areas where there was no gross failure, there were individual instances "deserving of at least criminal investigation." Id. ¶ 43.

[299] EECC, Prisoners of War, Eritrea's Claim 17, ¶¶ 139-142 (2003). It should be noted that with respect to some of the rape claims submitted by the parties, the evidence produced was not considered clear and convincing by the Commission. E.g., id. (denying Eritrea's claim for the rape of female prisoners of war for insufficient evidence).

[300] See id.

[301] EECC, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, ¶ 39 (2004).

[302] Id.

[303] The parties relied heavily on signed declarations. In the POW case, for example, Eritrea submitted seventy-seven signed declarations in support of its affirmative case, forty-eight of which were from former prisoners of war and ten of which were from former civilian internees. EECC, Prisoners of War, Eritrea's Claim 17, ¶ 48 (2003). Likewise, Ethiopia submitted thirty declarations in support of its affirmative case, all of which were from former prisoners of war. EECC, Prisoners of War, Ethiopia's Claim 4, ¶¶ 39, 42 (2003). Ethiopia also submitted numerous claim forms that were "filled in by a former POW or a person writing for him, responding at varying length to detailed questions regarding conditions and experiences in each of Eritrea's POW camps." Id. at ¶ 40. The Commission concluded that the claim forms were "of uncertain probative value" and did not use "them in arriving at the factual judgments." Id. at ¶ 41. For all of the other cases, including the civilian and war front cases, both parties submitted hundreds of sworn

Commission recognized the ***78** importance placed on the signed declarations submitted by the parties. It stated that in determining the probative value of an affidavit to establish a violation of international law, it considered the clarity and detail of the relevant testimony and whether the allegations were corroborated by testimony in other affidavits or other evidence.[304] The Commission also observed that it relied on the formal affidavits as supplemented by the testimony at the hearings and other documents in the record, signaling the importance it assigned to the signed affidavits.[305]

Live testimony by witnesses at the various hearings also played a remarkable role in the parties' efforts to establish their allegations.[306] The fact witnesses included, among others, former prisoners of war,[307] civilian detainees,[308] expellees,[309] victims of violence (including shootings and bombings),[310] military commanders,[311] and security officials. Expert witnesses included psychiatrists,[312] medical doctors,[313] retired U.S. army generals,[314] and various military and explosives experts.[315]

Documentary evidence appears to have played a lesser, but still important, role than that played by testimonial evidence. For example, in the prisoner of war cases, Eritrea submitted newspaper articles,[316] public statements, medical and hospital records, and

---

declaration for their respective affirmative and defensive cases. E.g., EECC, Civilians Claims, Ethiopia's Claim 5, ¶ 32 (2004).

[304] E.g., EECC, Prisoners of War, Eritrea's Claim 17, ¶ 49 (2003).

[305] Again, this emphasis on signed declarations should be compared with the ICJ's reliance on documents in the Congo case. See Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (Judgment of Dec. 19, 2005), available at http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm.

[306] The important role of witnesses in these proceedings should be contrasted with the more limited role played by witnesses before the International Court of Justice [ICJ].

[307] EECC, Prisoners of War, Ethiopia's Claim 4, ¶ 44 (2004).

[308] EECC, Prisoners of War, Eritrea's Claim 17, ¶ 48 (2003).

[309] EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 1 (2004).

[310] EECC, Central Front, Ethiopia's Claim 2, ¶¶ 22, 72 (2004).

[311] EECC, Central Front, Eritrea's Claim 2, 4, 6, 7, 8, & 22, ¶ 28 (2004) (Brigadier General Alemu Ayele for Ethiopia); EECC, Central Front, Ethiopia's Claim 2, ¶ 22 (2004) (Col. Abraham Ogbasellassie for Eritrea).

[312] EECC, Prisoners of War, Eritrea's Claim 17, ¶ 48 (2003). The health officer was also presented as an expert witness. Id. ¶ 48.

[313] See id.

[314] EECC, Central Front, Eritrea's Claim 2, 4, 6, 7, 8, & 22, ¶ 28 (2004) (U.S. Army General (Ret.) Charles W. Dyke for Ethiopia).

[315] Id. ¶ 28 (Mr. Henrik Tobeisen and Mr. William Arkin for Eritrea); id. ¶ 109 (Mr. Laurent Bouillet for Eritrea); EECC, Central Front, Ethiopia's Claim 2, ¶ 22 (2004) (Major (Ret.) Paul Noack and Col. (Ret.)Jake Bell).

[316] See Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda) (Judgment of Dec. 19, 2005), ¶ 68, available at http:// www.icj-

expenditure receipts related to POW camps.[317] In the civilian cases, Eritrea also submitted, among other official records, immigration documents.[318] In the prisoner of war cases, Ethiopia similarly submitted official declarations, newspaper articles, training materials, camp regulations, and medical records.[319] In the war front claims, both parties relied on various pieces of documentary evidence, including military records,[320] photographs,[321] and satellite imagery.[322] The Commission accorded the satellite imagery particularly strong probative value, mainly because it originated from a neutral source that was commercially available and showed the condition of buildings with a reasonable degree of clarity at specific dates.[323] Ordinary photographs were also given significant weight in establishing patterns of destruction.[324]

Given the fact that the parties were attempting to prove events that occurred in each other's territory without having access to the opposite side's territory, the Commission's cumulative evidence approach appears to be the most workable one to determine what actually transpired between the parties during the more than two years of armed conflict.

3. Specific Evidentiary Issues

During the course of the proceedings, the Commission faced numerous peculiar and specific evidentiary issues. Two of the most important issues were the utilization of confidential reports of the International Committee of the Red Cross and the failure by the parties to produce evidence known to exist in their custody. These issues are discussed below.

a. Evidence of the International Committee of the Red Cross

One of the important evidentiary issues addressed by the Commission was accessibility to confidential evidence under the authority of the ICRC. The ICRC had visited Ethiopian prisoner of war camps throughout the conflict and Eritrean prisoner

---

cij.org/icjwww/idocket/ico/icoframe.htm (last visited Feb. 2, 2007); Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran) (Judgment of May 24), ¶ 13, available at http://www.icj-cij.org/icjwww/icases/iusir/iusirframe.htm (last visited Feb. 2, 2007).

[317] EECC, Prisoners of War, Eritrea's Claim 17, ¶ 48 (2003).
[318] EECC, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, ¶ 32 (2004).
[319] EECC, Prisoners of War, Ethiopia's Claim 4, ¶ 39 (2003).
[320] See, e.g., EECC, Central Front, Ethiopia's Claim 2, ¶ 72 (2004).
[321] Id. ¶¶ 72, 73(4).
[322] EECC, Central Front, Eritrea's Claim 2, 4, 6, 7, 8, & 22, ¶ 62 (2004).
[323] See id. ¶¶ 62-64.
[324] See EECC, Central Front, Ethiopia's Claim 2, ¶ 73(4) (2004).

of war camps beginning in August 2000.[325] Accordingly, both parties had in their possession numerous confidential documents obtained from the ICRC.[326] Although the parties sought to provide this evidence to the Commission--and the Commission wanted to receive it --" [t]he ICRC maintained that [this evidence] could not be provided without ICRC consent, which would not be given."[327] This, even after the president of the Commission met with senior ICRC officials and offered to review the evidence "on a restricted or confidential basis if required."[328] The only documents that the ICRC was willing to permit to be used were those that were already public.[329] The

[325] E.g., EECC, Prisoners of War, Eritrea's Claim 17, ¶ 50 (2003).
[326] E.g., id.
[327] E.g., id. ¶ 51.
[328] E.g., id. ¶ 52.
[329] E.g., EECC, Prisoners of War, Eritrea's Claim 17, ¶ 53 (2003). The ICRC's official position on the confidentiality of its reports is stated as follows:

> ICRC believes that the best way that it can prevent or halt torture and ensure decent conditions of detention is by getting repeated and unrestricted access to prisoners, talking to them about their problems, and urging the detaining authorities to make any improvements that may be necessary. The price of this is a policy of confidentiality, taking up the problems only with the people directly concerned.

International Committee of the Red Cross [ICRC], Frequently Asked Questions, ICRC Doesn't Publish Its Reports on Prison Visits--How Can Working Confidentially Be Effective in Preventing Torture? (Nov. 15, 2002), available at http://www.icrc.org/Web/eng/siteeng0.nsf/html/5FMFN8. The ICRC sees two important benefits in keeping the reports confidential, i.e., as a tool for "negotiating access" and a strong belief in the "power of persuasion." Id. With respect to "negotiating access," the ICRC states that "[m]ost of the prisoners ICRC visits (or seeks to visit) are not protected by laws which oblige the authorities to open the gates--access must be negotiated." Id. With respect to the "power of persuasion," the ICRC states that its "discreet approach, in which its findings are reported only to the authority concerned, combined with its professional expertise and neutrality, form the key elements in persuading those in power to adopt, where necessary, more humanitarian measures." Id. Nonetheless, the ICRC sets a limit to its confidentiality principle, stating that

> [T]he ICRC might decide to break its rule of silence and/or suspend its operation under certain extreme circumstances: if, after repeated approaches and requests, the prisoners' treatment or conditions hasn't improved; if the ICRC's usual procedures for visits are not respected; if a detaining authority publishes just part of a visit report....

Id. The ICRC finally concludes that such decisions would be made taking into account the best interests of the detainees. Id. Currently, the ICRC relies on three sources of international law for its privileged exemption from providing evidence in international criminal proceedings: (1) the International Criminal Court Rules of Procedure and Evidence (which essentially grants the ICRC the final authority to decide whether to release its reports on a case-by-case basis); (2) Prosecutor v. Simic et al., I.C.T.Y. (July 27, 1999), available at http://www.un.org/icty/simic/trialc3/decision-e/90727EV59549.htm (last visited June 15, 2007), a decision of the International Criminal Tribunal for the Former Yugoslavia [ICTY], which held that the ICRC enjoys absolute privilege to withhold its confidential information as a matter of customary international law; and (3) headquarters agreements, which almost always provide for testimonial

Commission reacted in the following terms:

> *[T]he Commission believes that, in the unique situation here, where both parties to the armed conflict agreed that these documents should be provided to the Commission, the ICRC should not have forbidden them from doing so. Both the Commission and the ICRC share an interest in the proper and informed application of international humanitarian law. Accordingly, the Commission must record its disappointment that the ICRC was not prepared to allow it access to these materials.*[330]

Given its unique role, the extent to which the ICRC will be called on to produce evidence--either documentary or testimonial--will continue to be an important and evolving issue not only in international civil arbitration and litigation but before criminal tribunals as well.[331]

b. Inferences Drawn From Failure to Produce Evidence

Given the complexity and sensitivity of some of the issues, the parties were at times reluctant to produce some important evidence. In at least one important case, the Commission relied on negative inferences from non-production of evidence known to exist in the possession of a party to the dispute.[332] Undisputed facts indicated that on June 5, 1998, at least one of four Eritrean fighter jets flown that day dropped bombs in a civilian neighborhood killing civilians, including schoolchildren.[333] Ethiopia alleged that the Eritrean air force deliberately targeted civilians in violation of international law.[334] It argued that two separate bombings targeted the same school compound.[335] Eritrea admitted that it caused the injuries but said that it was accidental.[336] It argued that the intended target was a nearby airport and that only one, not two, of the four

---

privilege in domestic proceedings. See Gabor Rona, The ICRC Privilege Not to Testify: Confidentiality in Action, 845 Int'l Rev. Red Cross 207 (Mar. 31, 2002), available at http:// www.icrc.org/Web/eng/siteeng0.nsf/html/59KCR4.

[330] E.g., EECC, Prisoners of War, Eritrea's Claim 17, ¶ 53 (2003).
[331] See generally Rona, supra note 329 (providing a brief discussion of ICRC's perspective on this issue).
[332] EECC, Central Front, Ethiopia's Claim 2 (2004).
[333] Id. ¶ 101. Ethiopia alleged that the bombs were dropped near an Elementary School named Ayder and the casualties included 53 deaths, including 12 schoolchildren, and 185 wounded, including 42 schoolchildren. Id.
[334] Id. ¶ 102.
[335] Id. ¶ 101.
[336] Id. ¶ 102.

flights deployed to attack the airport accidentally hit the civilian neighborhood.[337]

The most important issue that the Commission was asked to resolve was whether there was only one flight, which may suggest an accident, or two flights, which may make that assertion doubtful.[338] The Commission thoroughly analyzed the conflicting evidence that the parties presented. The evidence included written statements from victims and witnesses of the attacks, live testimony from the deputy commander of the Eritrean Air Force, a victim of the air attack, and expert witnesses.[339] It also included contemporaneous video footage, medical records of victims, and news reports from the attack.[340]

The Commission deemed the issue of the number of attacks important because of the extreme odds against two accidental bombings hitting the exact same location.[341] To determine this issue, the Commission considered the evidence and decided that two of Eritrea's four separate air force flights attacked the civilian neighborhood.[342] Despite this conclusion, however, the Commission said that it "was not convinced that Eritrea deliberately targeted a civilian neighborhood."[343] It added that although the odds seem extreme, such accidental occurrences are not inconceivable.[344] It offered several reasons for its conclusion: (1) Given Ethiopia's air superiority, it is unreasonable to assume that Eritrea would see any advantage in setting precedent by targeting civilians;[345] (2) Eritrea's pilots and aircraft computer programmers "were utterly inexperienced, and it recognizes the possibility that, in the confusion of May 5, both computers could have been loaded with the same inaccurate targeting data";[346] (3) it is also "conceivable that the pilot of the third sortie simply released too early through either a computer or human error or in an effort to avoid anti-aircraft fire that the pilots of the previous sorties had reported;"[347] and (4) "it was also conceivable that the pilot of the fourth sortie might have decided to aim at the smoke resulting from the third sortie."[348]

Although the Commission agreed with Eritrea for the reasons stated above, it did not conclude that Eritrea was without liability. It held that Eritrea failed to take all

---

[337] Id. ¶¶ 104-05.
[338] See id. ¶ 104.
[339] See id. The expert witnesses included U.S. General (Ret.) Charles W. Dyke for Ethiopia and U.S. Major (Ret.) Paul Noack and Canadian Col. (Ret.) Jack Bell for Eritrea. Id. ¶ 22.
[340] Id. ¶ 107.
[341] Id. ¶ 109.
[342] Id. ¶ 108.
[343] Id.
[344] Id. ¶ 109.
[345] Id. ¶ 108.
[346] Id. ¶ 109.
[347] Id.
[348] Id.

feasible precautionary measures to prevent unintended injuries when choosing its targets in violation of Article 57 of Protocol I.[349] The Commission stated that "the failure of two out of three bomb runs to come close to their intended targets clearly indicate[d] a lack of essential care in conducting them . . . ."[350] Furthermore, the Commission said that based on the evidence before it, it was unable to determine why two of the four flights dropped bombs that hit the civilian neighborhood.[351] The

---

[349] Article 57 of Protocol I provides that:

> 1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.
> 2. With respect to attacks, the following precautions shall be taken:
> (a) those who plan or decide upon an attack shall: (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them; (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects; (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
> (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
> (c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.
> 3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.
> 4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.
> 5. No provision of this article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

Protocol I, supra note 1, art. 57.

[350] EECC, Central Front, Ethiopia's Claim 2, ¶ 110 (2004). The Commission also said that this failure was compounded by Eritrea's failure to take appropriate actions after the incidents to prevent future recurrences. The Commission came to this conclusion based on the live testimony of the Eritrean Deputy Air Force Commander who said that no systematic investigation of the bombings were subsequently conducted and all efforts of inquiry were limited to questioning one of the pilots who was believed to have accidentally bombed a civilian target. Id. ¶¶ 111-12.

[351] See generally id.

Commission observed that the critical evidence could have been produced by Eritrea, but it had failed to produce this evidence.[352] Consequently, the Commission concluded that it was "entitled to draw adverse inferences reinforcing the conclusions . . . that not all feasible precautions were taken by Eritrea in its conduct of the air strikes."[353]

Therefore, the serious conflict in the evidence and complexity of the wartime circumstances, coupled with non-production of vital evidence known to exist,[354] led the Commission to determine the issues based largely on inferences and logical analysis.

IV. CONCLUSION

Elaborate and well-conceived rules of international humanitarian law set the standard of treatment of persons involved in and affected by warfare. The lack of a centralized form of enforcement is a peculiarity that these standards share with the general body of international law.[355] Better enforcement mechanisms are currently in place for norms of international law dealing with international peace and security. The most important of all mechanisms of enforcement is enshrined under Chapter VII of the United Nations Charter. It authorizes the UN Security Council to employ coercive measures to protect and restore international peace and security. In recent times, the threat to international peace has been broadened to include gross violations of human

---

[352] Id. ¶¶ 111-12.

[353] See id. ¶ 112.

[354] See EECC, Central Front, Ethiopia's Claim 2, ¶ 111 (2004) (noting that "Eritrea did not make available to the Commission any evidence from the pilots and refused to identify them."). One of the most serious challenges facing tribunals dealing with inter-state claims is the withholding of evidence that may have national security implications. Because arbitral tribunals lack the authority to enforce decisions, they are often forced to adjudicate cases based only on the evidence that is made available to them. This problem is not uncommon. In fact, the Rules of Procedure of the Permanent Court of Arbitration, on which the Commission's rules of procedures and evidence are based, envisage the occurrence of such problems. For example, Article 24 of these rules states that:

> Any time during the arbitral proceedings, the arbitral tribunal may call upon the parties to produce documents, exhibits, or other evidence within such a period of time as the tribunal shall determine. The tribunal shall take note of any refusal to do so as well as any such reasons for such refusal.

Permanent Court of Arbitration, Optional Rules For Arbitrating Disputes Between Two States (effective Oct. 20, 1992), art. 24, ¶ 3, available at http://www.pca-cpa.org/upload/files/2STATENG.pdf. In disputes between states, the consequence of refusal to submit vital evidence seems to be limited to negative inferences, which is what the Commission did in this case. The Iran-United States Claims Tribunal had on numerous occasions relied on negative inferences for the determination of disputed facts. INA Corp. v. The Government of the Islamic Republic of Iran, 8 Iran-U.S. Cl. Trib. Rep. 373, 382 (1985), discussed in Aldrich, supra note 1, at 339.

[355] Handbook of Humanitarian Law in Armed Conflict, supra note 5, at 517.

rights and the perpetration of serious violations of humanitarian law in times of international or non-international armed conflicts. The mechanism of enforcement of such violations has included sanctions,[356] the appointment of commissions of inquiry for the investigation of violations,[357] military intervention,[358] and authorization of criminal prosecutions.[359] However, civil liability as a mechanism of enforcement of violations of international humanitarian law has never received the attention it deserves. Perhaps the only recent exception in this respect is the UNCC, which sought to compensate victims of violations within the context of the United Nations enforcement mechanism.

The Ethiopia-Eritrea Claims Commission shares some common characteristics with the UNCC. It is, however, a mutually agreed ad hoc forum established for the purpose of compensating victims of violations of humanitarian law. It is an unprecedented forum in many respects. Constituted by a mutual agreement between warring states, it sought to enforce violations of international humanitarian law through the determination of civil liability.

By so doing, it has served several important purposes: (1) it has contributed to the

---

[356] Sanctions could take a number of different forms. For example, during the Yugoslavia conflict, the UN Security Council prohibited the flight of military aircraft in the Bosnian airspace and authorized the use of all available means to protect humanitarian convoys. Id.

[357] E.g., S.C. Res. 780, U.N. Doc. S/RES/780 (Oct. 6, 1992); Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), reprinted in Boutros Boutros-Ghali, Letter Dated 9 February 1993 from the Secretary-General Addressed to the President of the Security Council, Annex I, U.N.Doc. S/25274 (Feb. 10, 1993).

[358] A prime example is the Security Council's authorization of the U.S.-led coalition to use military force against Iraq in 1991. See S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990). The interpretation of this resolution as it relates to the U.S.-led use of force against Iraq in 2003 has become a subject of immense controversy. See generally Sean D. Murphy, Assessing the Legality of Invading Iraq, 92 Geo. L.J. 173 (2004) (arguing that the U.S. decision not to adopt a legal doctrine based on preemptive self-defense was a welcome development for the maintenance of world order but contending that the U.S. legal theory that Resolution 678 authorized the use of force in 2003 is not persuasive).

[359] For example, in 1993, the Security Council established the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993); and in 1994, it established the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994). Prosecution of individuals for violations of customs and laws of war is perhaps the oldest and most frequently used method of enforcement. For example, discussions of prosecutions for violations of customs of war have been noted to have occurred as early as the middle ages by the forces that defeated Napoleon. See Handbook of Humanitarian Law in Armed Conflict, supra note 5, at 518 n.9; see generally M.H. Keen, The Laws of War in the Late Middle Ages (1965) (discussing early history); Bassiouni, supra note 5 (discussing the background of international criminal tribunals established since the First World War).

development of norms of international humanitarian law in the civil compensation context, (2) it has significantly contributed to the emerging consensus regarding the status of some norms of international humanitarian law as customary norms, (3) it has identified gaps in the existing standards of international humanitarian law and suggested the development of new norms to fill those gaps, (4) it has refined procedures and evidentiary standards of adjudication for mass claims processes, (5) it has clearly demonstrated that there is a feasible way to determine civil liability for violations of international humanitarian law occurring during and in the aftermath of armed conflict for the compensation of victims of such violations, and most importantly, (6) it has shown that determination of civil liability is a realistic alternative and an important supplement to criminal prosecution as a mechanism of enforcement of violations of humanitarian law.

Armed conflicts are seriously affecting the lives of societies in many parts of the world today. The work of this Commission will likely reinvigorate the debate over the importance of designing different mechanisms of enforcement of laws governing the conducts of these conflicts. This Commission has established a unique and workable model for future post-conflict adjudications of claims for compensation. It will likely inspire more interest in civil liability as a viable mechanism of enforcement of international humanitarian law.

The System of Intergovernmental Relations (IGR) in Ethiopia: In Search of Institutions and Guidelines

Assefa Fiseha[♣]

1. Introduction

"What if a certain Regional State is not interested in being part of the System of IGR?"[1] This was a question posed by a key regional state official in a seminar on IGR held in 2007. It should be noted that this question came from a notable regional state figure and reflects the fear (real or imagined) emanating from the system of IGR in Ethiopia as perceived by at least some of the regional states. More importantly the question also hints that IGR is little understood, if not a misunderstood concept in the Ethiopian federal system. Regional states need to realize that IGR is a forum for bargaining with the federal government on matters of common interest and if conducted based on some sense of partnership between the two governments then in the long run it is meant to be a forum for the attainment of *common goals* through co-operation. IGR after all is aimed at enhancing shared rule without undermining self rule. It is only if used inappropriately that it would be an instrument of centralization and by then one could say IGR has lost its objective. Hence we start by outlining what IGR is in a federal context.

The system of intergovernmental relations (IGR) has vertical as well as horizontal dimensions.[2] Federations divide political power between the federal government and the states and this gives rise to a complex set of relationships among several actors. Vertically, IGR deals with relations between the federal government and the states on issues of common interest. Depending on the substantive basis for interaction, it may involve some or all of the constituent units with the federal government. Some federations like the US (at least during the 19th c. and early 20th c.) have given emphasis to competitive relations between the federal government and the states.[3]

♣ LL.B., LL.M., PhD, Associate Professor, Institute of Federalism and Legal Studies, Ethiopian Civil Service College. The author would like to acknowledge the invaluable comments made by the reviewers. All errors and opinions remain that of the author.

[1] This was a question posed by a key figure of a Regional State in a seminar on IGR held in 2007. The author would like to acknowledge to all participants of the series of seminars on IGR held in Nazreth/Adama and Addis Ababa.

[2] For more on the system of intergovernmental relations see Deil Wright, *Understanding Intergovernmental Relations*, 3rd edn. (Pacific Grove, CA: Brooks/Cole, 1988); also David Nice, Patricia Fredericksen, *The Politics of Intergovernmental Relations*, 2nd edn. (Chicago: Nelson-Hall Publishers, 1995) pp. 122-144; David Cameron, 'The Structure of Intergovernmental Relations,' *International Social Science Journal,* 53:167 *(*2001) pp. 121-127; Brian R. Opeskin, 'Mechanisms for Intergovernmental Relations in Federations,' *International Social Science Journal,* 253:167 *(*2001) pp. 129-137.

[3] While the notion of dual federalism may be an appropriate description of the 19th century federal system of the United States, matters have changed a lot in the 20th century in favor of what some call co-operative or 'marble cake federalism,' signifying a complex intermixing of powers and responsibilities between the federal government and the states with shared rather than layered powers. The author who

This changed significantly in the 1960s with the emergence of co-operative IGR. Others (for the most part European federations) emphasize the interdependence between the two levels of governments.[4] In some cases intergovernmental relations in the vertical sense is extended to cover federal-local as well as state-local relations.[5] Horizontally, it deals with interstate,[6] inter-local relations and depending on their constitutional status municipal intergovernmental forums could also be included. However, our primary interest in this piece is the federal – state and to some extent interstate relations.

---

popularized the marble cake concept was Morton Grodzins and he defines it as 'an inseparable mingling of differently colored ingredients, the colors appearing in vertical and diagonal strands and unexpected whirls. As colors are mixed in the marble cake, so functions are mixed in the American federal system...functions are not neatly parceled out among the many governments...it is difficult to find any governmental activity which does not involve all three of the so-called levels of the federal system.' He argued that in the most local of all functions, law enforcement and education, as well as in what *a priori* may be considered as purely federal, there is significant sharing of power directly or indirectly. See Morton Grodzins, 'The Federal System,' in Laurence O'Toole, Jr. ed., *American Intergovernmental Relations* (Washington, D.C.: CQ Press, 1985)pp. 43-44; also See Michael Laslovich, 'The American Tradition: Federalism in the United States,' in Michael Burgess and Alain-G. Gagnon eds., *Comparative Federalism and Federation, Competing Traditions and Future Directions* (New York: Harvester, 1993) pp. 187-188; equally Rufus Davis states that although the early 19th century federalism is presented as 'dual worlds where two political streams flowed in parallel and splendid isolation from each other, the implications of interdependence were not wholly ignored.' 'By the mid 20th century the *two conditions* which characterized the political setting of the 19th century, the insulated remoteness of agricultural communities and the minimalization of government intervention in the affairs of the community completely changed.' More emphasis was placed on co-operation than on dual polity. Thus making the point that neither was 19th century American federalism solely dual nor is the present federal system exclusively co-operative. Rufus Davis, *The Federal Principle: A Journey Through time in Quest of Meaning* (Berkley: University of California Press, 1978) at 147.

[4] German Basic Law Articles 74 and 75 and the Swiss Constitution provide for a comprehensive list of shared powers. The Indian Constitution schedule VII and Art 246 as well provided for a comprehensive concurrent list.

[5] There is an emerging tendency to constitutionalize the position of local governments in India, Germany, South Africa and Nigeria and partly in Ethiopia (post 2001 development), which has traditionally been considered as the exclusive domain of the constituent units and in the former three countries there is an effort to include local governments and municipalities into the IGR.

[6] This is often not given enough emphasis but it covers crucial issues that may affect the whole federal system. Among other things, a federal system should clearly regulate interstate mobility, that is whether each constituent state is allowed to discriminate between those who come from other constituent states and its own residents and under what conditions; issues of guaranteeing the enforcement of decisions from courts of one state in another constituent state; the status of legal documents (like marriage and divorce certificates) before the courts of another constituent state court; extradition of fugitives from one jurisdiction to the other; interstate compacts among the states that may cover conservation of the environment, law enforcement, health, education and issues of guaranteeing uniformity of laws, when there exists significant variation of laws among the states. If history is any guide, one needs only to be reminded of the evils of the Articles of Confederation of the United States. Discriminatory policies, protectionism, burdensome and artificial barriers among the states contributed to the failure of the system, thus giving birth to the new federal system in 1789. See David Nice, Patricia Fredericksen, *supra* note 2: 122-144.

As already hinted intergovernmental relations is a very broad notion referring principally to the relations (formal or informal) between the federal government and the constituent states as well as among the constituent units, concerning the co-ordination of policies on shared programs. This often is linked to the bulk of frameworks and concurrent powers. In the areas where the constitution assigns exclusive powers to either level of government IGR is of little relevance. But when both levels of governments exercise power jointly the appropriate institutions and mechanisms need to be put in place for the purpose of coordinating their joint efforts. IGR is one such mechanism that serves as a forum for the frequent interaction of the two levels of governments.

IGR is one of the defining features of federations.[7] In a nut shell, federal polities are defined as systems where two or more orders of government each with constitutionally defined powers (legislative, executive, judicial and financial powers) exercise genuine autonomy and act directly on the citizen. Supreme and written constitution not unilaterally amendable by one order of government but rather requiring the participation of the federal and the units ensuring not only the division of power but also the continued interest of the actors in the federal process is also the essence of federations. Besides an umpire that rules on the interpretation of cases involving the division of powers and on the rule of constitutionality is crucial as disputes are bound to arise. Entrenched regional representation in the federal policy making as well remains a vital aspect strengthening the shared rule aspect of federations. Very relevant to this piece, processes and institutions to facilitate intergovernmental collaboration in those areas where governmental responsibilities are shared or overlap is the final defining feature of federations.[8] While earlier on it was thought that watertight division of powers (represented by a "layer cake federalism"[9]) between the federal and state governments was the essence of federations, later it became clear, both in the older and newer federations, that overlapping and interdependence between the two levels of governments is simply part of federal constitutions. Even the United States federal system where the constitution emphasized dual structure at least during the early phase of the federation somehow fits into this development. Indeed, several authors have written that even 19th century American federalism had some features of power sharing.[10] Zimmerman

[7] Ronald Watts, *Comparing Federal Systems*, 2nd edn., (Montreal and Kingston: Queen's University, 1999) p.7

[8] As to the relevance of the defining features of federations and their practical application to Ethiopia see Assefa Fiseha , *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study* (Nijmegen: Wolf Legal Publishers, 2005) Chapters 2 and 6.

[9] This model assumes clear-cut policy demarcations between the two levels of government and fails to consider the bulk of shared/concurrent jurisdictions. This is the essence of K. C. Wheare's book. K.C. Wheare, *Federal Government* 4th edn. (Oxford: Oxford University Press, 1963).

[10] Daniel Elazar, *American Federalism a View from the States* (New York) Thomas Crowell Co., 1966)pp. 53-76.

has recently confirmed the view that the United States federation had some seeds of co-operative federalism from the outset.[11]

Certainly, American federalism has undergone some changes during the 20th century. After 1937, the federal practice did not reserve much exclusive jurisdiction to the state governments to legislate free from federal interference.[12] After the New Deal, federal-state relationships shifted radically from its traditional dual form to a level in which the states became recipients of federal grants-in-aid. States administered dozens of important federal programs (that contain general nationwide standards), including unemployment insurance, poverty assistance, environmental protection, workers health and safety, public housing, community development, maintenance and construction of interstate highways. With the grants, Congress was able to induce states as well as condition states' continued ability to regulate in a given area on that states' assistance in the implementation of federal regulatory policies. Thus, Congress can secure state co-operation first by making a credible threat to pre-empt state law by creating a federal agency to regulate a field in place of the state unless the state regulates according to federal standards. Secondly, Congress may also condition the state's receipt of federal funds on that state's regulating according to federal standards and will secure state assistance as long as state politicians depend on federal funds. One can add the widening role of commerce power over the most part of the 20th century that brought about the regime of intra-state trade to the realm of interstate commerce. Duality then became more a myth than a reality.

The interdependence model as opposed to the 'layer cake' model gives emphasis to the existence of shared powers and responsibilities among the different levels of government. In a nutshell, it states that many areas of policy require federal, state and local involvement to carry out common programs. The federal and state governments do not operate in isolation but they rather interact frequently and this interaction forms the basis for the study of intergovernmental relations. The interdependence model is often known by various names but the most common one is co-operative federalism, also called 'marble cake' federalism.[13] Indeed, it is in the area of joint powers that an effective IGR is required for coordinating federal and state policies. As one author noted IGR "profoundly shapes the way in which a particular federation functions. IGR

[11] Joseph Zimmerman, 'National-State Relations: Co-operative Federalism in the Twentieth Century,' *Publius: The Journal of Federalism* 31:2 (Spring 2001) pp. 17-18.

[12] With the Depression, the New Deal and with the famous decision in *United States* v. *Darby* in 1941 in which the Supreme Court pronounced that the Tenth Amendment does not serve as a barrier to national government, dual federalism was almost declared irrelevant, if not dead. It is currently getting refreshed as in the *Lopez* and *Printz* decisions. Just in 2000 Chief Justice Rehnquest opined in *United States* v. *Morrison* 120 S. Ct. 1740, (2000), 1754, emphasizing that there is a need to distinguish between what is truly national and what is truly local. See Arthur Gunlicks, 'Principles of American Federalism' in Paul Kirchof and D. Kommers eds., *Germany and its Basic Law* v.14 (Baden-Baden, Series Drager Foundation, 1993) pp. 91-101.

[13] See Morton Grodzins, *supra* note 3.

is the workhorse of any federal system …it is the privileged instrument by which the job – whatever the job – gets done."[14]

2. A NOTE ON THE NATURE OF SHARED POWERS

Given the continued debate and ambiguity[15] on the nature of shared powers in the Ethiopian federation, it is appropriate to start the discussion by explaining its nature and relevance to IGR particularly in reference to the Ethiopian federation. We must state at the outset though that the Ethiopian Constitution is silent when it comes to the principles that guide the system of IGR and the necessary institutions that make it work. Hence the constitutional basis for IGR is very much limited to the provisions of the Constitution that deal with the division of powers and that are of some relevance to IGR. Although the constitutional division of powers between the federal government and the states is the central point in federations, we find, however, that the dividing line between the two powers is never clear. There are deliberate and some unintentional overlaps in the division of powers. Shared (joint) powers represent the meeting point of the two levels of governments, otherwise considered to be exercising exclusive federal and state powers.

Shared powers refer to that category of powers of which both the federation and the states at some point, exercise at least, a part. Experience has shown that there are certain matters which cannot be allocated exclusively either to the federal government or the states. It may be desirable that the states should legislate on some matters but it is also necessary that the federal government should also legislate to enable it in some cases to secure uniformity across the nation.[16] The federal government may also need to guide and encourage state efforts and more importantly some measures taken by the states may have spill-over effects and for this reason the federal government may need to intervene.[17] Shared powers as well avoid the necessity of enumerating complicated minute subdivisions of individual functions to be assigned exclusively to one area of government or the other, thus serving as a flexible channel for adjustment to new circumstances.[18] They are introduced in recognition of the inevitability of overlaps of jurisdiction between the federal government and the states.[19]

---

[14] David Cameron, *supra* note 2, 2001 p. 121.

[15] For instance one author stated the Ethiopian constitution has no concurrent powers except in the area of taxes. See Lovise Aalen, *Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000* (Bergen: Chr. Michelsea Institut 2002) p. 56; see Article 98 on the concurrent power of taxation. It is true that only in the field of taxation, under Art. 98 distinct from Arts. 51 and 52, the constitution expressly incorporates concurrent powers. Yet others have carefully elaborated that shared powers are inherent to the Ethiopian Constitution as well. See Assefa, *supra* note 8, chapter six; Solomon Nigussie, *Fiscal Federalism in Ethiopia's Ethnic Based Federalism*, (Nijmegen: Wolf Legal Publishers, 2006) chapter 3.

[16] Asok Chanda, *Federalism in India: A study of Union- State Relations* (London: George Allen & Unwin Ltd., 1965) pp. 68-69.

[17] *Ibid*., pp. 68-69.

[18] Ronald Watts, *New Federations: Experiments in the Common Wealth* (Oxford: Clarendon Press, 1966) p. 38.

[19] *Ibid.*

Traditionally, it has been argued that the existence of a separate list of powers other than exclusive and residual ones is liable to raise considerable problems. For instance, Wheare argued that shared powers add another series of disputes about jurisdiction to the already formidable list of possible conflicts, which are inevitable in even the simplest federal systems as it adds new and complicated list.[20]

However, Wheare's view of federalism is based on the co-ordinate theory implying dual polity, in which each government acts directly towards the citizen and assumes a clearly 'layered division' of power that is far from real.[21] Challenging this position Duchacek states that the existence of shared powers is simply another reflection of the fundamental impossibility and also the undesirability of dividing political powers neatly and permanently.[22] Besides, executive federalism (also called functional federalism), that is, a constitutionally mandated and entrenched provision for splitting legislative –mainly to the federal government and administrative jurisdiction – principally to the states,[23] as practised in Germany and Switzerland indicates that the classic approach of duality has been taken over by the regime of co-operative federalism.

In terms of the field of coverage it can be stated broadly that, for the most part, the social and economic spheres fall into the shared power category. Economic affairs (that include regulation of trade and commerce, industries and labor and economic planning) raise issues because both levels of governments have a lot of vested interest in these spheres of activities. It is, for instance, rarely possible to draw a line between trade and commerce which is interstate and that which is intra-state.[24] On the one hand, there are bound to be conflicts of economic interests between states specializing in different products and on the other hand fear that measures taken by the federal government integrating the national economy might undermine the cultural distinctiveness of the diverse societies. Besides, in the economic sphere states are often concerned with ensuring the economic welfare of their citizens and developing policies related to their own particular economic interests.[25] These concerns call for

[20] K.C. Wheare, *supra* note 9, 79.
[21] *Ibid*. at 14.
[22] Ivo Duchacek, *Comparative Federalism: The Territorial Dimensions of Politics,* 2nd edn. (Lanham: University Press of America, 1987) p. 272.
[23] Watts, *Comparing Federal Systems*, *supra* note 7, at 40.
[24] See for example US Supreme Court decisions *United States* v. *Darby*, 312, US 100 (1941) in which the Court held that an activity that took place wholly intra-state could be subjected to Congressional regulation because of the activities impact in other states. The Court stated intra-state transaction might be so intermingled with interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled; *Wickard* v. *Filburn* 317 US 111, 129, (1942) in which the Court stated Congress could control household production of goods because the cumulative effect of household production of goods might affect the supply and demand on the interstate commodity market; *United States* v. *Lopez*: 514 US 549 (1995); Jesse Choper, 'Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?,' *Arkansas Law Review* 55:4 (2002-2003) at 735, 793.
[25] Watts, *Comparing Federal Systems*, *supra* note 7 at 40.

state control of these spheres. On the other hand, there is the need for guaranteeing free trade and economic development, and in developing countries there is the urge for rapid economic growth through active federal participation. These provide the reasons for the involvement of the federal government in these fields.[26]

Social services cover education, health care and welfare of citizens, insurance, and assistance for old age, unemployment, accident, and workers' compensation. There are a number of arguments in favor of the involvement of the state governments in these services. Regional governments often have the primary constitutional responsibility. The personal nature of the services, the need to adapt them to local circumstances and their close relation to other aspects of local government urge for state power. However, extensive federal financial assistance has often been necessary because of program costs and the pressure for federal wide standards of service to the citizen.[27] Besides, greater scale of research and specialization is possible at federal level. As a result, these two fields (economic policy and social affairs) show extensive activity, interaction and co-ordination by both levels of government. Experience so far indicates that one can distinguish at least two types of shared powers: concurrent and framework powers.[28]

2.1 Framework Powers

When framework legislation has been prescribed for the exercise of power, a special type of shared power exists that in principle grants the federal government the competence to issue general legislation in a specific policy field. This federal legislation is subject to strict conditions because it has to leave substantial room for the states to issue their own legislation within the limits set by the federation.[29]

The federal government may use framework legislation to regulate federation-wide standards while leaving the states room to legislate the details and to deliver the services in a manner that is suitable to local situations. The states, under this category of powers, are allowed to *fill in the gaps* with more detailed laws. Unlike the concurrent powers in which the federal government has the potential competence to absorb, federal framework legislation indicates an interesting compromise that requires significant decentralization of policy-making authority without sacrificing uniformity, where it is needed.[30] Especially in the social services the federal government may legislate to secure a basic national uniformity and to guide regional

[26] Watts, *New Federations*, *supra* note 18 at 182.
[27] Watts, *Comparing Federal Systems*, *supra* note 7 at 40.
[28] Flora Goudappel, *Powers and Control Mechanisms in European Federal Systems* (Gouda Quint: Sanders Institute, 1997) p. 41.
[29] *Ibid*., at 41.
[30] Watts, *Comparing Federal Systems*, *supra* note 7 at 38.

legislation while leaving the states with the initiative for details and for adaptation to local circumstances.[31]

There is less guidance as to how far framework legislation enacted by the federal government could possibly go into details. In Germany where framework legislation is very common, the Constitutional Court held that a federal framework law cannot stand on its own but must be designed to be filled in by state legislation. It must leave the states an area, which is of substance.[32] This way it tried to protect the states' legislative power. Because the federal government had extensively used this power of legislation in a manner that affected the autonomy of the states, the Basic Law provision dealing with framework legislation (Article 75) was one that was amended as part of the Constitutional reform in 1994. The new provision sets at least two minimum conditions to be fulfilled before a federal framework law could be enacted.[33] It appears, therefore, that as far as the law is concerned, for the federal government, the framework powers are more restrictive than concurrent ones as it is obliged to leave room for the states to issue their own legislation.[34] Framework powers not only preserve the right of the states to legislate but also positively presuppose future state legislation. Thus, the federal government may not in principle legislate exhaustively on the subject.[35]

Although it has been argued that the Ethiopian Constitution has no shared powers except in the area of taxation, a careful study of the provisions hints that it indeed provides for such category of powers. By virtue of Article 55(6) the House of Peoples' Representatives (HoPR) is empowered to enact *civil laws*, which the House of Federation (HoF) deems 'necessary to establish and sustain one economic community'.[36] In principle by virtue of Article 52, civil law[37] is a matter reserved for the

[31] Philip Blair, *Federalism and Judicial Review in West Germany* (Oxford: Clarendon Press, 1981) at 85; Watts, *New Federations, supra* note 18 at 174; also Art. 75 of the German Basic Law. The article enumerates areas falling within this category: general principles on higher education, hunting, nature conservation, land distribution, regional planning, general legal relations of the press, film industry, land reform, water resource management, registration of residence, identity cards, legal status of state and public servants. This article was amended on 14 November 1994.

[32] 4 BverfGE, 115 (1954); for more on the German Basic Law see Blair, *supra* note 31; David Currie, *The Constitution of the Federal Republic of Germany* (Chicago: The University of Chicago Press, 1994).

[33] Art. 75 cross refers to Art. 72 to extend the conditions attached to concurrent powers to framework laws and these are: the necessity to establish equal living conditions or the maintenance of legal or economic unity. Apart from this Art. 75 also stipulates under sub 2 that only in exceptional cases could framework law be detailed or directly applicable.

[34] Goudappel, *supra* note 28: 56-57.

[35] Blair, *supra* note 31 at 87; see also Currie, *supra* note 32 at 51.

[36] This notion is not defined in the constitution but interestingly a policy document issued by the federal government that underscores the point that there can be one economic community if there is a network of infra-structure that connects people together and a uniform economic, fiscal and monetary policy as well as free movement of labor and capital throughout the country. If this is so then the power of the federal government is very wide in scope. But note that it seems to be limited to civil law. See *Be Ethiopia Ye Democrasiyawi Ser'at Ginbata Gudayoch* (Ministry of Information, Addis Ababa, Ginbot 1994 E.C.): 201-217.

states. However, as a matter of exception the federal government may enact civil laws when the HoF states that it is necessary to enact such laws to establish and sustain one economic community. This is a clear departure from the general clause under Article 52 sub 1. The last clause states that whatever is not expressly given to the federal government alone or concurrently with states remains with the states. But here the approach is that whatever is not expressly given from the civil law to the federal government is not necessarily with the states. It points out that federal government may legislate even in areas of civil law. It appears that like its German counterpart, if the federal government through the HoF decides that uniformity in some fields of civil law should be achieved in light of the potential and actual variation among states in terms of culture, religion and tradition, which may have a bearing on the rights of children, women or even inheritance, then the HoPR may be compelled to enact such laws. According to the Basic Law in Germany the conditions for enacting concurrent and framework powers are 'to establish equal living conditions throughout the federal territory or the maintenance of legal or economic unity.'[38] There is no doubt that a comparison of the two Constitutions hints at the Basic Law provision granting wider powers to the federal government. The responsibility of establishing equal living conditions or the maintenance of legal unity taken in light of the fact that under Article 74 of the Basic Law most part of civil law, criminal law and the procedures is concurrent, leaves wide powers to the federal government.

On the other hand, in Ethiopia where civil law is the residual power of the states and given the ethno-linguistic and religious diversity within which the federation operates, the need for some level of uniformity remain compelling. However, this attempt has to be considered in light of the sensitivity necessary to accommodate the diverse nationalities in Ethiopia. Yet this clause is potentially a key provision for guaranteeing uniformity in some fields of civil law.

Another area of great significance falling under the framework legislation appears to be Article 51(2) and sub (3) versus 52(2) c. The Constitution empowers the federal government to '*formulate and implement the country's policies, strategies and plans in respect of overall economic, social and development matters...; ...establish and implement national standards and basic policy criteria for public health, education, science and technology...*'[39] One may state that this perhaps goes further than the 'necessary and proper' clause in the US Constitution for it grants the federal government wide powers in economic, social, health and education spheres. It seems to place the primary responsibility of determining major policy directions and standards on the federal government. This expressly covers all economic and social issues that were federalized during the 1930's in the United States. There is no doubt

[37] The constitution does not define what the content of civil law is but traditionally it is understood to include all matters covered by the existing civil code, which in principle is within the jurisdiction of the states unless the constitution itself federalizes it as in the case of land.
[38] Basic Law of Germany Arts. 72 and 75.
[39] Article 51 sub 2 and sub 3 (Italics mine).

that these powers cover the bulk of concurrent power on a vast field of social and economic affairs as stated in other federations. However, it is also possible to argue with equal force that if one follows the terms closely, the powers of the federal government even in these vital areas do not seem exhaustive. The same Constitution also empowers the states, among other things 'to formulate and execute economic, social and development policies, strategies and plans for the state.'[40] Thus, there is obviously a lot of overlap between the powers of the federal government and the states concerning economic, social and development plans as well as health and education. But the extent of the powers of the respective governments is not clearly stipulated. To what extent could the federal government outline the national standards and policy criteria or the breadth and depth of the nationwide policies? It is consequently also not clear what is left for the states. But it seems clear from the provisions that the federal government cannot exhaustively legislate on all these matters. The wording of Article 52(2) seems to suggest that the states are endowed *not merely with administrative power* but with the power to formulate and execute economic, social and development policies. No doubt that this power is the basis for shared/framework power covering the bulk of social and economic spheres.

The provision that empowers the states to legislate on matters concerning state civil servants is also far from entrusting the state exclusively with these matters.[41] At first sight, it appears there are two entirely separate laws: a federal law governing the federal employees and state law regulating state civil servants.[42] Yet, the federal Constitution does not leave it there. In the implementation of state laws concerning the state civil service, the state is required to approximate national/federal standards. Besides, if one looks at the policies issued by the federal government, they blur the formal distinction and duality of authority stipulated in the Constitution. In the document there are standards that the federal government clearly spelt out as applicable to civil servants nationwide.[43] In the last decade or so indeed there is an emerging horizontal IGR regarding the civil service where regional state civil service bureau heads meet at least once a year and discuss some strategic issues concerning the human resource development but often without the center. One could keep on listing other examples but the point is simply that framework powers call for series of interaction between the two levels of governments and seem to be part of the Ethiopian Constitution.

2.2 Concurrent Powers

[40] Art. 52(2) c.
[41] Art. 52(2) f.
[42] See Proclamation No. 262 of 2002, Federal Civil Servants Proclamation, *Federal Negarit Gazeta*, 8th Year No. 8 (January 2002) that exclusively regulates civil servants at federal level and states have accordingly regulated their respective civil servants.
[43] *Ye Ethiopia Federalawi Democrasiawi Republic Mengist Yemasfesem Akim Ginbata Strategy Ena Programoch* (Addis Ababa: Ministry of Information, Yekatit 94 E.C.): 193-257.

As one category of shared powers, concurrent powers refer to powers attributed to both entities. However, one of the entities, often the states, are allowed to exercise this power until the federal government steps in to legislate on such powers. The states continue to regulate in some fields until the former occupies the field and the part of the concurrent power which has not yet been occupied by the federal government, may still remain with the states.[44] Concurrent powers provide an element of flexibility in the distribution of power enabling the federal government to postpone the exercise of potential authority in a particular field until it becomes a matter of federal importance. They enable both governments to exercise their respective powers depending on whether the matter remains of regional or of national importance.[45] Examples of such instance in Ethiopia include the provision on enactment of penal code. It is stated, 'it [HoPR] shall enact a penal code.'[46] The states may, however, enact penal laws too on matters that are not specifically covered by the federal penal legislation. It appears that this is more of a concurrent than parallel or framework one because the states may enact such laws only if the federal penal law does not exhaust the list of offences. Potentially the federal parliament may by virtue of Article 55(5) exhaust the field leaving no room for the states. But states do often include specific offences not covered by the federal penal code in every piece of legislation and as a result it is not a power merely written on paper.

If we agree that IGR principally derives from the nature of shared constitutional powers and if such powers are inherent to the Ethiopian Constitution, the question is what is required for IGR to be effective in Ethiopia particularly in terms of principles, institutions and policies? Are there any emerging tendencies from the practice of nearly a decade and half federal experiment relevant to IGR? What lessons can we draw from the system of IGR as evolved from other federations? In the Ethiopian context surely this is an area where little has been researched and policies and guidelines on IGR are yet to be designed. Besides most of the IGR activities, to the extent that they exist, are undertaken behind closed doors and through party machineries at the two levels of governments and one is not able to find comprehensive reports that disclose the practice. Therefore, this essay is a modest attempt to fill the gap in law/policies, institutions and research on IGR and to shed some light on the system of IGR in Ethiopia based on the experience of other federations.

To this end, the essay is divided into four parts. Part one and part two as already seen provide a short introduction to IGR. They principally aim at defining what IGR is and the constitutional basis for it. It is vital to hint that federal systems divide power between the two levels of governments and it is because powers are divided that the need for coordination arises. Part three attempts to shed some light on the institutions and principles of IGR as evolved in other, relatively older federations. This is indeed

[44] Goudappel, *supra* note 28 at 41; Watts, *Comparing Federal Systems*, *supra* note 7 at 38.
[45] Watts, *New Federations*, *supra* note 18 at 174.
[46] Art. 55(5).

the section that hints on the level of IGR in Ethiopia, that is, the institutional and policy gaps we have. Part four dwells on the practice (to the extent that it exists) of IGR in Ethiopia and the final section draws some conclusions. A final remark as to the scope of this paper. IGR as has developed in other federations is not limited to the interaction between the two levels of governments at executive and legislative level. Federal constitutions and legislations issued by both levels of governments often provide for a complicated level of interaction to exist among the judicial organs at federal and state level. Mechanisms for settling IGR disputes is also another component while dealing with IGR policies. Fiscal issues as well take center stage in any IGR structure and process in any federation. For the sake of limiting the size of the paper, these three aspects of IGR are not dealt with in this essay.[47]

3. Institutions/Instruments for Intergovernmental Relations

A central issue that often emerges in relation to the organization of IGR is whether or not the institutions, processes and guidelines for IGR should be stipulated in the constitution, in a proclamation or whether it should be left to evolve on its own. Indeed, there is a wide range of variation among federations in this respect. Older federations like the United States rarely attempted to regulate this sphere and for the most part left IGR to evolve on its own. Younger federations like Germany and South Africa on the other hand have attempted to take lessons from older federations and stipulated broad principles in their constitutions and in the case of South Africa even enacted a detailed proclamation on IGR. Nonetheless, it is important to realize that even in the older federations, there are general patterns and trends that evolved from practice indicating the institutions and processes of IGR. Besides there is enough evidence indicating the fact that IGR by its nature is dynamic and hence, however regulated it may be, there is a need to leave some room for flexibility and for it to evolve. Such dynamism and flexibility enables IGR to adapt to changing social, economic and political realties. Thus, while formalizing IGR will surely lay down the framework and the principles by which it is guided, it should not aim at regulating the entire sphere of the activity of IGR. The maximum that can be done to facilitate the smooth functioning of IGR is to state in broad terms the policies designed to support IGR and induce some incentives for co-operation, political culture of co-operation and mutual respect between the two levels of governments.

In the Ethiopian context, however, there are at least two compelling reasons calling for some level of institutionalizing IGR. Firstly, so far there are no formal federal-state, interstate mechanisms of intergovernmental relations except through what was *de facto* known as the Office of Regional Affairs (*kilil Guday Zerf*) within the Prime Minister's Office, later formally replaced by the Ministry of Federal Affairs (MoFA). As will be illustrated later, it is hardly possible to argue that MoFA has fully replaced

[47] The fiscal aspect has been dealt with by Solomon Negussie, *supra* note 15; and the judiciary by Assefa, *supra* note 8 chapter 8.

the informal party based IGR that is prevalent in Ethiopia. Indeed, if seen critically the name MoFA appears to be a misnomer as its performance so far has little to do with IGR proper. The federal government heavily relies on party lines rather than on formal institutions of intergovernmental cooperation. Intergovernmental relations are important in installing the culture of negotiation between the federal government and the states, checking the trend of centralization and thereby enhancing the bargaining power of the states. Institutionalizing intergovernmental relations could further facilitate resolving potential center-state conflicts. While the process is calm at the moment owing to the congruency of the party system at federal and state levels, it is not impossible to imagine states run by a party whose political program is different from the center or *vice versa*. Indeed this was about to happen following the May 2005 election when the Coalition for Unity and Democracy (CUD) won by a land slide all the seats to the Addis Ababa City Council. In such cases, conflicts could be serious and channels of negotiation should be set up to accommodate interests. The March 2001 TPLF split and its subsequent impact on other states regarding federal-state relations is also a clear evidence supporting the argument that there is indeed the need for separating party and government institutions including those dealing with IGR.[48]

Secondly, Ethiopia has no law-making second chamber. The HoF does play a modest role in the area of fiscal transfers, one field of intergovernmental relations between the federal government and the states, but this in itself is in the process of evolution. The states do not have control over the laws enacted by the federal government. The institutionalization of the regime of intergovernmental relations may then be one option for enhancing the participation of states on matters shared between the federal and state governments. Indeed in federations where the second chamber is weak or has no law making function a special kind of legislative IGR is recommended for the effective interaction of the legislative organs of both levels of governments.

Before embarking on the technical institutional aspect, there is another issue that is recurring within the emerging IGR system in Ethiopia that needs serious consideration. That is, whatever the details and technicalities of IGR may be, which organ of state, for example, the Prime Minister's Office, the HoF, MoFA or even as it appears today a department on IGR within MoFA should coordinate the entire system of IGR? This is central to the institutional aspect of IGR and will have an impact on the system of IGR in general and on its effectiveness in particular. Certainly, whichever institution is entrusted with the mandate of coordinating IGR nationwide, every level of government, line ministries and equivalent regional state offices will continue conducting some form of IGR relevant to their specific portfolios. This is what some prefer to call "picket fence federalism"[49] where every office in a less

[48] For more on the nature of the crisis see note 100 *infra.*

[49] See David Nice, Patricia Fredericksen, *supra* note 2: 11-14. 'Picket fence' federalism underscores the importance of the co-ordination of functions by functional bureaucrats in relation to their respective functions without the need for having a focal institution.

structured manner undertakes some aspect of IGR via the experts of both levels and where it is not easy to map out the forest of IGR as it remains scattered throughout. As such it is difficult to comprehend what is happening at national level and whether it is guided by some principles or is simply an instrument of manipulation by one level of government over the other. Hence, there is a need for a central/focal institution that designs policies on IGR and coordinates and guides the entire IGR system. Seen along this line, a department within a ministry as is presently the case in the MoFA is very likely to be ineffective for lack of resources, experts and more importantly for lack of the stature, leadership quality and influence to bring the actors into the structure and process. Current practice as well indicates that it can run the risk of being overshadowed by other priorities of the Ministry.[50] If so then the ideal candidate for the IGR to be effective may be the Prime Minister's Office or a Ministry appended to it. Experience elsewhere indicates that a higher level political commitment is crucial for its success.[51] One concern in this regard is perhaps that such office may lose focus given the overwhelming size of work related to coordinating and running the Council of Ministers.

Next in the list are the HoF that by virtue of Article 48 and 62 is mandated at least to conduct some aspect of IGR and arguably some even think that it is mandated to coordinate the entire IGR system in the country and the MoFA that until recently has been involved with some aspects of IGR as well. There is thus some overlap and even emerging tension between the two federal institutions. Constitutionally speaking the HoF's position appears to be more legitimate but the HoF suffers from institutional weakness. As a House it meets only two to three times a year and has a few experts who understand the complexities of the federal system in general and IGR in particular. MoFA as an executive body is in theory in a much better position in terms of institutional structure but as its 2005-2008 term indicates, it lacks political leadership to coordinate nation wide IGR activities. Besides IGR has in this term been a much sidelined activity. By and large, the IGR activity conducted by the two institutions is undertaken on an *ad hoc* basis. There is, thus, a need for designing an IGR policy and perhaps a framework law on IGR that defines the respective role of the institutions, sets the guidelines and principles and that outlines the various actors and their role if IGR is to have meaningful effect in the Ethiopian federal system.

Well regulated or not, the experience of other federations like Germany and Switzerland indicates that unless backed by relevant institutions facilitating the interaction between the two levels of governments IGR is unlikely to be effective in attaining its objectives. As Ronald Watts has rightly indicated, for the consultation, cooperation and coordination of joint activities to be effective, the establishment of structures and processes within each government is a prerequisite so as to coordinate

[50] This fact has clearly emerged on a number of seminars on IGR held in 2007 organized by MoFA, HoF and external donors. Most of the sources on the state of IGR on Ethiopia have been drawn from such series of seminars and interviews with key experts of MoFA.
[51] This is indeed the lesson one draws from the German and South African experience.

and participate effectively in its interaction with the other level. In Germany, South Africa and Switzerland,[52] for example, there are institutions already established for conducting and coordinating IGR at various levels. Comparative studies of these federations indicate that there are intra jurisdictional, federal-state and interstate institutions for IGR.

First we have Intra-jurisdictional IGR institutions that bring regional states into the federal level. In other words, in these institutions both the federal and state governments are represented at federal level and these include the second chamber which is often designed to be a federal institution but significantly influenced by the regional governments and hence having impact on the policy making process at the center. While the role and effectiveness of the second chamber in representing regional interests at federal level vary depending on the powers, composition and manner of appointment/election of the members, in some federations like Germany the second chamber is a key player in the IGR.[53] The HoF as well decides the formula for the allocation of federal subsidies to the regional states and in this limited sense and to the extent that such decision is influenced by the regional states could be treated in this part. Secondly, we have federal-state IGR institutions and in this broad part we have several actors. At the top we have the top regular conferences between the Federal Chancellor/Prime Minster and the heads of government of the states held, for example, in Germany in a more or less regular sequence of roughly every two months since 1969 and covering topics on which either the federation is dependent on the states or in which the competences of both sides are so closely connected with one another that separate action would compromise the effectiveness of any of the parts of the system. In South Africa this is called the President's Coordinating Council mainly composed of the President, his deputy, some key ministers and heads of the provinces; one step below this level is the interaction between a federal minister in a particular sector and the regional state counter parts. In all these processes IGR provides opportunities both for the federal institution to discuss national policy with regional state politicians who will implement it and for the latter to ensure that regional state concerns are adequately addressed in the design of such laws and policies.

Executive Dominated IGR

In theory the system of co-ordinating policies and shared programs between the federal government and the regional states involve both the elected and appointed

[52] See South African Constitution Section 41; Franz Lehner, 'The political Economy of Interlocked Federalism: A Comparative View of Germany and Switzerland,' in Lloyd Brown-John ed., *Centralizing and Decentralizing in Federal States* (Lanham: University Press of America, 1988).

[53] See Articles 50 and 84 of the Basic Law; Uwe Leonardy, 'The Working Relationship Between Bund and Lander in the Federal Republic of Germany' in Charlie Jeffery and Peter Savigear eds., *German Federalism Today* (New York: saint Martin's Press, 1991) pp. 40-59; Daniel Halberstam and Roderick Hills, Jr. 'State Autonomy in Germany and the United States,' 574 *Annals* 173 (2001) 173-178; Tony Burkett, 'The Ambivalent Role of the Bundesrat in the West German Federation,' in Michael Burgess ed., *Federalism and Federation in Western Europe* (Croom Helm: Harvester 1986) p. 210

officials (hence we talk about IGR at the executive and legislative level of both governments). But in parliamentary federations, because of the fusion of power between the legislature and the executive and the subsequent dominance of the executive, IGR is often dominated by the executive of both governments hence the name executive federalism. Executive mechanisms of IGR include formal cooperation, binding agreements - sometimes called treaties or compact agreements and informal interactions through telephone, fax, email, seminars, *ad hoc* meetings etc among the executive organs of both levels of governments from the top down to the lowest level.[54] In parliamentary systems, parliament is in principle supreme, 'makes and breaks the government' and the executive's continuity in power depends on the continued support it gets in parliament.[55] But political practice in many parliamentary federations seems to indicate that the executive has become dominant over the legislature. This is often visible as the executive dominates the beginning of the legislative process as it has key role in initiating policies and legislations. The executive is further responsible to apply such laws which it mostly initiated and that grant it wide discretionary powers. Observing this development one noted 'in fact the triangle of the *trias politica* where the legislature used to be at the top has been turned upside down with the executive becoming at the top.'[56] Ethiopia's emerging parliamentary federation is not immune to this phenomenon. There is already enough evidence indicating the executive's dominance over the legislature. Nearly more than 95 percent or so of the laws and policies of the federal government are initiated by the executive.[57] Given this reality, it is no surprise that the system of IGR in parliamentary federations is often dominated by the executive organs of both levels of governments and this is not without consequences. First, it reinforces the dominance of particular interests[58] in policy-making. Second, the process enhances an uncontrolled growth of government activity and hence severely reduces political (legislative) control of intergovernmental policy-making. This is because intergovernmental bargaining is by

[54] Opeskin, *supra* note 2, pp. 130-131.

[55] See for example Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes,* 2nd edn., (New York: New York University Press, 1997) pp. 101-114.

[56] Leonard F. M. Besselink, *The Role of National Parliaments – The Dutch Experience in Comparative Perspective*, Speech Delivered at the 2nd Annual Congress – Irish Center for European Law; available at http://www.icel.ie/Besselink%202.doc as accessed on November 04/2008.

[57] Interview with expert in the HoPR March 2008.

[58] In Germany for instance, according to Lehner, four different dimensions of conflict can be observed. One distribution of powers and responsibilities between the center and the states and related influences on policy making as both usually attempt to gain as much influence as possible on the decision-making process and the programs. Second, divergent fiscal interests of the poorer versus richer states that is between those that need federal financial intervention and those that do not. Third, socio-economic disparities among the states result in divergent interests. Fourth, party competition-different party composition among the federal and state. The same holds true in Switzerland except the last factor is replaced by cultural and linguistic diversity playing some role. As a result, intergovernmental bargaining in both countries usually takes place within specialized interaction between federal and sub-national bureaucracies rather than through comprehensive co-ordination programs. See Lehner, *supra* note 52 at 215.

and large an executive matter and federal and state legislative parliaments have little or no share in the bargaining process.[59] Most parliaments lack access to the details of intergovernmental agreements concluded behind closed doors. This creates a difficult situation for political control of executive activity. Thus, critics contend, the process limits the transparency of the federal- state relations, there is a problem of democratic deficit and accountability and tends to undermine the autonomy and responsibility of the state legislatures. This becomes more serious with federations in which the law-making functions of the states are reduced compared to those where the law-making is divided between the federal government and the states.[60] To compensate for the problem of democratic deficit and transparency, IGR policies and framework laws need to stipulate that any such intergovernmental agreements concluded between the executive organs of both levels of governments need to be reported to the respective legislative bodies in due time and approved.

Legislative IGR

Although as noted already the system of IGR is predominantly an executive task, elected bodies of both levels of governments as well exercise some form of IGR that facilitate their respective roles in the law making process in areas of shared jurisdiction. This is an important forum for the legislative organs of both governments to consult, communicate and interact on framework and concurrent laws before the promulgation of such laws. If not, both legislative bodies may enact on the joint powers without coordinating their activities and inconsistencies and uncertainties may prevail. It is represented in the conference of parliamentary speakers of the federal and state legislative bodies. To date, the only relevant development in this regard is the Forum of Speakers usually conducted once a year. Its role in terms of serving as a forum of legislative IGR is yet to be seen. Legislative IGR is particularly important in federations where the second chamber (the Senate or the HoF in Ethiopia) is either weak as in Canada or has little or no role in policy making at federal level. In such cases, the only way to facilitate effective interaction among the legislative bodies at federal and state level in areas of shared jurisdiction is through legislative IGR. Experience from other federations indicates that legislative IGR are mechanisms for converting (surely after going through a process) executive negotiated pieces into laws by the respective legislative bodies. This can take many forms but mirror legislation, agreed policies and complementary schemes are the most common ones.[61] Mirror legislation is where executive (of both level of governments) negotiated draft law is submitted to the respective legislative body or a proposed uniform law prepared by an independent body is adopted by both levels. Agreed policies refer to cases where both levels agree on general policies short of a draft law and then leave each legislative body to enact a law within the margin of appreciation. In concurrent and framework powers there is this jurisdictional and territorial limit on the power of the respective

[59] Lehner, *supra* note 52 at 217.
[60] *Ibid.*
[61] See Opeskin, *supra* note 2, pp. 133-134.

legislative bodies. Thus, depending on what type of legislation it will take, one level of government enacts a complementary law in cooperation with the other level.

Coming back to the third institutional level we have the broad range of interstate, also called horizontal IGR. These relationships may concern some or all of the regional states depending on the need that gave rise to such institutional structure. According to Klatt, functions assigned to the states in the Basic Law can be carried out on the basis of *common agreement* between the individual state ministers responsible for particular policy areas so that their decisions can have uniform application throughout the country.[62] The highest-ranking institution in this field is the conference of Minister Presidents (Heads of Governments of the states), which in Germany meet formally once a year but that can sometimes be more frequent. One step below this level are the conferences of *equivalent ministers* from different states whose responsibilities cover the *same areas* of policy.[63]

Very related to this is the conference of cantonal governments in Switzerland[64] established in October 1993.Although it formally belongs to the horizontal intergovernmental relations, it also plays a crucial role in expressing cantonal needs and views to the federal government on foreign policy. It was an active body in the negotiation process of Swiss constitutional reform. Another body, the Federal Dialogue that was set up in 1998, discusses issues of common interest between the federal parliament and cantonal delegates and takes place three to four times a year. There are also forums where members of cantonal governments, like German federalism without the center, in which respective heads of cantonal offices (for instance of finance and health) gather to promote co-ordination among the cantons. Similar patterns and trends are also emerging in Ethiopia. To mention some, we have the various cooperation agreements among some of regional states like the agreements between the Afar regional state and the two neighbouring regional states (Amhara and Tigray); agreements among regional states mainly inhabited by pastoral communities; frequent meetings among bureau heads of education and experts within the federal and regional state civil service etc. While the exact content and the process involved in such agreements and conferences is yet to be studied, this rather confirms the idea that IGR is by and large the result of an evolving process.

---

[62] Hartmut Klatt, 'Centralizing Trends in the Federal Republic: The Record of the Kohl Chancelorship' in Charlie Jeffery and Peter Savigear eds., *German Federalism Today* (New York: St. Martin's Press, 1991) p. 122.

[63] The whole objective of the three levels of interstate meetings is to facilitate mutual consultation and co-operation in all fields, particularly in the area of shared competencies; co-ordination and preparation of voting, particularly at *Bundserat* level; co-ordination on matters of administration of federal law at third level. See Uwe Leonardy, 'The Institutional Structures of German Federalism,' in Charlie Jeffery ed., *Recasting German Federalism: The Legacies of Unification* (London: Pinter, 1999) p. 10.

[64] Lehner states that the system of intergovernmental relations between the federal government and the states in Switzerland is less institutionalized when compared to Germany. Franz Lehner, *supra* note 52, p. 214.

Horizontal co-ordination (or federalism without the center) between the states themselves though strictly speaking is not part of federal-state relations surely has impact on the vertical IGR. Horizontal IGR has significant impact in terms of facilitating vertical relationships because it is here that the regional states harmonize the implementation of federal laws.[65] In both Germany and Switzerland, interstate relations have direct impact on the vertical relationship between the federal government and the states. Functions assigned to the states could be carried out on the basis of common agreement between the individual state ministers responsible for particular policy areas.

Horizontal IGR, among other things, provide opportunities for securing consensus or help develop common understanding among actors representing the governments before facing the federal government on specific policy issue.[66] At the same time it is also an avenue for sharing and learning experiences or for dealing with specific issues among all or some of the constituent units.

3.1 Co-operative Intergovernmental Relations: Principles/Guidelines

The structures and processes for IGR whether formalized or not must be guided by important principles if IGR is intended to achieve the desired objectives. There is already enough evidence indicating that failure to adhere to those guidelines because of lack of awareness or simply because one level of government lacks resources and capacity would lead to manipulations of one type or another. These guidelines partly emanate from the federal principle itself and partly from federal political practice. One of the cardinal principles that guide IGR is the respect for the constitutional status, institutions, powers and functions of government in the other sphere and not assuming any power or function except those conferred by the Constitution.[67] This might appear obvious but the practice of IGR both in Ethiopia and in many other federations indicate that there is a likelihood that over the years the overwhelming resource potential of the federal government and the relative lack of skill and resources on the part of the constituent states often leads to overlooking this vital principle and IGR may in the end be an instrument for centralization of power. It is thus important that actors in the IGR process respect the autonomy and institutions of the other government if IGR is to remain a relevant means for coordinating, consultation, planning and implementation of common programs. In the Ethiopian context, at least in the initial stage, the states may indicate, and this has a lot to do with the experience of the *Kilil Guday Zerf,* some suspicion to the system of IGR for fear of domination by the federal government and subsequent loss of autonomy, fear already hinted by the question stipulated at the beginning of this piece. But once they understand its role and importance as well as the point that this is a forum for bargaining with the federal

[65] Nicolas Schmitt, *Federalism: The Swiss Experience* (Pretoria: HSRC Publishers, 1996) pp. 49-54.
[66] Thomas Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Inquiry* (Boradview Press, 2006) p. 218.
[67] This principle can be derived from the German constitutional discourse called federal comity, South African Constitution Section 41 and Ethiopian Constitution Art 50 (8).

government on matters of common interest and if conducted based on sense of partnership between the two governments then in the long run such fear is expected to be minimized. IGR after all is aimed at enhancing shared rule without undermining self rule and only if used inappropriately it could be an instrument of centralization and by then it has lost its objective.

The second important principle relates to the need for mutual respect, trust, good faith and cooperation among the actors in the IGR process. Federalism as a concept is about the partnership between the federal and state governments. In so long as each level of government acts within the respective autonomy stipulated in the constitution, each level of government must treat the other with respect and particularly so in the process of IGR. The co-operation and trust that is expected to exist in the process is something that logically derives from the partnership and covenant inherent in the federal principle.[68] It is hoped that this will promote a favorable political culture that will encourage tolerance, consultation and coordination based on a sense of political partnership that in the end enhances the respective autonomy of the two levels of governments. Some eminent experts in this field indeed state that these are important values and preconditions for IGR to be effective or remain to be crucial factors for its success.[69] This principle has a lot to do with the political culture of a given polity in general and within the political elite in particular. In the Ethiopian situation this is something that requires a lot of improvement given the fact that the relationship among the various political actors has been very much influenced by the age old centrist political culture, history of subordination and mistrust. Despite a rich tradition of dispute resolution mechanisms and culture of tolerance in the society,[70] the political elite on both sides of the political spectrum sometimes manifest authoritarian political culture[71] inherited from the two previous regimes. This stands in sharp contrast to the federal political culture. The latter requires that actors need to work together for a 'common good' and respect their areas of differences, a theme inherent in the notion of unity in diversity.

Very much related to the two principles is the idea of negotiation as an inherent aspect of the IGR process and structure. If the respect for autonomy of each level of government and the idea of mutual respect is to have meaning and the goals of IGR to be achieved, it is imperative that the process should not be based on the dictates of one government over the other but should have some element of bargaining and

[68] Daniel Elazar, *Exploring Federalism*, (Tuscaloosa: The University of Alabama Press, 1987) pp. 2-5.
[69] Ronald Watts, 'Intergovernmental Relations: conceptual Issues,' in Norman Levy and Chris Tapscott eds., *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (School of Government, University of Western Cape, 2001) p. 39
[70] Alula Pankhurst and Getachew Assefa eds. *Grass-roots Justice in Ethiopia: The Contribution of Customary Dispute Resolution* (Addis Ababa: United Printers plc., 2008).
[71] The Red Terror that according to some authorities is said to have claimed 250,000 lives and the post May 2005 election are clear examples in this respect. But more could be said from the fact that there are many political parties sharing same or related programs but un able to forge a meaningful coalition. I think this state of situation has a lot to do with the political culture of the political elite.

negotiation. A brief elaboration of the evolution of IGR in Germany particularly the notion of 'joint tasks'[72] is particularly relevant here.

The system of co-operative federalism in Germany, a rather informal contact at first between the two governments, started to be institutionalized and took on a complex form with the introduction of the 'joint tasks.' Indeed, the joint tasks mark the first feature of co-operative federalism. With the joint tasks, planning, decision-making and financing responsibilities in areas that were considered to be within the domain of the states were now brought to the joint decision-making process. Thus, the relatively dual federal system was giving way to co-operative arrangements through the joint tasks. Significant developments in this regard are the constitutional amendments that had bearing on IGR. In 1969 the Basic Law was amended with three articles covering fiscal relations and co-operation between federal and Land governments. Particularly, Article 91(a) introduced the so-called 'joint tasks' of the two levels of government in some fields. Federal government was authorized to participate in these traditionally Länder functions if they are deemed to be in the national interest and if its participation is necessary in order to improve the standard of life in the federal republic. The introduction of interlocked federalism or co-operative federalism brought about a considerable change in the distribution of powers between the federation and the states thereby creating a new pattern of decision-making.[73] Thus, the emergence of joint tasks resulted in a considerable shift of effective policy powers and functions from the states and from the federal government to an elaborate *bargaining system*. However, as will be illustrated later the process and structure of IGR are to a large extent influenced by the federal government.

The third principle relates to the decision making process within the IGR structure. First, it should be stated clearly that the IGR structure and process in its full swing is not merely limited to passing on binding decisions. Such forums undertake countless consultations, co-ordinations, information sharing and the passing of decisions is just one component of the entire package. But once the need for making a binding decision arises, it is vital to explore what form of decision making procedure best suits the goals of IGR. Obviously, simple majority (50+1) would have serious negative repercussions on the sense of partnership and mutual respect that we already indicated above. This kind of procedure will create rather sense of 'win/lose' situation that will

[72] See Art. 35, 91 of the Basic Law that require the federal government to assist the states in maintaining law and order and in time of natural catastrophes. See Arts. 91a, 91 b, 104a. Joint tasks refer to areas in which the federal and state governments engage in joint planning, decision-making and financing in areas that were traditionally within the jurisdiction of the states. In principle the process of decision-making requires unanimous agreement between the federal government and the states. Financial relations between the federal government and the states were also changed in favor of the federation. It covers broad economic and infrastructural issues that require huge financial investments normally beyond the capacity of the states. By 1969-70 the joint task was constitutionalized by Articles 91a and 91b of the Basic Law. Since then joint tasks are no more about division of functions but about joint decisions. Hartmut Klatt, *supra* note 62: 121-123. Also Franz Lehner, *supra* note 52 at 209.

[73] *Ibid.,* at 207.

in the end affect the spirit of cooperation desired between the two levels of governments. Thus, the ideal way would be decision making process based on consensus where every actor is kept on board. Yet, the German federal experience indicates that there is also negative side to this procedure particularly when it is too formalized . German co-operative federalism is noted by its critics as an 'interlocked' system implying a low degree of freedom of action of involved agencies and institutions. It implies a commitment to securing consensus among the states and the federation on policy formulation and implementation facilitated by a multitude of coordinating committees. German co-operative federalism requires consent from multiple actors for political action resulting in the obstruction of clear and effective policy-making. By granting the states a collective veto in the *Bundesrat* and a monopoly over the implementation of federal law, it locks the two levels of government, 'the states and the federation into a position in which neither can dispense with the other in executing any policy of significance.' This is commonly described as the 'joint decision trap.'[74]

The joint decision-making process underscores the fact that neither of the levels of government possesses the power and capacity to control policy areas and related activities at the other level of government. As a result, once agreement is reached it can hardly be changed.[75] Yet, it is difficult to bring to consensus all those who have a stake in the process and that calls for a painful and protracted process of accommodation.[76] Thus securing consensus in all the circumstances could lead the IGR into inefficiency whereby necessary policy issues are frustrated by the vested interests of too many participants. The best compromise between simple majority and consensus would be to pass on decisions based on a qualified majority.

While these are some of the principles that guide the complicated processes and actors in IGR, federal practice indicates that 'IGR generally oscillate between conflict and cooperation.'[77] In some federations like the U. S. A., particularly after the emergence of the welfare state, the states have to comply with conditions attached to the fiscal transfers. In Germany, the Lander are required to comply with binding framework legislation. One should also bear in mind that in a dynamic and genuine federation that operates in a politically diverse atmosphere, IGR becomes a forum where disputes pit one level of government against another, one ideology against another, one political party against another etc and hence tensions arise between the principles and imperatives of power relations. Thus, IGR in reality combines cooperative,

[74] This is also called enmeshment or entanglement and was coined by the noted German writer and critic of the system of co-operative federalism Fritz Scharpf, 'The Joint Decision Trap: Lessons from German Federalism and European Integration,' *Public Administration* 66 (1988): 238-278; Daniel Halberstam and Roderick Hills, 'State Autonomy in Germany and the United States' 574 *Annals* 173, *The Annals of the American Academy of Political and Social Science*, (2001): 176-177.
[75] Lehner, *supra* note 52 at 215.
[76] For the complicated interests that need to be accommodated in the process see note 58 *supra.*
[77] Hueglin and Fenna, *supra* note 66, p. 215.

competitive and conflictual features.[78] For instance, John Kincaid argues that 'federal government as a senior partner is a commanding partner and without some constitutional revision, state and local government may not possess much leverage to compel co-operation because co-operative federalism or intergovernmental relations are mainly based on the will to co-operate or a balance of power that can force co-operation.'[79] But the states have over the years lost a significant portion of their powers and are no more equal partners. In short, the view is that the present state of federal practice is coercive[80] rather than co-operative.

Equally, in Germany critics state that the preconditions under which co-operative federalism used to operate no longer exist today and with it co-operative federalism in Germany is dead.[81] According to Jeffrey, German co-operative federalism is not just a set of institutions and procedures but also a set of ideas focused on solidarity, consensus, and the desirability of common standards across the federation.[82] Indeed, it had some favorable conditions when it was set-up in the 1960s, some of which include a confidence in the capacity of the government economic intervention after 1966 to secure economic and social goods and West Germany's relatively high degree of social and economic homogeneity. This was further reinforced by the period of congruence in party politics at federal and state levels, facilitating both vertical intra-party co-ordination and the consensual spirit of decision-making which operated at the crossroads of territorial and party politics in the *Bundesrat*.[83] In this respect, European federal systems contrast with the competitive policy of the United States. Through financial schemes, the level of federal interference has increased guaranteeing uniform living conditions and, Leonardy wrote, the United States cooperative federalism, is to some extent changing into a coercive one. The superior financial strength of the federal government in the form of grant-in-aid to state projects and the states inability to finance such projects seem to be at the center of the problem.[84]

---

[78] John Kincaid, 'Intergovernmental relations in the United States of America,' in Peter Meekison ed., *Intergovernmental Relations in Federal Countries: A Series of Essays on the Practice of Federal Governance,* (Gatineau: Gauvin Press, 2007) p. 44

[79] John Kincaid, 'From Co-operative to Coercive Federalism,' in John Kincaid ed., *American Federalism: The Third Century*, The Annals of the American Academy of Political and Social Sciences (Newsbury Park: Sage publications, 1990) at 144.

[80] Coercive federalism is defined by Zimmerman as follows: while co-operative federalism is a regime in which the different levels recognize each other as equivalent and take each other's interest into account, in the scheme of coercive federalism, Congress employs extensive regulatory powers on the states and also coerces them to implement national policies. Besides, it also implies extensive use of pre-emptive powers by Congress and lastly the intertwining of the two planes of government in implementing in specific functional areas creates accountability and responsibility problems. In short, partnership and co-operation between unequal powers is impossible and that takes away one of the essential features of cooperative federalism, *bargaining and negotiation.* Zimmerman, *supra* note 11 at 27.

[81] Charlie Jeffery, 'German Federalism from Co-operation to Competition' in Maiken Umbach ed., *German Federalism, Past, Present, Future* (Houndmills: Palgrave, 2002) at 176;

[82] *Ibid*., at 172.

[83] *Ibid*., at 172.

[84] Uwe Leonardy, *supra* note 53, p. 54

4. THE PRACTICE OF IGR IN ETHIOPIA: MAKING SOME SENSE OUT OF IT

As noted in the second part of this paper, the Ethiopian Constitution offers little guidance on managing federal-state relations relative to roles and tasks. There is no much study of how the relationship between the federal government and the states will be managed on a sector-by-sector basis. It has taken a century or more for other federations to settle these relationships by legislation, litigation, political practice, and tradition. It is time to point out once again that this institutional and policy gap needs to be noted and addressed.

Close observation of the existing practice indicates that the federal government has found (this should be clearly noted as the regional states seem to be on the receiving end) at least three ways of influencing the state governments thereby facilitating the enforcement of not only joint programs but also federal laws and policies: namely through, formerly, the *Kilil Guday Zerf* (Office for Regional Affairs) and presently, the Ministry of Federal Affairs. This may be considered as co-operation through executive institutions; party structure and the process of policy making. The following section is devoted to the discussion of the three sub-topics.

4.1 Co-operation through Executive Institutions

The political relationship between the federal government and the states is regulated by both formal structures weakly defined in the constitution[85] and various proclamations as well as practice outside the legal framework. One such mechanism is the Ministry of Federal Affairs (MoFA). The activity of the Ministry of Federal Affairs in the states is one of the semi-formalized practices that has an impact on federal-state relations at least with respect to some of the regional states. An understanding of the role of MoFA requires some background on its evolution and the links with its predecessor, the *Kilil Guday Zerf*.

An exploration of the pre-2001 federal experience and the role of the now *defunct* office for Regional Affairs on intergovernmental relations, indicate that a 'two tier

[85] This refers to the role and function of federal executive organs that are bound to enforce federal laws and policies throughout the country but in many cases remain, in terms of institutional structure, limited to the federal capital Addis Ababa. Surely the constitution under Art 50 (2) imply that each level of government will have its own legislative, executive and judicial organs thus dual structure but in reality that is not the case at least for some federal institutions where either state executive is delegated to enforce federal policy or the federal government resorts to ad hoc arrangements. The duality implied under Article 50(2) should, therefore, imply something beyond these few institutions to cover the whole field of other federal powers enumerated under Articles 51 and 55 of the federal Constitution. It is not by accident that until very recently the federal government did not have many federal institutions in the states despite constitutional powers to establish such offices. One has to travel from Jijiga or Rama to Addis Ababa to get a passport. Federal police force is one such instance. It is only with the judicial system that one discerns a relatively clear system of relationships between the federal government and the states.

system'[86] of federalism is emerging in Ethiopia. 'Although the constitution does not make such a distinction, in practice one is forced to make a distinction between the regional states of Tigray, Amhara, Oromia and SNNPRS with their relatively greater level of political and economic development on the one hand and the other four states, Gambela, Benshangul-Gumuz, Afar and Somali, otherwise known as 'emerging states,' or 'less developed states' which stand out for their lack of development and historical political marginalization on the other.'[87] While the former states, at least in relative terms exercised their powers with little or no interference from the MoFA or its predecessor, the latter states were not capable of assuming the full responsibility of state governments.

It could be stated that the emerging states more or less failed to articulate regional interests as political entities, and hence they have not yet been able to evolve into viable entities as stipulated in the constitution, even after a decade of federal experience. Certainly, there are many contributory factors to this state of fact.[88] It must be noted that the federal system was introduced after the fall of the most centralized regime that neglected the bulk of the ethno-linguistic groups. Thus, from inception most of the constituent states lacked skilled manpower and resources to man the newly established regional institutions. There were only a few hundred experts, for example, in Afar, Somali, Gambela and Benishangul-Gumuz regional states in 1995/1996 and the situation remained the same until the Ethiopian Civil Service College took the responsibility of training civil servants for these regions with a view to breaking the historic marginalization from political power and resources. Historic marginalization also meant that there was little or no infrastructure in the less integrated regions, making self-rule difficult. Lesser integration into historic Ethiopia also implies that the inhabitants of low land regional states, in relative terms, being mostly pastoralists lacked the tradition of indigenous settled administration and a disciplined ruling party capable of articulating regional interest. Thus, there is lack of not only disciplined and institutionalized local parties but the local politics operates under a socially fragmented and sectarian political elite.[89] As some of these regions are also located on the borders with neighboring states, local politics is very much interlinked with regional politics (the Somali region being the classic case) and thus subject to manipulation and maneuver by internal and external forces. These and other

[86] John Young 'Along Ethiopia's Western Frontier: Gambella and Benishangul in Transition,' *The Journal of Modern African Studies* 37: 2 (1999) at 344

[87] *Ibid*.

[88] Some of the constituent states under discussion include: Afar, Somali and Gambela. The two-tier nature of the federal system (those with relatively better experience in self-rule versus marginalized ones) has been made clear in a number of studies. See for instance John Young, *supra* note 86; Jon Abbink as well remarked that in the constituent states under discussion, there have been dismal failures. See his article "Ethnicity and Constitutionalism," *Journal of African Law* 41:2 (1997) at 173; also Dereje Feyissa, "The Experience of Gambella Regional State," in David Turton ed. *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (Oxford: James Currey, 2006): pp. 208-230.

[89] See for example Abdi Ismail Samatar "Ethiopian Federalism: Autonomy versus Control in the Somali Region" *Third World Quarterly* 25: 6 (2004) pp. 1131-1154.

factors facilitated governmental and party interference from the center. The low level of political development in these regions means that the ruling party plays a greater role in local administration than in other constituent states.

Thus, close observation of the performance of these regional states suggests that they have not yet been able to articulate distinct regional interests, a viable political unit that can compete with the federal government in intergovernmental relations. In short, some do not seem to have acquired the status of nation/nationality, which the Constitution seems to generously grant them.[90] This reflects that the federal system is in practice asymmetric in many respects. For instance, as far as intergovernmental relations is concerned, the constitutional principle "Member states ...[of the Federation]... shall have equal rights and powers"[91] is compromised to a considerable extent in relation to some of the member states. The fiscal competence of the states, the court structure, the political implications of Articles 46 and 47 (constituent states for some and not for all) are clear evidence of an already existing political asymmetry. Whether this calls for a formal asymmetric arrangement with greater powers of the federal government or it should be seen as a transitory challenge is a thorny issue, but in the short run, it seems to legitimize the *de facto* greater intervention of the federal government formerly through the Kilil Guday and currently through MoFA in these regions than others.

The initial argument for greater role of the federal government in the emerging states was based on the notion of capacity building to bring them on a par with the other regional states. In the long run, it aimed to enhance these regional states' capacity to utilize their constitutional rights to administer their own affairs. Yet later developments, according to critics, indicated that this objective was a mechanism of controlling the states by the center. Thus, the Office for Regional Affairs at least according to some observers from the bottom was viewed as a key instrument in controlling these states.

The ruling party, at least until 2001, had its own informal 'king maker's in the emerging states and through them it intervened in several policy issues in state affairs. According to some critics, the king makers at times exceeding their informal mandates of capacity building virtually run the regional governments and hindered self-administration.[92] The criticism is that some section of the local population developed the perception that the king makers emerged as heads to whom the regional government are accountable to. 'It is acknowledged that they participate in regional council meetings, reconcile differences between coalition parties in government and conduct the crucial *gim gema*[93] session. They are responsible for developing the political position of the regional government, review appointments and dismissals.'[94]

---

[90] See, for instance, an interesting article about the crisis in Gambela by Dereje Feyissa, *supra* 88 at 61.
[91] Art. 47(4).
[92] Aalen, *supra* note 15, p. 86.
[93] *Gim gema* literally refers to evaluation and has a long and unique history in the ruling party.

Indeed, the role of some of the king makers was visible even in some of the regional states like SNNPRS and Oromia outside of the emerging states between1997-2001. The point is that the federal government's concern over these peripheral states, as the most marginalized ones is appreciable. The issue is simply that the assistance and supervision by advisors or party officials goes too far until the ordinary person observes that the key persons running the regions in fact are not the elected regional officers but the appointees of the federal government. In the end this practice seemed to have perpetuated the regions dependency on the center. Virtually every critical political decision had to be considered by these watchdogs.[95]

The above political reality led to the emergence of dual face of IGR in Ethiopia. In the regional states of Tigray, Amhara, Oromia and SNNPRS perhaps because the ruling coalition party in each of the states is believed to be the strong wing of the ruling party that runs the federal government, federal intervention was relatively less formal. In the second group of states there was close supervision earlier on by the Regional Affairs of the Prime Ministers Office and presently by the Ministry of Federal Affairs.[96]

March 2001 was in some sense a land mark where we observe that with the split within (Tigray People Liberation Front) TPLF, an influential coalition member of the ruling party, EPRDF decided to withdraw those king makers as well as the party figures with a view to enhancing state autonomy.[97] It was believed that their role had gone too far,[98] to the extent of making such states puppet states rather than

---

Continuous sessions are held when serious public complaints or 'unwanted' officers become red tapes to government policy. Its proponents state that it is an evaluation of performance records, part of the routine in public administration whereas its critics hold that it is a means to purge critical thinkers or the opposition from office.

[94] John Young, *supra* note 86 p. 342.

[95] *Ibid* p. 330, 336.

[96] Comparing the two groups, Aalen, like Young, states that all in all the four emerging states were the units in the Ethiopian federation, which experience the most severe central interference in regional affairs. They were governed by formally independent parties but were nevertheless practically run by officials from the regional affairs department and centrally assigned party cadres without formal positions. The low level of political development in the emerging states means that EPRDF plays a greater role in local administration in these regions than in other parts of the country. Aalen, *supra* note 15 at 88.

[97] In March 2001, the party chairman of TPLF and current Prime Minster was challenged by an opposing fraction. At a critical party decision 12 members voted against and 16 in favor, two being absent, one the late Kinfe G. Medhin and Mulugeta Chaltu who resigned from his position in 2003. Apparently the cause of the split as alleged by the dissenters is that the PM had been too complicit with Eritrean matters during the war with Eritrea from May 1998- December 2000 (Indian Ocean News Letter March 24, 2001). The dissenters were expelled from their party as well as government position. This had a domino effect on other member parties of EPRDF in the SNNPRS and Oromia. Senior party members from those who shared the view of TPLF dissenters were equally expelled from party and government positions (Indian Ocean News Letter, June 30, 2001) (Africa Confidential Oct. 26, 2001).

[98] This fact is no more contested. Even a senior member of the ruling party *Ato* Sebhat Nega, in an interview held with *Woyin* admits that low ranking EPRDF cadres were practically ruling some of the regions, relegating the elected state officers. For full content of this interview see at

autonomous states. The record of the Office for Regional Affairs was not, therefore, that impressive.

MoFA between 2001 and 2005

It was in this context that the Ministry of Federal Affairs then *de jure* replaced the Regional Affairs Office in the Prime Minister's Office in 2001. The most relevant parts of the powers and duties of this office as formalized by a proclamation read:

b) without prejudice to the provisions of Articles 48 and 62(6) of the federal constitution, facilitate the resolution of misunderstandings arising between regions; and
c) *give assistance* to the regions with particular *emphasis* on the *less developed ones*;[99]

One may wonder about the differences between these two institutions apart from the fact that now the new institution's function is more legalized and has been set up as one of the federal ministries. According to the then Minster of State, 'the objective of providing additional support, that is, more federal impetus to the emerging states has remained the same. The new element added is a more or less coherent policy framework, a vision that hinges around capacity building of the emerging states. There was a similar mission earlier on but it focused on the traditional concept of training and infrastructure. Now capacity building is all-inclusive including change in attitude, in work ethos, guidelines, procedures and institutional capacity.'[100] He also points out that now it is intergovernmental relations rather than inter-party relations. Intergovernmental relations, assume the state party as partners and as coalitions. Implying that even if the parties that run the emerging states are not members of EPRDF, his office is working with them, in the fields specified by law, and the federal government is not trying to replace them. According to Gebreab the office recognizes the state executive and the ruling parties in these regions as partners or coalition governments and influences them indirectly using the government venue rather than the party channel. He says, 'I am not a political advisor but a representative of federal government'[101] implying his key role as instrument of intergovernmental co-operation at least in these states.

Looking at the list of powers of the new Ministry and the practice, it is the assistance, not to all the states but to the less developed states, that remained as *its main focus*. Its role as an instrument of intergovernmental relations between the federal government

---

http://www.aiga1992.org/woyin-sebaht5.html as visited on July 22/2004. Several meetings held in July 2001, in the aftermath of the party crisis, chaired by a senior TPLF central committee member confirm the same position.

[99] Article 11, Proclamation No. 256/2001, 'Reorganization of the Executive Organs of the Federal Democratic Republic of Ethiopia,' *Federal Negarit Gazeta,* 8th Year No. 2, Addis Ababa, 12th October 2001; Art. 5(6).

[100] Interview with Dr. Gebreab Barnabas, Minister of State, Ministry of Federal Affairs, Walta Information Center, December 25/2002.

[101] *Ibid*

and *all the constituent states* was not explicitly stated and MoFA never attempted to establish relations with the other regional states. This rather crucial role was missing in its power. As can be gathered from the proclamation, it is not broadly organized to facilitate intergovernmental relations between the center and states and its supervisory and coordinating role is limited to few institutions.[102] In this sense, one could say the name MoFA was simply a misnomer.

In its conflict handling power (see section b above) there remained an overlap with what is stated under Articles 48 and 62(6) of the Constitution on the powers of the HoF. The general scope is that the HoF does the legal aspect of the conflict but the Ministry of Federal Affairs handles administrative, political and developmental affairs with the states. It facilitates political negotiations before, for instance, an issue is taken for referendum. In short, it undertakes a 'non-binding consensus building or political negotiations.'[103]But there is nothing that prohibits the HoF from adopting the same process of dispute settlement in addition to its quasi-judicial function of constitutional interpretation and dispute settlement. After all one of the reasons for taking the power of interpreting the constitution from the regular judiciary to the political organ, HoF, was because it was felt, that the HoF has more democratic legitimacy than the courts. The HoF as a 'representative of Nations and Nationalities' was preferred to the courts, for its legitimacy as well as because constitutional interpretation was considered a political act. Indeed, one has to state explicitly that to the extent that the HoF exercises its powers to settle disputes between states and the crucial power of 'determining the division of revenue derived from joint federal and state tax sources and the subsidies that the federal government may provide to the states'[104] it remains an important organ of intergovernmental relations. Thus clear tension between the mandate of the MoFA granted to it by a proclamation and the HoF's mandate provided in the Constitution emerged and to date this tension remains unresolved.

MoFA between 2005 to early 2008

Significant development in this regard was the issuance of proclamation No. 471/2005.[105] The federal executive organs were reorganized and MoFA seemed to have assumed a new mandate that was missing in the previous proclamation. While the role of MoFA in terms of resolving misunderstandings arising between regional states and in assisting emerging regional states remained intact, the most relevant sections of the proclamation on the powers and duties of MoFA stated: to 'cooperate with concerned federal and regional state organs in maintaining public order; *serve as*

[102] One reason suggested is the lack of human resources. In the interview process it was pointed out that Gambella had only one medical doctor and in the opinion of Dr. Gebreab, it will be impossible to think at this time to set up its structure in the regions. Interview with Dr. Gebreab Barnabas January 3/2003.
[103] Interview with Dr. Gebreab Barnabas January 3/2003.
[104] Article 62(7); see also the power of the HoF to order federal intervention Art. 62(9).
[105] Proclamation No. 471/2005, 'Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia,' *Federal Negarit Gazeta,* 12th Year No. 1, Addis Ababa, 17th November 2005; Art. 21.

a focal point in creating good federal-regional relationship and cooperation based on mutual understanding and partnership and thereby strengthen the federal system.'[106] Legally speaking the new proclamation provides for two vital points that have significant impact on IGR in Ethiopia. The first one arguably provided that MoFA is now mandated to serve as a focal point in creating good federal-state relationship. This was missing in the previous proclamation and the institutional gap seems to have been *partly* addressed. Partly because the more complex institutions, guidelines and in the Ethiopian situation, the daunting task of transforming IGR from the informal to the formal institutional level can not be effectively done by a sub-article in a proclamation on the reorganization of the federal executive organs. This is the hard lesson we draw from the other more mature federal systems. Related to this first point is the careful use of the phrase serving as *a focal point* in creating good federal-state relationship. The new mandate seems to have given recognition to the fact that other relevant federal and regional sate institutions will continue to undertake some aspect of IGR as relevant to their routine functions but MoFA is to be the focal federal institution coordinating IGR nation wide. This brings us back to what we mentioned earlier in this piece: which federal institution is better suited to this very basic function and whether a department within MoFA is the right way of achieving this goal. The second important point is, the fact that the new proclamation has hinted at least to some of the principles that should guide IGR in Ethiopia: namely *mutual understanding and partnership.* The proclamation states that IGR is no more a forum where the federal government is to dictate its terms but should be based on some sense of partnership and mutual understanding. That regional states are no more on the receiving end but is a forum where they will be treated as partners in the process. Perhaps missing in the new mandate but very crucial in light of the discussion in this piece is that it could have been specific in stipulating that such good federal-regional state cooperation is linked to the coordination of shared programs and policies as there is often the temptation to widen its scope.

Even if early and the performance of MoFA with its new mandate is not that impressive, the new development should be seen as a step forward towards institutionalizing IGR in Ethiopia. Indeed, there is a good lesson that we draw from our own experience. It is important to point out that federal-state relations in Ethiopia have been very much linked to changes in party power.[107] As has been pointed out earlier, when TPLF split into two and the dissidents were expelled from the party as well as government positions they held, it had a *domino effect* on other member parties of EPRDF in the SNNPRS, and Oromia. Senior party members from OPDO, member of EPRDF as well as the ruling party in the State of Oromia, and senior party members in the party that ruled in the SNNPRS who shared the view of TPLF dissenters were equally expelled from party and government positions. Before this moment it was difficult to distinguish party structure from constitutional institutions.

[106] See Article 21 sub 1 and sub 6.
[107] Aalen, *supra* note 15 at 104.

It appears that because 'EPRDF has effectively merged with the state, the crisis of the Front is in effect a crisis of the Ethiopian state.'[108] The internal split in the TPLF and the following crises in the other states indicated how fragile and soft the government institutions were and it is tempting to state that there cannot be but a party channel. Institutions for intergovernmental relations, separate from party channels are, therefore, not only important for day-to-day co-ordination of federal – state relations but are also conditions for maintaining federal stability. These institutions should be permitted to evolve as autonomous government bodies so that they will survive any party crisis. This is also a question of transforming IGR from party politics to legally established institutions.

4.2 Co-operation through Party Channels

We now turn to the second mechanism. Despite the formal constitutional division of powers as stipulated in the constitution, the lack of institutionalized federal–regional state IGR throughout was not without reasons. Implementation and coordination of shared policies and programs was facilitated to a large degree by party channels. Indeed, even after MoFA's new mandate IGR through party channels still remains the most pervasive scheme used by the federal government to influence state governments as well as to guarantee uniformity of policies. MoFA's new mandate and the experience between 2005 to early 2008 seem to confirm that it is hardly possible to state that MoFA has replaced fully the informal party based IGR in Ethiopia. Perhaps the use of party channels is not unique to the Ethiopian federation. Riker and Schaps state that 'intergovernmental disputes are important features of federations although the excess may lead to a peril or the absence of which might be an indicator of full unification or the federal collapse.[109] Federations constantly suffer from a lack of integration between policies of the federal government and the states. As a result, the institutional structure of most contemporary federations often provided mechanisms for settling intergovernmental disputes and for integrating policies. One such mechanism they outline is through political parties, which could be a source of harmony or disharmony.

If the officials of both sets of government are adherents of the same ideology or followers of the same leader or leaders, then they might be expected to pursue harmonious policies. India's federalism during the first three decades was very much influenced by Congress Party's dominance of both federal and state institutions and

[108] Medhane Tadesse and John Young, 'TPLF: Reform or Decline?' *Review of African Political Economy* 30: 97 (2003) at 389; on the other hand some state that crisis of that magnitude could have led to military rule, civil war or anarchy but because the political elite demonstrated political maturity, it paved the way to a system that is conscious of managing different kinds of conflicts. See Tom Patz, 'Ethiopia,' in Ann Griffiths ed., *Handbook of Federal Systems 2005* (Montreal and Kingston: McGill Queen's University Press, 2005) at 144.

[109] William Riker and Ronald Schaps, 'Disharmony in Federal Government' in William Riker, ed., *The Development of American Federalism* (Boston: Kluwer Academic Publishers, 1987): 73, 74, 75.

was the era of smooth functioning IGR later to be turned into short term crisis in the late 1970s and then to more or less stable federal – state cooperation operating in regionally based coalition parties.[110] But complete, harmonious and smooth functioning of IGR resulting from party harmony at federal and state level is unlikely to occur in genuine and dynamic federations. This is particularly so in federations inhabited by diverse ethno-linguistic and religious groups as in India, Switzerland and Ethiopia, for it is certain that in the long run one central vanguard party like Congress or EPRDF can not satisfy all local concerns and sub-state claims. If Livingston's claim that federal institutions are simply reflections of existing diversity on the ground has any meaning then the reality is that the more diverse the society is the more decentralized powers will be to constituent units.[111] Thus the present IGR calm and harmonious policy coordination via the party system within the Ethiopian federal system is likely to change with the consolidation of democracy in the country. The South African National Congress's current break down and possible split into two appears as well a political development along the patterns of India.

Nonetheless, the above is not to imply that regionally based political parties are the necessary preconditions for healthy IGR or for enhanced state autonomy. While it is true that such parties are expected to be jealous in terms of exercising regional state autonomy, there is a possibility in those circumstances for political deadlock and even the risk of fragmentation. As some have noted "if all constituent governments were controlled by one homogenous political party and the federal government by another, the degree of federal conflict would be tense. Between these two extremes lie all existing federations.'[112] Indeed, there are good lessons to learn from Nigeria's decentralized federal experiment of three regions in the 1960's[113] and the current deadlock in the Belgian federation.[114] If all parties are regionally based with little or no nationally/federally based parties serving as inter-regional bridges, then there can not be any smooth functioning IGR and fragmentation might be a near possibility.

---

[110] See for details Robert Bejesky, 'Hegemonic and Centralized Political Party systems: Undermining Egalitarian Principles of Federalism? A Cross-National Comparison of India, Mexico and the United States,' *Temple International and Comparative Law Journal* 14:2 (Fall 2000) pp. 363-399.

[111] See William S. Livingston, 'A Note on the Nature of Federalism,' *Political Science Quarterly*, 67:1 (Mar., 1952), pp. 81-95; Watts, *supra* note 7, p. 35.

[112] Riker and Schaps, *supra* note 109 p. 77.

[113] Nigerian federalism in this period was parliamentary one where leaders of the regional parties chose to head their respective regional governments and send deputies to the federal level thus resulting in weak federal government and strong states finally resulting in the attempted Biafran secession. The regional political leaders, for example Chief Awolowo was Premier of the West, Dr. Nnamdi Azikiwe was Premier of the Eastern region and Sir Ahmadu Bello remained Premier of the North. See J.A. Ayoade, 'The Changing Structure of Nigerian Federalism' in Isawa Elaigwu and A. Akindele eds., *Foundation of Nigerian Federalism*: 1960-1995 (Abuja: National Council on Intergovernmental Relations 1996) at 52; Lincoln Joshua, *The Effects of Federalism on Inter group Relations in Multi-ethnic States: Evidence from Nigeria and Ethiopia* 1960-1998 (UMI Dissertation, 2000) p. 82.

[114] See Frank Delmartino and Huges Dumont, 'Belgium: Unity Challenged by Enhanced Diversity,' a paper presented in June 2008 in Brussels as the seventh theme of the Forum of Federations on Unity and Diversity in Federal Countries (Forthcoming).

Thus, in a genuine and dynamic federation an IGR calm resulting from one highly disciplined party controlling all governments, both federal and the state is rare or might be a reality that occurs during the early phase of the federation where such party enjoys wide support because of its role in liberation or independence. Otherwise, the forces of diversity will not allow complete absorption to occur in a free society.[115] The other extreme situation also seems to pave the way for IGR deadlock and even fragmentation. There is the risk that they might enhance regional loyalty at the expense of federal loyalty. Between these two extremes lie all existing genuine and dynamic federations.[116] Ethiopia's smooth functioning of IGR based on one party dominated system is, therefore, expected to change in the long run and it is for this reason that we emphasized on the need for the principles that guide IGR and for some kind of framework policy/law on IGR.

The pros and cons of Ethiopia's one party dominated federal practice needs to be put in the right perspective though. It is often indicated either as an obstacle to the full enjoyment of regional state autonomy or as a panacea to all the country's challenges. On the positive side, given Ethiopia's diverse society and level of poverty, coherent and disciplined party at federal and state levels appears to be an asset, at least in the short run, but at times this exceeds its limit and affects state autonomy. The four major parties of EPRDF, Oromo Peoples Democratic Organization, (OPDO), the Amhara National Democratic Movement (ANDM), the Southern Ethiopian People's Democratic Front (SEPDF) and Tigray Peoples Liberation Front (TPLF) operate in the four regions of Oromia, Amhara, SNNPRS and Tigray respectively. In addition to the member states that are under direct control by EPRDF member parties, EPRDF has close allies and affiliated parties in the other regional states of the federation. These parties are formally autonomous from the ruling party but cannot be considered as opposition parties because of their tight links with the EPRDF.[117] The EPRDF has been instrumental in establishing the affiliated parties in Afar, Gambela, Benshangul Gumuz, Somali and Harar regional states. This largely centralized party structure appears to have impact on the autonomy of the regional states that is expected to exist in a federation.[118] The existence of some level of paradox between constitutional form implying wide autonomy and some level of subordination of the regional governments to the federal government in practice has already been pointed out by a lot of observers.[119]As a parliamentary federal system, the party discipline, the party system

[115] Riker and Schaps, *supra* note 109 p. 76
[116] Ibid., *supra* note 109 p. 77
[117] Aalen, *supra* note 15 at 83.
[118] By now there is ample evidence pointing to the fact that a centralized party system and federalism are more an oxymoron. It is certainly this anomalous combination that led many federal writers to conclude that many of the former socialist federal systems were federal in form and not in operation. See for example Alfred Stepan, 'Federalism and Democracy: Beyond the US Model,' *Journal of Democracy* 10:4 (October 1999): 22-23; Daniel Elazar, *Exploring Federalism* (Tuscaloosa, AL: University of Alabama Press, 1987); Ivo Duchacek, 'Antagonistic Cooperation: Territorial and Ethnic Communities,' *Publius: The Journal of Federalism* (Fall, 1977): 3-29.
[119] See Merera Gudina, *Ethiopia: Competing Ethnic Nationalisms and the Quest for Democracy 1960-*

combined with 'democratic centralism'[120] seem to have great impact on how decisions are taken within the party and on the federal system. A central committee leads the ruling coalition. The central committee, often through the chairman, generates specific plans of action which are the basis for the EPRDF's five-year plans that are implemented nationwide. The five-year plans to be implemented are adopted at federal level and become the basis for state government plans and policies.[121] While this state of facts is often presented as a one way process (federal governments dominance over the regional states or top down),[122] without challenging the federal government's dominance others have indicated the existence of a much more complex informal interaction between the two levels of governments based on neo patrimonial system[123] where regional state and local political elites at least to some degree manipulate and influence the federal government. Nonetheless, it is the one party dominated federal practice along with its impact on the process of policy-making that explains the centralizing trend in the federal system. It is also this factor that appears to explain the fact that intergovernmental conflicts are rare, perhaps absent, from most of the contemporary conflicts that challenge the federal system. So far, boundary disputes, the issue of local tyranny, and not federal-state issues dominate the federal system. It is only in 2004 that the regime of fiscal transfers was brought to the table in the HoF.

What is apparent, therefore, is that except the difference, between the two groups of states distinguished above, which is a matter of degree, both groups of state governments are under the direct control and influence of the ruling party. This in turn seems to fit the extreme scenario mentioned above. Consequently, the constitutional right of the states to formulate and implement plans and policies are severely diminished by the fact that the state governments are in one way or another forced to follow the centrally designed policies and plans, resulting from the party structure.[124]

2002 (Shaker Publishing: 2003) at 119; Assefa Fiseha, 'Theory versus Practice in the Implementation of Ethiopia's Ethnic Federalism' in David Turton ed., *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (Oxford: James Currey, 2006) pp. 131-162.

[120] This is a very vague concept but implies that decisions are often reached at party level, often at the top executive level (small number of party leaders allege to have monopoly of theoretical knowledge, as ideologues, as sources) and flow directly (top-bottom, not the other way round) to the grass root party members. One is supposed to strictly execute the decision coming from this higher hierarchy. This in turn seems to be based on the idea that a party is supposed to lead, not to be led by the people. In Amharic they say 'yehizib chira anketelim,' which roughly goes like 'we do not follow the *tail* of the people,' interview confidential, January 3, 2002, Addis Ababa; see also Medhane and Young, *supra* note 108.

[121] Aalen, *supra* note 15 at 82.

[122] See Aalen, *supra* note 15; Andreas Eshete, 'Ethnic Federalism: New Frontiers in Ethiopian Politics' in *First National Conference on Federalism, Conflict and Peace Building* (Addis Ababa: United printers, 2003): 142-172.

[123] This concept implies the co-existence of formal and informal interactions in the political system (hybrid regime as is often called), patron-client relationship and institutional instability resulting from the informalisation of politics and the informal overshadowing the formal institutional approach. See for example Tobias Hagmann, 'Beyond Clannishness and Colonialism: Understanding Political Disorder in the Somali Region, 1991-2004,' *Journal of Modern African Studies* (2005) 43:4 pp. 509-36

[124] Aalen, *supra* note 15 at 85.

Yet, there is no governmental structure connecting the respective federal and state offices.

In our comparative studies, we earlier on noted the various complex networks of relationships between the federal government and the states in Germany, Switzerland and recently South Africa. In Ethiopia, except the party channel, there is hardly any institutionalized intergovernmental mechanism comparable to system of IGR in other federations. Nor can we state that MoFa's new mandate and subsequent practice has replaced the existing informal party based IGR. It should be noted that informal interactions between the two levels of governments are common in IGR even in more mature federations. What is rather troubling is when such informal interaction coupled with patron-client relationship shapes or predominates the process more than the formal/institutional one. There and then the informal interaction overshadows the formal one and it then becomes hardly possible to talk about institutional stability. It is the possibility of such risk that urges some level of formalization and guideline to IGR in Ethiopia.

4.5 Co-operation through the Process of Policy-Making

Another instrument of influencing the states and hence inter-governmental relations and enforcing federal policies is through the power of policy-making. The federal government has currently issued several policy documents.[125] These documents outline sometimes areas covering even elementary education that are according to the Constitution within the competence of the states. The documents might make some sense in the context of state governments that lack expertise to design the necessary policy areas but the authors sometimes forget that in a federal system, there is limit to the competence of the respective governments. The documents mainly originated as party documents are then published as federal documents and published by the Ministry of Information. Party members at federal and state level discuss them and decide to implement them in their capacity as government officers. In general, the states accept the economic, social and development plans issued by the federal government. In theory they can adapt the policies to fit their own circumstances but the federal government does play a key role in influencing through national policies mainly due to the party congruence and decision-making structure and also, because the states lack the required expertise to bring alternative policies.[126]

Conclusion

What lessons can we draw from the comparative study of IGR in other federations and the evolving practice of IGR in Ethiopia? Except for the scanty constitutional/legal

[125] See for instance *Ye Ethiopia Democrasiyawi Republic Mengist Ye Masfesem Akim Ginbata Strategy ena Programoch* (Ministry of Information, Addis Ababa Yekatit 94 E.C); also Be *Ethiopia Ye Dimocraci Sirat Ginbata Gudayoch* (Ministry of Information, Addis Ababa, Ginbot 94 E.C.)

[126] Some authorities indicate that some of the states literally copy the federal policies. Interview with Suleman Dedefo November 26/2003. But Gebreab speaks of harmonization and customization of federal policy by the states as common practice. Interview January 3/2003.

clauses on IGR, one could safely state that IGR in Ethiopia is in its early phase. There is a felt need for understanding of the structures, processes and the principles by which it is guided as these are crucial requirements for the federation to be stable and effective. We have already noted that it is often dynamic and evolutionary but this should be preceded by conscious thought over its relevance.

We have also indicated that the system of IGR in Ethiopia to the extent that it exists relies heavily on party machinery and weakly on the government institutions. The MoFA although mandated to serve as a focal institution for IGR after 2005, its activities still remain limited to the traditional function of assisting the emerging regional states. Nor is it institutionally well organized for its new mandate. A function as important as IGR is placed within a department and even then poorly manned except a very enthusiastic head for IGR. These concerns raise the thorny issues of whether a department within MoFA will have the stature, influence, resource and capacity to undertake the coordination of nation wide IGR activities and surely the answer, as things stand right now is in the negative. It goes without saying that if MoFA is to remain relevant as a focal institution for the coordination of IGR, high level commitment and organization preferably at the ministerial level is crucial. The reliance on party instrumentality might be feasible in the light of the present resources, manpower constraints and urgency to eradicate poverty but it is very unreliable when there is a tension between government and party structure. In this respect Ethiopia has enough lessons to learn from the 2001 party crisis. The reliance on the party machinery, although understandable given the above factors and the party harmony at federal and state level, should be slowly replaced with formal institutional structure and relevant IGR policies and laws. The present relative calm in IGR disputes surely will change with the change in political party configuration at federal and state level and this is bound to happen upon the consolidation of democracy in Ethiopia. Thus the more we rely on *institutions and laws* than party channels the more *mature and stable* the federation will be. Indeed, this is a matter of transforming IGR from party politics to government institutions. Very much related to this point is that given the emerging trend and constitutional silence on IGR, there is a need for a general policy guideline or a framework law on IGR that formalizes existing acceptable practices but that also outlines who the main actors are, the objectives and structures and define the roles of the different organs in the process.

Finally, the role of the different government institutions in IGR, particularly that of the HoF and MoFA needs to be clarified if we are to avoid confusion and anarchy in the already weak and emerging IGR in Ethiopia. As the experience of other federations indicate surely one organ alone is not to run IGR effectively. Several federal and state institutions will continue to undertake IGR activities. The HoF or the MoFA which ever is picked to be the focal coordinating unit for the nation wide IGR system in Ethiopia should realize this point and hence define their respective role within this framework.

The Monist -Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia

Takele Soboka Bulto[*]

1. Introduction

A critical appraisal of dominant literature on the status of human rights treaties under the Constitution of the Federal Democratic Republic of Ethiopia (the Constitution)[1] reveals a converging opinion regarding the normative position of *ratified* treaties in the country's pyramid of laws. There are two-tiered dimensions to the emerging consensus about the status of treaties. At one level, the supremacy clause of Art 9(1) of the Constitution, rendering any inconsistent 'law, customary practice or a decision of an organ of state or a public official' null and void, has led to the assertion that the Constitution is superior to all ratified treaties.[2]At another level, the declaration under Art 9(4) of the Constitution that duly ratified treaties are "integral parts of the law of the land" and the requirement of its Art 13 (2) that the Bill of Rights[3] of the Constitution must be interpreted in conformity with ratified treaties have been taken only as a partial answer to the question of the hierarchical position of ratified treaties.

---

[*] LL.B, LL.M, M.A, PhD Candidate and Teaching Fellow , Melbourne Law School, The University of Melbourne. I wish to thank Ato Getachew Assefa who generously shared with me his compilation of the *travaux preparatoires* of the Ethiopian (Federal) Constitution and other publications that were of crucial help in writing this article.

[1] Promulgated by virtue of Proclamation No. 1/1995, *A Proclamation to Pronounce the Coming into Effect of the Constitution of the Federal Democratic Republic of Ethiopia*, Federal Negarit Gazeta, 1st Year, No. 1, 21 August 1995.

[2] Chi Mgbako, et al, 'Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and Its Impact on Human Rights' (2008) 15(1) *Fordham International Law Journal* 701, 713; Sisay Alemahu, 'The Constitutional Protection of Economic and Social Rights in the Federal Democratic Republic of Ethiopia,' (2008) 23 *Journal of Ethiopian Law* 135, 147; Gebreamlak Gebregiorgis, 'The Incorporation and Status of International Human Rights under the FDRE Constitution' in Girmachew Alemu and Sisay Alemahu (ed), *The Constitutional Protection of Human Rights in Ethiopia: Challenges and Prospects (Ethiopian Human Rights Law Series)* (2008) vol 2, 37; Getachew Assefa, 'The Protection of Fundamental Rights and Freedoms in Ethiopian Federalism' (Paper presented at the Proceedings of the First National Conference on Federalism, Conflict and Peace Building, Addis Ababa, 2005) 257; Ibrahim Idris, 'The Place of International Human Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution' (2000) 20 *Journal of Ethiopian Law* 113, 132-134;; Rakeb Messele, 'Enforcement of Human Rights in Ethiopia' (Action Professionals Association for the People (APAP), 2002) 15.

[3] This refers to Chapter Three of the Constitution, which enshrines the civil and political rights, economic, social and cultural rights and group (peoples') rights. The elaborate catalogue of the rights and freedoms guaranteed under the Constitution, running from Art 13-44, comprise almost a third of the overall constitutional provisions.

The fact that the House of Peoples' Representatives (HPR)[4] is entrusted with treaty ratifying powers[5] as well as powers to issue proclamations,[6] led to the conclusion that treaties and proclamations of the HPR share parity of status due to their identical formal source.[7] As a result, treaties would take the rank of proclamations and are subject to the temporal-sensitive rule of *lex posterior derogate lex priori* (latter law prevails over the former).[8] The doctrinal debate of monism and dualism has added some credence to the dilemma of normative hierarchy.[9]

This paper, departing from the emergent consensus of the dominant literature on the status of human rights treaties in Ethiopia, argues that the prevailing scholarship that has put the Constitution at the apex of any law (domestic or international) and treaties on equal footing with proclamations is a consequence of the mistaken approach which allows domestic law to determine the position of treaties at the national level. The contention here is that, unless the status of human rights treaties is analysed outside the four corners of domestic law, the analysis continues to be a self-fulfilling prophesy. Owing to the customary principles of good faith and *pacta sunt servanda*, domestic law cannot sit in judgment of its hierarchical interactions with international law. Any other approach would lead to a situation that licences the domestic legislature to establish a normative regime that not only denigrates but also violates international standards contained in ratified human rights treaties. This automatically implicates the country's international responsibility for violations of international law and rights and freedoms consecrated therein through legislative means.

---

[4] The HPR is the federal parliament with a constitutional mandate of comprehensive 'power of legislation in all matters assigned by this Constitution to Federal jurisdiction.' See Art 55 (1) of the Constitution.

[5] In Ethiopia, treaties are concluded (signed) by the State's Executive branch which must subsequently submit it for ratification to the HPR. Under Art 55 (12) of the Constitution, the HPR 'shall ratify international agreements concluded by the Executive.' A more specific proclamation has assigned the power of negotiating and signing treaties to the Ministry of Foreign Affairs. Thus the Ministry shall, 'in consultation with the concerned organs, negotiate and sign treaties and agreements Ethiopia enters into with other states and international organizations … and effect all formalities of ratification of treaties and agreements.' See Art 25 (2), Proclamation No. 4/1995, *A Proclamation to Provide For the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic Of Ethiopia*, Federal Negarit Gazeta, 1st Year, No.4, 23 August 1995.

[6] Art 55 (1) of the Constitution. Proclamations are primary laws that occupy a position second only to the Constitution in the domestic normative hierarchy.

[7] Getachew, cited above at note 2, p. 257; Ibrahim, Cited above at note 2, p.134; Sisay, cited above at note 2, 147; Gebreamlak, cited at note 2 above) 46.

[8] Getachew, cited at note 2 above, p. 257; Ibrahim, cited above at note 2, p. 134; Minasse Haile, 'Comparing Human Rights in Two Ethiopian Constitutions: The Emperor's and the "Republic's" - *Cucullus Non Facit Monachum*' (2005) 13 *Cardozo Journal of International and Comparative Law* 1, 28.

[9] See Ibrahim, cited above at note 2, p. 113; Rakeb, cited above at note n 2 p. 15 and 53; Gerbeamlak, cited at note 2 above, 55; Sisay, cited at note 2 above, 147.

The starting point of the present enquiry is, therefore, to cut domestic law to size (without abandoning it) in the determination of its status visa-a-vis international standards, and to transcend domestic legal and institutional hurdles and analyse the place of international human rights treaties from the international law standpoint. This approach, arguably supported by the text of the Constitution and Ethiopian legislative and judicial practices, makes it evident that international human rights treaties ratified by Ethiopia are superior to proclamations and share equality of status with the Constitution. It would thus become impossible for latter laws to prevail over ratified treaties which are presumably consistent with the letters and the spirit of the Constitution's Bill of Rights.

The next section briefly discusses the waning role of the monist-dualist debate as a theoretical explanation of the interactions between national and international legal norms as well as the increasing triumph of monism at least in the area of human rights treaties. Section 3 presents a rebuttal of the dominant opinion that latter proclamations override inconsistent and previously ratified treaties in Ethiopia. It argues that the state's duty to implement ratified treaties domestically, the attendant obligations of good faith and *pacta sunt servanda,* the duty to provide domestic remedies to violations of (treaty-based) human rights as well as domestic Ethiopian legislative and judicial practice accord ratified treaties a position superior to that of proclamations. Section 4 gauges the hierarchical position of ratified treaties vis-à-vis the Constitution and contends that ratified treaties share parity of status with the Constitutional Bill of Rights. The final section draws the threads together and concludes the study.

2. The Monist-Dualist Clash

Just as the international debate regarding the monist-dualist distinction has come to lose its currency,[10] much of the scholarship on the status of human rights treaties in Ethiopia has increasingly tended to analyse the domestic status of human rights treaties in the framework of those doctrines.[11] The relationship between international law and municipal law triggers the issue of the relative validity of rules of international law on the domestic plane compared to their municipal counterparts. This in turn raises a crucial issue of whether, and, if so, the degree to which domestic courts and other institutions may give way to rules of international law where they are not necessarily consistent with domestic law. It has been rightly commented: '[n]othing is more essential to a proper grasp of the subject of international law than a clear understanding of its relation to state law.'[12]

---

[10] Martin Schenin, 'International Human Rights in National Law' in Raija Hanki, and Markku Suksi (ed), *An Introduction to the International Protection of Human Rights* (2002) 417, 418; Ian Brownlie, *Principles of Public International Law* (2008) 31-35.

[11] Ibrahim, cited above at note 2, p 113; Rakeb, cited above at note 2, p.15; Mgbako, cited above at note 2, 713-714.

[12] J G Starke, *Starke's International Law* (11th ed, 1994) 63.

The monist doctrine does not recognise the distinction between the domestic and the international, and, does not allow room for contradiction between the two sets of rules. Because domestic law and international law are part of the same system of norms[13], in the unlikely event of conflict between the two sets of rules, legal interpretation and application must give precedence to international law.[14] This theory argues that 'the basic norms of the national legal order are determined by the norms of international law,…[i]t is the basic norm of the international legal order which is the ultimate reason of validity of the national legal order, too.'[15] The validity and authority of domestic law is thus primarily due to its conformity with the international law, lack of which renders it null and void whereby it is superseded by the international law rules which, as a consequence, would directly apply domestically.

The dualist doctrine represents a contrasting approach and starts from the assumption that the national and international legal systems regulate entirely different and parallel subject matters and have no room for conflict.[16] It holds that international law is a horizontal regime for the regulation of inter-state relations while municipal law is a vertical regime governing the relationship between the state and its inhabitants.[17] In D'Amato's words, "[t]he objects of domestic law are people; the objects of international law are states."[18] Domestic law prevails in matters of domestic nature and domestic jurisdictions apply domestic law: "Domestic law and international law are each sovereign in their own spheres."[19] Thus, 'neither legal order has the power to create or alter rules of the other.'[20] Domestic jurisdictions may apply international law but solely as an exercise of the authority of domestic law which adopted or transformed the rules of international law.[21]

As D'Amato noted, dualism is a sibling of strict state sovereignty according to which 'international law and national law are two separate, independent legal orders, each

[13] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1995) 205.
[14] Brownlie, cited above at note 10, p. 32-33.
[15] Ibid.
[16] Id, p. 31.
[17] Higgins, cited above at note 13, p. 205.
[18] Anthony D'Amato, 'Is International Law Coercive?' *Northwestern University School of Law Public Law and Legal Theory Series No. 08-25* (2008) p.6.
[19] Ibid.
[20] Brownlie, cited above at note 10, p. 31-32.
[21] Id, p. 32.

valid in its own sphere. National law governs the internal or domestic affairs of a state while international law governs foreign affairs.'[22] He thus asserted:

> If dualism were a correct theory of international law, internal affairs would be fixed for all time as purely internal. Anything within a state's domestic jurisdiction would have to remain within a state's domestic jurisdiction, forever impervious to international regulation. For under the dualist theory, both international law and domestic law would be powerless to transform domestic subject-matter into international subject-matter; neither of these legal regimes has any "jurisdiction" over the other.[23]

The dualist doctrine is a theoretical construct that was developed a century ago for a period prior to the emergence of a fully-blown international human rights regime.[24] It was suited to the epoch where the state enjoyed an exclusive sovereignty in its territory and the role of international law was truly restricted to the governance of inter-state relations. What a state does to individuals and groups within its territory was an exclusive internal concern as the principle of sovereignty precluded interference by the rest of the international community in a state's internal affairs. As Henkin observed, '[h]uman rights were generally not the stuff of international politics until after World War II.'[25] According to D'Amato, '[p]rior to 1945 a government would not be deemed to have violated international law by the mass murder of its own citizens in its own territory.'[26]

This scenario is no longer the same, and human rights are no more matters of exclusive internal concern.[27] Today, a multitude of international tribunals and monitoring bodies call upon states to account for their domestic human rights performances in accordance with the international treaties they ratify, and adjudge them to be in violation of the same for which states are required to provide remedies to domestic victims. D'Amato asserted that there is a fundamental change in the

---

[22] Anthony D'Amato, 'Human Rights as Part of Customary International Law: A Plea for Change of Paradigms' (1996) 25 *Georgia Journal of International and Comparative Law* 47, 60.

[23] Id, p. 60-61 (footnotes omitted).

[24] Armin von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6(3-4) *International Journal of Constitutional Law* 397, 399.

[25] Louis Henkin, *The Rights of Man Today* (1979) 90.

[26] D'Amato, cited above at note 22, p. 47.

[27] Takele Soboka Bulto, 'Beyond the Promises: Resuscitating the State Reporting Procedure under the African Charter on Human and Peoples' Rights' (2006) 12 *Buffalo Human Rights Law Review* 57, 57.

international legal environment that has posed a serious challenge to the core of dualism:

> … if we all accept the fact that genocide moved from a purely internal matter prior to 1939 to an international matter after 1945, then dualism cannot describe the new status of the prohibition against genocide. Prior to 1939, what a government did to its citizens within its territory – including mass murder – was purely within its internal law, its "domestic jurisdiction." *If dualism were a correct theory, then nothing that transpired since 1939 could transform domestic mass murder into an international crime. Since we now routinely say that a government is prohibited by international law from committing genocide against its own citizens within its own territory, we must discard the theory of dualism.*[28]

In other words, international norms have long addressed domestic issues that are concomitantly regulated by domestic laws, and certainly so in the area of human rights. The ensuing state of affairs has been described by academics as 'erosion of sovereignty.'[29] The contention that domestic law and international law are devised for separate, parallel planes of application no more holds water: dualism has come to overleap itself. Indeed, the whole idea of monist-dualist debate has outlived its importance.[30]

Dualism thus raises consequences that are in conflict with the way international and national organs and courts have operated in the post-World War II world.[31] The shift of international attention towards the search for 'compromise implementation methods' of the promises of international human rights law at the domestic level means that the monist-dualist debate is now considered outdated.[32] There is an emerging rapprochement between international norms and national laws.[33] The ever increasing domestic application of international human rights treaty norms means that there is a 'creeping monism' not least in the traditionally dualist nations.[34] The situation of the monist-dualist divide and the status of treaties in the Ethiopian legal

---

[28] D'Amato, cited above at note 22, p. 60-61 (emphasis added). For an equally forceful rejection of the theory of dualism, see Hans Kelsen, *Principles of International Law* (2nd ed, 1966) 405-406.

[29] Frans Viljoen, *International Human Rights Law in Africa* (2007) 17.

[30] Von Bogdandy, cited above at note 24, p. 398.

[31] Brownlie, cited above at note 10, p. 33.

[32] Scheinin, cited above at note 10, p. 418.

[33] Mchael Kirby, 'The Growing *Rapproachment* between International Law and National Law' in Anthony Anghie, and Garry Sturgess (ed), *Legal Visions for the 21st Century: Essays in the Honour of Judge Christopher Weeramantry* (1998) 333, 335.

[34] See generally Melissa A Waters, 'Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties' (2007) 107 *Columbia Law Review* 628.

strata should be gauged against the backdrop of such emerging international opinions and practices.

3. The Hierarchical Position of Ratified Treaties vis-a-vis Proclamations

As has been introduced at the outset, the fact that the HPR is a source of proclamations and treaty ratifying powers led many an author to the conclusion that ratified treaties and proclamations sit on the same rung in the country's normative hierarchy. The premise behind this line of thought emerges from treating ratified treaties as ordinary domestic laws in all material aspects. The view proceeds along the line of contention that seeks to accord hierarchical normative parity to ratified treaties and proclamations simply because they share the same formal source (HPR) at the domestic level. The logical consequence is that any conflict between the two sets of norms is taken merely 'as a conflict existing *between two sets of domestic laws* of equal status.'[35]

This line of argument loses sight of the essential difference in the *nature* of the two types of norms-the domestic and the international- and focuses only on the *source* which gives domestic effect to them. However, the major difference between ratified treaties and domestic legislations emerges from their inherent nature and the principles from which they derive their binding force. Focusing on these aspects, the next section argues that latter laws of the HPR do not prevail over ratified treaties, and, to the contrary, domestic laws that are inconsistent with ratified treaties will bow to their international counterparts.

3.1 State's Obligations Entailed by Treaty Ratification

The interplay between domestic and international law depicts a relationship of dependence of the latter on the former for its implementation. The domestic legal system must provide a conducive legislative, judicial and administrative framework if treaty-based guarantees are to be translated into reality for domestic beneficiaries. There is a *structural* (as opposed to substantive) dependence of international human rights law on the domestic laws and procedures for its domestic implementation.[36] The domestic legal system can employ any means to give effect to treaties, however. Notably, domestic laws and law-making organs have the liberty of choice regarding the manner and means of incorporating[37] international treaties into 'the law of the land.' This liberty of action, or the margin of discretion, so to speak, is as to *how* to

[35] Ibrahim, cited at note 2 above, 134.

[36] Carlos Manuel Vazquez, 'Treaties as Law of the Land: The Supremacy Clause and Presumption of Self-Execution' (2008) 121(1) *Harvard Law Review* 1, 14.

[37] The word 'incorporate' is used throughout this paper in its non-technical and ordinary sense to refer to the domestication of international treaty provisions in any of the means and methods used by a country.

incorporate[38] ratified treaties into the domestic legal system but it does not empower local authorities to decide *whether* to incorporate them at all because the state's duty to incorporate them results from the act of ratification.[39]

However, the order of enquiry must be reversed when it comes to the substantive content of the domestic and the international norms. The imperatives of domestically implementing the provisions of international human rights treaties impose essential obligations to respect, protect, promote and fulfil on the ratifying/acceding states. As the African Commission emphasised in its landmark decision against Nigeria:

> [i]nternationally accepted ideas of the various obligations engendered by human rights indicate that all rights - both civil and political rights and social and economic - generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations *universally apply to all rights* and entail a combination of negative and positive duties. … Each layer of obligation is equally relevant to the rights in question.[40]

The quartet layers of obligations are analytic tools for gauging whether and to what extent a state has been implementing (or violating) a given human right, while they also reflect the manner in which the state must behave in order to discharge its human rights obligations.[41]

The duty to *respect* human rights implies that the state should refrain from disturbing individual's and groups' enjoyment of the right in question. In other words, it would be a violation of its human rights duties for a state to encroach upon the rights being exercised by the beneficiaries. Thus the duty to respect implies that the state should not do anything that has the direct or indirect effect of worsening the level of enjoyment of the human right concerned. The obligation to *respect* a human right therefore 'constitutes what is essentially a negative duty on the part of the state to

---

[38] According to Scheinin, states may opt to employ either or a combination of adoption, incorporation, (active) transformation, passive transformation and reference for purposes of giving effect to a human rights treaties in the domestic law. Regardless of the method of incorporation used, ratified treaties will bind the state and should be given judicial notice by the state's domestic institutions. See Scheinin, cited above at note 10, p.418-419.

[39] Yuval Shany, 'How Supreme is the Supreme Law of the Land: Comparative Analysis of the Influence of International Human Rights Treaties upon the Interpretation of Constitutional Texts by Domestic Courts' (2006) 31(2) *Brooklyn Law Journal* 341, 355.

[40] Communication 155/96, The Social and Economic Rights Action Center and the Center for Economic and Social Rights vs Nigeria, *15th Annual Activity Report*, Para 44 (emphasis author's), (hereinafter 'the SERAC' case).

[41] Magdalena Sepulveda, *The Nature of the Obligations under the International Covenant on Economic, Social, and Cultural Rights* (2003) 172.

neither impede nor restrict the exercise of these rights.'[42] It is thus a 'minimalist undertaking'[43] and an obligation of 'primary level'[44] for the states. Therefore, if a country promulgates a domestic law that restricts or takes away the treaty-based rights that have hitherto been enjoyed by individuals and groups, this is a clear case of violation of its international obligation to respect human rights.

The duty to *protect* requires the state to act positively to prevent and remedy the violations of human rights caused by interferences of non-state actors.[45] The obligation involves the requirement that the state must issue laws and procedures and provide legal and institutional remedial avenues to enforce the horizontal duty of non-state actors. This goes beyond the prescription of the duty of abstention from human rights violations and requires Ethiopia to issue laws that uphold rights and guarantees that are enshrined in the treaties that it has ratified. Issuance of a later law to repeal a ratified human rights treaty is a retrogressive measure and does not fit the bill in this regard.

The duty to *promote* involves the facilitation of the enjoyment of human rights (including treaty-based guarantees) especially through the provisions for legal protections and related enforcement procedures and through the removal of domestic legal obstacles to pave the way for the enforcement of the rights and freedoms. This necessarily involves that comprehensive reviews of legislations take place with a view to identifying laws and polices that negatively impact on the exercise of the rights and eventually repeal and replace them with those that protect and promote treaty-based rights.[46] The state's duty to *fulfill* entails a 'direct provision of basic needs such as food or resources' in the event that the individuals and groups lack the means to access these resources.[47]

---

[42] Scott Leckie, and Anne Gallagher, 'Introduction: Why a Legal Resource Guide for Economic, Social and Cultural Rights?' in Scott Leckie, and Anne Gallagher (ed), *Economic, Social, and Cultural Rights: A Legal Resource Guide* (2006) xiii, xx.

[43] Philip Alston, and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156, 184.

[44] SERAC case, cited above at note 40, Para 45.

[45] See Daphne Barak-Erez, and Aeyal M Gross, 'Introduction: Do We Need Social Rights? Questions in the Era of Globalisation, Privatisation, and the Diminished Welfare State' in and Aeyal M Gross Daphne Barak-Erez (ed), *Exploring Social Rights: Between Theory and Practice* (2007) 3, 7-8; Aeyal M Gross, 'The Right to Health in an Era of Privatisation and Globalisation: National and International Perspectives' in Daphne Barak-Erez and Aeyal M Gross (ed), *Exploring Social Rights: Between Theory and Practice* (2007) 289, 303; SERAC (note 40 above) Para 46.

[46] Leckie and Gallagher, cited above at note 42, p.xxi.

[47] SERAC case, cited above at note 40, Para 47.

Therefore, Ethiopia cannot lawfully issue a domestic law that contradicts ratified treaties as such measures would trample an existing enjoyment of rights and violate the country's duty to respect human rights. The duty to protect, promote and fulfil require the country to issue and maintain legislative and other measures that are consistent with its treaty obligations to give domestic effect to ratified human rights treaties. This leads to the conclusion that later contrary laws cannot be lawfully issued, let alone prevail over treaties.

3.2 The Duty of Good Faith: States' Duty to Ensure Normative Compatibility

International law complements, supplements and overrides contrary domestic law in matters involving the protection of human and peoples' rights. There is a need to bring domestic legislation, administrative rules and practices into conformity[48] with the international treaties which are 'high minded-legal formulations.'[49] As Henkin noted,

> [t]he international law of human rights parallels and supplements national law, superseding and supplying the deficiencies of national constitutions and laws, but it does not replace and indeed depends on national institutions.[50]

Accordingly, with respect to obligations arising from international law, the principle of *pacta sunt servanda* dictates that treaties willfully entered into should be executed (fulfilled) in good faith. Indubitably, the principle of *pacta sunt servanda* in the law of treaties is based on good faith,[51] and the maxim has constituted 'since time immemorial the axiom, postulate and categorical imperative of the science of international law.'[52] According to Hugo Grotius:

> For good faith, in the language of Cicero, is not only the principal hold by which all governments are bound together, but is the key-stone by which the larger society of nations is united. Destroy this, says Aristotle, and you destroy the intercourse of man.[53]

---

[48] This is part of the domestic implementation of ratified treaties, which specifically require the state parties to take, inter alia, legislative measures to ensure their domestic applicability. Just to cite examples: ICCPR, Art 2(2) ; African Charter (Art 1).

[49] Philip Alston, 'The Purposes of Reporting' ' in *Manual on Human Rights Reporting Under Six Major International Human Rights Instruments* (1997) 24; see also Ibrahim, cited above at note 2, p.136.

[50] Henkin , cited above at note 25, p. 95.

[51] Under Art 26 of the VCLT, 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

[52] J F O'Connor, *Good Faith in English Law* (1990) 5-10.

[53] Hugo Grotius, *De Jure Belli ac Pacis* (1925), quoted in: Maria Manuela Farrajota, 'Notification and Consultation in the Law Applicable to International Watercourses' in L

The principle of good faith, itself a customary rule of international law,[54] requires states to maintain domestically such laws and institutions as will enable them to discharge their international obligations. This has been codified under the VCLT, which provides that: 'A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when… (b) it has expressed its consent to be bound by the treaty.'[55] According to Bradley, this provision reflects customary international law, the rules and principles of which are binding on all nations irrespective of consent, including those states that have yet to ratify the VCLT.[56] More specifically, Brownlie asserted that the law and jurisprudence in this area is nothing but 'settled':

> [a] state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law. The acts of the legislature and other sources of internal rules and decision-making are not to be regarded as acts of third party for which the state is not responsible, and any other principle would facilitate evasion of obligations.[57]

In this regard, the jurisprudence of the Permanent Court of International Justice (PCIJ), the International Court of Justice (ICJ) and the African Commission on Human and Peoples' Rights (the Commission) and the UN human rights bodies are in unanimous agreement. In the *Free Zones* case[58], the PCIJ observed that 'it is certain that France cannot rely on her own legislation to limit the scope of her international obligations.' Similarly, in its Advisory Opinion in the *Greco-Bulgarian Communities* case[59], the PCIJ stated:

> It is a generally accepted principle of international law that in the relations between Powers who are Contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.

Boisson De Chazournes, and Salman A Salman (ed), *Water Resources and International Law* (2005) 281, 281.

[54] J F O'Connor, *Good Faith in English Law* (1990)35-42; Georg Schwarzenberger, *International Law* (3rd ed, 1957) 15.

[55] VCLT, Art 18.

[56] Curtis A Bradley, 'Unratified Treaties, Domestic Politics, and the U.S. Constitution' (2007) 48(2) *Harvard International Law Journal* 307, 307.

[57] Brownlie, cited above at note 10, p. 34.

[58] (1932) *PCIJ Reports*, Ser. A/B, No. 46, p.167.

[59] (1930) *PCIJ Reports*, Ser. A/B, No. 17, p.32.

So too, the PCIJ, in the case of *Polish Nationals in Danzig* case[60], held that 'a state cannot adduce as against another state its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force.'

In the same vein, the ICJ, too, affirmed the principle already established by the PCIJ. Thus, in the *Fisheries* case[61] and *Nottebohm* case[62], the ICJ decided that a state cannot present its domestic law as a defence to evade its international obligations. Afterwards, the VCLT codified the rule that a 'party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'[63]

The African Commission invariably decided that a state cannot plead its domestic law as a defence to evade its obligations under international law. In *Legal Resources Foundation v. Zambia* case[64], the Commission held that international treaty law prohibits Zambia from relying on its *Constitution* as a justification for its non-compliance with its international obligations. Similarly, the Commission decided that 'Nigeria cannot negate the effects of its ratification of the [African] Charter through domestic action. Nigeria remains under the obligation to guarantee the rights of [the Charter's] article 7 of its citizens.'[65] In another judgment, against The Gambia, the African Commission ruled that:

> By suspending chapter 3 (the Bill of Rights [of The Gambia's Constitution]), the Government therefore restricted the enjoyment of the rights guaranteed therein and, by implication, the rights enshrined in the Charter…. It should, however, be stated that the suspension of the Bill of Rights does not *ipso facto* mean the suspension of the domestic effect of the Charter…. [T]he Commission held that 'the obligation of the . . . government . . remains, unaffected by the purported revocation of the domestic effect of the Charter.'… The suspension of the Bill of Rights and consequently the application of the Charter was not only a violation of article 1 [of the Charter]

[60] (1931) *PCIJ Reports*, Ser. A/B, No. 44, p.24.
[61] *ICJ Reports* (1951) 116 at 132
[62] *ICJ Reports* (1955) 4 at 20-21.
[63] Art 27 of the Convention.
[64] Communication No 211/98, Legal Resources Foundation vs Zambia, *14th Annual Activity Report*, Para 59-60.
[65] Communication 129/94, Civil Liberties Organisation v Nigeria, *9th Annual Activity Report*, Para 12.

> but also a restriction on the enjoyment of the rights and freedoms enshrined in the Charter, thus violating article 2 of the Charter as well.[66]

So too, the UN Committee on Economic, Social and Cultural Rights has argued that States have an obligation to promote interpretations of domestic laws which give effect to their international obligations. Accordingly:

> legally binding international standards should operate directly and immediately within the domestic legal system of each State Party, thereby enabling individuals to seek enforcement of their rights before national Courts and tribunals.[67]

Ideally, a state should conduct a *compatibility study* which in some cases results in amendment of existing municipal laws so as to bring it into conformity with international instruments. Either before or immediately after a state ratifies a treaty, it is expected to review its domestic laws and practices to ensure that it is in compliance with the obligations contained in the treaty. The African Commission was very explicit about the requirement of a state's duty to ensure domestic compatibility of international human rights treaties and domestic legislations. It stated:

> In principle, where domestic laws that are meant to protect the rights of persons within a given country are alleged to be wanting, the African Commission holds the view that it is within its mandate to examine the extent to which such domestic law complies with the provisions of the African Charter. This is because when a State ratifies the African Charter it is obligated to uphold the fundamental human rights contained therein. Otherwise if the reverse were true, the significance of ratifying a human rights treaty would be seriously defeated. This principle is in line with Article 14 of the Vienna Convention on the Law of Treaties of 1980.[68]

---

[66] Communications 147/95 and 149/96, Sir Dawda K Jawara v The Gambia, , *13th Annual Activity Report,* Paras 48-50.

[67] CESCR General Comment 9, 'The Domestic Application of the Covenant' E/C.12/1998/24, CESCR, 03 December, Nineteenth Session (1998), pp 8-52.

[68] Communication 241/2001 – Purohit and Moore v The Gambia, 16th Annual Activity Report (2002-2003) Para 43.

States would normally undertake, at the time of ratifying a treaty, the duty to adopt legislative and other measures to give effect to the rights and freedoms guaranteed in the treaty in question. As far back as 1925, the PCIJ asserted that a ratifying state's obligation to make the changes to its legislations that is necessary for the fulfillment of the duties undertaken in the treaties is simply 'a principle that is self-evident.'[69]

In Africa, the process of *compatibility study* has in some cases resulted in legislative amendments as part of the ratification process.[70] There have been practices of pre-ratification compatibility studies in Senegal, South Africa and Zambia.[71] The initial review may be undertaken in conjunction with each of the relevant national ministries or other authorities responsible for policy making and implementation in the different fields covered by the treaty concerned.[72] Sometimes, states undertake pre-ratification reviews primarily by the foreign ministry or its equivalent with relatively limited inputs from other ministries or from the principal sectors of society.[73] As if to say *better late than never,* Ethiopia has reportedly started the same process as part of the preparation of its already long overdue multiple state reports to the various global and regional human rights monitoring bodies.[74]

The upshot of the above discussion is that the rules of international law and the practices of international judicial practice dictate that obligations of states emerging from international law operate domestically irrespective of (and superseding) contradictory domestic law. And Ethiopia is by no means an exception. In effect, Ethiopia is precluded from pleading domestic laws as a defence for non-compliance with its international obligations, which means that a later law cannot prevail over (but must conform to) all previously ratified

---

[69] Exchange of Greek and Turkish Populations, Permanent Court of International Justice, Advisory Opinion, PCIJ Reports 1925, Series B, No. 10, P 20.
[70] C. H. Heyns and Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (2002) 14.
[71] Ibid.
[72] Comment, cited above at note 36 above, Para 2.
[73] Alston, cited above at note 49 , p. 21.
[74] See Solomon Goshu, " Ethiopia to Report on the State of Its Human Rights Implementation for the First Time," *The Reporter* , Zena (Amharic Version) , 7 December 2008. Indeed, the records of the African Commission show that Ethiopia has already submitted its first ever state report (but consolidating its initial and overdue reports) to the Commission and would nominally be considered to be up to date in its reporting duties. The report does not indicate the date of its submission, but the document has been made public by the Commission and can be accessed at: http://www.achpr.org/english/_info/news_en.html , (last accessed on 14 May 2009).

treaties. Indeed, a country that has ratified a treaty is required to amend its domestic laws to conform to and facilitate the domestic application of the international standards,[75] and this invariably applies to Ethiopia. Failing compatibility through amendment of domestic norms, ratified international treaties would apply regardless of inconsistent domestic proclamations in force, superseding and replacing the latter to the degree of their inconsistency. If the domestic judicial and quasi-judicial bodies tend to disregard a ratified human rights treaty in favour of an inconsistent domestic law, individuals and groups have the option of directly accessing international tribunals which would find the country in violation of its treaty obligations through maintaining contradictory domestic laws and denial of local remedies. Thus, international treaties occupy a normative rank that is superior to any of the local laws, save the Constitution.

3.3 The Right to Domestic Remedies: Implications for Treaties' Domestic Status

Underlying the requirement of internalising the substantive *corpus* of international human rights law is the aspiration that individuals and groups who are victims of violations of (treaty-based) human rights avail themselves of local remedies before local tribunals through local procedures just in the same manner that they enforce the rights guaranteed under local laws. As Popovic noted, '[t]he right to a remedy is the implementing agent for other human rights.'[76] This also explains the structural dependence of international human rights law on domestic law. The incorporation of international human rights guarantees thus links the violations of such standards and accessibility of local remedies. The types and content of local remedies may vary from jurisdiction to jurisdiction but they must be available, adequate and effective. The decision of the African Commission makes it starkly clear:

> …Three major criteria could be deduced from the practice of the [African] Commission in determining this rule, namely: the remedy must be available, effective and sufficient. … A remedy is considered available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.[77]

The requirement of exhaustion of local remedies assumes the availability, adequacy, and effectiveness of local remedies, in the absence of which complainants of human rights violations (including violations of treaty-based guarantees) will be allowed to lay their cases before international human rights bodies. It must be noted that

---

[75] Purohit and Moore (note 68 above) Para 42-43.

[76] Neil A. F. Popovic, 'In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment' (1996) 27 *Columbia Human Rights Law review* 487, 561.

[77] Jawara case, cited above at note 66, Para 31-32.

remedies in this context refer to judicial and non-discretionary remedies as opposed to discretionary or executive remedies such as presidential amnesty in cases of death penalty.[78] Similarly, in cases where the jurisdictions of the ordinary courts over the subject matter of a complaint is ousted by domestic laws and procedures, or where such jurisdictions have been given to special tribunals, the local remedies are said to be unavailable.[79] Additionally, '[t]he existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which it will lack the requisite accessibility and effectiveness.'[80]

The availability of the remedy is gauged from a subjective standpoint, with the implication that 'a remedy is considered available only if the applicant can make use of it in the circumstance of his case.'[81] In a case where the present author was involved as a counsel on behalf of the complainants in a litigation currently pending before the African Commission, Ethiopia, the defendant state, argued that the case should be declared inadmissible for want of exhaustion of local remedies.[82] The issue at stake was whether the complainants had any leeway to use the right to appeal, where Ethiopia argued that the complainants had to exhaust local appeal procedures complaining about delayed justice before filing a case before the African Commission. We, the legal counsels, argued that appeal on the sole ground of 'interlocutory matters' such as delayed justice is disallowed under Art 184 (b) and (c) of the 1961 Ethiopian Criminal Procedure Code, and is permissible only if and when the party lodges an appeal alongside the conviction or sentencing of the final verdict which was yet to be handed down at the material time. Even though appeals are generally available under Ethiopian laws, it was not available to the complainants in the case (subjectively) and Ethiopia's argument was overruled and the case was declared admissible. In the same case, Ethiopia argued that the complainants could have approached the Human Rights Commission and the Ombudsman for other remedies. The Commission once again rejected this argument on the ground that these local institutions have no right to intervene in a case pending before domestic courts and that they were not operational or never handed down a decision on any human rights issues as at that point in time. The availability of adequate and effective remedies through litigation before these institutions was thus uncertain at best. This rejection was a result of the Commission's established jurisprudence that a remedy

[78] Communication 231/99, *Avocats Sans Frontie`res (on behalf of Gae¨tan Bwampamye) v Burundi*, *14th Annual Activity Report*, Para 23.
[79] Jawara case, cited above at note 66, Para 33 - 34.
[80] Id, Para 35.
[81] Id, Para 33; See also Communication 275/2003, *Article 19 v The State of Eritrea*, *22nd Annual Activity Report* (2007) Para 73.
[82] Communication 301/05 – Haregewoin Gabre-Selassie and Institute for Human Rights and Development in Africa (on behalf of former Dergue Officials v Ethiopia). This case has passed admissibility, and is currently awaiting the Commission's final decision on the merits of the case.

'the availability of which is not evident, cannot be invoked by the state to the detriment of the complainant.'[83]

Thus the availability, adequacy and effectiveness of domestic remedies are gauged from the standpoint of international law and by the relevant international bodies. In other words, if the domestic laws fail to live up to the treaty requirements, the international human rights monitoring and adjudicatory bodies would intervene and declare the domestic legislative obstacles null and void, paving the leeway for the direct domestic application of international human rights norms. In instances where there are no domestic remedies, or where the available remedies are less than effective or adequate, international monitoring and adjudicatory bodies would be fora of first instance to hear cases of and mete out appropriate remedies to redress the violations of treaty-based rights by local authorities.[84] This is only logical because 'if the right is not well provided for [in the domestic legal system], there cannot be effective remedies, or any remedies at all.'[85]

In the process, individuals and groups who are victims of violations of treaty-based rights will thus be given treaty-based remedies irrespective of a domestic law that denies or restricts access to such by the right-holders. Consequently, the rule that 'latter law prevails over the former' does not apply as between proclamations and treaties. Treaties thus occupy a position superior to that of domestic proclamations, which, if inconsistent with ratified treaties, should give way to the domestic application of treaty-based remedies.

3.4 The Ethiopian Legislative and Judicial Position on the Status of Treaties

Besides the international norms that impose obligations upon states to ensure compatibility of domestic norms and ratified treaties as well as prohibit the presentation of domestic law as a defence for not discharging treaty requirements, the recent trends in domestic legislative and judicial practices also support the conclusion that a proclamation that contradicts ratified treaties should be disregarded. The provisions of Proclamation 251/2001 require the House of the Federation (HoF) as the final constitutional arbiter[86] to interpret the Constitution in conformity with treaties[87]

---

[83] Jawara case, cited above at note 66, Para 34.

[84] See Takele Soboka Bulto, 'The Indirect Approach to Promote Justiciability of Socio-Economic Rights of the African Charter on Human and Peoples' Rights' in Rachel Murray (ed.) *Human Rights Litigation and the Domestication of International Human Rights in Africa* (forthcoming 2009), p. 29; See SERAC case (note 40 above) Para 36-41.

[85] SERAC case (note 40 above) Para 37.

[86] The critical importance of the HOF decisions arises from their precedent-setting effects. Under Art 11 (1) of Proc 251/2001, 'The final decision of the House [of the Federation] on constitutional interpretation shall have general effect[s] which therefore shall have applicability on similar constitutional matters that may arise in the future.'

ratified by Ethiopia.[88]If the Constitution and treaties are in consonance with each other's terms, a proclamation that contradicts a treaty, by necessary implication, contradicts the Constitution and as such becomes null and void in pursuance of Art 9(1). In other words, the cumulative reading of Art 9(1) and 13(2) of the Constitution and Art 7 (2) of Proclamation 251/2001 does not allow room for the valid promulgation of a law that is inconsistent with treaties ratified by Ethiopia.

From the judiciary's standpoint, we have now come to have some judicial decisions that indicate that ratified human rights treaties remain unaffected despite subsequently promulgated inconsistent domestic laws. In the case between *Federal Police Criminal Investigation Department vs Naod Misale* and others,[89] the Court ruled that the Amendment to the Federal Anticorruption Proclamation[90] that almost flatly disallows the right to bail to persons arrested on suspicion of corruption does not empower the police to keep suspects in its custody indefinitely. It found that the 'prohibition of bail' under this law has led to the violations, inter alia, of Ethiopia's international human rights obligations, particularly those guaranteed by the ICCPR. Interestingly, the ICCPR, which was allowed to override the 2001 Anticorruption Proclamation, was acceded to by Ethiopia on the 11 June 1993, about a decade before the promulgation of the instant Proclamation.[91]

Consistent with this ruling, the High Court, in another bench involving a trio of other judges, reached the same conclusion in the interpretation of Proclamation 255/2001[92] which barred any outgoing presidents from taking part in partisan politics. In the case litigated between *Dr Negasso Gidada (former President of Ethiopia) vs HPR and the HOF[93],* the Court relied, inter alia, on the ICCPR and the Universal Declaration of Human Rights (UDHR)[94] in rejecting the proclamation's attempt to limit the outgoing Presidents' right to run as a candidate for election into the HPR.

It is fairly clear that the emergent domestic judicial and legislative practices have put ratified international human rights treaties above proclamations. As Scheinin rightly stressed, the 'domestic role and effect of international human rights norms cannot be

---

[87] This is also in line with the original intent of the drafters of the Constitution. See Minutes of the Ethiopian Constitutional Assembly, Volume 2, p 68 (Tikimt 30-Hidar 7 1987 EC).
[88] See also footnote 133-134 and accompanying text (below).
[89] Case No. 17705, Federal High Court, Pagume 5, 1995 EC (10 September 2003), p. 28.
[90] See Art 2(1), Proclamation No. 239/2001, *Anti-Corruption Special Procedure and Rules of Evidence (Amendment) Proclamation*, Federal Negarit Gazeta, 7th Year, No 27, 12 June 2001.
[91] See Status of Ratification, available at < http://www2.ohchr.org/english/bodies/ratification/4.htm >.
[92] Arts 7 and 14(b), Proclamation No. 255/2001, *Administration of the President of the Federal Democratic Republic of Ethiopia*, Federal Negarit Gazeta, 8th Year No 1, 8 October 2001.
[93] Computer File No 41183, Tahsas 26,1998 EC (6 October 2005), p. 7
[94] Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948. Ethiopia was one of the countries that adopted the UDHR in 1948.

assessed in the abstract on the basis of studying the written constitution of a given country. What counts in the last resort is whether courts of law apply human rights norms in their concrete decisions.'[95]As the limited analyses of Ethiopian judicial practices reveal, ratified treaties cannot be placed on equal footing with proclamations and they remain in force despite subsequent contradictory laws and practices which themselves need to conform to Ethiopia's international obligations contained in ratified treaties.

4. The Hierarchy of Ratified Treaties Relative to the Constitution

As has been shown above, Ethiopia cannot lawfully issue domestic proclamations that contradict its treaty obligations and, as a result, later proclamations do not prevail over previously ratified treaties. We have thus concluded that ratified treaties prevail over contradictory proclamations regardless of domestic proclamations' date of promulgation as the latter must conform to human rights treaties ratified by Ethiopia.

It now remains for us to explicate the hierarchical relationship of ratified treaties and the Ethiopian Constitution. It needs stressing that the incorporation of treaties into domestic law does not take away their international character and convert them into pure domestic law. While ratification is a 'sticking point' in the process of expressing the country's consent to be bound, the treaty still remains an instrument of international character destined for domestic application. This remains to be the case even after the treaty has been domesticated through ratification or accession. Thus, domestication of a treaty does not have the effect of turning the nature of the treaty into pure domestic norm amenable to domestic legislature's manipulation. As a Nigerian court recently commented, international treaties such as the African Charter are 'statute[s] with international flavour."[96] Revisited in the light of this special nature of international instruments, an attempt to put treaties hierarchically below the Constitution reveals numerous anomalies and contradicts the constitutional text itself. The next section thus argues that ratified treaties are not below the Constitution, as is usually asserted, and are rather part and parcel thereof, with the implication that ratified treaties and the Constitution form an integrated whole and share equality of normative status.

4.1 The Nature of Treaties and Re-Reading the Constitutional Text

Views have been expressed that ratified treaties in Ethiopia sit on the same footing as proclamations which are also primary laws, having been made by the HPR. According to this view, ratified treaties would come second to the Constitution in the pyramid of

[95] Scheinin, cited above at note 10, p.421.

[96] Inspector-General of Police v All Nigeria Peoples Party and others, Court of Appeal of Nigeria in the Abuja Judicial Division, Appeal No CA/A/193/M/05, Decided on 11 December 2007, Para 22. Full text of the decision is available at < www.chr.up.ac.za>.

laws.[97] This has led scholars to the conclusion that, because treaties share the same status with domestic legislations, they can be overridden by latter Proclamations.[98]

If this line of thought is followed, all treaties ratified by Ethiopia will only operate within the intervals of its ratification and the issuance of a subsequent but contradictory proclamation which will prevail over and terminate the application of treaties in the country.[99] One can only wonder as to the implications of the 'latter prevails over the former' rule if domestic proclamations are to prevail over former treaties to which Ethiopia is a party. Does such a scenario constitute a reservation, a suspension, a termination, or a withdrawal by Ethiopia from the treaty? Under the VCLT, a reservation is made 'when signing, ratifying, accepting, approving or acceding to a treaty.'[100] The striking down of a treaty by a later proclamation, as a post-ratification measure, does not fit the definition of reservation. The issuance of a later law that contradicts a state's international treaty obligations is no cause for suspension, termination or withdrawal from the treaty regime.[101] In any case, suspension, termination and withdrawal from a treaty regime are formal processes which require a country to submit a written declaration, similar to the instrument of ratification, to be communicated to all other state parties to the treaty and should be signed by a state delegate who has the power to negotiate treaties on behalf of the country.[102] As the African Commission ruled:

> Given that Nigeria ratified the African Charter in 1983, it is presently a convention in force in Nigeria. If Nigeria wished to withdraw its ratification, it would have to undertake an international process involving notice, which it has not done.[103]

Unless and until these formalities are complied with, the treaty continues to bind the country. If latter laws repeal earlier treaties, an anomalous situation arises wherein a

---

[97] Ibrahim, cited above at note 2, p. 135. Sisay, cited at note 2 above, p.147; Gerbeamlak, cited at note 2 above, 45-46.
[98] Ibrahim, cited at note 2 above, 133-135; Getachew, cited above at note 2, p. 257-258.
[99] This line of contention led Minasse to conclude that 'ordinary laws may contradict international human rights and still be constitutional …[and] a later domestic law can always override an international treaty obligation regarding human rights, for all domestic purposes.' See Minasse, cited above at note 8, p.28.
[100] See VCLT, Art 2(1) (d).
[101] The VCLT is explicit in stating that '[t]he validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.' See VCLT, Art 42(1). The causes and effects of impeachment of the treaties have been extensively listed from Arts 42-72 of the VCLT, but excludes a country's issuance of contradictory law in order to bring about the end of the binding force of the treaty in its domestic sphere.
[102] VCLT, Art 67 (1) and (2).
[103] *Communication* 129/94, Cited above at note 65, Para 12.

treaty's domestic force expires while it continues to bind the country internationally. Such contradictions are outcomes of the misconception arising from attempts to locate treaties amid and on equal footing with local proclamations. The view is a by-product of the notion of state's 'exclusive jurisdiction' within its territory according to which human rights are matters of exclusive internal concern. As a result a state may change its mind at any time to disobey international law, and if it changes its mind, the rule loses its force against the nation.[104] This view emanates from the theory of dualism which has now come to lose its sway.

It would be odd to expect the HPR to *intentionally* issue a proclamation that contradicts any of the human rights treaties that have been ratified by the country with a view to withdraw from a human rights treaty regime, even if there were a possible legal avenue to do so. A careful reading of the Constitutional provisions reveals that the HPR is prohibited from promulgating proclamations that contravene the terms of ratified treaties. Providing for the position of local laws, customs and decisions vis-à-vis itself in its Art 9(1), the Constitution has regulated the situation of treaties under a separate sub-Article 9(4). If the disparate provisions are to be given proper meaning, the separate provision for domestic laws and practices on the one hand and treaties on the other is indicative of the Constitutional intent to treat different norms differently. Thus ratified treaties are not merely 'any other' proclamation but are special types of norms integrated into domestic legal system. Irrespective of contradictory domestic laws and practices they remain binding on the country, and a law, conduct or decision that deviates from the treaty requirements can only be found in the realm of treaty violation.

In addition, Art 13 (2) of the Constitution prescribes a mandatory rule of interpretation specifically applicable to the Bill of Rights such that the fundamental rights and freedoms guaranteed therein "shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia." This interpretation is further bolstered by the provisions of Proclamation 251/2001, which requires the House of the Federation (HoF) as the final constitutional arbiter[105] to interpret the Constitution in conformity with treaties ratified by Ethiopia.[106]

International human rights treaties thus provide a source of inspiration in the ascertainment of the meaning of otherwise ambiguous Constitutional provisions.

---

[104] D'Amato, cited above at note 19, p.59.

[105] The critical importance of the HOF decisions arises from their common-law type of precedent-setting effects in a civil law jurisdiction. Under Art 11 (1) of Proc 251/2001, 'The final decision of the House [of the Federation] on constitutional interpretation shall have general effect[s] which therefore shall have applicability on similar constitutional matters that may arise in the future.'

[106] See also footnote 133-134 and accompanying text (below).

Conversely, it has not prescribed that treaty interpretation should follow the Constitution's meaning; it is to the contrary. If this situation is to be given a meaningful application, the Constitution is either below or on par with ratified treaties.

4.2 Customary Human Rights Standards

A perusal of the rights guaranteed in the Bill of Rights of the Constitution reveals a close similarity with those of the UDHR, giving rise to the assertion that the latter's guarantees have been directly incorporated into the text of the Constitution. According to the *travaux preparatoires* of the Constitution, 'there is an inherent interrelatedness and compatibility between treaties ratified by Ethiopia and the Constitutional provisions.'[107] While this is invariably true of the relationship between the Bill of Rights and provisions of the UDHR, a closer perusal of the corresponding provisions of both instruments reveals a close-to-verbatim similarity.

The fact that the UDHR has achieved the status of customary norm of international law is a subject of widespread agreement, and is well documented.[108] Despite the original 'soft law' nature of the Declaration, with passage of time, subsequent consistent state practice and *opinio juris* have given it an overriding credence such that it has acquired the status of customary international law and its provisions are binding irrespective of consent.[109] Transcending and surpassing the original intent and imagination of the drafters, the UDHR has now taken 'a life of its own.'[110] It has become a 'world-wide secular religion,'[111] the 'yardstick by which we measure human

---

[107] Minutes (note 87 above) p 68 (Tikimt 30-Hidar 7 1987 EC). (Translation mine).

[108] See generally the works of the following eminent jurists: Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1996) 25 *Georgia Journal of International and Comparative Law* 287; D'Amato, cited above at note 19; Bruno Simma, and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles' (1989) 12 *Australian Yearbook of International Law* 82; Richard B Lilich, 'The Growing Importance of Customary International Human Rights Law' (1996) 25 *Georgia Journal of International and Comparative Law* 1

[109] Lilich, cited above at note 117, 1; Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional, and International Jurisprudence* (2002)29-30; Louis Henkin, 'Human Rights and State "Soveriegnty"' (1996) 25 *Georgia Journal of International and Comparative Law* 31, 38.

[110] Egon Schwelb, 'The Influence of the Universal Declaration of Human Rights on International and National Law' (1959) 53 *Proceedings of the American Society of International Law* 217, 217-218.

[111] Elie Wiesel, 'a Tribute to Human Rights' in Y Danieli et al (ed) *The Universal Declaration of Human Rights: Fifty Years and Beyond* (1999) 3.

progresses[112] and 'the essential document, the touchstone, the creed of humanity that surely sums up all other creeds directing human behaviour.'[113]

Although the Constitution is silent about the status of customary rules in Ethiopia, limiting itself to provisions on 'treaties' under Art 9(4) and Art 13, the absence of an explicit provision on the domestic hierarchical status of customary international law can be explained by the fact that it is binding on all states irrespective of the states' consent thereto without a need for enabling domestic law. Indeed, if the Constitution had mentioned the hierarchical status of customary international law, it could have helped obviate possible ambiguities regarding their domestic normative status but would have equally proved redundant and superfluous. Their absence would not take anything away from their normative force in Ethiopia.

Saving some domestic flavours the discussion of which is beyond the aspiration of this article, the wording and catalogue of the Ethiopian Bill of Rights closely resembles those of the provisions of the UDHR, and the twin Covenants (the ICCPR and ICESCR) that grew out of it.[114] The Constitution also makes explicit reference to the UDHR and other ratified treaties as interpretative sources of inspiration. The rights guaranteed in the UDHR which have found their ways into the Ethiopian Constitution cannot be set aside by a contradictory domestic law (including the Constitution) as they form part of customary international law. The argument that Constitutional provisions prevail over human rights treaty norms thus loses sight of the customary nature of most of the Bill of Rights provisions of the Constitution. Some of the rights guaranteed in the UDHR and other international treaties and incorporated in the Constitution are not derogable at all even for a transitory period in situations of state of emergency.[115] As the Constitution is an embodiment of the UDHR and other treaty provisions, it would be impossible to draw a neat dividing line between the Constitution and human rights treaties ratified by Ethiopia. As a result, the UDHR, ratified treaties and the Bill of Rights form an indivisible whole, and they jointly occupy the status of the supreme law of the land.

4.3 The Constitutional 'Charming Betsy' Analogy

The belief that in the process of legal adjudication judges merely uncover and expound pre-existing law without making any new improvements has gone out of favour. Decision making by judges is no longer perceived as a purely deductive

---

[112] Kofi Anan, quoted in Michael Ignatieff, *Human Rights as Politics and Idolatry* (2001)53.
[113] Nadine Gordimer, 'Reflections by Nobel Laureates,' in Y Danieli et al (ed) *The Universal Declaration of Human Rights: Fifty Years and Beyond* (1999) vii.
[114] This resemblance is not typical of Ethiopian Constitution. Given the similar purpose of the Bills of Rights of national constitutions and international human rights treaties, 'cross-fertilisation' between Constitutions and such treaties have now become the norm. See Shany, cited above at note 39, 342-343.
[115] See, for instance, Art 4(2), ICCPR.

exercise. The very indeterminacy of language has a consequence that no legal text, however detailed, can have a wholly precise meaning or determinate range of application. As Willis correctly argued, '[w]ords do not have inherent meaning. At best, they point toward a meaning.'[116] The usually general constitutional text 'posits, with great authority, a starting point for interpretation, and eventual application, but it invites, with equal authority, improvisation, thereby recognizing its own inconclusiveness.'[117] Seen in this light, Article 13 of the Constitution cannot be, as some would have us believe, easily discounted as 'just a rule of construction'[118] or as a rule of infrequent application, that courts employ *only* when interpretation is needed in the determination of cases.[119] The nature of constitutional provisions, broadly worded as they are, means they tend to raise questions of interpretation more often than is foretold by many an author. It has already been commented that the brevity of the 'crude'[120] socio-economic provisions of the Bill of Rights, for instance, necessitates a heavy reliance on ratified treaties for the explication of the rights contained therein.[121] In such cases, employing international treaties could be more of a norm than an exception.

Thus, it becomes the task of bodies interpreting constitutions to examine as many of the alternative meanings as possible before selecting the one that is deemed most appropriate for the resolution of a particular case. This entails a value-coherent construction, the aim of which is to uphold rights and freedoms of individuals and groups as *explicitly* and *implicitly* provided for in the constitutional text. This in turn engenders an extension, a reformulation, a reading of something into the text. Thus usually the text:

> has an unambiguous and predictable … capacity for expanding. Once something new and different appears, something not thought of before, it can be felt to fit within existing categories. In this sense, every category in fact has an immanent and expansive category.[122]

As noted above, the Ethiopian Constitution has provided for a mandatory interpretational approach to the Bills of Rights section. Accordingly, a local interpreting body must make every effort to arrive at a constitutional meaning that is consistent with the terms and the spirit of the UDHR and other human rights treaties ratified by Ethiopia. A differential meaning cannot be given to the constitutional Bill

---

[116] Clyde Willis, *Essays on Modern Ethiopian Constitutionalism: Lectures to Young Lawyers* 1997)(Unpublished) 4.
[117] Lourens Du Plesis, 'Legal Academics and the Open Community of Constitutional Interpreters' (1996) 12 *South African Journal on Human Rights* 214, 223.
[118] Getachew, cited at note 2 above, 257.
[119] Ibid; Gebreamlak , cited at 2 above, 48.
[120] See Sisay, cited at note 2 above, 139.
[121] Id, 147-148.
[122] Willis, cited above at note 116, p.

of Rights provisions. Given that the Bills of Rights are modelled upon and have incorporated the provisions of the UDHR and other human rights treaties, interpretation of the Constitutional provisions in line with these treaties could be easier than proving that such a meaning is unavailable.

The approach of interpreting constitutional provisions in line with a country's international obligations has the effect of making constitutions convenient 'sites for implementation of international law' [123] and has long been in use in other countries. Perhaps it is most elaborated and nuanced in the United States, where the approach grew out of the famous Supreme Court decision in the case of *Murray v Schooner Charming Betsy in 1804*.[124] In his decision, Chief Justice Marshal decided that US courts must construe ambiguous federal statutes in a manner that would not violate either US treaty obligations or customary international law,[125] giving rise to the now widely accepted *Charming Betsy canon*. The application of the canon now transcends the US judicial practice and has influenced several constitutional and statutory interpretations in many other jurisdictions.[126]

While it had been originally applied only to statutory interpretation, the Charming Betsy canon has now come to be referred to as 'Constitutional Charming Betsy'[127] to imply that constitutions should also be interpreted in a manner that is consistent with a country's international obligations. The provisions of Art 13 (2) of the Ethiopian Constitution can therefore be appropriately referred to as the Ethiopian Constitutional Charming Betsy Rule.

The underlying justification is the presumption that is 'reflective of a hypothetical parliamentary intent – that, barring contrary evidence, judges must assume that legislators had not intended to compromise their state's international obligations via legislation.'[128] Indeed, the *travaux preparatoires* of the Constitution was explicit in this regard. It states that the spirit of Article 13 (2) of the Constitution is based on the

---

[123]Vicki Jackson, 'Constitutional Comparisons: Convergence, Resistance and Engagement' (2006) 119 *Harvard Law Review* 109, 112.

[124] See 6 U.S. (2 Cranch) 64 (1804).

[125] For an elaboration of the Charming Betsy canon, see 'The *Charming Betsy* Canon, Separation of Powers and Customary International Law' (2008) 121(4) *Harvard Law Review* 1215; Waters, cited above at note, 34, p. 660 *et.seq.*

[126] Waters, cited above at note 34; Shany, cited above at note 39; John Dugard, 'The Role of International Law in Interpreting the Bill of Rights' (1994) 10 *South African Journal on Human Rights* 208; John Dugard, 'The Role of Human Rights Treaty Standards in Domestic Law: The South African Experience' in Philip Alston, and James Crawford (ed), *The Future of UN Human Rights Treaty Monitoring* (2000) 269; Neville Botha, 'International Law in the Constitutional Court' (1995) 20 *South African Yearbook of International Law* 222.

[127] See Waters, cited above at note 34, p.679.

[128] Shany, cited above at note 39, p.367.

conviction that 'there would be no problem of incompatibility between ratified treaties and existing and future domestic legislations.'[129]

Faced with a similar ambiguity about status of treaties as the one that is prevailing in Ethiopia, a Nigerian Court has decided to rely on the presumption of consistency of legislative intent and international treaties. It thus ruled:

> The African Charter on Human and Peoples' …is a statute with international flavour. Being so, therefore, if there is a conflict between it and another statute *its provisions will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation.*[130]

This presumption has found expression in Ethiopia not only in Art 13 (2) of the Constitution but also in an implementing legislation. Under Proclamation 251/2001, the HoF, a Federal body with the highest power of Constitutional interpretation,[131] is instructed to heed the Constitutional *Charming Betsy* canon:

> Where the Constitutional case submitted to the House [of the Federation] pertains to the fundamental rights and freedoms enshrined in the Constitution, the interpretation shall be made in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights, and International instruments adopted by Ethiopia.[132]

As a matter of *opinion juris*, Ethiopia also declared its support for the normative development of its laws in line with the regional and international standards: it was enunciated that 'the Ethiopian Government consistently expressed its support for regional and international efforts to achieve normative standards for basic human rights.'[133] It remains for the constitutional interpreting bodies to ensure that the Constitution is construed in a manner that conforms to Ethiopia's treaty commitments. The concordance of the letters and spirit of the Constitution and ratified treaties means that it is impossible to differentiate norms that belong in the Constitution and those which are treaty-based. The Charming Betsy rule of Art 13 (2)

---

[129] Minutes (note 87 above) p 68 (Translation mine).

[130] Inspector-General, cited above at note 96, Para 37, (emphasis author's).

[131] Under Art 83 (1) of the Constitution: "All constitutional disputes shall be decided by the House of the Federation."

[132] See Art 7(2), Proclamation No. 251/2001, *Consolidation of the House of the Federation and the Definition of its Powers and Responsibilities Proclamation*, Negarit Gazeta, 7th Year, No. 41, 6 July 2001.

[133] See Preamble, Para 2, Proclamation No. 114/1998, A Proclamation to Provide for Accession to the African Charter on Human and Peoples' Rights , Negarit Gazeta, 4th Year, No 40, 2 June 1998.

and the presumption of consistent parliamentary intent mean that there is a 'merger', so to speak, between Constitutional and treaty-based fundamental rights and freedoms such that assigning differential status to either set of rules due solely to its material source borders legal and practical impossibility.

4.4 Sovereignty

The position of domestic laws vis-à-vis ratified treaties have traditionally been explained in terms of state sovereignty according to which a state enjoys territorially rooted exclusive power to prescribe laws. Arguments related to sovereignty have been advanced by Ibrahim who grounded his contention in Art 86 (4) of the Constitution[134], and interpreted the provision as implying that 'the Constitution requires Ethiopia to observe only those international conventions respecting its sovereignty and promoting its national interests.'[135] According to him, 'any ratified international convention that poses a threat to Ethiopia's interest could be subject to repeal. It can thus be maintained that a national law prevails over an international convention in case the latter runs contrary to Ethiopia's interests.'[136]

But this argument fairly quickly runs into internal contradictions. Firstly, the ratification of international human rights treaties is an exercise of a state's sovereignty and an unambiguous declaration of a state to be bound by the relevant treaty. It signifies a state's consent to the limitation of its sovereignty in favour of the respect and realisation of human rights to the extent warranted by the requirements of the treaty in question. If state sovereignty is strictly adhered to, almost all human rights treaties would end up in repeal as they generally limit (and thereby contradict) state sovereignty. It needs stressing that human rights are 'derogations'[137] from state sovereignty and their contradiction with (and consequent erosion of) state sovereignty is more of a norm than an exception. Thus it has been remarked that 'the time of absolute and exclusive sovereignty has passed.'[138] I have argued elsewhere that '[i]nfractions of basic human rights are no longer matters of internal concern, just as sovereignty is no longer an acceptable defence to deprivation of fundamental rights of nationals and other residents of a country.'[139]

Secondly, and at least in the Ethiopian legal context, the Constitution is made by the Nations, Nationalities and Peoples of Ethiopia.[140] Accordingly, '[a]ll sovereign

---

[134] According to this provision, Ethiopia aspires '[t]o observe international agreements which ensure respect for Ethiopia's sovereignty and are not contrary to the interests of its Peoples.'
[135] Ibrahim, cited above at note 2, p.134-135.
[136] Id, p. 135.
[137] Henkin, cited above at note 109, p. 34.
[138] B Boutros-Ghali 'An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping' (1992) 31 ILM 953, Para 17.
[139] Takele, cited above at note 27, p. 57.
[140] Preamble, Para 1.

powers reside in the Nations, Nationalities and Peoples of Ethiopia'[141] which they exercise through their representatives and in accordance with the Constitution. The exercise of sovereignty according to the Constitution requires the creation of 'supportive conditions for ensuring respect for our rights and freedoms and for the collective promotion of our interests…[and]…consolidate, as a lasting legacy, the peace and the prospect of a democratic order which our struggles and sacrifices have brought about.'[142] Granted, state sovereignty must be exercised for the purpose of upholding international human and peoples' rights which should inspire the constitutional interpretation of fundamental rights and freedoms. The reversal of the domestic application of international treaties would almost inevitably lead to the curtailment of treaty-based rights and freedoms hitherto enjoyed by Nations, Nationalities and Poples of Ethiopia who are the ultimate holders of sovereignty. Ethiopia's sovereignty must be used for the better protection and promotion of the rights and freedoms of 'Nations, Nationalities and People of Ethiopia' in whom resides the ultimate state sovereignty.

The contention that the exercise of sovereignty would entitle Ethiopia to "repeal"[143] its ratified international treaties at will, if such are found to contradict Ethiopia's national interests is extremely controversial at best. It is difficult to imagine the situation where a ratified human rights treaty all of a sudden starts to contradict Ethiopia's sovereignty and national interests to a degree that is different from the time of its ratification to bring about the nullification of the domestic effects of the treaty.

It is now generally accepted that human rights assume priority over national sovereignty, and as such states have accepted international scrutiny of their human rights credentials.[144] Strict sovereignty has now been 'eroded' by the exigencies of human rights protection and promotion.[145] To the extent that sovereignty is limited by the necessities of domestic implementation of international human rights standards, such has been accepted as part of the norm and cannot be used as a ground from which to argue towards the repeal of binding human rights treaties.

5. Conclusion

Dualism has outlived its usefulness and must be laid to rest. The choice of methods for treaty incorporation into domestic legal system is discretionary and dependent on a country's legal procedures. But depositing ratification instruments with relevant treaty depository bodies, issuing ratification proclamations to incorporate the treaties into the law of the land, and publishing those proclamations in the Negarit Gazetta are unmistakable and unequivocal indicators of legislative intent to abide by ratified

[141] Constitution, Art 8(1).
[142] Preamble, Constitution, Paras 6-7.
[143] Ibrahim, cited above at note 2, p. 135.
[144] Takele (note 27 above) 57.
[145] Viljoen, cited above at note 29, p. 17.

international treaties in Ethiopia. Just in a similar manner that the legislature has devised its own discretionary means of domesticating international human rights treaties, so should judicial and quasi-judicial bodies seek ways of translating the promises of international human rights treaties into domestic reality through purposive interpretation and application. It is for the courts and the HoF to clarify the ambiguities surrounding the status of treaties in the country's normative hierarchy: just as they mould and remedy domestic legal deficiencies and inconsistencies in the "run-of-the mill" cases, so is it part of their routine duty to interpret and apply constitutional provisions in line with international treaties. It remains for the legal professionals to invoke treaties in appropriate domestic fora in order to help promote the process.

The principle of good faith and the resultant states' duty of ensuring compatibility between its national laws and international obligations, the substantive independence of international law, and Ethiopia's duty to provide domestic remedies for violations of treaty-based rights warrant the conclusion that treaties are above any proclamation. The domestic legislative and judicial trends also support this conclusion. It is with the intention of treating international agreements to a different status that the Constitution has provided for them separately under Art 9(4) as contrasted to other domestic laws whose status is defined under Art 9(1). The drafters' omission of treaties from the list of inferior norms explicated in the supremacy clause must have been intentional and purpose-oriented: it bears witness to the differential position of treaties as contrasted to other domestic norms.

Due to the customary nature of the UDHR whose provisions have cross-fertilised the Constitution's Bill of Rights, and because of the Constitutional Charming Betsy rule it is almost impossible to separate the Constitutional Bills of Rights from international treaties ratified by Ethiopia. It is safe to conclude that treaties share at least the same status as the Constitution. Any other interpretation gives rise to the unwarranted scenario where Ethiopia will contravene its international obligations through contrary domestic law. The supremacy clause should be taken at its words: as explicitly stated under Art 9(1), the Constitution's supremacy is over "law, customary practice or a decision *of an organ of state or a public official* which contravenes this Constitution." Treaties as embodiments of international norms are different to what is *normally* referred to as 'law, customary practice or a decision of an organ of state or a public official' proper – and, so is their normative status.

The Impact of the International Patent System on Developing Countries*

Getachew Mengistie•*

INTRODUCTION

The development of the patent system has passed through different phases in history. Initially, the concern was restricted within the domain of national territories so as to encourage local inventive and innovative activities. Later on, in parallel with the expansion of industrialization and international trade, the concern began to go beyond national territories. At this stage, the need to do something with a view to creating confidence for the smooth undertaking of inventive and innovative activities as well as the international movement of goods became imperative than ever before. The conclusion of the 1883 Paris Convention on Industrial Property Protection was the reflection of those earlier days' concerns. Of course, it may also be important to note that the concern was and is reflected not only through the international multilateral arrangements but also regional and bilateral agreements.

In its various phases of development, the historic evolution of the patent system has also faced a critical challenge regarding the scope of patenting. In earlier days, patent was granted on mechanical inventions. But, with the advent of the biotechnology revolution life forms became an attractive area for patenting. It may be at this phase in history that the patent system caught the attention of more people than ever before. The concerns range from the religious and ethical perspectives to the politics of genetic resources. Of course, these issues, except genetic resources related matters and the associated knowledge are not within the purview of this paper.

---

* This study was commissioned by the World Intellectual Property Organization (WIPO) and submitted at the Assemblies of member States of WIPO Thirty-Ninth Series of meetings Geneva, Sept. to Oct.1, 2003. The study was later updated, prepared in a form of a journal article and submitted to the law school of the AAU, upon permission of WIPO to make it accessible for academic purposes of the faculty and potential users.

• * LL. B., LL.M., Former Director General of the Ethiopian Intellectual Property Office.

In the eyes of many critics, the IP system is succumbing to enter into a more critical and decisive stage of development. Until the 1990s, it had been argued that the patent system was more flexible and within the discretion of the national patent laws. The TRIPS Agreement, which laid down substantive principles that all members of the WTO should respect, signaled the inevitability of a more harmonized and strong global patenting system. Thus, the implication of this new development has caught the attention of many governments, multilateral organizations, NGOs as well as civic societies. Some argue that the new development towards a global patent system would undoubtedly affect the interest of developing countries; while others, on the contrary, argue that the move towards a globally harmonized patent system would be advantageous to developing countries. The third tier of the argument says that the term developing countries is an umbrella and amorphous concept. It consists of the most populous country, with one-fifth of world's population, and the very small countries with a population of less than a million. It further includes the most advanced countries which in many respects are comparable to some of the OECD countries. Thus, they have argued that the impact of the global patent system would depend on the techno-economic development level of countries.

The main purpose of this study is to examine the impact of the international patent system on developing countries as well as shade light on the on-going harmonization process and the evolving international patent system. The paper also aims to assess the options that developing countries would have in the advent of global movement towards a more harmonized and global patenting system.

The article consists of five parts. Part I deals with the rationale for the introduction of the patent system, and what it looks like in developing countries in general. Part II focuses on examining the existing international patent system. In this regard, the driving forces to and the major legal instruments of the international patent system are discussed.

Part III deals with the implications of the international patent system on the developing countries based on selected functions of patent. This part mainly discusses the issues involved in relation to the international patent system. Any country has expectations in joining the international patent system. To what extent those expectations have materialized in developing countries and the problems associated with maximizing the benefits from the international patent system are examined in this chapter. The arguments against and in favor of strong and weak patent regimes respectively come into picture in the discussion under this Part.

The ongoing negotiations to harmonize procedural and substantive requirements for the protection of patents as well as the future trend of harmonization have been considered under Part IV. The options that developing countries have in the evolving international patent system and the possible strategies that may be followed by these countries are also highlighted in this chapter. In the last part of the article, an

attempt is made to show the lesson that is learned from the study and indicate what should be done by developing countries.

PART I: THE PATENT SYSTEM IN DEVELOPING COUNTRIES

A. JUSTIFICATION

1. General

Traditionally patents had been deemed to play a positive role in the fulfillment of a number of functions related to social and economic development. However, studies on the patent systems of different developing countries revealed that the patent system did not succeed in attaining adequately the presumed objectives and fulfilling the claimed functions[1]. This may be due to two main reasons. One of the reasons relates to the national patent system itself, particularly the way it is tailored. It has been noted that unlike that of the developed countries, the patent system of many of the developing countries did not evolve from within the national context, but was transplanted from abroad or tailored to meet international requirements and standards. Most of the patent laws of developing countries prior to the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter, TRIPS Agreement) were either introduced by or inherited from the colonial masters or directly adopted from WIPO model laws, which had to be used as a guideline and modified according to the needs and specific conditions of the countries concerned.[2] Of course, some developing countries, in the 1970's and 1980's, made efforts to revise patent laws with a view to customizing the patent system to their socio-economic realities.[3] However, these countries were forced to change their laws either because of the pressures from advanced countries or to comply with the requirements of the TRIPS Agreement.[4]

---

[1] UNCTAD, *The Role of the Patent system in the Transfer of Technology to Developing countries*, TD/B/C.6/16, Geneva 1975, p.11

[2] G. Yankee, International Patent System and Transfer of Technology to Least Developing Countries: the Case of Ghana and Nigeria, Avebury Gower Publishing Company Limited, England, 1987.

[3] Examples are Mexico (see, UNCTAD, 1975a) and India.

[4] Mexico revised its patent law in 1991 due to the pressure made by the USA, while India was forced to change its law to meet the requirements of the TRIPS Agreement.

The other reason relates to factors outside of the patent system. In this regard, among others, lack of awareness on the role of the patent system as a tool for economic growth and wealth creation, weak indigenous technological base and capacity, and absence of complementary policies and support schemes can be mentioned. In some of the developing and least developed countries, the non-patent related factors seem to have more weight than the patent system itself.

2. Patents and Local Inventive and Innovative Activities

The patent system was basically conceived as an important tool to stimulate indigenous technological development, promote domestic inventive activity and enhance the exploitation of patented inventions. However, those expectations seem to be far from being realized in many of the developing countries. This may be explained by the number of patents granted locally and abroad to nationals of developing countries as well as the exploitation of patented inventions in these countries.

a) Ownership of Patents

In developing countries, the proportion of patent grants to foreigners tends to be much higher than patents granted to their own nationals. According to UNCTAD's study[5], developing countries accounted for 6% of the world stock of patents granted and their nationals held not more than 1%. Furthermore, a study conducted on the pattern of ownership of patents in Nigeria concluded that foreigners instead of nationals own most of the patents. During the period between 1978 and 1984, of the 51 countries that filed patent applications in Nigeria five Western industrial countries, USA, UK, France, Germany and Switzerland, accounted for 76.4% of all patents registered; whereas Nigerians accounted for 2.53%.[6] In some of the LDCs such as Ethiopia, patents are granted almost invariably to foreigners or foreign owned firms.[7]

The reasons for the small number of patents granted locally may not necessarily reflect the low level of inventive activity. It may relate to the absence of a scheme

---

[5] UNCTAD, *The Role of Patent System in the Transfer of Technology to Developing Countries*, TD/B/AC.11/19/Rev.1, Geneva 1975, at p.**328**

[6] Yankee, *supra* footnote 2, at p. 258

[7] In Ethiopia it is only a single Patent that was granted to a local researcher and local Research institute. The rest are owned by foreigners. (Ethiopian Intellectual Property, Industrial Property Data Base, 2006)

that protects inventions that may not meet the requirement of patentability. Most of the developing countries have no utility model protection.[8] As a result, a large number of useful technologies are excluded from protection mainly due to the stringent requirements of patentability: i.e. novelty, inventive step, and industrial applicability.[9] Countries that have such a scheme have succeeded in stimulating local inventive and innovative activities. In this regard, the experience of the young patent system of Ethiopia can be cited as an example. The patent law was first introduced in 1995 and was implemented after the regulation was enacted in 1997. Until February 2006, for example, 172 utility model applications have been filed, of which 81 have secured utility model certificates.[10] Ethiopians filed all of the applications.

At the international level, the number of patents granted to nationals and residents of developing countries is also insignificant, although the share of individual countries varies depending on their level of development. In 2001, for example, less than 1% of US patents were granted to applicants from developing countries, about 60% of which were from seven of the technologically advanced developing countries.[11] According to the study conducted by the Commission on Intellectual Property Rights (hereinafter, CIPR), the share of developing countries from the total PCT applications for the period between 1999 and 2001 was less than 2% of which over 95% were from just five countries: China, India, South Africa, Brazil and Mexico. Besides the question of patent ownership, the distribution of patents seems to concentrate on few fields. The greater concentration of patents in developing countries is in the chemical and pharmaceutical sectors, which are sensitive to patent protection. A study undertaken in Ghana shows that the number of inventions registered in mechanical fields, which are crucial to the development of the capital goods sector, were negligible.[12]

Here, it is important to note that low level of protection may be attributed to other factors such as capacity, awareness, cost of processing patent applications and maintenance of titles.

---

[8] The countries that provide utility model protection include Argentina, China, Colombia, Costa Rica, Ethiopia, Guatemala, Kenya, Malaysia, Mexico, OAPI, Peru, Philippines, Republic of Korea, Republic of Moldova, Trinidad & Tobago and Uruguay. Information available at http://www.wipo.org/sme/en/ip_business/utility_models/utility_models.htm accessed in February 2006

[9] C. Juma and B. Ojwang, (eds.), *Innovation and Sovereignty: The Patent Debate in African Development*, African Center for Technology Studies Research Series, No.2., ACTS Press, Nairobi, 1989, at p. 127

[10] See Industrial Property Data Base, 2006, *supra foot note 7.*

[11] Commission on Intellectual Property Rights: *Integrating Intellectual Property Rights and Development Policy, Report of the CIPR*, London, 2002, at p. 12

[12] Yankee, *supra* footnote 2, at p.178

In most of the developing countries, the critical issue for innovativeness and patenting are not adequately available. For example, in these countries, the numbers of researchers and potential inventors are few; the research facilities are poor; funds are also meager. Furthermore, there are no clearly and comprehensively articulated patent and technology policies that will encourage inventive and innovative activities. The synergy between the patent system and the national socio-economic development plan is not maintained.

The amount of fund allotted for R&D varies among developing countries. It is estimated that in 1994 China, India and Latin America together accounted for nearly 9% of the world's research expenditure, but sub-Saharan Africa accounted for only 0.5%, and developing countries other than India and China accounted for only about 4%.[13] Generating revenues from R&D results has not yet been considered as an important strategy to mitigate the funding problems of these countries. Research is mainly done in public research institutions and universities. This activity may result in inventions which could be patented and generate revenue that may be used for further inventive and innovative activities. However, because of a wrong attitude in many academic circles that considers patenting of research results as falling outside their domain, most valuable knowledge assets in many countries have been wasted and the opportunity to generate fund for further research has been lost.[14] The inaccessibility of the patent office, the high cost involved in patenting and maintenance of the title as well as enforcement of the rights in cases of infringement have also impacted the patenting of inventions. In this regard, a CIPR[15] report notes that firms in developing countries can seldom bear the costs of acquisition and maintenance of rights and, above all, of litigation if disputes arise.

Cognizant of these problems, and recognizing the need to complement the patent system, some developing countries have taken positive steps and encouraging results have been registered. In this regard, it may be worthwhile to mention that some Asian countries such as Philippines, Vietnam, Thailand, Indonesia and Singapore have already established a system of intellectual property management, incentive and support system to patent owners.[16]

The Philippines established Invention Development Assistance Fund (IDAF) that provides fund to inventors for prototype development and early stage research

---

[13] CIPR, *supra* footnote 11, at p.2

[14] Kamil Idris, *Intellectual Property: A power Tool for Economic Growth*, Geneva 2002, at p.103

[15] CIPR, *supra* footnote 11, at p.15

[16] WIPO, *Case study on Using Intellectual Property as a tool for Economic Growth in the ASEAN Region*, conducted by WIPO for the Association of Southeast Asian Nations (ASEAN), Geneva , at p.25

experiments while Vietnam and Thailand have financial award programs for R&D projects.[17]

Some developing countries such as Indonesia have taken measures to promote the use of patents by public research institutions and universities. Indonesia has established "IP management offices at universities and research centers all over the country. Twenty centers for IP management have been set up to offer IP licensing expertise, IP rights management, counseling, patent searching and other functions to promote knowledge based national economic development through encouraging inventive culture, protecting and selling intellectual property works."[18]

To deal with the problem of the cost of processing of patent applications, financial assistance schemes have been developed and implemented in Singapore and Vietnam. Singapore has established a patent application fund to provide financial assistance to meet the cost of patent applications to her citizens, permanent residents, and companies, thereby, promoting a patenting culture in the country.[19] WIPO's study has also noted that Vietnam has a scheme of providing financial assistance for filing of patent applications.[20]

In Africa, little is known of measures similar to the above. In Ethiopia there is a local research grant scheme that aims to encourage young researchers. Although, the main objective of the scheme is to develop a research culture and capacity, some of the results have been protected by utility model certificates and are exploited.[21]

b) Exploitation of Patented Inventions

It is instructive to note that the number of patents granted in developing countries may not be sufficient to evaluate the economic significance of the patents since the figures alone may not show whether the patented inventions are exploited or not. It is, therefore, said that the figures on patents granted in developing countries overstate the significance of patents since the majority of these have minimal economic or technological importance as many of them are not worked or exploited in the

---

[17] ibid

[18] Idris, *supra* footnote 14, at p. 102

[19] WIPO, *supra* footnote 16, at p. 40

[20] WIPO, *supra* footnote 16, at p. 25

[21] See Getachew Mengisite, 2006, Intellectual Property Assessment in Ethiopia, Published by the Ethiopian Intellectual Property Office (EIPO).

countries.[22] It appears that all patented inventions are not exploited and that there is a problem of non-use of patents in both advanced and developing countries. However, the degree of non-use of patented inventions is much higher in developing countries than the developed ones.[23] Studies made in Canada, UK, and USA revealed that in these countries only between 40 and 70% of the patents registered were commercially exploited.[24] This figure is much lower in developing countries. According to UNCTAD the rate of patent utilization is about 5% in Argentina and Chile, 1.1% in Peru and below 1% in Tanzania.[25]

The underlying reasons for non-use of patents in production are different in the developed and developing countries. In the former countries, non-use is due to the realization that patented inventions are not, or are no longer of commercial significance; whereas in the latter countries the non-use is relating to commercial strategies of foreign patent owners. Some argue that foreign patent owners apply for patent protection in developing countries mainly to protect local markets from domestic and foreign competition.[26] A study made in Ghana and Nigeria revealed that the majority of patents were not worked domestically, but exploited by patentees through the importation of the patented product or products derived from the patented processes.[27] It has also been explained that foreign patent owners used their right as a "scare crow" and legal barrier not only to the containment of competitors but also to prevent any potential indigenous "intruder" in the field.[28]

Furthermore, it has been argued that patents have been used to impose direct and indirect restrictions on local technological development. Patent licensing has served to impose direct limitations such as restrictions on the freedom of access to competitive technology and requirements that inventions and improvements developed by the licensee must be handed over to the licensor. Moreover, contracts of apprenticeship had been used to impose restrictions that bind nationals from using or disclosing technological know-how even after the termination of the labor contract.[29] It has been noted that such restrictions have direct effect on the development of

---

[22] M. Blakeney, Legal *Aspects of the Transfer of Technology to Developing Countries*, Oxford: ESC Publishing. 1989, at p.80

[23] UNCTAD, *supra* footnote 5, at p. 40

[24] M. Blakeney *supra* footnote 22, at p. 80

[25] UNCTAD, *supra* footnote 5, at p.80

[26] UNCTAD, *supra* footnote 1, at p. 19

[27] Yankee, *supra* footnote 2, at p. 289

[28] Yankee, *supra* footnote 2, at p. 53

[29] UNCTAD, *supra* footnote 1, at p. 16

indigenous technological capability. In addition to the direct impacts, the restrictions will also have indirect bearing on related matters.[30]

Moreover, the absence of sanctions or safeguards against patent abuses has worsened the situation. A study showed that in some countries such as Ghana there were no provisions for dealing with abuses of patent rights including non-use.[31] In other countries, there may be sanctions but are inadequate and full of loopholes. To ensure the exploitation of patented invention, working of invention, for instance, was considered as one of the duties of the patentee in most Latin American countries but without defining the concept precisely. As a result, working of the patent outside the country was accepted as evidence for compliance with the legal requirment.[32]

In spite of the fact that compulsory license has been conceived by many countries to be the major instrument of sanction against non-working of patents, in practice it has been proved virtually of little value.[33] Furthermore, the Commission on Intellectual Property Rights in its study[34] noted that developing countries have not used compulsory license though the TRIPS agreement as further elaborated by the Doha Ministerial declaration allows it. The Ministerial declaration recognizes that "each member has the right to grant compulsory license and the freedom to determine the ground upon which such licenses are granted."[35] The reason for the non-use of compulsory license include the absence of the requisite administrative and legal infrastructure as well as the non availability of potential licensees having the necessary know how and capacity to exploit the patented invention without the cooperation of the patent owner.[36]

---

[30] It has been explained that "[a] number of studies have shown that patents have been used indirectly as a means of regulating or influencing not only the behaviors of other enterprises linked by restrictive clauses…but also have impact on national economic policies… relating to exports, substitution and selection of imports, price controls, employment etc. The use of lawful monopolies has, in general, had adverse effects on certain key aspects of industrial development by restricting exports of patented products by "tying" the purchase and supplies of licensed enterprises, by setting arbitrary price for products under patents or manufactured under licensing agreements, by imposing restrictions on employment of local personnel etc." UNCTAD, *supra* footnote 1, at p. 22.

[31] Yankee, *supra* footnote 2, at p.197

[32] UNCTAD, *supra* footnote 1, at p.19

[33] UNCTAD, *supra* footnote 5, at pp.335-340, See also Yankee, *supra* footnote 2, at p.73

[34] CIPR, *supra* footnote 11, at p. 42

[35] WTO, Doha Declaration on the TRIPS agreement and public ,2002: p.25

[36] CIPR, *supra* footnote 11, at p. 42

It is instructive to note that there are a number of factors that may affect the exploitation of a patented invention in a country. This may relate to indigenous capacity and economic factors such as market size and finance. It is hardly possible to invoke compulsory license and exploit a patented invention in most of the low-income and least developed countries such as Ethiopia. Persons with the requisite capacity and resources are often non-existent. Furthermore, the size of the market is too small to influence the decision to exploit an invention.

3. Patents and Transfer of Technology

The existence of a patent system and appropriate mechanism of enforcement of patent rights are prerequisites for technology transfer and investment. Without patent protection, no business is comfortable in disclosing or transferring its technologies.[37] There is, thus, a need to create an enabling environment for transfer of technology. One such environment is the existence of the patent system. Patents are of vital importance to facilitate the transfer of technology directly by stimulating the introduction of foreign technology and indirectly by making available technological information through patent documents. It is believed that the existence of the patent system not only makes possible for patentees to disclose and register their inventions, but also provides some guarantee and security to foreign owners of invention to exploit and authorize the exploitation of their technology. According to Blakeney[38] the role that patents could play in the transfer of technology is the principal justification for the existence, or introduction of the patent system in developing countries.

However, studies reveal that the role of patents in transfer of technology in developing countries is negligible. It has been estimated that patents accounted for less than 2% of the technology transferred to developing countries.[39] This estimate, however, does not include the contribution made to the transfer of technology by information derived from published patent documents. The principal way in which patents may contribute directly to the transfer of technology to developing countries is through the exploitation of the patented technology in the patent granting country by the foreign patent holder himself or with his consent by third parties. The former mainly takes place in the form of foreign direct investment or joint venture, while the latter chiefly occurs through a licensing arrangement.

The technology transferred through foreign direct investment or joint venture seem to be negligible as almost all of the foreign owned patents are not exploited in the

---

[37] Idris, *supra* footnote 14, at p. 84

[38] Blakeney, *supra* footnote 22, at p. 57

[39] Yankee, *supra* footnote 2, at p. 87

developing countries. It was noted that in most developing countries, patents have failed to promote joint ventures and foreign direct investments since their owners have not used the majority of the patented inventions. The exploitation of few of the registered inventions have been made possible not because of the protection offered by the patent system, but because they form part and parcel of an entire investment project.[40]

The transfer of patented technology via licensing arrangement to developing countries seems to be rare and/or ineffective particularly in middle and low-income developing countries. A study undertaken in Ghana and Nigeria revealed that in both countries "patent licensing as a vehicle for the transfer of technology is very rare for lack of competent licensee capable of independently exploiting the licensed inventions or due to the difficulty patentees face in getting capable licensees."[41] Moreover, it was found that effective transfer of technology could not be possible due to a number of unfavorable terms and conditions stipulated in license agreements. It is common to find onerous terms, which are one-sided and constitute restrictive practices or monopolistic abuses, prohibited by anti-trust legislations of advanced countries, imposed on developing countries. According to UNCTAD sample study of license agreements, 90% of licensing contracts had been found consisting of unreasonable restrictions. Examination of the sample agreements showed that 94% in Peru, 97% in Mexico, 91% in Chile and 43% in India had restrictions that would inhibit growth of indigenous technology and perpetuate technological dependence.[42] The unreasonable restrictive clauses include grant back provisions, which impose obligations on the licensee to transfer to the licensor any improvement made on the transferred technology, restrictions on R&D which prohibit the licensee from conducting further research on or making improvement of, or adaptation to the licensed technology, restriction on use after expiration of the patent protection would diminish the benefit of introducing patented invention into the developing countries.[43]

In spite of the above-indicated limitations, it is argued that in the absence of security of patent protection foreign technology will not be disclosed and that a system of patent protection is considered to be a hallmark of a reliable environment for investment. There is a belief that the existence of the patent system in countries does not only make it possible for patent owners to register their inventions in other countries, but also provide some guarantees and security to foreign owners of inventions to license their technology.

---

[40] Yankee, *supra* footnote 2, at p.198

[41] Yankee, *supra* footnote 2, at p. 22

[42] UNCTAD, *supra* footnote 1, at pp. 15-16

[43] See, UNCTAD, *supra* footnote 1, at p. 15, UNCTAD, *supra* footnote 5, at pp.23 to 28.

It is also important to note that the patent system in itself is not sufficient, although undoubtedly important, to effect transfer of technology. There are a number of factors that influence the transfer of technology. Effective transfer of technology presupposes the existence of indigenous technological capability. The importance of such capacity is explained as follows:

> For developing countries, like the developed countries before them, the development of indigenous technological capacity has proved to be a key determinant of economic growth and poverty reduction. This capacity determines the extent to which these countries can assimilate and apply foreign technology. Many studies have concluded that the most distinctive single factor determining the success of technology transfer is the early emergence of an indigenous technological capacity.[44]

Indigenous technological capacity includes the capacity to select, adapt and apply foreign technology. Such capacity differs among developing countries thereby affecting the degree of transfer of technology. Developing countries such as China and India have the requisite technological capacity compared with Sub-Saharan African countries, excluding South Africa.[45]

The size of market also affects transfer of technology. In this regard, it was noted that a developing country with a relatively small population of potential consumers or low level of manufacturing base may not be an attractive location for licensing because the royalties that can be realized in such a market are too small.

4. Patent as a Source of Technological Information

The patent system that provides exclusive right over inventions for a limited period of time helps to stimulate technological development through patent documents. The grant of a monopoly right over an invention may be regarded as a trade off between the state and the inventor. The latter is granted a limited exclusive right in return for prompt disclosure of new inventions so that inventions are not kept secret and society benefits from the disclosure thereof.[46] It is a standard requirement of most patent laws that the patent description discloses the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art. The rationale behind this requirement is to facilitate the use and dissemination of technological information. That is to enable other persons to exploit the invention upon the expiry

---

[44] CIPR, *supra* footnote 11, at p. 11.

[45] CIPR, *supra* footnote, at p. 2

[46] Yankee, *supra* footnote 2, at p. 60

of the patent right protection or under prescribed conditions during the currency of the patent without the consent of the patent holder or to use it for lawful purposes such as R&D activities. The technological information helps to avoid duplication of and reorient local inventive efforts and to invent around the patented invention when there is a capacity to do so.

The technological information contained in patent documents facilitates and helps to overcome problems related to selection, negotiation, acquisition and transfer of foreign technologies. The information helps, *inter alias*, in alleviating the problem developing countries, such as Ethiopia face in the identification, selection, negotiation, acquisition and transfer of foreign technology due to lack of information on alternative sources of technology. It has been noted that a "patent document presents concrete solution of technological problems in a standard, concise and easily accessible form. The comprehensive information contained in patent documents permits receivers of patented technology to see precisely what they will be receiving together with an evaluation of comparable technology and alternative solutions."[47] In spite of the fact that patents help in making available valuable information that would help to stimulate local inventive effort as well as facilitate transfer of technology, little has been made in using it. This is true in particular in the majority of the developing countries in Africa and elsewhere. Patents in the majority of sub-Saharan African countries are being administered by offices, which often discharge a mere function of registration and deposit of registers.[48]

Patent offices can play a role of a development agency by rendering technological information services. This can be evidenced by looking at the experience of the young Ethiopian Patent Office, which was established in 1994. One of the major functions entrusted to it is to render technological information services. Prior to the establishment of the Office, there was no single patent document consisting of technological information. A concerted effort was made to collect patent documents. This effort bore fruit with the generous support obtained from the World Intellectual Property Organization (WIPO), the African Industrial Property Office (ARIPO) and European Patent Office (EPO), the United States Patent and Trade Mark Office (USPTO), Japan Patent Office (JPO), Swedish and UK patent offices. At present

---

[47] Blankeney, *supra* footnote 22, at p. 85.

[48] In this regard, it has been noted that: "Patent Offices of Ghana and Nigeria have merely served as patent registration centers and do not undertake any other functions expected of patent offices....do not adequately publish new inventions in any patent journal or publication and thus do not help to disclose new technical knowledge to the general public. In addition, as a result of very poor filing systems, general indifference and lack of absolute resource and governmental support, the two offices have also not been successful as data banks for technological information to the technological and industrial development in their respective countries." Yankee, *supra* footnote 2, at p. 286.

there are more than 30 million patent documents consisting of information in any field of technology and comprising inventions patented since 1790.[49] Although the number of users of the information when viewed in light of the collection and the technology needs of the country is small, encouraging results have been reported. There are entrepreneurs who improved their products using the technological information contained in these patent documents, which established enterprises and began to manufacture products that replaced imported ones. As a result, it became possible to save foreign exchange, provide employment opportunities and widen the revenue base of the government.[50]

B. REVISION OF THE PATENT SYSTEM IN DEVELOPING COUNTRIES

In spite of the fact that the patent system failed to adequately contribute to socio-economic development objectives of many developing countries, its abolition has not been suggested.[51] Instead, it has been said that, the patent system may serve useful purposes if it is properly administered.[52]

There is a belief that the patent system can be effectively employed to nurture the development of indigenous technological capability.[53] In line with this, some countries such as Mexico and India reformed their patent regimes so as to make them more appropriate to their respective needs and conditions.[54] However, the reforms made in the 1970's could not last long. The countries were forced to reform their patent regimes that were deemed weak by advanced countries. Furthermore, the reformed national laws were revisited to comply with international instruments mainly the TRIPS Agreement.

It has been noted that loopholes and flexibilities available under the TRIPS Agreement should be exploited in designing national patent systems.[55] However, the

---

[49] National Intellectual Property Information and Advisory Center, Patent Data base, EIPO .

[50] These benefits may be explained by taking one success story as an example. A chemical engineer produced a printing ink that was found to be of a comparable quality with that which was imported. The product is now in the market with a reasonable price. One can easily see what this would mean to a poor country and what the effect could be if many of the patented technologies in the public domain would be exploited.

[51] UNCTAD, *supra* footnote 1, at p. 34

[52] Yankee, *supra* footnote 2, at p. 45

[53] Yankee, *supra* footnote 2, at p. 45

[54] See UNCTAD, *supra* footnote 5, at p. 13; Yankee, *supra* footnote 2, at p. 309

[55] CIPR, *supra* footnote 11, at p. 49

mere tailoring of a system in the way one thinks fit may not be on its own enough to generate wealth using patents as a tool. There is a need to put in place complementary measures.

C. COMPLEMENTARY POLICIES AND SUPPORT MEASURES

Many developing countries have not benefited from using patents as a tool for wealth creation. This may be partly due to the absence of complementary measures. Appropriate policy, legislative and related measures should be taken to complement the patent system. The patent law may, for instance, with a view to promoting local R&D effort, provide protection for minor inventions. However, this objective may not be achieved unless supported by complementary measures such as favorable fiscal and monetary policies and schemes. Since patents are policy instruments, they should be integrated with and supported by other national policies and related measures.

The measures that have been taken by a number of ASEAN countries to complement the patent system through other policy measures to stimulate local inventive activity and to encourage the transfer of foreign technology have been found promising.[56] Similar measures, however, are lacking in Africa.

A well designed patent system together with other policy instruments and commitment of the government, without doubt, will serve useful purposes and help nurture the generation and development of local technology and facilitate the transfer and effective use of foreign technology.

PART II: THE INTERNATIONAL PATENT SYSTEM

A. GENERAL

The international patent system evolved and developed to govern relations between states and deal with the difficulties arising from the territoriality of patents. The system includes international legal instruments as well as organizations entrusted with the administration of these instruments. The international patent legal regime consists of multilateral agreements, international organizations, regional conventions, treaties or protocols as well as bilateral agreements. The international patent institutional or administrative framework mainly involves organizations established to administer the

---

[56] WIPO *supra* footnote 16, at pp. 14-45

multilateral patent agreements. This includes the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO) and regional patent organizations such as the European Patent Office (EPO), the African Intellectual Property Organization (OAPI) and the African Regional Intellectual Property Organization (ARIPO). The purpose of this paper is not to deal with each of the constituent elements of the international patent system but to examine existing major multilateral patent agreements concluded at the international level that may have an impact on developing countries.

B. RATIONALE AND NATURE OF THE INTERNATIONAL PATENT SYSTEM

The reasons behind the conclusion of international patent agreements lie in the nature of inventions in the sense that inventions protected by patents do not know borders. However, patent protection is territorial in nature. As a result, various difficulties arise that may defeat the purpose of patents and affect the relation between states. If an invention is not protected under national law then it will constitute a public domain and can be freely used in the country concerned. Seeking patent protection in a foreign country could be difficult for a number of reasons such as possible discriminatory treatment, the variation between national laws, the problem of cost, time and distance relating to the filing and processing of patent applications. In order to avoid undesireable results that may arise in such circumstances and to mitigate the difficulties in securing a patent in a foreign country, international agreements were concluded.

The multilateral treaties concluded in the field of patents that are effective to-date include the 1883 Paris Convention on Industrial Property; the 1970 Patent Cooperation Treaty (PCT); the 1971 Strasbourg Agreement Concerning International Patent Classification; the 1979 Budapest Treaty on the Deposit of Micro-organisms and the 1994 Agreement on Trade Related Aspects of Intellectual Property (TRIPS). These international undertakings may be classified as substantive and procedural. International agreements that deal with substantive issues include the Paris Industrial Property Convention and the TRIPS Agreement. The PCT and the Strasbourg Agreement intend to harmonize formal standards and procedures.

In spite of the fact that the above agreements try to harmonize national patent systems by setting standards and common requirements, patents are still governed by national laws and where appropriate by regional agreements.[57] There is no international patent

[57] This is the case where patents are granted by regional organization such as OAPI, which are valid in member states.

law that provides for a world patent. The international patent agreements are not meant to replace national patent regimes, but facilitate the protection of the interests of nationals or residents of a member state in another member state.

The international agreements that deal with substantive issues such as the Paris Convention and the TRIPS Agreement merely set the minimum requirements. Countries that desire to go beyond the minimum standards are free to do so, as far as the step would not defeat the underlying objectives of the international agreements. There are, thus, variations among national laws. That is why the effort to harmonize national laws is going on. The discussion in this part is limited to the existing international patent legal regimes. Furthermore, it is limited to briefly explaining the main agreements that deal with procedural and substantive issues. As a result, the Strasbourg Agreement and the Budapest Treaty are not considered for the purpose of this article.

C. MAJOR MULTILATERAL PATENT AGREEMENTS

1. The Paris Industrial Property Convention

The Paris Convention, that was concluded in 1883 and amended in 1900, 1911, 1925, 1934, 1956, 1967 and 1993, is considered as the first multilateral agreement in the field of patents. From historical perspective, the 19th century, among other things, was characterized by the unprecedented expansion of trade across national boundaries. Thus, this new development required close international cooperation among nations with respect to various economic matters including patents. To be sure, the patent system is one of the factors that tie the economic and political sub-systems of nations to each other. Moreover, it was during this period than ever before that the centrality of patent to inventive activities was recognized. At the same time two developments took place, which tend to oppose each other. On the one hand, there was a growing demand, particularly from inventors and manufacturers for strong patent protection. On the other hand, advocates of free trade, particularly trade associations came on the scene to challenge the patent system.

By 1873, a propitious condition was created in favor of patent proponents. The international exhibition held in Austria in 1873, was considered as an important landmark towards the establishment of an international mechanism for the protection of intellectual property. It was the reluctance of the manufacturers, because of the fear that their ideas would be stolen, to participate in the Vienna Exhibition that eventually led to the conclusion of the Paris Convention on the Protection of Industrial Property in 1883.

The Convention could be described as the institutionalization of the patent system at the international level for the first time and signaled a more global concern for the protection of the intangible assets. Although, only a few countries signed the Convention, it laid down the fundamental principles of international patent protection. The basic principles and rules as stipulated in the Convention include the principle of national treatment, the right of priority and common rules.

The first signatories of the Paris Convention were the major advanced countries including Brazil and Tunisia from the developing countries. However, after the Second World War, a number of developing countries that enacted patent laws or inherited from their colonial masters joined the Convention.[58] The number of developing countries joining the Convention has increased particularly in the 1990s and the reason is attributable to the TRIPS Agreement. Maskus explains the increase in number, the type of countries that join the Convention and the reason behind such a step as follows:

> All new members since 1985 have been developing countries and countries in transition...while several key developing economies, including Venezuela, Singapore, India and Chile, chose to join in 1990s, most of the newer members are small and poor or new republics in transition. No doubt, much of the increase in membership stems from the need of WTO parties to implement TRIPS, which incorporates by reference the substantive legal provisions of the Paris Convention while not requiring membership *per se*[59]

By 5 February 2005, 169 countries, of which the majority were developing countries, were party to the Paris Convention.[60] Some argue that the Paris Convention, which was first signed and concluded mainly by developed countries to reflect their conditions and to cater to their needs, is inappropriate to and disadvantageous to the interests of developing countries. In this regard, it has been noted that:

> Developing countries, such as Kenya, which have acceded to the Paris Convention, have joined a regime of obligations that was not originally designed for their present condition. With the protection provided for by the Convention, the new states have in effect committed themselves to give a one-sided advantage to foreigners who operate from their land, as these have a much larger technological base than their own nationals.

---

[58] C. Juma, *supra foot note 9,* at p. 39

[59] Maskus, K. *Intellectual Property Rights in the Global Economy,* Washington, DC,2000, at pp. 89-90.

[60] http://www.wipo.int/treaties/en/show results.jsp?lang=en& treaty id=2 accessed on 5 February 2006.

> Under these obligations the developing countries adhering to the Paris Convention have restricted their own direction to make such policy or legislation, as they deem best to enhance local priorities regarding inventions and patenting. Since the commitments already assumed by these countries are binding and ought, in principle to be complied with, the only respectable open course is for the countries to seek appropriate international negotiations leading to adjustments in the world regimes of patents. Indeed the developing countries have been calling for revisions in the Paris Conventions but no such changes have been made.[61]

It has, however, been argued that the Paris Convention leaves rooms to accommodate the needs and interests of developing countries regarding the requirements and standards for patents. The Convention is said to be weak compared to the patent requirements and standards in the developed economies. Moreover, it allows wide discretion to national laws as far as compulsory license, patentability, and setting opposition procedures are concerned.[62]

2 The Patent Cooperation Treaty

The Patent Cooperation Treaty (PCT) was concluded in 1970, amended in 1979 and further modified in 1984. The PCT was adopted mainly to deal with the problem of filing several applications in several countries within the period of time prescribed by the Paris Industrial Property Convention and overcome the duplication of effort by national patent offices. This is made possible by streamlining pre-patent granting procedures and requirements such as filing, search and examination. It provides for filing a single application, performing international prior art search and international publication. The Treaty also provides for international preliminary examination that is made optional to member countries.

Membership of the Treaty, in particular those of the developing countries, has increased in the 1990s mainly due to the benefits the system gives to applicants, the patent offices as well as countries. Nationals or residents of member states, among other things, have the opportunity to file international application with their national patent offices and receive international prior art search report from an international searching authority to decide to continue or not with their application. This would save considerable cost for the applicant. The availability of prior art search, international publication and examination facility would lessen the burden of national offices of developing countries, which often lack the requisite qualified manpower,

---

[61] Juma and Ojwang, *supra* footnote 9, at pp. 39-40

[62] Maskus, *supra* footnote 59, at p. 91

information and documentation as well as the financial resource the tasks require. The PCT aims at assisting the economic development of the developing countries by providing easily accessible information on the availability of technological solutions applicable to their special needs as well as build their capacity through the technical assistance that may be obtained under the Treaty.[63]

PCT is considered as the most advanced mechanism in international cooperation in the field of patents since the conclusion of the Paris Convention. The PCT does not grant patent, but facilitates obtaining national patents in several countries. The patent granting procedure under the PCT system consists of two phases: an international phase and a national phase. The international phase deals with a centralized filing and searching procedure and optional international preliminary examination. The national and where appropriate the regional phase is concerned with the final patent granting procedure by the national and regional industrial property offices. The filing of only one international application has the same effect as if separate national or regional applications have been filed in all the countries which the applicant designates in his international application.

3. Agreement on Trade Related Aspects of Intellectual Property Rights

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) that forms part of the WTO regime was signed on April 15, 1994 in Marrakech, Morocco, and came into effect on January 1, 1995. Before the TRIPS Agreement, intellectual property was not part of a multilateral trade agreement. When the developed countries led mainly by the USA and Japan tried to bring the intellectual property (IP) protection issues, during the Uruguay Round, under the frame work of the General Agreement on Tariffs and Trade (GATT), developing countries strongly opposed the idea saying that GATT is not the appropriate forum. However, the opposition was ignored and the effort to force some of the developing countries to revise their IP system and provide for stronger protection was successful before the formal linkage of intellectual property protection to international trade[64].

---

[63] For technical assistance that may be given to developing countries, *see* the Preamble of the Treaty and Article 51(3) (a) and (b).

[64] This was partially achieved through unilateral pressure made by the USA. It has been said that under the guise of "Special 301" measures, access to US markets was used as a leverage to force Third World Countries to implement strict IP regimes ahead of any decision in the Uruguay Round. It has, for instance, been noted that special 301 measures were used against Brazil in 1988 in order to induce Brazil to extend patent protection to pharmaceuticals.

The reason for the conclusion of the TRIPS Agreement may be explained on two grounds. First, the need to provide a stronger IP protection to business communities of industrialized countries, which had been complaining that they suffered huge economic loss as a result of piracy and counterfeiting.[65] Second, the need to overcome the shortcomings of the existing IP conventions that failed to provide for effective means of enforcing intellectual property rights. The TRIPS Agreement, unlike prior IP conventions, provides an effective dispute settlement mechanism. Countries failing to comply with the TRIPS Agreement standards[66] could be subjected to trade retaliation if the dispute settlement mechanism of the WTO has determined the existence of a case of non-compliance with the Agreement.

A lot has been written on the TRIPS Agreement. Some writers argued that the Agreement deprives the freedom of States to tailor their own patent regime by setting minimum standards and stringent requirements, which are lopsided in favor of right holders. While others argue that the Agreement leaves developing countries some room in which countries may adopt national policies that favor the public interest, the encouragement of foreign direct investment (FDI) and transfer of technology as well as the stimulation of local innovation.[67] It also gives due care to protect "public interest" and to deal with the problem of misuse or "abuse" of patent rights[68]. Even though the implementation of the TRIPS Agreement standards will tend to promote a great deal of uniformity in many areas of patent law, the Agreement does not seek to

---

[65] It has been said that "US business communities have estimated that world wide losses suffered by US corporations owing to IP 'theft' runs to the tune of around US$43 billion to US$61 per annum." *Cf.* M. Blakeney, *TRIPS: A Concise Guide to the TRIPS Agreement,* 1996; See also M. McGrath, *The Patent Provisions in TRIPS: Protecting Reasonable Remuneration for Services Rendered V. the Latest Development in Western Colonialism?* European Intellectual Property Review,1996.

[66] The TRIPS Agreement, *inter alias*, aims to: (a) harmonize intellectual property rights protection by providing with the minimum standards that should be adopted by member states; (b) enhance and broaden the scope of protection of patents by (i) reducing the scope of various restrictions and safeguards which used to be incorporated by national laws to protect the public interest and control abuse of a right by the patentee, (ii) expanding the scope of duration of protection by, for instance, requiring that patent protection shall be available in all fields of technology (Article 27(1) and making the duration of a patent 20 years (Article 33), (c) providing a mechanism that ensures effective enforcement of rights; violation of IPRs and failure of member states to provide with an effective enforcement of the same will entail severe consequences such as loss of trade rights and imposition of sanctions.

[67] Reichmann, *Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement*, The International Lawyer, Vol. 29, No. 2., 1995, at pp.345-388, cited by UNCTAD, **in**: *The TRIPS Agreement and Developing Countries The TRIPS Agreement and Developing Countries.* Geneva, 1996, p.32.

[68] UNCTAD, *The TRIPS Agreement and Developing Countries,* Geneva, 1996,, at p. 32.

achieve (nor its implementation likely to produce) a global harmonization of domestic patent laws.

PART III: MAJOR IMPACT OF THE INTERNATIONAL PATENT SYSTEM ON DEVELOPING COUNTRIES

A. IMPACT ON ECONOMIC AND TECHNOLOGICAL PROGRESS

1. Protection of Inventions

In developing countries the propensity to patent inventions has increased not only in terms of domestic applications but also international applications. However, patent applications made and patents held by residents of developing countries are few. Patents are owned overwhelmingly by foreign residents Looking at data from Mexico and Brazil attests to this. In 1996, in Mexico, only 389 patent applications came from domestic residents against over 30,000 foreign applications. In the same year, Brazil's domestic applications accounted for 8% of total applications.[69]

The reason for the low level of patenting in developing countries by their nationals and residents can be explained by a number of factors, including non-use of the system by universities and local research institutions.[70] It has been indicated that many inventions from developing countries, particularly in state-funded universities, have not been recognized as patentable. Thus, "the potential technological advances often never get to see the light of day."[71]

The low level of local inventive activity is also reflected in low level of patenting abroad. The share of developing countries in the world's patent distribution is insignificant, though, their position has remarkably improved. The table below shows the level of developing countries involvement in international patent applications.

Table 1: PCT Applications

---

[69] Maskus, *supra* footnote 59, at p. 175.

[70] IERSNU, (Institute of Economic Research Seoul National University) *Industrial Property Rights and Technological Development in the Republic of Korea*, submitted to The Korean Intellectual Property Office and the World Intellectual Property Organization, 2002..

[71] Idris, *supra* footnote 14, at p. 44.

	1998	1999	2000	2001	2002
From all contracting parties	67,007	74,023	90,948	103,947	114,048
From developing countries	1,197	1,745	3,152	5,379	5,359
Share of developing countries	1.79	2.36	3.47	5.17	4.7
No. of contracting states	100	106	109	115	118
Of which developing countries	46	52	55	61	64
No. of developing countries from which at least one application was received	13	16	20	25	31

Source: WIPO, *The Patent Cooperation Treaty and the Developing Countries in 2002*; http://www.wipo.int/cfdpct/en/statistics/pdf/cfdpct_stats_02.pdf

The above table shows a remarkable growth of patent applications made by applicants from developing countries. This would, however, not give a complete picture of the discrepancy within the developing countries unless the distribution of the applications is examined. It should be noted here that most of the PCT applications were from very few developing countries. The ten major PCT applicants in 2002 were: Republic of Korea (2,552), China (1,124), India (480), South Africa (407) Singapore (322), Brazil (204) and Mexico (128), Columbia (33), Philippines (26) and Cuba (13). From the total PCT application from developing countries in the same year, the above statistics also shows that Asia and Pacific accounted for 84.31 percent, Africa 7.8 percent, Latin America & Caribbean 7.33 percent and the remaining 0.56 percent was from Cyprus and Arab countries. The participation of developing countries in the PCT system is increasing. From the above table, we can notice that by the year 2002 more than 50% of the PCT members were developing countries. The table also shows that the number of PCT applications from developing counties has exponentially increased in terms of absolute figures (from 1,197 in 1998 to 5,359 in 2002, with more than four fold increase). The number of developing countries that filed at least one PCT application has also grown by more than 50% (from 13 in 1998 to 31 in 2002).

Although the share of developing countries in the PCT application is low, a significant development has been seen with regard to institutions involved in patent applications. The public institutions and universities in the developing countries are now entering into the system of patent application. It has been noted that the Indian Council of

Scientific and Industrial Research and the National University of Singapore made 184 and 28 PCT applications respectively in 2002[72].

The share and number of patent applications made by and in developing countries seems to relate to their technological capacity. In the early stage, when the technological capability of a developing country was low, the local inventive and patenting activity was not only limited but also there would not be much foreign interest in the local market for technology, and hence for patent protection. The experience of the Republic of Korea shows that the lower the country's technological capability, the lesser foreign firms are interested in applying for patent protection in that country. Thus, the share of foreign applicants in Korea earlier, for example, was low among the total number of patents. When the technological capability of domestic firms showed impressive growth, and the market for technology was attractive in the 1980's, the share of Korean IPRs moved fast to catch up with foreign owned IPRs. Rapid upgrading of technological capability of Korean firms was made possible by massive R&D investment, and it led to the rapid rise of international patent applications by the Korean firms.[73] Studies noted that from the early 1990's, Korea emerged among the top 10 or 15 in the world in terms of the number of patents registered in the United States of America.[74] As per the information solicited from the USPTO, patents owned by Koreans rose from 7 in 1982 to 3,558 in 1999. The proportion of Korean patent holders in the US rose from 0.01% to 2.09% in the same period; and Korea ranked 6th in terms of patents granted in the US in 1999, following the USA, Japan, Germany, UK and Taiwan.[75]

Patent protection is a costly business. Many inventors in developing countries do not have the capacity to file and process their applications in countries outside their own. PCT has helped to deal with this problem by making available the filing of a single international application at a reduced cost. Residents of developing countries are entitled to a 75% reduction in all PCT fees. This will facilitate the protection of inventions generated in developing countries in as many member countries of the PCT as possible. This would in turn facilitate obtaining benefit from the exploitation of protected inventions abroad, through, for example, royalties from licensing arrangements. However, this would depend on the national technological capability of a country to generate inventions. Where this capacity is weak, the benefits that

---

[72] See WIPO, *The Patent Cooperation Treaty and the Developing Countries in 2002*, available at <http://www.wipo.int/cfdpct/en/statistics/pdf/cfdpct_stats_02.pdf>, accessed on 10 July 2003.

[73] IERSNU, *supra* footnote 70, at p. 4

[74] IERSNU, *supra* footnote 70, at p. 2

[75] ibid

developing countries derive from international patent agreements such as the PCT is limited.

2. Transfer of Technology and Investment

There is no agreement among writers on the impact of the international patent system on transfer of technology and foreign direct investment (FDI). In this regard, some argue that the absence of IP protection encourages technology transfer and technological learning through copying and imitation, while others argue that IP protection is a mechanism, which encourages technology transfer from abroad through direct investment or licensing, and the indirect effects are effective means of technological learning.[76] Those who support the existence of positive relationship between patent and technology transfer or FDI argue that in the absence of protection or weak patent protection, decision making on technology transfer or investment would be difficult or even when decision is made the form and type of technology to be transferred or investment to be made would vary.

One of the key arguments made by advocates of stronger global IPRs is that such a system, as embodied in the TRIPS agreement, would increase FDI, and associated technology transfers to developing countries.[77] Idris[78] noted that many experts in the field have recognized the direct link between strong IP protection and an increased inflow of FDI. He explained that the steady and steeply rising increase in FDI in India and the spectacular growth in Brazil have been attributable to the enhanced patent protection after the revision of patent laws of these countries. Some authors argue that the form and type of technology to be transferred or investment to be made would depend on the level of patent protection. Maskus quoted different writers who stated that in countries with weak patents, the preferred mode of technology transfer is Foreign Direct Investment, the quality of technologies transferred would be obsolete and inferior; and that strong IP protection could facilitate technology transfer not only in quantitative terms, but also qualitatively. The incentive for foreign firms to license their best technologies lay on the degree of IP protection. Empirical studies demonstrate that the strength of intellectual property rights and the ability to enforce contracts have important effect on Multi-National Enterprise's decisions on where to invest and the level (sophistication) of the technology to be transferred.[79]

---

[76] CIPR, *supra* footnote 11, at p. 21

[77] UNCTAD, *supra* footnote 68, at p. 17

[78] Idris, *supra* footnote 14, at p. 39

[79] See Maskus, *supra* footnote 59, at pp.139,154 to 155

In contrast to the above, some writers advance a different position. They argue that the existence of patents or stronger patents would affect the interest and hamper technological development of developing countries. There is a concern that stronger patents would increase the price of technology, thereby, reducing the transfer of technology to developing countries. It is argued that a strong patent would further strengthen the strong bargaining position of technology suppliers, thereby, enabling them to negotiate higher license charges and royalty fees that would reduce inward technology flows.[80]

The international patent system has also been described as a reason for the technological development problems of developing countries. Some experts argue that it is the international patent system that keeps developing countries technologically dependent and backward. In this regard, it was stated:

> Patent laws of developing countries, following international standards, have legalized an anomalous situation, which had come to act as a reverse system of preference granted to foreign patent holders in markets of developing countries. Instead of strengthening national capabilities and seeking special preference for themselves, legitimized by the standards of the Paris Convention, have brought about this situation. Quite clearly a fundamental revision of the entire patent system is needed to alter this peculiar, if not perverse, situation.[81]

Odle & Arthur[82] further argued that the international patent system has important social cost; it does not transfer technology but concede rights.

Although some authors expressed that from developing countries' perspective the TRIPS Agreement is seen as an important mechanism to attract inflows of advanced technology from abroad[83], others have different views. With respect to the latter, it has been noted that "some countries may use weak IP regimes as a means of gaining access to foreign technologies and developing them using reverse engineering, thereby, enhancing indigenous technological capacity. The implementation of TRIPS Agreement now restricts the ability of developing countries to follow this path."[84]

---

[80] UNCTAD, *supra* footnote 68, at p. 18

[81] M. Odle and O. S. Arthur, *Commercialization of Technology and Dependence in the Caribbean*, Caribbean Technology Strategies Project, 1985, at p. 33

[82] ibid

[83] Maskus, *supra* footnote 59, at p. 150

[84] CIPR, *supra* footnote 11, at p. 8

Studies show that the relationship between weak or strong patent protection and transfer of technology and FDI vary from sector to sector and the type of investment to be made or technology to be transferred. It has been noted that the role of patent is considered to be important in the pharmaceutical and chemical industries as opposed to other sectors such as distribution or service sector. Studies also showed that firms, which put considerable investment in R&D activities, are reluctant to invest in or transfer technologies to countries with weak intellectual property protection.

In spite of divergence of views among authors on the role of weak or strong patent protection in transfer of technology and foreign direct investment, there is considerable agreement that there are a number of factors that would affect transfer of technology and investment in addition to patents. Decisions of investment or transfer of technology by a foreign party may be affected by the type of technology, whether the technology is low or sophisticated, whether the technology is easy or difficult to copy, the existence of technological capability and the size of the market.

Studies have revealed that IP protection by itself is not a sufficient factor to attract FDI. One study noted that:

> What is clear from the literature is that strong IP rights alone provide neither the necessary nor sufficient incentives for firms to invest in particular countries... investment decision is contingent on many factors. For most low technology industries, of the kind that less technologically advanced developing countries are likely to attract, IPRs are unlikely to be a relevant factor in the investment decision. Where technologies are more sophisticated, but relatively easy to copy, then IPRs may be – though not necessarily – a significant factor in investment decisions if a country has both the scientific capacity to copy and a sufficiently large market to justify the costs of patenting and enforcement and other relevant factors are favorable.[85]

Another study also indicated that the least developed countries opportunity to attract FDI (except in extraction sectors) is marginal due to the absence of the other pull factors in these countries such as high level of productivity, education, and skills.[86]

The determinants of effective technology transfer are many and various. The ability of countries to absorb knowledge from elsewhere, make use of it and adapt same for their own purposes is of crucial importance. This is a characteristic that depends on the development of local capacity through education, R&D, and the development of appropriate institutions. In the absence of such a capacity technology transfer on the

---

[85] CIPR, *supra* footnote 11, at pp. 23-24.

[86] Maskus, *supra* footnote 59, at p. 122

most advantageous terms is unlikely to succeed. Effective transfer of technology or FDI requires the existence of indigenous capacity on the side of the recipient.[87]

It is of significance to assess the domestic capabilities of the recipient country in order to measure the impact of international technology transfer. In this regard, Rosenberg[88] says that "... perhaps the most distinctive factor determining the success of technology transfer is the early emergence of an indigenous technological capability."[89] This is applicable to all the developed countries as well as the newly industrialized countries. Segai[90] further argues that the international technology transfer cannot be structured so as to foster indigenous capacity. It means that the converse is always true, in a sense that indigenous capacity is a requirement to make sense out of the technology transfer arrangements whatever the modality is.

In spite of the above, developing countries are criticizing the international technology transfer system for their technological underdevelopment on the ground that technologies are inaccessible because of the patent regimes. However, studies indicate that it is the incapacity of developing countries to reap available opportunities that keep them simple bystanders in a technologically competitive world. In this regard, a World Bank study[91] has noted the following:

> A country without the capacity to carry out research on its own benefits very little from the research done elsewhere. A developing country's ability to screen, borrow, and adapt scientific knowledge and technology requires essentially the same research capacity as those needed to generate new technology. Yet few national systems so far have developed the administrative and technological capabilities to absorb and adopt, in an effective way, knowledge and technology that is becoming available to them from the work at the international centers and research institutions in the developed countries.[92]

---

[87] See for example, CIPR, *supra* footnote 11, at p. 24; C. Freeman, *Technology Policy and Economic Performance: Lesson From Japan*, Pinter Publishers, London,/New York, 1987.

[88] RosenbergN. Inside the Black Box: technology and Economics, Newyork Cambridge University Press (1982) p. 271, quoted by A.Segai,*From Technology Transfer to Science and Technology Institutions,* in J. R. McIntyre, and D. S. Papp, (eds.): *The Political Economy of International Technology Transfer*, Quorum Books, N.Y/ Westport, Connecticut/London,1986 p.104

[89] Cited in A. Segai, *supra footnote 88*, at p. 101.

[90] Segai, *supra* footnote 88, at p. 100

[91] World Bank, Agricultural Research, Sector Policy Paper, Washington, DC, 1981, pp.25-26, Qouted by A.Segai, *supra footnote 88, p.104.*

[92] Cited in Segai, *supra* footnote 88, at p. 104.

The above argument posits that international technology transfer can only be tapped and harnessed to national development endeavors in a situation where the country has a better history of research and development activities, coupled with a relatively strong level of local technological capability. As Freeman observed[93], there is always something behind success and failure in technology development. That is why only very few countries have registered success stories in technological development, while for the majority of developing countries the situation is still gloomy and dim. They are not poised to make a difference in their position of the technologically divided world. In this regard, Segai[94] has expressed the reality by using a biblical expression, "… so many societies are called to science and technology, while it is that so few are chosen." It has been often quoted that since the 18th century Western Europe, America and lately Japan became exporters, while Asia, Latin America and Africa were and are importers. The imbalance has been a direct result of the exporters being able to acquire domestic S&T capabilities earlier and to sustain it.

Furthermore, the perception of technology, government policy etc., have been identified as factors that may influence technology transfer and FDI. It has been observed that the major problem created in connection with technology transfer is primarily associated with the conceptualization of technology itself. Technology is considered as a simple end product[95]. However, technology is applied knowledge that requires the ability to acquire and adapt it.

Government policies have also important role in using FDI as a learning opportunity and as a channel of technology transfer. Studies indicate that the difficulty is not to import, but to transform foreign technologies whatever their form: capital goods, licenses, direct investment, so as to contribute to a genuine upgrading of industrial technology development[96]. Availability of foreign technology cannot make a difference in the technological development of a country unless there is a critical minimum level of domestic capacity to make use of the technology, absorb and adapt it to local conditions. This could in part be made possible by putting conducive policy environment in place.

---

[93] See Freeman, *supra* footnote 87.

[94] Segai, *supra* footnote 88, at p. 95

[95] J. McIntyer, *Introduction:: Critical Perspective on International Technology Transfer*, in J. R. McIntyre, and D. S. Papp, (eds.), *The Political Economy of International Technology Transfer*, Quorum Books, N.Y/ Westport, Connecticut/ London, 1986, at p.8

[96] See M. Hambert, *Globalisation and Glocalisation: Problems for Developing Countries and Policy (Supranational, National and Sub national) Implications*, Rio De Janeiro, 2000.

3. Access and Use of Technological Information Contained in Patent Documents

The PCT makes available patent documents to developing countries, thereby, facilitating access to and use of valuable information contained in patent documents. The valuable information made available through patent documents help in making technology transfer and investment decisions as well as avoiding duplication of effort and wastage of resources in R&D and inventive activities. The problem of duplication of efforts and wastage of resources mainly caused due to lack of information or absence of awareness of the importance and nature of the information contained in patent documents is a serious problem in many countries. In this regard, it has been noted that the European Patent Office estimated that the European industry is losing US$ 20 billion every year due to lack of patent information that results in duplication of effort and reinventing products that are already available elsewhere.[97] Patent documents enable the exploitation of technologies that are not protected in a given country or patents that have lapsed before the expiry of protection. Developing countries, where little patent protection is sought, are in a favorable position to freely exploit inventions patented elsewhere but not in their countries using the technological information disclosed in patent documents. Even when patents are protected, developing countries may use the information to invent around the patent or reproduce it when the patent lapses. The majority of patents lapse before the expiry of the duration of protection for not being maintained. Patent laws require for payment of maintenance fee during a prescribed period of time. If the patent is not maintained it is deemed as lapsed. It has been noted that "maintenance of patents that are not being practiced can be expensive, and the average "effective life" of a patent before abandonment is 5 years. Only 37 percent of patents are maintained until the end of their term."[98] In spite of all these opportunities and advantages, little or no use is made of such a valuable source in developing countries, the majority of which are sub-Saharan African countries.

4. Access to Essential Drugs

The relationship between patent and essential drugs has caught attention, particularly with the emergence of HIV/AIDS pandemic. Until the emergence of AIDS pandemic, the perception was that health problems were attributable to poor health care infrastructure, lack of health professionals, finance, distorted government policies and so on. It is the HIV/AIDS pandemic that arose a heightened debate on the relationship between patents and access to affordable medicine. It has been estimated that nearly

---

[97] Idris, *supra* footnote 14, at p. 88

[98] Idris, *supra* footnote 14, at p. 92

40 million people in developing countries, of which 29.4 million in Africa, are living with HIV/AIDS.[99]

The major concern is based on the argument that patents inflate the price of drugs; prevent generic competition; and limits availability and affordability of drugs.[100] It has been argued that a key factor in determining the cost of a drug is its patent.[101] There are studies that show the relationship between patent and price. According to the WHO[102], most patented drugs are sold at 20-100 times marginal cost. Furthermore, Oxfam U.K.[103] noted that patented anti-retroviral therapies cost 3 to 15 times as much as their generic equivalents.

In addition to the impact of patent on price of drugs, the impact of such protection on manufacturing of generic drugs is also invoked as a reason for inaccessibility of essential drugs. Prior to TRIPS, a number of countries excluded patentability of pharmaceutical inventions or limited patent protection to process inventions. Article 27.1 of TRIPS Agreement which require the availability of patents in all fields of technology without discrimination forced countries to recognize patent protection to pharmaceutical inventions. Thus, it has been argued that it would not be possible to manufacture generic products and this may have undesirable impact on both manufacturing enterprises as well as accessibility of drugs to people. Critics have argued that patents would more profoundly affect the health sector. This is to say that, the generic version drug manufacturers that play an important role inmaking prices affordable to the majority of the poor will cease to produce. In this regard it has been noted that countries like India, Argentina, and those from the Middle East argue that TRIPS will seriously affect industries specialized in manufacturing generics and

---

[99] B. Baker, *Death by Patents: Intellectual Property Rights and Access to AIDS Medicine*, (12/1102):Econ-AtrocityBulletins, available at <http://www.fguide.org/Bulletin/patent.htm>, accessed in June 2003.

[100] See the papers presented at a meeting held in Nairobi, Kenya, June 15-16, 2000, on the theme *East African Access to Essential Medicines*, available at <http://www.haiweb.org/mtgs/nairobi200006.html>, accessed in June 2003.

[101] O. ONG'Wen, *The Crocodile Tears: How "TRIPS" Serves West's Monopoly*; The East Africa, March 12, 2001 available at <http://www.nationaudio.com/News/EastAfrica/19032001/Business Opinion2.html>; C. Correa,: *Beyond TRIPS: Protecting Communities Knowledge*, available at <http://csf.colordo.edu/mail/eln/sept97/0047.html>, accessed in June 2003.

[102] Cited in M. Williams, *The TRIPS and Public Health Debate: An Overview*, 2001 available <http://www.genderandtrade.net/WTO/TRIPS_Publichealth.pdf>, accessed __

[103] Oxfam U.K., Patent Injustice: how would trade Rules Threaten the Health of Poor People, February 2001, available at http://www.oxfam.org.uk/What-We-do/issues/health/dc p.4, accessed on 11 February 2006..

improving production process.[104] Moreover, Fluconazole that has been used for the treatment of Aids related meningitis has been mentioned as example. It has been noted that several generic versions of the product are available for US $0.30 per 200 mg capsule, while the drug that is patented in Kenya costs US $18.00.[105]

On the other hand, there are arguments made in favor of the need for patent protection of pharmaceuticals to promote R&D and stimulate transfer of technology and investment. The pharmaceuticals industry, argues that most of the R&D investment estimated at US $24 billion for 1999 is made possible because of the guarantee provided through patent protection.[106] As Juma[107] has noted, less than one third of the approved drugs recoup average R&D costs and, the cost of introducing new drug into the market in the early 1990's exceeded US$500 million; and, thus, it is imperative that firms have to rely on successful drugs to fund new ones. Furthermore, it has been argued that the transfer of technology and investment will be made possible only if there is patent protection since pharmaceuticals are sensitive to patent protection.

As far as the link between patents and HIV/AIDS drugs is concerned, there are studies, which argue that there is no relation between price of drugs and patents. In this regard, it has been noted that most of the AIDS drugs are not under patent protection in most African countries, so governments are free to import or manufacture generic versions. The survey conducted by Attran and Gillospie-White, between October 2000 and March 2001, on 15 ARVs in 53 countries of Africa, showed that with the exception of South Africa, most of the drugs were not patented.[108] The survey concluded that there was almost no treatment of AIDS patients with ARVs in these African countries; and patenting was not found to be the

---

[104] J. Dumoulin, (1998), *Pharmaceuticals: The Role of Biotechnology and Patents*, Biotechnology and Development Monitor, No. 35, pp. 13-15, available at <http://www.biotech-monitor.nl/3505.htm>, accessed in June 2003.

[105] See the reference cited above under foot note 97. Oxfam also argues that if a country were able to import the generic drug Fluconazole,used in the treatment of Cryptococcal mengities (an opportunistic infection associated with HIV/AIDS from Thailand, Kenya could reduce the annual cost of treatment from over US $3000 to US$ 104, suprafoot note 100., *supra foot note 103*.

[106] C. Juma, *Intellectual Property Rights and Globalization: Impacts for Developing Countries*. Science, Technology and Innovation Discussion Paper No. 4, Center for International Development, Harvard University, Cambridge, MA, USA 1999, at p. 7, available at http://www2.cid.harvard.edu/cidbiotec/dp/discuss4.pdf

[107] ibid

[108] See PhRMA: *Health Care in the Developing World: IP and Access to AIDS Drugs*, available at <http://www.world.phrma.org/ip.access.aids.drugs.html>, accessed in June 2003.

major barrier to access to treatment.[109] The problem in using drugs not patented in African countries seems to relate to the absence of capacity.[110] It has often been quoted that African countries have little ability to construct drug combinations that are effective, easy to take and have few side effects without running into drug companies' patent monopolies.[111] It has been noted that of the 40 major exporters of medicinal and pharmaceutical products in the world from 1994-1998, there were six developing countries from Asia (namely, China, Hong Kong, India, Singapore, Republic of Korea, and Thailand), and other four countries from Latin American region (namely, Mexico, Argentina, Brazil, and Colombia). There was not a single country from the African continent.[112]

It has been argued that the problem of health care in developing countries such as access to medicine goes beyond the availability of patent protection. The Independent Commission on IP[113], for example, has noted that the IP system is one factor among several that affect poor people's access to health care. Other important hurdles that impair access to medicines in developing countries are lack of resources and absence of suitable health infrastructure to administer medicines safely and efficaciously. According to the World Health Organization, "50 percent of the population in developing countries do not have access to essential drugs; 50-90 percent of drugs in developing and transitional economies are far beyond the purchasing power of the poor people in these countries; up to 75 percent of antibiotics are not prescribed with due care and diligence; and the patients who take their medicine correctly are less than 50 percent; anti microbial resistance is growing alarmingly for most major infectious diseases; less than one in three developing countries has fully functioning

---

[109] A similar conclusion that patent protection is not a problem in Africa was also reached by International Intellectual Property Institute (IIPI), *Patents Protection and Access to HIV/AIDS Pharmaceuticals in Sub-Saharan Africa*, A Report Prepared for WIPO by International Intellectual Property Institute, 2000, at p. 3, available at http://www.iipi.org/reports/HIV_AIDS_Report.pdf

[110] It is essential to note here that the problem of incapacity is not limited to those drugs that are patented elsewhere, which may be new and sophisticated, but includes those that are off patent and are relatively less sophisticated. *Cf.* IIPI, *supra* footnote 106,, at pp. 52-54

[111] See Health Global Access Project, *Myths and Realities: In the Global Struggle for AIDS Treatment Acces*s, available at <http://www.globaaltreatmentaccess.org/content/ press_releases/01/ 10080_HGAP_FS_myts.pdf>, accessed in June 2003

[112] *See*. table 5, in N. Kumar, *Intellectual Property Rights, Technology and Economic Development: Experience of Asian Countries*, Study Paper 1B, prepared for the work of the Commission on Intellectual Property Right, at pp. 30-31

[113] *See*. CIPR: Press Release, September, 12, 2002, available at http://www.biotech-info.net/independent-commission.html

drug regulatory authorities; 10-20 percent of sampled drugs fail quality controls tests in many developing countries, often resulting in toxic, sometimes lethal products."[114]

There are writers who recognize the need for access to pharmaceutical inventions in developing countries and suggest ways for catering to the public interest. In this regard, for example, Juma[115] has noted that policy interventions are imperative to draw a balance between providing incentives for inventors and the public interest. One of the policy interventions is public sector funding to make sure that the R&D spillovers benefit everyone in the society without the privileges of exclusive rights. In the absence of such public R&D support, Juma[116] argues that extending intellectual property protection is one of the alternatives that can be devised.

In relation to access to medicine, it has also been noted that there are built in safeguards within the patent system that would enable to cater for the public interest. These are parallel imports, compulsory licensing and Bolar exception.[117] Compulsory license and parallel importing were identified as critical tools for developing countries to improve access to lower priced essential medicines

The TRIPS Agreement in Article 6 and Article 31 leaves member States to determine exhaustion of rights and provides for the grounds for the issuance of compulsory license. However, the use of compulsory license has been difficult. Most of the developing countries have no licensees with the potential to manufacture locally. Furthermore, Article 31(f) limits such use for the supply of the domestic market. This requirement made it difficult to import cheap drugs produced by other developing countries. The public health concern and the limitation of Article 31(f) was an issue of negotiations in WTO that resulted in The Doha Ministerial Declaration on Public Health. The Ministers clarified that TRIPS should not prevent countries from taking measures to protect public health. They confirmed that, within the terms of the agreement, compulsory licenses could be granted on grounds determined by member countries. Moreover, domestic demand could be supplied by parallel imports. They also recognized that a special problem existed in countries with insufficient manufacturing capacity in making use of compulsory license, and instructed the TRIPS Council to find a solution by the end of the year. The Council, however, had not arrived at the expected solution until 2003. The member states of WTO on 30 August 2003, made a decision to enable countries that have no manufacturing capacity

---

[114] Cited in IIPI, *supra* footnote 109, at p. 9

[115] Juma, *supra* footnote 106, at p. 8

[116] *ibid*

[117] CIPR, *supra* footnote11, at pp. 39-50; *See* also papers presented at the Nairobi meeting, referenced above under foot note 97, and C. Correa, *Beyond TRIPS: Protecting Communities Knowledge, available* at http://csf.colorado.edu/mail/elan/sep 97/0047.html.

to import cheaper generic versions of patented medicines manufactured under compulsory license in the exporting country.[118]The decision waives the obligations under Article 31(f) that limit production of pharmaceutical products and its export to eligible importing member countries.[119] The member states agreed that the waiver would last until the article is amended and enters in effect.[120]

The general council further decided that the TRIPS council initiate by the end of 2003 work on the preparation of such amendment.[121]In line with this, negotiations were conducted, which resulted in a historical decision by WTO member states. The general Council on 6 December 2005 adopted the protocol[122] along with an ANNEX and appendix amending the TRIPS agreement and decided that it shall be open for acceptance by members until 1 December 2007 or such later date as may be decided by the Ministerial Conference.[123] The provisions of Article 31 *bis* that amended the TRIPS Agreement are the following:

1. The obligations of an exporting Member under Article 31 (f) shall not apply with respect to the grant by it of a compulsory license to the extent necessary for the purposes of production of a pharmaceutical product(s) and its export to an eligible importing Member (s) in accordance with the terms set out in paragraph 2 of the Annex to this agreement.
2. Where a compulsory license is granted by an exporting Member under the system set out in this article and the Annex of this agreement, adequate remuneration pursuant to Article 31 (h) shall be paid in that Member taking in to account the economic value to the importing Member of the Use that has been authorized in the exporting Member. Where a compulsory license is granted for the same products in the eligible importing member, the obligation of that member under Article 31 (h) shall not apply in respect of those products for which remuneration in accordance with the first sentence of this paragraph is paid in the exporting member.
3. With a view to harnessing economies of scale for the purposes of enhancing purchasing power for, and facilitating the local production of, pharmaceutical products: where a developing or least developed country WTO Member is a

---

[118] World Trade Organization, Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, Decision of 30 August 2003, WT?L540. For the purpose of understanding eligible importing country and exporting country, see paragraph 1 of the decision.

[119] See, *Supra note* 118, paragraph 2.

[120] See, *Supra note* 118, paragraph 11

[121] ibid

[122] The protocol states that the Agreemnt on Trade Related Aspects of Intellectual Property Right (the "TRIPS Agreement') shall, upon the expiry of the protocol pursuant to paragraph 4, be amended as set out in the Annex to this protocol, by inserting Article 31 *bis and* by inserting the Annex to the TRIPS Agreement after Article 73.

[123] World Trade Organization, Amendment of the TRIPS Agreement, WT/L/641.

party to a regional trade agreement within the meaning of Article XXIV of the GATT 1994 and the Decision of 28 November 1979 on Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries (L/4903), at least half of the current list of least developed countries, the obligation of that Member under Article 31(f) shall not apply to the extent necessary to enable a pharmaceutical product produced or imported under a compulsory license in that Member to be exported to the markets of those other developing or least developed country parties to the regional trade agreement that share the health problem in question. It is understood that this will not prejudice the territorial nature of the patent in question.

4. Members shall not challenge any measures taken in conformity with the provisions of this article and the Annex to this Agreement under subparagraph 1(b) and 1 (c) of Article XXVIII of GATT 1994.
5. This Article and the Annex to this Agreement are with out prejudice to the rights, obligations and flexibilities that Members have under the provisions of the Agreement other than paragraphs (f) and (h) of Article 31, including those reaffirmed by the Declaration of the TRIPS Agreement and Public Health (WT/MIN/DEC/2) , and to their interpretation. They are also without prejudice to the extent to which pharmaceutical products produced under a compulsory license can be exported under the provisions of Article 31 (f).

The Annex[124]to the above article defines the terms and conditions for using the system, and deals with issues, such as definitions, notification, diversion of pharmaceutical products to the wrong markets, developing regional systems to allow economies of scale, and annual reviews to the TRIPS Council.[125]The appendix deems least developed country members to have insufficient or no manufacturing capacities in the pharmaceutical sector and enumerates the conditions that eligible importing members should meet to benefit from the system.[126]

5. Access to Traditional Knowledge and Genetic Resources

There is an increasing recognition of the value and a growing demand of traditional knowledge and genetic resources to deal with various socio-economic and technological problems. Traditional knowledge has played an important role in identifying biological resources worthy of commercial exploitation. It has been noted that the search for new pharmaceuticals from naturally occurring biological materials

[124] See, *supra note* 123, Annex to the Protoccol Amending the TRIPS Agreement, pp.4-6.
[125] Ibid ,
[126] See, *supra note 123,an* Appendix to the Annex to the TRIPS Agreement, P.7

has been guided by ethno biological data.[127] Furthermore, genetic resources have been used as a basis for the search of new products. It has been noted that of the 119 drugs developed from higher plants on the world market, it is estimated that 74% were discovered from a pool of traditional herbal medicine.[128] In monetary terms this is quite substantial. In 1995, the annual world market for medicines derived from medicinal plants discovered from indigenous peoples was estimated to amount to US$43 billion.[129] These resources, however, have often been misappropriated, accessed and used freely without the authorization of and benefit for local communities that have kept and nurtured them for generations.

The patent system is criticized, among others, for failing to prevent misappropriation, provide a scheme that would ensure sharing of benefits and a mechanism for protection of traditional knowledge. It has been noted that a large number of patents have been granted on genetic resources and knowledge obtained from developing countries, without the consent of the possessors of the resources and knowledge.[130] In this regard, the patents granted by the United States Patent and Trade Mark Office (USPTO) and the European Patent Office (EPO) can be mentioned as examples. The USPTO granted a patent in 1998, for a method of using turmeric powder to heal wounds. Turmeric is a plant of the ginger family that has been used as a traditional medicine to heal wounds and rashes by Indians for years. The Indian Council of Scientific and Industrial Research, challenged the validity of the patent; and eventually the patent was revoked. The case, which cost the Indian Government about US$ 10,000, is considered as a landmark where a patent based on the traditional knowledge of a developing country has for the first time successfully been challenged.[131] Similarly, the EPO granted a patent for a method for controlling fungal plants by the aid of hydrophobic extracted neem oil in 1994. Local communities in India have been using neem extracts to heal fungal diseases since time immemorial.

---

[127] McCheney, *Biological Diversity, Chemical Diversity and the Search for New Pharmaceuticals*, in M. Balick, E. Elisabesk, and S. Larid, (eds.), *Medicinal Resources of the Tropical Forest: Biodiversity and its Importance to Human Health*, Colombia, University of Columbia Press 1996. at p. 12.

[128] Laird *et al* (eds.), *Biodiversity Prospecting: using Genetic Resources for Sustainable Development*, World Resource Institute, Washington, DC 1993, at p. 6

[129] J. Mugabe, *Intellectual Property Protection and Traditional Knowledge: An Exploration in International Policy Discourse*, Biopolicy International Series No 21, 1999; M. Blakeney, *What is Traditional Knowledge? Why should it be protected? Who should protect it? For Whom:Understanding the Value Chain*, WIPO/IPTK/RT/99/3, Geneva 1999, at p. 9

[130] C. Correa, *Traditional Knowledge and Intellectual Property: Issues surrounding the Protection of Traditional Knowledge*, 2001 , p.7 available at <http://www.quno.org/geneva,pdf/economic/discusssion/traditional -knowledge-IP-English.pdf accessed on 21 Februalry 2006

[131] CIPR, *supra* footnote 11, at p.75

The patent was challenged by international NGOs and representatives of Indian farmers and was revoked in 2000.[132]

The reason behind the grant of the above and similar patents, which are also referred to as bad patents, is linked to the non-availability or inaccessibility of relevant information and documentation to patent examiners. Traditional knowledge is often not documented. Even when documented, it may not be available in an organized manner to help patent examiners in undertaking prior art search. The mode in which traditional knowledge is available and its accessibility was invoked as a reason behind the issuance of bad patents. Correa noted that the US government has justified the problems behind the granting of invalid patents as follows:

> Informal systems of knowledge often depend upon face-to-face communication, thereby limiting access to the information to persons in direct contact with one another. The public at large does not benefit from the knowledge nor can the knowledge be built upon. In addition, if information is not written down, that information is completely inaccessible to patent examiners everywhere as prior art when they are examining patent applications. It is possible, therefore, for a patent to be issued claiming as an invention technology that is known to a particular indigenous community. The fault lies not with the patent system, however, but with the inaccessibility of the knowledge involved beyond the indigenous community."[133]

The problem, however, is beyond the absence of information. Even when information is available such as prior public use, such information may not be considered as part of the prior art for purpose of determining the novelty of an alleged invention. There is no uniformity in patent laws on what constitutes "prior art". In most patent laws, prior public use or disclosure of an invention defeats the novelty of an invention.[134] However, this is not the case in the USA. In accordance with section 102 of the US Patent Law, information that has been published in a written form in the USA or in any other country is not patentable. But, if the information was publicly used but not documented in a foreign country, novelty is not lost. Correa[135] argued that unless this relative standard of novelty is modified, the problems of appropriation of TK remain unsettled.

---

[132] ibid

[133] Correa, *supra* footnote 130, at p. 7.

[134] *See*. Biotechnology, WIPO Working Group on Biotechnology recommendation of re-examining this issue WIPO/BIOT/WG/99/1, Paragraph 49 (October 28, 1999).

[135] Correa, *supra* footnote 130, at p. 8

This is one of the issues that are being looked into currently at the WIPO Standing Committee on Patents. The draft Substantive Patent Law that is under negotiation aims to determine what constitutes a prior art. As Kirk[136] noted, oral disclosures of traditional knowledge will be prior art available for use in rejecting patent claims in accordance with the present draft Treaty language.

India revised its patent law to prevent the granting of patents based on knowledge, which was not necessarily documented. Provisions had been incorporated to include the anticipation of inventions made available using local knowledge, including oral knowledge, as one of the grounds for opposition and revocation of patents, if patent is granted.[137]

The existing patent system is criticized for failing to provide for compensation or a mechanism that will facilitate the sharing of benefits. It has, for example, been noted that under the Australian Intellectual Property Law there is no obligation for companies, which utilize the traditional medicinal knowledge of Aboriginal people to provide any compensation or to recognize their equity in the commercial application of their knowledge.[138]

Patent laws do not require patent applicants to disclose the origin of biological resources used in inventions in their patent applications. Recently, efforts have been made to amend existing patent laws by imposing the obligation to indicate the origin of a genetic resource. India has already taken the initiative in this regard. The 1999 Patent (Second Amendment) Bill of India provides the grounds for rejection of the patent application as well as revocation of the patent. This includes non-disclosure or wrongful disclosure of the source of origin of biological resource or knowledge in the patent application. It has also been made incumbent upon patent applicants to disclose the source of origin of the biological materials used in the invention in their patent application.[139]

However, the mere revision of national patent laws is not enough. There is a need for incorporation of the same by other countries, particularly by the developed countries that have the capacity to use genetic resources accessed from developing countries.

---

[136] M.Kirk, *Competing Demands on Public Policy,* WIPO Conference on the International Patent System, Geneva, 2002, at PP.8-9.

[137] WIPO Intergovernemntal Committie on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, first session, Geneva, 2001, document WIPO/GRTKF/IC/1/13 pp.11.

[138] Blakeney, *supra* footnote 129, at p. 9

[139] See also *supra* footnote 129, at p. 11_, See also Correa, 2001, *supra foot note 130, at p.19.*

Nevertheless, the proposal made by the delegation of Colombia to incorporate such a requirement during the negotiation of the Patent Law Treaty was not accepted.[140]

The incorporation of such a requirement both by national and international laws would allow protection of the rights of the countries supplying the materials and the application of the principle of benefit-sharing as stipulated in the Convention on Biological Diversity (CBD).[141]

The need for protection of traditional knowledge is well felt. However, there is neither common understanding on the rationale nor uniformity in the approaches with regard to the protection of TK and genetic resources. As Correa[142] noted, some understood the concept of protection in the sense of excluding unauthorized use, while others considered protection as a tool to preserve traditional knowledge from uses that may negatively affect the life or culture of the communities that have developed and applied it. The approaches employed or proposed to be employed include use of existing IPR systems, a new *sui generis* scheme, documentation and registration, and contracts. Different countries have used the existing intellectual property rights including patents to meet the need for protection of traditional knowledge. China, for example, has used its patent law to protect traditional medicine. It was reported that 12,000 patent applications were filed with the Chinese Patent Office in 1999 for the protection of traditional medicines, most of which were domestic applications.[143]

Critics have argued that the existing patent system, however, is inadequate to accommodate the need for the protection of traditional knowledge. The system does not deal with any knowledge or the product thereof, but specific creations of the mind that would constitute an invention. This would exclude traditional knowledge that may not be explained as a product or process invention. Furthermore, the stringent requirements such as novelty exclude knowledge that is made available to the public. Even when the knowledge is secret, the requirement of disclosure will discourage the use of the system. Traditional knowledge holders are often hesitant to disclose their knowledge mainly for two reasons. First, they may not be confident with the system. Traditional knowledge holders such as traditional medicinal practitioners (TMPs) fear that they would lose their means of livelihood if the knowledge is disclosed without any mechanism to compensate them. The other relates to belief and value systems.

---

[140] Correa, *supra* footnote 130, at p. 19 noted that other members did not accept the proposal made by Colombia.

[141] ibid

[142] Correa, *supra* footnote 130, at p. 5

[143] Z,Yongfeng, 2002, *The Means and Experience of Patent Protecion of Traditional Medicine in China,* Paper presented at a seminar on Traditional Knowledge organized by the Government of India in cooperation with UNCTAD secretariat, Delhi, available at http://www.unctad.org/trade_env/test 1/meetings/delhi/coutriestext/chinaspeech.doc, p.1

TMPs feel that the medicinal value of a certain product of knowledge would be lost if it is disclosed.

The use of a *sui generis* scheme to meet the need for the protection of traditional knowledge is often proposed; and some countries have adopted it. *Sui generis* is a Latin phrase meaning "of its own kind." A *sui generis* system, for example, is a system specifically designed to address the needs and concerns of a particular issue. The system could be a known IPR regime[144] or a regime that is entirely new. Such a regime might aim specifically to protect traditional knowledge or certain aspects of traditional knowledge such as those related to biological resources or biodiversity. In the latter case the protection of TK is accommodated within a broader set of objectives such as access and benefit sharing (ABS) systems and conservation framework legislation.[145] It may be because of this that *sui generis* protection schemes have been adapted by some countries and proposed by different writers.

The *sui generis* system mainly aims to protect traditional knowledge associated to biological resources. The countries that developed a scheme of protection of traditional knowledge associated to biodiversity include Philippines, Costa Rica and Brazil.[146] The main purpose of these regimes is the regulation of access to resources and accompanying knowledge and ensuring sharing of benefits. As such the regimes can hardly be said schemes of protection of traditional knowledge (TK); there is no definition for TK, the requirements that should be met for protection are not provided, the scope of rights is not determined, etc.

The need for documentation of TK is well recognized and steps have been taken. Documentation and registration of TK, amongst others, is intended to control bio

---

[144] According to WIPO specific *sui generis* mechanisms have been developed with in general IP law to deal with particular needs or policy objectives relating to specific subject matter: these include specific legal provisions and practical or administrative measures. For example, *sui generis* disclosure obligations, in the form of requirements for the deposit of samples can apply to patent procedures relating to new microorganisms (in accordance with the Budapest treaty on International recognition of the deposit of Microorganisms for the purposes of patent procedure)- WIPO/GRTKF/IC/3/8 what makes an intellectual property system a *sui generis* one is the modification of its subject matter, and the specific policy needs which led to the establishment of a distinct system.

[145] G. Dutfield, *Developing and Implementing National Systems for Protecting Traditional Knowledge: A Review of Experiences in Selected Developing Countries*, Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices, 30 October- 1 November, 2000, Geneva, UNCTAD 2000, at p.11.

[146] *Cf.* The Philippines 1995 Presidential Executive Order and Indigenous Peoples Rights Act, No. 8371 of 1997; biodiversity laws of Costa Rica and Brazil.

piracy, prevent loss of knowledge, and ensure sharing of benefits.[147] Several developed and developing countries have agreed on the importance of documenting TK. Once published, novelty on the disclosed information could not be claimed. The Indian Government initiative to establish a Digital Library System for Traditional Knowledge is considered as an important landmark to ease the problems that may arise in relation to IPR protection and traditional knowledge. India has "set up a TK digital library", namely an electronic data base of TK in the field of medicinal plants and took a step to put the data base on a network making it accessible to patent offices throughout the world.[148] Any body that sought any kind of IPRs protection on research based on biological resources or knowledge obtained from India would need to obtain prior approval.[149] The main purpose of documentation in India seems to prevent bio piracy and provide a basis for sharing of benefits arising out of the use of such knowledge. This positive step should be complemented by similar measures taken at the international level. In this regard Maskus[150] noted that WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is working to mitigate the problem of issuance of bad patents by establishing links between patent offices and those collections of traditional knowledge documentation that do exist as well as by encouraging the creation of documentation for other traditional knowledge that is in the public domain.

The issue of misappropriation of traditional knowledge and genetic resources as well as the absence of benefit sharing schemes has attracted international attention. Efforts are being made at regional and international levels to address the issue of protection of TK. Regional initiatives including those made by the OAU[33] and the Andean Group can be mentioned as examples.[151] The international forums at which TK is discussed, with a view to elaborating the concepts and issues involved, include WIPO, the CBD Secretariat, UNCTAD, WHO, and WTO. The WIPO Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is working on issues relating to contractual practices, TK databases and preparation of a document with elements for a possible *sui generis* system for the protection of TK. The WTO forum tends to focus on the elaboration of the concepts of TK as well as review of the relationship between existing international legal instruments such as

---

[147] For reasons of registration, *see*. Seedling Solutions, Vol.2, pp. 53-54.

[148] See M. Blakeney , *supra* footnote 126,at p.11

[149] *see* WIPO/GRTKF/IC/1/13 pp. 11-12.

[150] Maskus, *supra* footnote 56, at p. 8

[33] *See* OAU Model Law on the protection of the rights of communities, farmers and breeders and the regulation of access to biological resources,1998.

[151] See the common regime on access to genetic resources of the Andean community, Decision 391 and the Common Intellectual Property of the region of the Andean Community that entered in to force on December 1, 2000.

between the provisions of the TRIPS Agreement, Article 27.3(b) in particular, and the CBD.[152]

B. IMPACT ON CHANGE OF LEGISLATION AND ENFORCEMENT OF PATENTS

The harmonization of procedural and substantive requirements of patents has benefits and costs. An example of beneficial harmonization is that made by the PCT. The system, that made possible a single filing of patent application provides for a state-of-the-art search, a preliminary examination report and a centralized publication of applications. This system is advantageous to applicants, patent offices and developing countries. This may be elaborated by taking the available prior art search as an example. An applicant may use the report to decide to continue or discontinue his/her/its application. Patent offices can use the report to decide on whether or not an invention fulfills the criteria of patentability. This means a lot, in particular, to patent offices of developing and least developed countries. These offices lack qualified manpower, adequate information and documentation as well as the facilities to process patent applications.

On the other hand, however, critics argue that the harmonization of substantive requirements such as that was made by TRIPS Agreement restricts the freedom of developing countries in fine-tuning their patent system in line with their level of techno-economic development. Moreover, it has been noted that developing countries may incur cost as a result of the harmonization. Before the TRIPS Agreement, countries were free to exclude certain inventions such as pharmaceuticals, food products, and biological materials from patenting; to limit the exclusive right of the patentee such as excluding import monopoly from the exclusive right of the patent holder, setting flexible duration for a patent such as attaching the extension of the life of a patent to the domestic exploitation of the protected invention etc.[153] It has for example been noted that prior to TRIPS over 40 countries had not provided patents protection for pharmaceuticals, many provided only process and not product patents[154], and the protection was much less than 20 years in many countries; and these freedoms are highly restricted by the TRIPS Agreement.

---

[152] See Paragraph 19 of the Doha WTO Ministerial declaration.

[153] M. Kohr, *Patent System Facing Legitimacy Crisis*, Third World Net Work, March 26, 2001, available at <http://www.twnside.org.sg/title/ef0110.htm>, accessed in June 2003.

[154] Oxfam noted that prior to TRIPS,approximately 50 developing countries either excluded medicnes from being patented or provided patents only for production processes rather than products, Oxfam, *supra foot note 103,* p.18

In addition to the above, the implementation of the TRIPS Agreement, among others, involves the amendment of existing legislations, the adoption of new ones, the strengthening of IPR administration and building up of enforcement capacity. These entail a huge financial cost on the developing countries. In order to appreciate the problem, the required reform and the estimated cost in selected countries is taken from an UNCTAD study as an example and shown in the table below:[155]

Table 2: UNCTAD case study related to estimated costs for reform and capacity building in selected countries

Country	Reforms Needed	Cost in US$
Bangladesh	Draft new laws, improve enforcement	$250,000 one time plus $1.1 million annually
Chile	Draft new laws, train staff administering IPR laws	$718,000 one time plus $837,000 annually
Egypt	Train staff administering IPR laws	$1.8 million
India	Modernize Patent office	$5.9 million
Tanzania	Draft new laws, develop enforcement capability	$1.0-1.5 million

It has also been noted that the above estimates do not include training costs that would be high in developing countries where trained professionals are extremely scarce. Maskus[156] underlined that the above indicated estimates may be low since they were not prepared on extensive studies using a standardized methodology. He has also noted that there is a concern that the largest cost of implementing an effective administrative system would be diversion of scarce professional and technical resources into such administration from other productive activities.[157]

Developing countries need to make effective use of loopholes as well as opportunities to deal with the problems they may encounter in their effort to comply with the TRIPS Agreement. It has been posited that the flexibilities available in the TRIPS Agreement could be exploited in designing patent legislations.[158] In order to deal with the problem associated with administrative cost and capacity building, developing countries may exploit a number of avenues such as levying fees on administrative services as well as seeking technical assistance from developed

---

[155] UNCTAD, *supra* footnote 68, at pp. 25-26

[156] Maskus, *supra* footnote 59, at pp. 173-174, See also UNCTAD, *supra* footnote 64, at p.19

[157] Maskus, *supra* footnote 59, at p. 174

[158] See CIPR, *supra* footnote 11, at pp. 49, 114-121; ad Maskus, *supra* footnote 59, at pp. 177-180.

countries. Theses countries have the obligation to provide technical and financial assistance to developing countries to facilitate the implementation of the TRIPS Agreement.[159] Maskus[160] has underlined that developing countries may petition for technical and financial assistance from the industrialized countries and the multilateral organizations such as WIPO and WTO. There are others who argue that developed countries in particular foreign right holders should be the basic source of technical assistance. In this regard, CIPR argued that WIPO, the European Patent Office (EPO) and developed countries should significantly expand their programs of IP related technical assistance by making modest increases in intellectual property right user fees[161]

Joining regional patent systems and international patent agreements such as the PCT has also been indicated as an alternative means to cope with the administrative burden developing countries may face while trying to comply with the requirements of the TRIPS Agreement.[162] Maskus[163], for example, suggested that developing countries might join the PCT that provides significant advantage. Examiners may read the opinions of major patent offices about novelty and industrial applicability, rather than undertaking technical examination by themselves. This would reduce cost and the burden on the few trained patent examiners, if any, of patent offices of developing countries.

PART IV: CURRENT DEVELOPMENTS AND FUTURE TRENDS OF THE INTERNATIONAL PATENT SYSTEM AND OPTIONS FOR DEVELOPING COUNTRIES

A. CURRENT DEVELOPMENTS AND FUTURE TRENDS

1. The Patent Law Treaty (PLT)

The Patent Law Treaty (PLT) was adopted in a diplomatic conference held in June 2000. The Treaty aims to harmonize formal and procedural requirements for granting

---

[159] See Article 67 of the TRIPS agreement.

[160] Maskus, *supra* footnote 59,, at p. 174

[161] CIPR, *supra* footnote 11, at p.151.

[162] *See* Maskus, *supra* footnote 59, at p 174, CIPR, *supra* footnote 10, at p. 143, UNCTAD, *supra* footnote 68, at p. 37.

[163] Maskus, *supra* footnote 59, at p. 174

and maintaining patents. These requirements include according filing date, content and form of application, representation, communication and notification. The Treaty provides for electronic filing of patent applications. This may be difficult to implement in many developing countries where patent offices are not equipped with the necessary facility. Cognizant of the position of developing countries, the diplomatic conference called for a grace period and requires for the provision of assistance to these countries to facilitate electronic filing of applications. The statement by the diplomatic conference regarding the treaty and the regulations under the Treaty stated that "with a view to facilitating the implementation of rule 8(1)(a) of this treaty, the diplomatic conference requests the general assembly of WIPO and the contracting parties to provide the developing and least developed countries as well as countries in transition with additional technical assistance to meet their obligations under this treaty, even before the entry into force of the treaty. The diplomatic conference further urges industrialized market economies to provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favor of developing and least developed countries and countries in transition."[164]

The PLT is open to States party to the Paris Convention or are members of WIPO, intergovernmental organization that has at least one member state party to the Paris Convention or WIPO and regional patent organizations that have adopted the Treaty in the diplomatic conference and duly authorized to become a party.

The Treaty will enter into force three months after ten instruments of ratification or accession have been deposited with the Director General of WIPO. As of January 15, 2006, only eleven countries ratified though there are 53 states and one regional patent organization that signed the treaty. The states that deposited the instruments of ratification and accession are Bahrain, Croatia, Denmark, Estonia, Kyrgyzstan, Nigeria, Republic of Moldova, Romania, Slovakia and Slovenia.[165] The majority of these are developing countries and countries in transition.

4.1.2 Draft Substantive Patent Law Treaty (SPLT)

The Paris Convention and the TRIPS Agreement deal with a number of substantive requirements with the aim to harmonize patent laws of member states. However, both agreements left a number of substantive issues to be dealt with by national patent laws. The Draft Substantive Patent Law Treaty (SPLT) therefore aims to fill this gap.

---

[164] See WIPO, *Patent Law Treaty and Regulations under the Patent Law Treaty, Explanatory Notes on the Patent Law Treaty and the Regulations under the Patent Law Treaty*, pp. 64-65.

[165] WIPO, Treaties Database: Contracting Parties, http://www.wipo.imt/treaties/en, accessed on 17 January 2006.

The issues that SPLT deals with include the requirement for technical character of inventions, definition of prior art and exclusions from patentability. Since national laws for various considerations deal with these issues differently, the negotiation on the draft SPLT is full of serious controversy. Two issues, among others, may be taken as examples to show the debate between countries.

One of the most controversial and debatable issues in the patenting system is the requirement for technical character of the invention. In the earlier days, patentability was confined to technical inventions, and thus, there was no problem. However, with the advent of the biotechnology and information technology revolutions, the requirement for technical character of inventions has been challenged. This brought a change in the patent laws of countries such as the USA. So, now it is possible to secure patents for software and business methods, which are excluded in a number of countries from patenting.[166]

It has been noted that this issue was a dividing line between the developing countries and the USA. The developing countries want to stick to the concept that a patentable invention should show a technical character, while the USA argues that the technical character requirement unnecessarily limits innovations in new areas of technology and is contrary to Article 27.1 of the TRIPS Agreement that allows patenting "in all fields of technology". Furthermore, the USA argues that the standard for patentability should be that an invention only provides for a practical application having a useful, concrete and tangible result.[167]

The second substantive issue that was a bone of contention relates to the scope of patentability. The harmonization of the criteria of patentability is important. Michael Kirk[168] noted that this would permit patent offices to base their decisions to grant or deny patents on precisely the same criteria so that a decision by one office need not be completely reevaluated by other patent offices when the same application reaches them. However, there is a serious debate between the developed and developing countries in relation to the delimitation of the scope of patentability.

Some developing countries[169] sought the SPLT to incorporate the provisions of Articles 27.2 and 27.3 of the TRIPS Agreement to enable countries to exclude certain inventions from patentability on the ground of public interest. However, the United

---

[166] C. Correa and F. Mussungu, *The WIPO Agenda: The Risks For Developing Countries*, Working Paper, South Center, 2002, at p. 19.

[167] *see WIPO/.* SCP/6/9 para. 185, cited in Correa and Musungu, *supra* footnote 163, at p. 20.

[168] M. Kirk, *supra foot note* 136, at p. 12

[169] These countries were Argentina, Brazil, and Guatemala, as noted by Correa and Mussungu, *supra foot note* 163, p.20.

States and the biotechnology industry argue that the TRIPS Agreement "provides for minimum requirements under the WTO" and that the SPLT, in contrast, would aim at establishing best practices at the international level."[170] These and similar issues are still under debate, and the resolution remains to be seen in the future.

3. Revision of the Patent Cooperation Treaty

The revision of the Patent Cooperation Treaty (PCT) which started in October 2000, arose from the need to deal with the challenges encountered by national patent offices and international searching and examination authority such as increasing work load and duplication of effort as well as the problems faced by patent applicants such as the cost of application and processing of patents.

The initiative to reform the PCT[171] had been supported by both developed and developing countries.[172] The PCT Assembly has amended the PCT regulations under the ongoing reform. The amendments made so far include the alignment of the PCT requirements with those of the PLT with regard to the language of international application and translations and the reinstatement of rights after failure to comply with requirements for entering the national phase within the prescribed time limit, which

---

[170] See SCP/6/9, para.186, referred to by Correa and Musungu, *supra foot note* 163 at p.20.

[171] The aims of the reform are provided in the document Objectives PCT/R/1/26, para. 66 as follows:: "(a) simplification of the system and streamlining of procedures, noting also that many PCT requirements and procedures will become more widely applicable by virtue of the patent law treaty; (b) reduction of costs for applicants, bearing in mind the differing needs of applicants in industrialized and developing countries including individual inventors and small and medium sized enterprises as well as larger corporate applicants; (c) ensuring that PCT Authorities can meet their workload while maintaining the quality of the services provided; (d) avoiding unnecessary duplication in the work carried out by PCT Authorities and by national and regional industrial property offices; (e) ensuring that the system works to the advantage of all Offices, irrespective of their size; (f) maintaining an appropriate balance between the interests of applicants and third parties, and also taking into account the interests of States; (g) expanding programs for technical assistance to developing countries, especially in the area of information technology; (h) alignment of the PCT, to the extent possible, with the provisions of PLT; (i) coordination of PCT reform with the ongoing substantive harmonization work being carried out by WIPO´s Standing committee on the Law of Patents; (j) taking maximum advantage of modern information and communications technology, including the establishment of common technical and software standards for electronic filing and processing of PCT applications; (k) simplifying, clarifying and, where possible, shortening the wording of the provisions of the Treaty and the Regulations; (l) streamlining the distribution of provisions between the Treaty and the Regulations in order, in particular, to gain increased flexibility

[172] See PCT/R/1/26.

entered into force on 1 January 2003 and introduced an enhanced international search and preliminary examination system that entered into force on 1 January 2004.

Under the new system, the international searching authority would be responsible for establishing a preliminary non-binding written opinion on the questions whether the claimed invention appears to be novel, involve an inventive step and industrially applicable. The compulsory written opinion by the International Searching Authority is equivalent to the first written opinion of the International Preliminary Examining Authority. The report will also be used during the international preliminary examination. As a result the two tasks are referred to as preliminary international examination (Chapter I) and preliminary international examination (Chapter II). The main distinction between the two reports lie on the fact that the former is mandatory and is based on the text of the application while the later is made upon request of the applicant after receipt of the first report and is made following a dialogue between the applicant and the examiner.[173]

The reports that provide a reasoned opinion on novelty, inventive step, and industrial applicability of international applications will be useful for designated countries, in particular developing countries where patent offices have no capacity for search and examination.

4. The Patent Agenda

The Director General of WIPO introduced the "WIPO Patent Agenda" in the thirty-sixth series of meetings of the Assemblies of Member States of WIPO.[174] In his memorandum, the Director General highlighted the challenges and shortcomings of the existing international patent system, the need to streamline the ongoing harmonization initiatives, complemented by new ones and suggested solutions to some of the problems. In introducing the agenda, the Director General underlined that his "prime objective was to initiate open and world wide consultations to prepare a strategic blue print for change in the international patent system and emphasized that this initiative was not intended to replace or undermine on going activities with regard to PCT reform and harmonization of substantive patent laws, but rather it would complement and even strengthen them."[175] The Agenda was intended to prepare a

---

[173] PCT/A/31/6, para. 16.

[174] *see*. WIPO document A/36/14: Memorandum of the Director General, Agenda for Development of the International Patent System, August 6, 2001: Geneva.

[175] *see* WIPO Assemblies of Member States of WIPO, thirty-sixth series of meetings, Geneva, September 24 to October 3, 2001, Geneva, Report adopted by the Assemblies, A/36/15, para. 195.

coherent orientation for the future evolution of the international patent system, ensuring that the work undertaken by the International Bureau and by member states in their cooperation with the organization was directed towards achieving a common goal. It was introduced with the belief that the international patent system should become more users friendly and accessible, and provides an appropriate balance between the rights of inventors and the general public, while at the same time taking in to account the implications for the developing world.[176]

The WIPO General Assembly, the Paris Union and the PCT Assembly approved the initiative of the Director General and instructed that further work, which would take into account the views expressed at the assemblies session, including the request for a study by the Secretariat on the possible implication of the proposal on developing countries be done and presented for discussion by the WIPO General Assembly and the assemblies of the Paris and PCT Unions in September 2002.[177] The secretariat presented a document, A/37/6, using comments received and matters raised in discussions during the Conference on the International Patent System held in March 2002 to discuss the WIPO Patent Agenda. The document outlined the challenges the international patent system faced, highlighted a number of issues and indicated options for the future development of the system.

During the discussions, member countries expressed common and different concerns. The shared concerns include appreciation of the challenges and how they should be addressed as well as the notes of caution made in relation to the initiative.[178]

---

[176] See WIPO document A/37/6, para. 2. The studies commissioned by WIPO and the agenda were discussed during the Thirty-Ninth Series of the Assemblies of the Member States of WIPo. Member states expressed different views regarding the studies and the Patent agenda. The meeting took note of the contents of the document on the Agenda as well as the studies made available in documents A/39/13 Add.1 to Add.4. For the purpose of examining the divergent views of the states, see WIPO Assemblies of the Member States of WIPO: Thirty-Ninth Series of meeings, Geneva, September 22 to October 1,2003, General Report, Document A/39/15 Paragraphs 169-185.

[177] See WIPO document A/36/14, para. 42 and A/36/15, para. 222.

[178] Developing and developed countries had recognized the problem of workload faced and the need to simplify and streamline patent procedures. For example, the delegation of Barbados on behalf of the group of Latin American and Caribbean countries (GRULAC) expressed GRULAC's willingness to participate constructively in discussions to deal with the problem of workload aiming at the rationalization of patent procedure. The delegation of France also expressed the same feeling. It stated that the increasing workload of national patent offices and the PCT authority would be lessened and duplication of effort eliminated by further rationalization and simplification of the PCT system. Some of the advanced countries expressed their concern that the initiative is beyond the mandate of WIPO or is ambitious. The delegation of USA stated that

B. OPTIONS FOR DEVELOPING COUNTRIES

1. Options

We have seen that the international patent system is evolving. The harmonization of procedural and formal requirements and certain substantive issues are under negotiation. It will thus be high time to consider these and forthcoming developments and think of possible options for developing countries.

To sum up, the current and future harmonization measures will result in stronger patent protection that may affect the interest of developing countries. According to

---

many of the proposals such as the creation of "substantive central patenting authorities" contained in the document appeared to go beyond the mandate of WIPO and may lead to unfocussed and undisciplined expenditures and diversion of resources that would be better directed elsewhere.

The delegation of Canada also expressed that the patent agenda was ambitious, and the work ahead was enormous in scale and that WIPO's immediate attention and efforts should focus on those activities that would yield an early harvest of concrete and tangible results. A number of developing countries also expressed various concerns regarding the initiative. These include the following: (a) The document was one sided and not balanced in that it focused principally on the interest of users of the patent system; (b) The need to maintain a balance between different interests such as the interests of users of the system and the general public, (c) A one-size-fits all solution should not be sought and that there should be flexibility in tailoring national patent systems to accommodate specific situation of different countries, particularly that of developing and least developed countries, (d) The implication of the Patent Agenda to developing countries be studied and evaluated, (e) Future developments should not increase the burden of developing countries or be detrimental to achievements in other international forums, which recognize sovereign rights of member states to protect and promote public policies.

The concerns raised were different and involved serious issues. However, the differences should be expected as the agenda was just introduced and meant for discussion at that stage. In this respect, the Director General stated that the intention was to provoke discussion, noting that the international patent system was already evolving, the inclusion of the item on the agenda was not meant for taking a decision but rather the WIPO patent agenda denoted an ongoing process that would give guidance to the international community and the WIPO in shaping the international patent system. Member states noted the contents of A/37/6 and decided to keep the WIPO Patent agenda for discussion at their next session in 2003.

Correa and Musungu[179] the SPLT, the PCT Reform and the WIPO Patent Agenda are separate but interlinked, which would aim to set up an international legal framework for a global patent that will further erode the limited policy space left under the TRIPS Agreement. Whether this will happen or not will be seen in the future. Considering the fact that there are a number of factors that would influence investment, transfer of technology and inventive and innovative activities; and noting that there will be developing countries that may benefit from a strong patent system, it may be difficult to arrive at a conclusion regarding the ongoing debate for and against the impact of strong patent regime.

Assuming, however, that the danger is there, what options do developing countries have? Is there an option in view of the increasing globalization and the growing linkage between international trade and intellectual property? Would harmonization be considered as given as globalization? A number of questions can be asked. Setting aside these queries, one would, however, think that there would be two options. Developing countries may either be part of the process or stay out of it.

a) Option 1: Staying out of the International Patent System

To stay out of the evolving international patent system is an easy option. In fact, some studies such as those made by CIPR and the South Center[180] advise developing countries to do so where the outcome of the ongoing and future harmonization results in an international patent system is not in their interest. Such a measure, one may argue, will help to make use of the technologies generated by others freely. However, this is hardly possible in view of the weak indigenous technological capability in the majority of developing countries as well as the need for relationship with and support of technology suppliers to make, adapt and assimilate foreign technology. Kitch[181] argues that it is not easy to copy technology and that effective and timely transfer of technology requires transfer of personnel and hands on assistance to transfer the state of the art techniques and methods.

Staying out of the evolving international patent system will be a costly option. Developing countries are extremely dependent on the developed countries for their export and import, having no access to their market will be difficult. In this connection, it was noted that "a country couldn't build its economy on technology appropriated from other countries and expect to be admitted to the international trading system on an equal basis. The countries from whom the technology is

---

[179] Correa and Musungu, *supra* footnote 166, at p. ix

[180] See , CIPR, *supra* footnote 11 and Corea and Musungu, *supra* footnote 166.

[181] E. Kitch, *The Patent System: A Design for All Seasons?*, paper presented at the WIPO Conference on the International Patent System, March 2002, Geneva, at p. 6

appropriated will be moved to protect its value in their markets by barring imports from the appropriating country."[182]

Experience also reveals that industrialized countries may impose pressure using regional and bilateral trading agreements that would force countries to put in place a scheme of protection higher than that which is provided in a multilateral treaty or force them to join such a treaty. Mexico, for example, adopted laws based on the highest global standards as early as 1991 and have further tightened them in the context of NAFTA. The adoption of strong patent protection laws in the 1990s by Argentina, Brazil, Chile, South Korea, Malaysia, Thailand and Venezuela were partly due to external pressures.[183]

The concern that further harmonization of the international patent system will result in a "one-size-fits-all" scheme is appropriate. There is a need to have flexibility to accommodate the needs of countries that are at different level of socio-economic development. However, this concern may not be attended to by staying out of the evolving international patent system, but by being part of it and influence the developments therein.

b) Option 2: Being Part of the International Patent System

This is a good option if developing countries are in a position to influence developments. History shows limited and inactive involvement of developing countries in the process of international law making. Studies of international conventions and treaties in the field of intellectual property including the TRIPS Agreement reveal that limited participation, poor preparation and performance, weak negotiation capacity as well as lack of unity, among others, kept developing countries in weak bargaining positions. For example, the majority of these countries were not represented during the negotiation of the Uruguay Round. It was only Brazil, India, South Africa and Egypt that took part during the negotiation. Furthermore these countries were poorly represented both in number and qualification of experts during the negotiation.[184]

The situation has not yet improved. The participation and involvement of developing countries in the ongoing negotiations at the Standing Committee on Patents (SCP) has been limited. It was noted that few interventions were made by developing countries

---

[182] Kitch, *supra* footnote 180, at p. 8

[183] Maskus, *supra* footnote 55, at p. 97

[184] G. Tansey, 1999,*Trade, Intellectual Property, Food and Biodiversity: Key Issues and Options for the 1999: Review of Article 27(3) (b) of the TRIPS Agreement*, A discussion Paper available , at http://www.geneva.quno.info/pdf/trips-col.pdf/PHPSESSID=98f3a25bea0bc6fa5cd2dc3b97d82bb, accessed on 8 February 2006, p. 9

at the Sixth Session of the SCP (Geneva, 5-9 November 2001), most of which were made by China and South Korea, while less frequent observations or questions were made by Argentina, Brazil, Dominican Republic, Egypt, Kenya, Morocco and Sudan.[185]

The international forum created by WIPO, where negotiations for the development of the international patent system is taking place can be used to fight for accommodation of the needs and interests of developing countries as well as pushing their own agenda. These could include seeking incorporation of an obligation of a patent applicant to indicate origin of a genetic resource used in biotechnological inventions to facilitate sharing of benefits and prevent misappropriation. The fact that developing countries are the majority in WIPO may help them to protect and promote their interests in international negotiations. This advantage has not been exploited for lack of active involvement and adequate coordination of negotiating positions. This may be explained by two factors: the level of importance given to issues related to patents as well as the capacity of developing countries.

There is a serious problem in appreciating the role and importance of patents in national development and the significance of taking part in the international standard setting process. The patent system is either the least in the priority list of the majority of governments of developing countries or it is totally forgotten. In most cases, there is nothing in national polices or government plans relating to patents and the use of the same as a tool for development. There is a tendency of taking the agenda of patents as that of developed countries. The low level of importance attached to the issue is a reflection of the low level participation of developing countries in the negotiations where international standards are set. Most of the Sub-Saharan African countries do not take part in the ongoing negotiations under the auspices of WIPO unless the latter sponsors delegates.

The other major problem relates to capacity. Most of the developing countries lack the financial resource and the technical capacity to take part meaningfully in international negotiations. However, developing countries that cannot send delegations from home owing to financial constraints have an option to take part in the negotiations through their representatives in Geneva. Indeed, a large number of developing countries have no permanent representation or missions in Geneva. As noted by CIPR[186], there are 36 developing country members of WTO; and 20 least developed countries that are members of the WTO and WIPO that have no permanent missions in Geneva. Even those with missions are often inadequately staffed or lack qualified experts in the field.

---

[185] Correa, and Musungu, *supra* footnote 166, at p. 17

[186] CIPR, *supra* footnote 11, at p. 164

\Intellectual property experts are also lacking at home. Even when there are few, they may not be able to attend negotiations for lack of financial resource or may not be able to attend negotiations on a continuous basis. Lack of continuity of delegations is common in WTO and WIPO negotiations.

2. Strategies for Effective Engagement in Negotiations

In order for developing countries to take part meaningfully in the international debate and negotiations that may shape the future of the patent system, they need to devise strategies. These may include taking steps at national, regional and international level. Furthermore, international organizations such as WIPO may help in areas such as creating the necessary awareness and building up of capacity.

a) Measures that may be taken by Developing Countries

a) At National Level

At a national level, patents should be taken as a serious and important agenda by governments. There should be a mechanism where developments at the international level aree followed up, issues will be examined and discussed, national positions are formulated and continuity of participation of delegates in the international organizations is ensured. This can be done using patent offices as a focal point with little or no cost.

b) At Regional Level

Regional patent organizations may be used to represent member states in the negotiations or to develop common positions. In Africa, there are two regional offices: the African Intellectual Property Organization which consists of mainly French speaking African countries and the African Regional Intellectual Property Organization which consists of mainly English speaking African countries. Each of these organizations has 15 member states. Empowering regional patent organizations to represent member states in international forum may require revisiting the mandates of the organizations and conferring on them the necessary power. This may need serious thinking and a serious exercise. Short of that, however, these organizations may be considered as important forums to discuss issues and develop common positions.

Sub-regional trading arrangements and regional political bodies may also be used to streamline positions. There are sub-regional organizations, such as the Common Market for Eastern and Southern Africa (COMESA) that are mandated to harmonize

patent protection in member countries.[187] The forum created in such organizations may help to coordinate and promote common positions. Political organizations such as the African Union can also play a role in the formulation of regional positions.[188] The involvement of the different regional bodies may also help to examine issues from a different perspective and develop a well-reasoned position.

c) At International Level

In WIPO, positions of developing countries are developed and promoted by regional groupings such as the Africa Group, the Asia Group and the Latin American and Caribbean Countries Group (GRULAC). These would help to strengthen the negotiating position of developing countries and win better terms and conditions. To this effect, the positions of these groups should be strengthened and coordinated. The concession secured at Doha WTO Ministerial Conference regarding pharmaceutical inventions is a very good example that can be achieved in international patent negotiations if developing countries act together and present a well reasoned and articulated common position.

Support from international organizations such as WIPO may be solicited and used to promote awareness of patents at national level and build capacity in terms of qualified manpower through fellowship programs offered by the Organization. Technical and financial support could also be obtained from developed countries. The latter may be requested to discharge their obligations under the TRIPS agreement. Article 67(1) of the agreement requires developed country members to provide, on request and mutually agreed terms and conditions, technical and financial cooperation in favor of developing and least-developed country members. The required cooperation includes training of personnel.

Developing countries may exploit the support and sympathy of developed countries. Differences in positions are common within the developed countries.[189] These

---

[187] COMESA, Member states agreed to jointly develop and implement suitable patent laws and industrial licensing systems for the protection of industrial property rights and encourage the effective use of technological information contained in patents (Article 128 (e)).

[188] The role that can be played by the African Union in promoting common positions can be explained by taking the measure taken by its predecessor regarding the revision of the TRIPS Agreement as an example. The sixty Eighth ordinary session of the OAU held in Ouagadougou, Burkina Faso, in 1998 passed a resolution which recommended that the Governments of member states "develop an African position to safeguard the sovereign rights of member states and the vital interests of local communities and forge alliance with other countries on the revision of TRIPS in 1999."

[189] An example is the support given by the delegation of The Russian Federation to the delegations of Argentina, Brazil and Guatemala at the six session of the Standing Committee

differences may be exploited by developing countries to promote their interests. Public opinion and pressure groups in the North may also be used to back the demands of developing countries. The relevant data and studies made by international NGOs may also be used in understanding issues and developing positions.

PART V. CONCLUSION AND RECOMMENDATIONS

The role of patents in technological progress and economic development is well recognized. Almost all developing countries have national patent systems. The majority of developing countries are also signatories to the major multilateral agreements concluded at the international level. The reason for the existence of the national patent system in developing countries as well as their membership to international patent system indicates a belief that such a system contributes to national socio-economic development. The experience of some developing countries shows how useful the patent system is in the creation of wealth. In others, where the impact is not big, the reason could be attributed to the low level of importance given to patents as well as other factors such as weak indigenous technological base, inadequate R&D funding and facility. In this regard, it may be plausible to note that the patent system by itself does not ensure success in technology development. In order to benefit from the patent system national technological capacity is of critical importance.

The belief in the role that patents play in wealth creation is shared among writers. The patent debate now is not the same as the debate in the nineteenth century between the proponents and opponents of patents. The debate now is on whether strong or weak patent helps to stimulate inventive and innovative activity, encourage transfer of technology and FDI.

The debate on the role of patents coupled with a number of factors that may affect transfer of technology and FDI will make it hard to arrive at a conclusion on whether or not the international patent system positively or negatively affects transfer of technology or investment. There is no comprehensive data or case study that shows the improvement or non-improvement of the flow of technology and investment to a given developing country by comparing the situation of a country before and after being member of an international patent regime. It has been noted that there is a paucity of studies that directly address issues such as whether or not strong patent protection would affect investment, R&D, access to foreign technology and domestic innovation process, let alone reach a definitive conclusions on the impact of IPRs.[190]

---

on patents on the issue that the Draft SPLT incorporates the provisions of Article 27.2 and 27.3 of the TRIPS agreement to enable countries to exclude certain inventions from patentability.

[190] CIPR, *supra* footnote11, at p. 23

However, there seems to be an agreement among writers that there are a number of factors that affect inventive and innovative activities, transfer of technology and investment in addition to patents. In this regard, it has been noted that" the system needs to be accompanied by comprehensive policies that promote dynamic competition and technical change. Important among such initiatives are programs to build human capital and technical skills, ensure flexible factor markets, and liberalize restrictions on international trade and investment."[191]

The history of patents evidences that it is dynamic in nature. It evolves and develops to meet new needs and address new challenges. It may be possible to say that the patent system is one of the policy instruments of techno-economic development. At present, the international patent system is in the process of evolving to deal with various problems that arose from the increase in volume and type of inventions as well as the growing importance of securing valid patent protection in many countries with little cost as early and smoothly as possible. This would require streamlining of national or regional laws and functions of national, regional and international patent authorities. To meet this need negotiations are underway to harmonize procedural and substantive requirements of patent laws under the auspices of WIPO.

There is a serious concern that the future international patent system will be designed in line with the national patent laws of developed countries that will not only deprive the flexibility available in the existing international patent treaties but also impose new burdens on the developing countries. On the other hand, there is a strong desire on the part of the developing countries that the international patent system that would evolve in the future addresses their specific needs as well as deal with issues relevant to them such as protection of traditional knowledge.

The concern and desire of developing countries can be addressed by taking part actively in the evolving process of the international patent system. However, the importance attached to patents at the national level in the developing countries such as the majority of African countries, is low. Furthermore, the participation of developing countries in the international standard setting has been very limited hitherto. As a result, developing countries were forced to play a game, the rules of which were set mainly by developed countries. This should be changed. The involvement of developing countries should increase both in quantity and quality. This in turn requires clarity on the issues that are being discussed as well as capacity to meaningfully participate in international negotiations. With respect to clarity of the issues WIPO and Regional Patent Organizations may play crucial role in sponsoring concrete case studies and stimulating discussions within developing countries. Indeed the reason behind the low level of participation in the negotiation and international standard setting may also relate to inadequate technical and financial capacity.

---

[191] Maskus, *supra* footnote 59, at p. 232.

Devising a strategy as well as coordinating negotiating positions at different levels may help to deal with this problem.

The ongoing harmonization is and future harmonization will be the reflection of the world's techno-economic reality It seems that no one can change the wheel of history. Moreover, different countries may have different interests in the process. It is impossible to accommodate the interest of each and every nation. International undertakings are based on a win-win approach. Every party gets something, but not necessarily equal. Therefore, for developing countries the best option in the move towards a harmonized global patent system is neither being bystanders nor staying out of it. The best option to these countries is to follow the development critically, join the movement and exert all possible efforts to influence the developments so as to accommodate their interest. Developing countries are the majority in WIPO and this numerical advantage should be exploited. In relation to this, there is a need to build up negotiating capacity and strengthen bargaining position to meaningfully participate in the process and influence it. The need to strengthen their bargaining power by streamlining positions at regional and international level should also be underlined. The experience at the WTO Ministerial meeting held in Doha in 2001 evidences that if developing countries act together, they can obtain concessions.

Developed countries should also recognize the position of developing countries and the need to leave room for the latter to fit into the international patent system while at the same time catering to their specific national needs and situations. The future international patent system should not deprive developing countries the opportunity to make use of the patent system as a tool for development.

Sometimes the Law is 'a Ass'

Girma W. Selassie (Ph.D)

It is interesting that religion and law have so much in common. To a large extent, both are dogmatic. You shall … lest you be condemned to hell or to jail.

Sometimes they insist on blind faith – certainly the one more than the other. But they both do. Blessed are those who believe without seeing is perhaps the biggest challenge most believers are confronted with. Law has its counterparts- we call them presumptions or legal fictions.

The latter are often cruder than the religious dogma because it is easier to believe what you don't see than to believe the contrary of what you see. It was this apparent anomaly that impelled one of the not-much-literate characters of Charles Dickens to pronounce a candid indictment: sometimes the law is a ass, a idiot.

Religion, however, has one superior virtue over law-the dogma is preached far and wide. The pulpit is important. In law it is not. Law takes the lazy way out- it presumes knowledge regardless of consequence.

In the 1950's and 60's, Ethiopia imported a massive body of essentially European laws. The environment into which these 'modern' laws were introduced could not have been less conducive. Whatever its status today, Ethiopia then was an almost entirely rural country with an overwhelmingly illiterate population that is dipped in traditions- the traditions of dozens of ethnic groups. There were only a handful of trained lawyers in the entire country and legal institutions were largely manned by feudal personages and church educated civil servants. Modern means of transportation and communication were, at best, in their infancy.

It is probably hazardous to ponder what rationale underpinned the decision to import European laws- obviously laden with European values- into such an environment. Did the western advisors and the recipient local elite believe that European values were superior to those of Africans (as were their muskets and quinine)? Were they

convinced that African values would ultimately and inexorably evolve toward the European (thereby anticipating globalization) and that they should hasten the process?

One thing was certain- all parties concerned must have earnestly believed that, when it comes to Africans, law must serve as a vehicle of modernization. But Westerners then, as now, believed that laws should gradually and deliberately evolve from and reflect local values. Why the double standard?

With a stroke of a pen, the Civil Code of 1960 repealed all customary rules in conflict with any of its provisions covered a lot of ground. Many of these rules were hundreds of years old and were deeply imbedded in the psyche of the people.

Earlier in 1957, a brand new Penal Code had come into force and every peasant and nomad in the country was immediately presumed to know every word of its content. Article 78 boldly proclaimed that ignorance of the law is no defense. One would be tempted to cry out loud- but this really is not true! Most people of this country are not only illiterate but they have little means of getting to know about these alien laws!

Even so, for decades millions of Ethiopians remained totally oblivious of this daring decision made in Addis Ababa. Most people carried on with their lives as if nothing had changed. That, however, did not mean that all of them escaped its radical effects. I do not know of any study that could shed light on the effect this presumption had, and is still having, on the Ethiopian people. How many lost their property for not complying with some technical requirement of the law of contracts? How many went to jail or to the gallows for doing things their forefathers did and for which they were admired and honored by everyone in the tribe? We may never know.

Why am I beating on a dead horse? After all, this presumption is almost universally accepted and no substitute is in sight. For all one knows, it's here to stay. But I am concerned because while we continue to copy laws en masse from other countries and presume that every Ethiopian gains knowledge of them automatically, we are not doing enough to mitigate the negative effects of that presumption on innocent people. We have become adept at copying laws so much so that drafting has become equated with coping. We copy constitutions as well as simple regulations and everything in between.

The problem gained sharper focus recently when the country revised its Criminal Code. Among other things, it incorporated new provisions that sought to obliterate centuries-old traditions and practices. Prominent among them were a number that

criminalized female circumcision (FC). (Call it FGM- female genital mutilation- if you are inclined to emphasize the horridness of the act). FC has long been an accepted practice that millions of Ethiopians believed necessary and even honorable. To many, it was ordained by the holy books. Overnight, however, what was long perceived respectable became an offense. The Revised Criminal Code proclaimed:

> *Whoever circumcises a woman of any age, is punishable with simple imprisonment of not less than three months, or fine not less than five hundred Birr. (Art. 565)*
>
> *A parent or any other person who participates in the commission of one of the crimes specified in this Chapter, is punishable with simple imprisonment not exceeding three months or fine not exceeding five hundred Birr.(Art. 569)*

Of course, the millions of people who until the previous evening believed FC was the farthest thing from constituting a criminal act would, as of the very day of the enactment of the law, know otherwise. This is so not because anyone made an extraordinary effort to inform them about the change but because the law said so. The Revised Criminal Code has, in fact, reinforced the presumption contained in its predecessor. The current provision (Art. 81) reads: Ignorance or mistake of law is no defense.

But it's partly gratifying that the legislature was conscious of the radical nature of the measure that criminalized FC and its potential to harm a large number of innocent people. The ignorance of the parties who committed the crime could constitute a mitigating factor and judges may not even impose any penalty. As considerate as that is, it does not change the fact that the accused would, in all likelihood, spend the rest of their lives as convicts. Given the size of the population that practices FC, and the number of people who may participate in a single ceremony, (it may involve not only parents but also members of the extended family and neighbors) we run the danger of turning ourselves into a nation of convicts.

My own appreciation of the problem was heightened recently when I was on a training mission in one of the regions. Two young men, a judge and a prosecutor, shared with me their perplexity. "Where we work", they told me, "the entire community believes in circumcising girls and the practice goes on every day under our very noses. Should we prosecute all these people?"

The foremost purpose of the Ethiopian Criminal Code is the "prevention of crimes by giving due notice of the crimes and penalties prescribed by law." (Art.1). It is only where this fails that punishment is resorted to. Thus notification (publicity) and prevention of crime should precede any other measure.

Accordingly, it should be underscored that the presumption that burdens the citizen with knowledge of the law also imposes a concomitant duty on the government- the duty to notify, to inform and to educate the public every time it enacts a new piece of legislation. It is my submission that this duty has been neglected far too long with perhaps dire consequences.

> *Ignorance of (the law) will not excuse the offender. It is the duty of the subject to know it, and knowing, to obey it. The existence of the implication and duty, demands the correlative obligation of government, to publish its requirements. Men cannot be required to know that which is unrevealed, or to obey that which is unannounced. They cannot be punished but for sinning with knowledge, or with the means of knowledge. History has immortalized the shame of the ancient lawgiver, whose edicts were only published upon the city walls, high above the observation of the people. If ever a…. citizen shall be condemned under an unknown law, history will be true to her trust, and perpetuate the memory and condemnation of the prodigious wrong.*[1]

True, Federal laws are published in the national gazette which is available to the public from a single sales office in Addis Ababa. Not surprisingly, its circulation is miniscule and it appears that litigants looking for a specific law and government agencies are its principal customers. Hence, the gazette's role in informing the general public is negligible, at best. In view of its inadequacy, for the majority of Ethiopians the situation is comparable to the ancient practice of posting edicts upon the city walls, too high for people to read them. Both may meet the formal requirement of the law but they fail to serve the real and important purpose of informing the public.

Over a decade ago, nine regional States acquired law-making power. While decentralization of legislative authority does, to some degree, increase the publicity of new legislation (at least, through word of mouth), it is disappointing that all of the States have yet to devise an effective mechanism through which they could disseminate news of laws they enact.

The mass media has rarely owned the responsibility of regularly informing the public about legislative measures taken by the Federal and State governments. Its occasional forays into the subject are haphazard and selective.[1]

It should also be recognized that the more the new law seeks to overturn a longstanding custom or practice and the larger the segment of the population that is illiterate, the greater the need for a concerted effort to inform, and inform in a manner comprehensible to the general public. The purpose of legal presumptions is not to condemn the innocent but to deprive the dishonest and the crafty of an all-purpose defense the State may not be able to surmount. "The citizen cannot be entrapped into crime. He must be notified of the demand of society … before obedience can be exacted and disobedience punished."[2]

Let me urge in the same tone that we put the horse before the cart. Let us educate before we criminalize; let us inform before we punish. If we fail in doing this, one of two things occurs; either the law becomes impossible of application and remains dead on the books or we zealously impute criminality to many with no criminal intent whatsoever. Both would be wrong.

Female circumcision offends me as much as it offends the next person. But so does the conviction of a mother without any criminal intent.[2]

---

[1]William A Beach, quoted in Manual of Forensic Quotations, by Leon Mead, P. 125

[2] Ibid, p. 125

Book Review

Alula Pankhrust and Getachew Assefa (eds), *Grass-Roots Justice in Ethiopia, The Contribution of Customary Dispute Resolution,* (French Center of Ethiopian Studies, Addis Ababa, United Printers PLC., 2008) p. xi and 301, price not indicated.

Muradu Abdo[1]

The book documents some customary dispute resolution mechanisms extant in the nine national regional states which constitute the Ethiopian federal state, on top of its inclusion of traditional dispute settlements methods in two localities in Addis Ababa. The book is a survey of the diverse traditional dispute settlement institutions of Ethiopia. In the Preface, the Editors have succinctly stated the objective of the survey as aiming at the possibility of and the methods of integrating the longstanding customary dispute resolution institutions with the state legal system.(p.vi) Also made patent is the nexus the subject matter of the book has with the ongoing justice reform program of the country. (id.) The Preface, in addition, describes the various stakeholders which took part in the project which has led to this book, indicates their involvement in the project, research methods and working procedures as well as the justification for the adoption of and the appropriateness of the term customary dispute resolution as the central unifying concept of the book.(p.vi-ix)

The book consists of fourteen chapters. The first chapter is a joint contribution of the Editors. In this review, the opening chapter warrants greater coverage owing to its size, scope and depth. This chapter goes by far beyond a mere introduction. In the first section, it maps out the historical development of the interface between modernity and traditions in the context of law and legal institutions in Ethiopia. The historical narrative demonstrates that the state has shown a constant and visible orientation towards giving a limited formal place for traditional legal institutions. Put it differently, the Ethiopian state has preferred to predominately look outward for inspiration and raw materials in crafting its laws and legal institutions and little to inward sources.(p.8) Even the limited domain left by the state legal system to legal diversity, to the Editors, *has not been followed through with practical provisions and the creation of an enabling environment for a fruitful cooperation, alliance and partnership in the legal sphere* between the two.(p.8) This same first chapter, in the next section, provides the reader with the profile, in terms mainly of geography, population and economic base, of several ethnic groups/regions in the country followed by a short but informative description of the traditional legal institution of each of these communities.(p.18-50)

---

[1] LL.B., LL.M., Assistant Professor of Law, Addis Ababa University, Faculty of Law.

More importantly, this second segment of chapter one, accomplishes an extremely useful task by bringing to our attention the various researches conducted so far on the customary law system of each of these ethnic groups. This section is not a mere enumeration of the pertinent bibliography. It characterizes them. It shows their gaps, too. Moreover, this same section complements the other contributions by describing certain traditional legal institutions such as the customary dispute settlement institutions of Kambata, of Gurage and of Wolayta, which are not at all covered by the other contributors in the book. This introduction to or indication of the available literature in the area seen together with the more than 270 bibliography supplied at the end of the book makes the book a good bridge to these readings. This considerably lessens the burden of those who want to venture into this seemingly well trodden path, but in actuality an interdisciplinary virgin territory. In the third portion of the first chapter, the reader is elevated to the domain of abstraction for she is offered the opportunity to identify and expound the major common pillars of the multiplicity of traditional legal institutions. At root, the Editors have demonstrated that territory, kinship, spiritual authority, and a combination thereof are common principles of social organization that tie together the diverse traditional legal institutions of the country. (p.51) Examination of these principles is followed, in the same winding up part of the first chapter, analyses of concepts such as *sirat*, *sera, aadaa* and *gome*. (p.58-60) This chapter shows the fact that customary dispute resolution mechanisms are amenable to change. The Editors make mention of extraneous factors such as writing, money, religion and the stretch of the tentacle of the state legal system to the geographic peripheries as accounting for some signs of dynamism in the existing customary law systems in Ethiopia.(p.73-76) The chapter closes with a sensible proposal, which is re-raised in the last chapter, for greater accommodation by the state of Ethiopia of the grass-roots justice systems by eliminating their de-meritorious faces (e.g., age and gender orientations) and formally embracing their meritorious aspects (e.g., malleability and reconciliation).(p.76)

The chapter by Kohlhagen presents a survey of the most significant experiences of the *de jure* and *de facto* dialogue between what he calls living laws (which are rooted in traditions) and state laws (which are either received or grafted) in Africa. In the sense that this contribution injects outside experiences sets it apart from all the other contributions included in the book. This second chapter asserts that there is a significant discord between customary laws and state law on the continent of Africa. The former are used to adjudicate the overwhelming majority of disputes in rural Africa while the latter deals with *only an infinitely small number of disputes*. (p. 77) After explaining the reasons for this huge discrepancy (e.g. language, infrastructure, value disjunctions) and outlining the interrelationship between the two systems based on the lived experiences of fifteen African nations having common law, civil law and *lusophone* heritages, Kohlhagen forwards the various avenues through which traditional justice systems could be accommodated (i.e., codification, integration, incorporation, tolerated self-regulation, cooperation and innovation).(p. 90-1) This

second chapter calls for an in-depth study of customary laws of Africa, which is a call for knowledge about customary laws before one decides either to condemn or maintain them. Kohlhagen does not suggest as to what African countries should do in the event of a significant value divergence between the received or imposed western legal traditions and the homegrown legal traditions.

This reviewer lumps the remaining chapters (chapters 3-13) together for the unifying first chapter captures and distills their essential attributes as shown above. These eleven contributions have unearthed a number of dimensions of the customary laws of Ethiopia. On the downside of traditional legal institutions, in many instances, women are not permitted to present their case before traditional elders (e.g. Afar, p.98; Amhara, p.108; Oromo, p.182; Somali, p. 187 and Tigray, p. 221); in the event of compensation for homicide, the value attached to the life of a woman is less than the life of a man (Oromo, p.176 and Somali, p. 195); the existence of cooperation between customary law systems and state legal institutions or delegation of matters to traditional legal institutions (e.g. Amhara, p.108-109; Nuer, p. 148 and Somali, p.193) and marriage between tradition and religion (Berta, p. 124 and Somali, p. 191). On the positive notes, among others, traditional legal institutions uphold the principle of public hearing (e.g. Afar, p.99) and are more often than not reachable for the majority of the populace.

Chapter twelve and chapter thirteen demonstrate amply that customary dispute settlement institutions are not mere rural phenomena. They are also urban occurrences, too. The occurrences of homegrown legal institutions at the citadel of the modern legal system of the country are not limited to commercial disputes. Cases considered in the localities of *Yeka* and *Mercato* prove that wide arrays of disputes including criminal and civil disputes are handled through traditional means of adjudication even in major cities. (p. 238-239 and p. 251-252)

When one goes through the book, one can vividly see that the pervasiveness of traditional dispute settlement methods radiate from the capital of the state legal system to all directions, north, south, east and west. They are in the four corners of the country embedded in the fabric of the peoples, though their degree of entrenchment might vary from time to time, place to place and from area of law to area of law.

In the final chapter, the reader finds the editors again, this time with conclusions and recommendations. This chapter garners evidence from the preceding thirteen chapters to single out and explain ten common major attributes of customary laws of the country. The ten attributes confirm the truthfulness of the message of the preamble of the FDRE Constitution, which to this reviewer, means that nations, nationalities and peoples of Ethiopia have common bondages in some respects and they do exhibit some differences. Then, the Editors consider ten merits of customary dispute resolution methods followed by discussions about five limitations of the same. A well targeted and structured set of recommendations brings the body of the book to an end.

This reviewer hopes that the first chapter of the book, in its second edition, if that is intended, will treat the writings, published in late 1960 and early 1970, which assess the success and failure of the massive codification project of Ethiopia. These writings examined the divergence between the imported laws and the practices in the areas of commercial law, labor law, adoption, marriage and juvenile justice ten years after the wholesale adoption of foreign laws by our country.[2] Besides, it is hoped that the second edition of the book will treat the space given by different legal theories (such as legal positivism and legal pluralism) for customary laws. This element, missing from any of the contributions in the book, will inject greater depth and perspective into the future edition. Further, it looks that the book seeks to defend meritorious customary dispute resolution methods (those which go with current expectations) on utilitarian grounds as opposed to principle based defense in their favor. That is, the book latently argues that the good faces of customary laws systems should be maintained provided they give advantages to the respective communities, for example, accessibility of the forums to the people in terms of distance, cost, opportunity for participation, etc. The right based (principled) defense for customary law systems would, on the other hand, argue that the positive dimensions of customary law systems should be maintained not just because they offer a particular advantage but because as a matter of collective entitlement of the owners of such customary laws. This latter type of collective entitlement based argument in defense of the accommodation of customary law systems located in our country is missing from the book. What is more even if the Editors have taken good care in the choice of expressions which capture the subject matter of the book, the term *customary dispute resolution* employed tends to send the message that customary law systems come into the picture when a dispute arises. The use of this expression hides the preventive role (which is latent throughout the book) of customary law systems.

On the whole, the book is a good read. The overwhelming majority of contributions in the book are joint products of a pair of researchers drawn from the discipline of law and of anthropology. This attempt made in the book to forge a union between the two disciplines is sound and should be encouraged. Bringing actively on board two of the key actors in the justice system (the Ministry of Justice and the Federal Supreme Court) of Ethiopia makes one to hope that the findings and recommendations of the book would not be taken lightly. Furthermore, the book has enabled us to understand the indigenous legal institutions better. A distinguished Malariologist made a striking remark to capitalize upon the utility of mastery of the conditions of things and

[2]Some of these contributions are: Aklilu Wolde Amanuel, The Fallacies of Family Arbitration Under the 1960 Ethiopian Civil Code, 9JEL1 (1973); John H. Beckstrom, Divorce in Urban Ethiopia Ten Years After the Civil Code, 6JEL2 (1969); _____., Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia 21Am. J. Comp. L, 3. (1973); Daniel Haile, Law and Social Change in Africa: Preliminary Look at the Ethiopian Experience, 9JEL2 (1973)**;** Thomas Gerathy, People`s Practice, Attitudes and Problems in the Lower Courts of Ethiopia, 6JEL2 (1969).

communities. He said: *if you wish to control mosquitoes, you will learn to think like mosquitoes.*[3] Following him but with a little tinkering with his memorable remark, one should say that if you wish to accommodate or banish customary laws, you should learn to think like customary law systems. The full understanding of the reasons behind the diverse communities for creating and maintaining their grass-roots legal institutions should precede any form of dealing with them by the state. This book is a stride towards this direction.

[3]Dr. Samuel Darling as quoted in Benjamin D. Paul, Health, Culture and Community: Case Studies of Public Reactions to Health Programs (New York: Russell Sage Foundation, 1955) at 1.

Kjetil Tronvoll, Charles Shaefer and Girmachew Alemu Aneme (eds), *The Ethiopian Red Terror Trials: Transitional Justice Challenged* (James Currey, Suffolk and New York, 2009) ISBN 978-1-84701-320-0, 158 pp.

Yonas Birmeta[*]

The Red Terror trials in Ethiopia are the trials of the officials of the former Derg government that ruled the country from 1974 up to 1991. The trials began in 1994 following the establishment of the Special Prosecutor's Office in 1992 by the Transitional Government of Ethiopia with a mandate to prosecute the former Derg officials. In 2006 the former head of the Derg and president of the country Colonel Mengistu Hailemariam and his top colleagues were convicted of genocide and crimes against humanity and sentenced to life imprisonment. The Red Terror trials are left with a few cases that still await final decision by courts. The *sui generis* nature of the Red Terror trials lies in the ambitious attempt of putting the whole government on trial. Despite the numerous issues that require analysis, there is scanty research conducted on the Red Terror trials to date.

The Ethiopian Red Terror Trials: Transitional Justice Challenged is the first analytic work to critically examine the Red Terror Trials. By adopting a unique multi-disciplinary approach, the anthology looks into the trials not only from a purly legalistic but also an historical and political prism which makes the volume the first comprehensive analysis of the Red Terror trials and a laudable contribution to the burgeoning scholarship on transitional justice. This book certainly fills the glaring void of treatises on the Red Terror trials.

The book is the result of a long and unswerving research effort by the editors and contributors. The editors are well known for their contribution to the scholarship on Ethiopia and the Red Terror trials. Kjetil Tronvoll is a Professor at the Norwegian Center for Human Rights, University of Oslo. Professor Tronvoll is a political anthropologist renowned for his long standing research on different issues relating to Ethiopia since the 1990s. Charles Schaefer is an Associate Professor of History at Valparaiso University who has also taught at the Addis Ababa University. Dr. Schaefer has researched and published on the Ethiopian historical understanding of vengeance and forgiveness. The third editor, Girmachew Alemu Aneme, is an Assistant Professor at the Faculty of Law of Addis Ababa University. Dr. Girmachew has been following the Red Terror trials from the beginning and has published articles on different aspects of the trials.

[*] LL.B, M.A.; Lecturer Faculty of Law, Addis Ababa University.

The book is divided in to nine informative chapters written by specialists on Ethiopia from several disciplines. The nine chapters employ a well-structured and clear approach and they coherently follow each other. In their introductory chapter entitled "The 'Red Terror' Trials: The Context of Transitional Justice in Ethiopia", the editors explain the objective of the book: 'The different contributions in this anthology analyze the approach taken by the current government of Ethiopia led by the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) to deal with the massive human rights violations that took place from 1974 up to 1991…'(p.2).

In chapter two, the veteran historian Professor Bahru Zewde explores the antecedents and precursors of the Red Terror and its historical ferment. In his contribution, *The History of the Red Terror: Contexts and Consequences*, Professor Bahru draws parallels among the classical revolutions like the French and Russian revolutions with that of the Ethiopian Revolution focusing on the euphoria preceding all the revolutions and the ensuing anguish and remorse accompanying them. He invokes the Ethiopian Revolution as a classical manifestation of the contrasting faces of revolutions whereby the very proponents were persecuted (p. 17). He succinctly explains the execution of terror as the defining feature of revolutions noting some exceptions. Furthermore, Professor Bahru makes a very arduous effort and confronts the daunting task of explicating the antecedents of post-revolution Ethiopia. He broadly outlines the warrior and militarist tradition and religious and doctrinal orthodoxy as paving the way for the dogmatic ideological adherence to entrenched political positions as culprits for the horror which unfolded in the course of the Red Terror. These two negative traditions were demonstrated by both the Derg and its civilian and military adversaries, who were vying for political power up on the demise of the imperial monarchy in 1974. (p. 22)

In the subsequent sections of the chapter, Professor Bahru proceeds to clarify the build up to the Red Terror dividing the period in to three phases. He sets out with recounting the clamp down on military units who endorsed the "Provisional Popular Government" (PPG), which was the rallying point of the civilian and military opponents of the Derg. (p. 23) He has also scrutinized the relationship prevailing between the adversaries of the Derg such as the Ethiopian Peoples Revolutionary Party and *Ma' ison* which was initially cozy but became poisoned shortly afterwards in early 1975 following the decision of *Ma' ison* to shift strategy from opposition to critical support and the land reform the Derg embarked on (p. 24). Having clarified the lack of unanimity on issues such as when the Red Terror started and who started it, Professor Bahru went on to skillfully outline the three phases of the Red Terror. He then brings the discussion to an end by wrapping up the consequences of the Red Terror.

In their very informative contribution on the rights of the accused, Frode Elgesem and Girmachew Alemu Aneme undertake assessment of the Red Terror trials in light of

the rights of the defendants in the third chapter of the book. This chapter notes the human rights framework of the country including the ratification of the International Bill of Human Rights and the adoption of the 1995 FDRE Constitution which incorporated international instruments ratified by the country as integral part of the domestic law of the land. The writers also dwelt up on the use of the International Bill of Human Rights as aid in the interpretation of domestic laws (p. 35). Apart from this, they scrutinized the charges brought against three groups of defendants including senior government officials, military and civilian field commanders and individuals who actually carried out the orders based on the 1957 Penal Code and the 1961 Criminal Procedure Code (pp. 35-36). The chapter also illustrates charges brought forward by the public prosecutor in the Red Terror trials. (pp. 40-41) In the subsequent sections, the chapter focuses on the assessment of the Red Terror trials in the light of pre-trial, trial and post-trial rights of accused persons. The analysis in these sections is focused on selected judicial guarantees of due process of law Such as the rights of accused persons to be brought promptly before a court and to trial within reasonable time or to release, the right to be tried without undue delay and the right to legal counsel. The sections also look into the issue of capital punishment. The chapter makes the observation that the Red Terror trials have been fraught with violations of the rights of the accused persons.. Consequently the writers argue that 'International law and practice dictate that the Ethiopian courts and authorities should reject or commute the death penalty in the Red Terror trials in light of the series of rights of the accused that were not respected and protected for one reason or another' (p.50).

The fourth chapter on the *Role of the Special Prosecutor's Office (SPO)* by Sarah Vaughan examines the activities of the Office and its relationship with other key players. The Special Prosecutor's Office of the Transitional Government of Ethiopia was established in 1992 though it became operational in early 1993 (p.52). It was vested with a twofold mandate of investigation and prosecution of perpetrators of offences and of maintaining record for posterity of the offences committed under the Derg (p. 52). The writer substantiates the frantic effort on the part of the SPO to catch up from the outset of the Red Terror trials and the ensuing disaffection with the Office by the stakeholders. Irrespective of this disaffection, the response of many governments and donors for its request to address its capacity challenges was overwhelmingly positive (p. 53). This is followed by a detailed and informative discussion of the strategy of investigation, evidence collection and analysis and security of the SPO (pp. 53-54). This chapter also shifts attention to several considerations and arguments in defense of the decision by the government to opt for a court process and a domestic one in lieu of international reconciliatory mechanisms (pp. 57-59). The writer concludes her chapter by articulating the relationship of the SPO with the judiciary, the executive, the general public and the international community.

In the fifth chapter of the book entitled *The Red Terror Trials versus Traditions of Restorative Justice in Ethiopia,* Charles Schaefer inquires whether retributive justice was the right way to go. He confronts the vexing question of why EPRDF endorsed the trial format regardless of the fact that the history of Ethiopia is abound, though not replete, with rendering of restorative justice (p. 68). He characterizes the decision to go along the lines of retributive justice as a unique one, a break from the tradition of restorative justice in the country (p. 69). The writer examines the landmark event of the Battle of Adwa to support his argument that restorative justice as a potent tradition of conflict resolution existed in Ethiopia. The writer depicts the magnanimity Emperor Menilek displayed to the defeated Italians as emblematic or symptomatic of how Ethiopian rulers treated the vanquished. He weaves through history to demonstrate the fact that Ethiopian rulers confined themselves to overcoming the enemy short of inflicting wanton destruction.

The Derg, therefore, is singled out as marking a break or rupture from this tradition of restorative justice by denigrating time-honored methods of conflict resolution. The repudiation of the virtues of the past was so wanton that the EPRDF government found it difficult to re-discover a scenario for reconciliation (p. 80). Nonetheless, the writer points out that the total rejection of restorative justice coupled with the problems in the proper administration of retributive justice may have caused the characterization of the Red Terror trials as "victor's justice" (p. 82).

In chapter six of the book entitled *The Quest for Justice or the Construction of Political Legitimacy? The Political Anatomy of the Red Terror Trials,* Kjetil Tronvoll explains the Red Terror trials in terms of the political relationship of the different actors. According to the writer, EPRDF's choice of retributive justice in the form of the Red Terror trials was meant to mark a clear break from the past (p. 85). The writer examines if the trials have achieved the stated objective based on three principles of transitional justice: Firstly, the whole truth about atrocities committed in the past must be revealed. Secondly, any politico-juridical process must reflect the will of the people. Finally, an incumbent regime must itself respect and up-hold human rights during the process of transition. Thereafter, the writer proceeds to apply these tests to the Ethiopian scenario in the context of the Red Terror trials (pp.89-91).

In her contribution under chapter seven entitled *Building State and Nation: Justice, Reconciliation and Democratization in Ethiopia and South Africa*, Elsa Van Huyssteen, compares and contrasts the effectiveness of approaches adopted by Ethiopia and South Africa in dealing with past massive human rights violations. In her introductory remarks the writer invokes the need for 'a reckoning of some kind with the past' up on transition from repressive regimes to democracies (p.98). This reckoning calls for two requirements, namely the need to document the abuses and

violations of the past and the need to deal with the perpetrators of those abuses (p.98). It is the second requirement of the process of reckoning, which the writer characterizes as the most daunting. After identifying strategies to address this thorny issue, which range from prosecution to *carte blanche* amnesty, she equates the debates as to the effectiveness of these strategies with that of the relative importance of justice and reconciliation in the democratization processes of the state and society (p. 98). This chapter clarifies that Ethiopia opted for prosecution of perpetrators and by so doing, the construction of an official record of what happened, when South Africa embarked up on writing an official history of abuses and giving amnesty for the perpetrators. Despite the fact the two countries employed different mechanisms, they both aimed at the same objective i.e. "providing the basis for consolidating a new state and society with a new culture of accountability and democracy where the atrocities of the past could never happen again." (p. 99)

In chapter eight of the book entitled *Beyond the Red Terror Trials: Analyzing Guarantees of Non-Repetition* Girmachew Alemu Aneme examines the normative and institutional mechanisms put in place to prevent the recurrence of the atrocities of the Red Terror. The main objective of the analysis under chapter eight is the critical assessment of the current Ethiopian normative and institutional mechanisms against the backdrop of major standards of non-repetition as developed in the 'Van Boven principles' endorsed by the General Assembly of the United Nations (p.116). With this objective in view, the writer focuses on the analysis of the independence of the judiciary, the rules regulating the media, the legal profession, and human rights defenders as well as the efforts in creating a human rights culture and establishing conflict prevention and resolution mechanisms. In his analysis the writer points out the gaps and challenges of the normative and institutional guarantees of non-repetition such as the lack of qualified judges, the absence of strong professional organizations and the lack of awareness of the human rights laws and ideals at the grass-root level (pp. 122-128). In his concluding observation the writer of this chapter observes that 'The non-repetition of the past unspeakable violations cannot be assured unless the above legal and institutional guarantees are reinforced.'(p.133).

Chapter 9 of the book entitled *Concluding the Main Red Terror Trial: Special Prosecutor v. Colonel Mengistu Hailemariam et al*. by the editors offers an analysis of the verdict and sentence as well as the appeal process in the leading case of *Special Prosecutor v. Colonel Mengistu Hailemariam et al*. In this chapter, the editors make the following insightful observation as part of the conclusion of the anthology: 'The Red Terror trials, no matter their shortcomings described in this volume, will mark a juncture in history where ideally law trumps violence and will be understood as the starting point in the transition towards societal justice in Ethiopia'(p.151).

This book is clearly structured and well written. Nonetheless, a few typographical errors appear on some of the pages. Another challenge for the editors is to translate the book in to local vernaculars of Ethiopia so as to make it accessible to the general

public. These, however, do not affect the quality of the book. In conclusion, *The Ethiopian Red Terror Trials: Transitional Justice Challenged* is an admirable and important inquiry which is highly recommended for students, academics and practioners of law, political science, history and sociology. Last but not least, the fact that one of the editors and contributors of this book is a member of our Faculty is certainly of something of paramount importance and a source of encouragement to the Faculty's endeavor to enhance research and publications in critical legal developments in the country.