

The Regulation of Illicit Cultural Heritage Trafficking under Ethiopian Law: Analysis of the Problem of Non-comprehensive Criminalization and Inconsistent Penalties

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Abstract

The illicit cultural heritage trafficking belongs to the most profitable criminal activities alongside illicit drug and firearms trafficking. It is impoverishing the history, archeological context, culture, and similar resources of states. Furthermore, it has now become a security concern, and thus, the intervention of criminal law is highly required. To circumvent the problem, the Research and Conservation of Cultural Heritage Proclamation of Ethiopia, Proclamation 209/2000, incorporates provisions that regulate crimes related to cultural heritage trafficking. Writers have indicated that the incorporation of criminal offenses within administrative legislations, including Proclamation 209/2000, may create a problem of over-criminalization. Specifically, the Proclamation has been criticized for prescribing a penalty in a way that could lead to over-criminalization. This article nonetheless explores another equally problematic dimension of the Proclamation related to inadequate criminalization. Accordingly, the article argued that the inadequacy of the law results from non-comprehensive criminalization and inconsistent penalties. Following doctrinal research methodology, the article critically examined relevant literatures, laws, policies, international conventions, and soft laws. Besides, the author employed the Four-stage Network Model to explain the nature of cultural heritage trafficking as a transnational and organized crime. Consequently, for the sake of triggering academic and policy debates, the article recommends that the UNODC non-binding guidelines and the UNTOC could be referred to as a guide to fill the gaps with due human rights safeguards.

Key Words: Ethiopia's Criminal Law, Cultural Heritage Trafficking, Non-comprehensive Criminalization, Inconsistent Penalties, Network Model, Transnational and Organized Crime.

Introduction

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Ethiopia's cultural heritage has frequently been subjected to looting during armed conflict or peacetime.¹ Despite rare notable repatriation cases,² trafficking in Ethiopia's cultural heritage remains a persistent problem.³ In response to the problem, Ethiopia's Constitution,⁴ Cultural Policy,⁵ and heritage protection legislation recognize the importance of combating cultural heritage trafficking. In particular, the Research and Conservation of Cultural Heritage Proclamation No. 209/2000 (Hereinafter, Heritage Protection Proclamation) is the main heritage protection law that regulates the management, preservation, and protection of cultural heritage.⁶

The Heritage Protection Proclamation contains provisions criminalizing offenses related to cultural heritage trafficking.⁷ Even though the Proclamation is part of administrative law, it also contains criminal offenses on cultural heritage trafficking. The legislature's act of attaching criminal provisions within this administrative⁸ law is problematic since the law aims to regulate a purpose other than the prevention of crime.⁹ Particularly, the preamble of the Proclamation specifies that the purpose of the law is to protect and preserve cultural heritage. It does not mention the protection of 'common good' or words implying the prevention of crime as the purpose of the law.¹⁰ Also, Simeneh and Cherinet hinted that the 'over-criminalization' problem is reflected in the punishment

¹ Rita Pankhurst, The Library of Emperor Tewodros II at Mäqdäla (Magdala), *Bulletin of the School of Oriental and African Studies*, Vol. 36, No. 1, (1973), p. 19.

² Richard Pankhurst, Ethiopia, the Aksum Obelisk, and the Return of Africa's Cultural Heritage, *African Affairs*, Vol. 98, No. 391, (1999), p. 236

³ UNESCO, Ethiopia Strengthens its Capacities to Fight the Illicit Trafficking of Cultural Property through Prevention, Cooperation and Restitution, (8 July 2018), available at http://www.unesco.org/new/en/member-states/single-view/news/ethiopia_strengthens_its_capacities_to_fight_the_illicit_tra/, last accessed on 20 September 2020.

⁴ The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, *Federal Negarit Gazette*, (1995), Articles 41(9), 51(3), 91(2). (Hereinafter, FDRE Constitution).

⁵ National Cultural Policy, Ministry of Youth, Sports and Culture of Ethiopia, (1997), Section 4.3 (Hereinafter, Cultural Policy (1997)); The Revised Cultural Policy of the Federal Democratic Republic of Ethiopia, Ministry of Culture and Tourism, (2016), Section 2.1.11, 2.6, 2.12, 2.1.5, 2.11.1 (Hereinafter, Second Cultural Policy (2016)).

⁶ Research and Conservation of Cultural Heritage Proclamation, Proclamation No. 209/2000, *Federal Negarit Gazette*, (27 June 2000). (Hereinafter, Heritage Protection Proclamation)

⁷ Id., Article 45.

⁸ Being part of the Continental Code tradition, the Criminal Law is expected to be a single body of law which is to be manifested in a unified Criminal Code. See Simeneh Kiros Assefa and Cherinet Wordofa, "Over-criminalisation": A Review of Special Penal Legislation and Administrative Penal Provisions in Ethiopia, *Journal of Ethiopian Law*, Vol. 29, No. 1, (2017), p. 57, 59-60, 80, and 82.

⁹ Protection of 'public good' is the purpose of Ethiopia's Criminal Code. See, Criminal Code, *infra* note 29, article 1.

¹⁰ For further discussion on the concept of common good under Ethiopia's criminal law, See, Philippe Graven, *An Introduction to Ethiopian Penal Law*, Hail-Selassie I University and Oxford University Press, (1965), p. 5-8. Article 1 of the Criminal Code is almost the replica of Article 1 of the 1957 Penal Code.

clause of the Heritage Protection Proclamation.¹¹ This dimension of the law needs, and is expected, to be remedied to overcome the problem of ‘over-criminalization’.

Nonetheless, there is a justifiable reason to worry that Ethiopia’s criminal law, including the Criminal Code and the Heritage Protection Proclamation, has shown gaps related to the criminalization of cultural heritage trafficking. For instance, the Proclamation does not specifically criminalize art dealers who conceal the original provenance of a cultural heritage although they are key participants of the illicit artifacts trade. Additionally, there appears to be an inconsistent pattern while fixing the amount of punishment attached to the offenses prescribed under Article 45 of the Heritage Protection Proclamation. Such inconsistency seems to inaptly disregard the critical and relatively balanced role of major illicit actors, in the trafficking network, for the completion of the cultural heritage trafficking process. These issues are not examined in academic literature in connection with cultural heritage trafficking, specifically on Ethiopia’s law.

Therefore, in this article, Ethiopia’s laws on cultural heritage trafficking is analyzed to provide an adequate criminalization scheme. In examining such an unexplored area, this article inquires the following questions: How does Ethiopia’s law address the crimes of illicit cultural heritage trafficking? To what extent Ethiopia’s law that criminalizes illicit acts of cultural heritage trafficking considers the transnational and organized nature of the crime? How should gaps that are reflected in Ethiopia’s law related to the criminalization of cultural heritage trafficking be addressed?

To do so, the doctrinal legal research method is employed. Thus, relevant literatures, legislations, policies, international treaties, standards, and soft laws are examined. This article argued that to formulate an adequate criminalization scheme concerning cultural heritage trafficking Ethiopia needs to consider the four consecutive networking stages of this transnational and organized crime.

These sets of themes in the article are organized under three sections. The first section presents the four-stage consecutive Network Model could help to explain the nature of illicit cultural heritage trafficking. This part set the context with which Ethiopia’s cultural heritage laws would be examined. The second section examines the crimes of cultural heritage trafficking as recognized under Ethiopia’s law and situates them in their proper category of the trafficking

¹¹ Simeneh and Cherinet, *supra* note 8, p. 79 at foot note no.166.

network. The third section analyzes the gaps in light of the networking model. The article identifies two main gaps related to criminalization— incomprehensive criminalization and inconsistent penalties. Finally, the article provides concluding remarks. It points out two possible way-outs, consideration of the UNTOC and the UNDOC model guidelines as a guide, to address the gaps that are identified in section three. These recommendations aim to shed light on further academic discussion and debate on whether there is a need to reform Ethiopia's legislation or not.

1. Cultural Heritage Trafficking as a Transnational and Organized Crime Network

In this section, the author indicated the appropriate criminological framework which will help to unpack and evaluate Ethiopia's law related to cultural heritage trafficking is a 'Network' model of transnational and organized crime. It has been suggested that the crime of cultural objects trafficking usually crosses boundaries, and it involves organized criminals.¹² According to the UN, the illicit cultural heritage trafficking is mainly committed in the form of transnational organized crime.¹³ Thus, the crime could be explained better through a model that explains transnational and organized crimes. In particular, the Network model is preferable to the Hierarchical model to understand the nature of transnational and organized crimes. It means that the crime is often committed in a series of actors where each actor operates independently without long-term agreements, formal hierarchies, and command and control structures.¹⁴ While the Network model recognizes that the crime of illicit cultural heritage trafficking shows flexibility and independence of actors, the Hierarchical Model, views the crime as an organization with a centralized command and control structure as it can be observed in some mafia syndicates and military-like groups.

¹² For the purpose of the Convention, 'organized crime' and crimes having a 'transnational nature' are defined under Article 2(a) and 3(2) of the UNTOC Convention respectively. See, UN General Assembly, United Nations Convention against Transnational Organized Crime: resolution / adopted by the General Assembly, (8 January 2001), A/RES/55/25, available at <https://www.refworld.org/docid/3b00f55b0.html>, last accessed on 15 September 2020. (Hereinafter, UNTOC)

¹³ Dona Yates, The Global Traffic in Looted Cultural Objects, in N. and Carribine, E (eds.), *The Oxford Encyclopedia of Crime, Media and Popular Culture*, Oxford University Press, (December 2016), p.8.

¹⁴ Peter B. Campbell, The Illicit Antiquities Trade as a Transnational Criminal Network: Characterizing and Anticipating Trafficking of Cultural Heritage, *International Journal of Cultural Property*, Vol. 20, No. 2, (2013), p. 114, 118; Renate Mayntz, Organizational Forms of Terrorism: Hierarchy, Network, or a Type sui generis?, Max Planck Institute for the study of societies', MPIfG Discussion Paper 04/4, (2004), p. 8.

The specialization of criminal activities could vary in each stage of the trafficking network with multiple participants from source, transit, and market countries operating according to their field of specialization. Writers have employed different methods of naming and counting each stage of the trafficking process.¹⁵ For instance, Peter Campbell¹⁶ has described four consecutive stages and types of role specialization, which are: (1) ‘looting’, (2) acts committed by ‘early-stage intermediaries’, (3) acts committed by ‘late-stage intermediaries’, and (4) ‘collecting’. Similarly, Kenneth Polk¹⁷ has identified four stages: (1) ‘extractors’, (2) ‘middlemen’, (3) ‘dealers’, and (4) ‘buyers.’ Also, Jessica Dietzler has identified the ‘four-stage progression model’ that would help to analyze the illicit antiquities trade from the source to end.¹⁸ These are: (1) ‘theft’, (2) ‘transit’, (3) ‘facilitation’, and (4) ‘Sale/purchase’.¹⁹ Even though writers slightly differ on how to count and label the networking phases, their terminologies are similar in spirit. This is because there is a “convergence in these various expressions of constituent network roles.”²⁰ For instance, looters, extractors, and thieves are mentioned by Campbell, Polk, and Dietzler respectively to describe the typical character of criminals in the first stage. Essentially, all of these first-stage actors have a similar specialization—locating or finding and abstracting a cultural heritage from its original place. Similarly, the second, the third, and the fourth stage actors play the role of smuggling, facilitating, and collecting respectively although the stages are uniquely expressed by different writers. For the sake of consistency, Campbell’s model, which focuses on the acts rather than the actors, will be primarily used to identify the illicit acts committed at each stage.

Though the illicit cultural heritage trafficking is mainly analyzed through the lens of the networking model, the possibility of different forms of organization of the trade is not necessarily excluded. For instance, Mackenzie and Davis, in their ethnological empirical study on Cambodia’s artifacts trafficking problem, indicated that in source countries there may be long-term and territorial control

¹⁵ Simon Mackenzie and Tess Davis, *Temple Looting in Cambodia: Anatomy of a Statue Trafficking Network*, *British Journal of Criminology*, Vol. 54, No. 5, (2014), p. 723.

¹⁶ Campbell, *supra* note 14, p.116

¹⁷ Kenneth Polk, *the Global Trade in Illicit Antiquities: Some New Directions?*, in L. Grove and S. Thomas (eds.), *Heritage and Crime: Prospects, Progress and Prevention*, Palgrave Macmillan, (2014), p. 212-213.

¹⁸ Jessica Dietzler, on ‘Organized Crime’ in the Illicit Antiquities Trade: Moving Beyond the Definitional Debate, *Trends Organ Crim*, Vol. 16, No.3, (2013), p. 377.

¹⁹ *Id.*, p. 378.

²⁰ Mackenzie and Davis, *supra* note 15, p.723. Bator also considers three stages in the trafficking network: (1) looters (‘local diggers’), (2) ‘black market middlemen’ and (3) ‘local or foreign dealers.’ See, Bator, P. M., *An Essay on the International Trade in Art*, *Stanford Law Review*, Vol 34, No. 2, (1982), 275-384. Here, it is clear that Campbell and Polk divided Bator’s the ‘middlemen’ category into two specific categories.

by gang-like figures; whereas, in destination countries, the relation could be more opportunistic and flexible.²¹ This implies that the organizational structure of the illicit trafficking in cultural property might vary depending on local peculiarities. But Mackenzie and Davis do not exclude the consecutive stages from source to transit and finally to market countries. Their ethnological study is rather framed by taking into account the progressive consecutive stages.

Whether the nature of the organization of the trade is characterized by a Network or a Hierarchical model, the direction of the transnational trafficking process remains the same which flows from source to transit and then to destination countries. There will be a sequence of events within which different actors could involve in different phases of the trafficking process, whether the organization of the trade remains flexible or not. Thus, analyzing a national law in line with the Network model is relevant so long as the purpose remains to identify those illicit acts that could be committed in the trafficking process and to properly criminalize such conduct. Consequently, Ethiopia's criminal law is expected to address each of the illicit acts in the trafficking network. Failure to do so may lead to non-comprehensive criminalization.

This is because such non-comprehensive criminalization of illicit acts may partly lead to the problem of under-criminalization. Under-criminalization problem often occurs “when: (1) criminal (in its nature) and harmful (in its results) conduct is not charged, prosecuted, or penalized; and (2) the sentence imposed is clearly inadequate to the harmful nature and consequences of the crime.”²² Thus, failure to criminalize illicit acts related to cultural heritage trafficking that are criminal by nature may result in a risk of inadequate criminalization. This is because the major illicit actors in the trafficking process play an invaluable role in the completion of the cultural heritage trafficking process. In effect, one of the under-criminalization problems—non-comprehensive criminalization—would adversely affect the protection of

²¹ Neil Brodie, The Criminal Organization of the Transnational Trade in Cultural Objects: Two Case Studies, in Saskia Hufnagel and Duncan Chappell (Eds.), *The Palgrave Handbook on Art Crime*, Palgrave Macmillan, (2019), p. 440; Mackenzie and Davis, *supra* note 15, p. 736-737

²² Kamensky, Dmitriy, American Peanuts v. Ukrainian Cigarettes: Dangers of White-Collar Overcriminalization and Undercriminalization, *Mississippi College Law Review*, Vol. 35, No. 1, (2016), p. 153. On the contrary, providing civil preventive orders instead of criminalization, while there is a justifiable reason to provide criminalization, may result in a problem of under-criminalization which will then lead to a risk of deprivation of procedural safeguards that are absent in civil proceedings. See, Andrew Ashworth and Lucia Zedner, Preventive Orders: A Problem of Undercriminalization?, in R.A. Duff and et al. (eds.), *The Boundaries of Criminal law*, Oxford University Press, (2010), p. 82-87. This implies that the under-criminalization problem, depending on the situation, may affect either public good in some cases or jeopardize individual liberties in other cases.

cultural heritage trafficking whenever the law fails to criminalize the illicit acts that are criminal by their nature.

Almost all the illicit acts the four stages of the trafficking network could have the potential to impact public good within the meaning of Article 1 of Ethiopia's Criminal Code. As a result of their transboundary effect and the gravity of the problem, the impact of the crimes has even transcended the national border and has now become a global security concern.²³ Accordingly, illicit activities related to cultural heritage trafficking threatens public peace, security, and order, and thus, could justifiably trigger the intervention of the criminal law.

Additionally, the penalty attached to each crime is expected to take into account the key role of almost every stage actor as the majorities of them play a relatively balanced role for the commission of the trafficking process.²⁴ All the offenses in the trafficking network are not expected to contain the same amount of penalty. However, the amount of penalty should take into account the transnational nature of the crime and must not jeopardize the mutual co-operation regime in criminal matters on transnational and organized crimes. Usually, states may refuse mutual co-operation when the penalties are significantly severe penalties on the one hand—like the case of the death penalty or life imprisonment or artificially elevated penalties. On the other hand, states could refuse to mobilize resources of the mutual co-operation system when the crime is trivial. Therefore, it is essential to look into the international trend to know how the amount of penalty could affect the international mutual co-operation system in criminal matters. In this respect, the UNTOC provides a better picture by indicating that organized crimes need to be treated as 'serious crimes' with a maximum penalty of at least four years of deprivation of penalty for mutual co-operation purposes.²⁵ Here, the UNTOC is referenced due to its advanced nature and wider acceptance by the international community.²⁶ The

²³ In 2017, the UNSC resolution 2347(2017) "formally recognized that threats to cultural heritage are a major security issue and that the international community has a direct responsibility to protect it." UNESCO, *Fighting the Illicit Trafficking of Cultural Property: A toolkit for European Judiciary and Law Enforcement*, p. 5. available at www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/movable/pdf/Toolkit_01.pdf, last accessed on 15 September 2020

²⁴ In most cases, determining the amount of proportional punishment depends on the theory a given legal system is more inclined to. For the discussion on Retributionists and Utilitarian theories of punishment, See, Johannes Keiler and David Roef(eds.), *Comparative Concepts of Criminal Law*, 2nd edition, Intersentia: Cambridge (2016), p. 19-26. Determination of the exact amount of punishment is mostly made intuitively through trial and error. See, Simeneh and Cherinet, *supra* note 8, p. 78.

²⁵ UNTOC, *supra* note 12, Article 2(b).

²⁶ 147 states are parties to the Convention. Ethiopia ratified the Convention on 23 July 2007 available at <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&msgid=12&chapter=18&clang=en>, last accessed on 28 October 2020

spirit of the Convention could serve as a representative of international emerging trends in the field of countering transnational and organized crimes. Similarly, Guideline 16 of the UNODC's non-binding guideline recommends that the crimes related to cultural heritage trafficking be considered as serious offenses.²⁷

Thus, Ethiopia's law needs to provide a penalty that takes into account such international trends to effectively counter the transnational and organized crime of illicit cultural heritage trafficking. Cultural heritage trafficking offenses are one manifestation of the transnational and organized crimes that could logically be covered by the UNTOC for mutual co-operation purposes. Thus, while this article refers to the consistency of penalties, it takes into consideration such international trend as reflected in the UNTOC that requires 'seriousness' of the crime for mutual co-operation purposes. Consequently, there is a possibility that the major offenses of cultural heritage trafficking under Ethiopia's laws, other than crimes of omission, to be treated as serious offenses.

Yet, the legislature of Ethiopia, in adapting the international instruments, has to consider the minimum obligations, and the spirit of the instruments. This article, therefore, signals the possibilities of reconsidering the penalties attached to the crimes of cultural heritage trafficking in a way that would not undermine the transnational mutual co-operation process and the transnational and organized nature of the crime. Thus, the frame of analysis to examine the penalties stipulated in Ethiopia's cultural heritage protection laws and the Criminal Code is not a specific principle of criminalization or punishment. In effect, the amount of penalties attached to each crime is not analyzed in the context of under-criminalization. The amount of penalties would nonetheless be evaluated in light of the general spirit of major emerging international trends and initiatives.

2. Criminalization of Cultural Heritage Trafficking in Ethiopia

In the preceding section, it has been discussed that illicit cultural heritage trafficking is not an act that constitutes a single crime rather it is a process that could involve multiple crimes to be committed at four consecutive networked stages. In this section, as stated before, crimes stipulated in Ethiopia's law

²⁷ Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, approved by the Commission on Crime Prevention and Criminal Justice of the UNODC, Vienna, and adopted by the General Assembly Resolution 69/196, in December 2014 (Hereinafter, Operational Guidelines), available at https://www.unodc.org/documents/organized-crime/trafficking_in_cultural/RES-681-86/A_RES_69_196_E.pdf, last accessed on 22 July 2020. This Guidelines aim to rectify the existing global penal minimalism of binding treaties in the field of cultural heritage trafficking.

related to cultural heritage trafficking are analyzed in light of the Four-stage Network Model to identify the gaps reflected in the law.

2.1. Crimes Committed at the First Stage

In the first stage, the crimes are committed by individuals that are specialists in locating a cultural heritage since they have local knowledge on the whereabouts of an item.

a) Crimes Related to Theft

Ethiopia's law takes relatively a firm stand on crimes related to the theft of cultural heritage. For instance, Article 45(2)(a) of the Heritage Protection Proclamation states that 'unless the Penal Code provides for a more severe penalty, any person²⁸ who [...] commits theft on cultural heritage shall be punished with rigorous imprisonment of not less than seven years and not exceeding ten years.' This provision does not list out the specific elements of the crime of theft. But a cross-reference to Article 665 of the Criminal Code²⁹ reveals that theft is an intentional crime that could be committed with the purpose of obtaining unlawful enrichment, to the benefit of oneself or procuring a benefit to a third party, by abstracting another person's³⁰ movable property or a thing detached³¹ from immovable property. Hence, it is a crime that cannot be committed by way of negligence.

The nature of the penalty stated under Article 45(2) (a) of the Heritage Protection Proclamation is rigorous imprisonment. According to Article 108(1) of the Criminal Code, rigorous imprisonment³² would be attached to crimes of 'very grave nature committed by criminals who are particularly dangerous to society.'³³ Referring to the Criminal Code is plausible since the general principles of the Criminal Code apply to 'those regulations and laws except as

²⁸Article 45(2)(c) of Heritage Protection Proclamation specifically criminalizes illicit acts to be committed by officials in the exercise of their official duty.

²⁹The Criminal Code of Federal Democratic Republic of Ethiopia, Proclamation No.414/2004, *Federal Negarit Gazette*, (9 May 2005). (Hereinafter, Criminal Code)

³⁰The abstraction of jointly owned movable properties is governed by Article 667 of the Criminal Code. Also, an abstraction of properties from the deceased or objects buried with the deceased is regulated by Article 668 of the Criminal Code.

³¹If the detachment causes damage, during theft, it would result in an additional concurrent crime. (See, Criminal Code, *supra* note 29, Article 665(2), 689-691. Heritage Protection Proclamation, *supra* note 6, Article 45(2)(b))

³²To determine the quantum of punishment, the following provisions are relevant. See, Criminal Code, *supra* note 29, Articles 88(2), 178-183, 188, and 189) and the sentencing guideline issued by the Supreme Court. See, Federal Supreme Court, Revised Federal Sentencing Guideline, *Directive 2/2013*, (1 October 2006 E.C)

³³Article 108 of the Criminal Code implies that the mode of enforcement of penalty is relatively more severe than simple imprisonment. (See, Criminal Code, *supra* note 29, Article 110).

otherwise expressly provided therein.’³⁴ It implies that the legislature considers theft of cultural heritage as a very serious crime that would be met by a harsh legal consequence, i.e., rigorous imprisonment.

Additionally, Article 45(2)(a) of the Heritage Protection Proclamation takes into account the possibility of increasing the penalty if the Criminal Code provides a more severe penalty. Such general cross-reference to the Criminal Code in a desperate search of a more severe penalty is a violation of the principle of legality of criminal law which requires specificity or enumeration of every element of a crime so that the public could take proper notice of the crime. This would lead to the problem of over-criminalization.³⁵ The fact that the provision shows the problem of over-criminalization does not mean that it should be abrogated. The offenses provided in the Proclamation should, however, be analyzed in a way that could help to update offenses stated in the Criminal Code by considering the transnational and organized nature of the crime of illicit cultural heritage trafficking.

Until Article 45(2) of the Heritage Protection Proclamation is wholly incorporated within the Criminal Code with proper synergy with the existing offenses, it is possible to explore related provisions of the Criminal Code that are referenced by Article 45(2)(a) of the Proclamation. Article 669 of the Criminal Code provides a greater penalty than the one prescribed under Article 45(1)(a) of the Proclamation.³⁶ Particularly, Article 669(1)(a) of the Criminal Code states that if theft is committed on ‘sacred or religious objects, or objects of scientific, artistic or historical value, in places, of worship or museums or, other public buildings or buildings open to the public’, the crime will be elevated to the status of ‘aggravated theft’.³⁷ Thus, under Article 669(1)(a) of the Code, the amount of penalty could be either simple imprisonment of not less than one year of rigorous imprisonment and a maximum of fifteen years.

Acts related to theft may also be committed during armed conflict. In this regard, Article 270(j) considers that ‘the destruction, removal, attack, rendering useless or appropriation of the historical monuments, works of art, or places of worship or using them in support of military effort,’ would lead to a war crime. Even if the provision does not employ the term ‘cultural heritage’, it is fair to include ‘works of art’ and ‘historical monument’ and ‘places of worship’ into

³⁴ Criminal Code, *supra* note 29, Article 3, paragraph 2. Simeneh and Chernet argue that this provision does not allow departure from the general principle of the Criminal Code except for cases of petty offenses. See, Simeneh and Cherinet, *supra* note 8, p.69-71,

³⁵ Simeneh and Cherinet, *supra* note 8, p. 78-81.

³⁶ Articles 272, 273, 670, 671 of the Criminal Code could be relevant.

³⁷ Criminal Code, *supra* note 29, Article 669(1)(a).

the category of ‘cultural heritage’. Consequently, the amount of penalty that would be imposed on anyone who has committed a war crime is five to twenty-five years of rigorous imprisonment or in a more serious case life imprisonment or the death penalty.

Similarly, the cumulative reading of Articles 273 and 674 of the Criminal code shows that ‘pillage’, ‘looting’, ‘piracy’, ‘robbery’, ‘unlawful removal’ of property under the pretext of military necessity could lead to a war crime. In doing so, the Criminal Code incorporates the requirements set by Article 15(1)(e) the Second Protocol of the 1954 Hague Convention.³⁸ The Protocol requires States to consider the ‘theft, pillage or misappropriation of or acts of vandalism’ of cultural heritage as a serious violation constituting the *actus reus* of a war crime. In this case, Articles 270(j), 273, and 674 are compatible with the Second Protocol. Although Article 237 and 674 does not specifically refer to ‘cultural properties’, it is reasonable to include them into the category of the generic term ‘property’ since there is no justification to exclude them. The provisions of the Criminal Code nonetheless should have to be more clarified to protect all types of cultural heritage.

b) Illicit Excavation

According to Article 44(1) of the Heritage Protection Proclamation, the Council of Ministers, upon the recommendation of the Minister of Tourism and Culture is empowered to reserve an area where the archeological site and the immovable cultural property are situated by declaring the reserved area and publishing the same in the official *Negarit Gazetta*. In such a reserved area, as per Article 44(2) of the Proclamation, excavation and any similar acts including conducting a construction work are prohibited without obtaining a prior permit from the ARCCH unless otherwise decided by the Council of Ministers. Also, if any person discovers a cultural heritage during permitted construction activity, in the reserved area, he will be required to cease construction immediately and report it to the Authority.

³⁸ The Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999), adopted on 26 March 1999, and entered into force on 9 March 2004. Ethiopia did not sign the Second Protocol although it is a party to the 1954 Convention and the First Protocol. See, Convention for the Convention for the protection of Cultural Property in the event of Armed Conflict and its first protocol Accession Proclamation, Proclamation No. 373/2003, *Federal Negarit Gazetta*, (28 October 2003). See also, the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted at The Hague, on 14 May 1954, entered in to force on 7 August 1956. Article 4(3) and 28 of the 1954 Hague Convention reveals that imposing penal sanction is an option left to each member states.

Consequently, illicit excavation in the designated archeological site or in areas where immovable cultural heritage is situated, in contravention of Article 44(2) of the Proclamation, would lead to criminal liability with simple imprisonment³⁹ of not exceeding six months or with a fine of up to 1500 birr or with both unless a more severe penalty is provided by the Criminal Code.⁴⁰ These penalties are relatively much lesser than the penalties stated for acts related to theft, under the Criminal Code.

2.2. Crimes Committed at the Second-stage

Crimes in this stage are committed mainly by early-stage middlemen who can transfer the object into another individual or outside of the country. Sellers, exporters, importers may serve as an early-stage intermediary. It is worth noting that the stages are classified based on the acts rather than focusing on the actors, in line with Campbell's model. For instance, a seller may be an early stage intermediary or on other occasions, he may play the role of a launderer at the third stage. Thus, the categorization of acts in this section takes into account such flexibility which is a typical character of the Network model that is discussed in the preceding section.

a) Failure to Notify upon Transfer of Ownership by the Transferor

Even though Article 14 of the Heritage Protection Proclamation provides that 'cultural heritage may be owned by the state or by any person,'⁴¹ there are legal limitations on the exercise of the rights of private ownership. For instance, only the State has a right to own newly discovered cultural properties that are found by archeological, fortuitous, or any other forms of discovery.⁴² If a private individual finds a cultural heritage fortuitously, the state will own it after the finder is paid in the form of an award and reimbursed for the expenses he had incurred for the preservation of the property.⁴³ Also, upon fulfillment of conditions stated under Article 25 of the Proclamation, the ARCCCH has the power to expropriate any cultural items.⁴⁴ Similarly, the Ethiopian National Archives and Library Agency could nationalize any privately owned archives

³⁹ According to Article 106 of the Criminal Code, the punishment of simple imprisonment would be imposed on crimes which are not very grave by their nature and committed by persons who do not pose a serious danger to the society.

⁴⁰ Heritage Protection Proclamation, *supra* note 6, Article 45(1)(a).

⁴¹ Similarly, Article 3 of the repealed Proclamation 36/1989 permits both private and state ownership

⁴² Heritage Protection Proclamation, *supra* note 6, Article 14(2), 29, 41. For a more historical comparison, See, Vijayakumar Somasekharan Nair, Perceptions, Legislation, and Management of Cultural Heritage in Ethiopia, *International Journal of Cultural Property*, Vol. 23, No. 1, (2016), p. 103.

⁴³ Heritage Protection Proclamation, *supra* note 6, Article 41(2-3).

⁴⁴ See also, Article 12 of Proclamation 36/1989 and Article 7(b) of the repealed Proclamation 229/1966.

that have ‘national importance’, upon payment of compensation, so far as they are threatened by a ‘man-made or natural disaster.’⁴⁵

Moreover, the holder of cultural property has a right to transfer it to another party only after both the transferor and the transferee submit prior written notification to the ARCCH.⁴⁶ However, the Authority has a ‘right of preemption over the sale of cultural heritage.’⁴⁷ In this case, when the Authority received the written notification, it can use its right of priority to purchase the heritage. The requirement of written notification applies to both non-gratuitous and gratuitous forms of transfers such as donation, will, or any other modalities such as a loan. But the Authority’s preemption right is limited only to the cultural heritage items that would be offered for sale. Failure to observe the conditions attached to the transfer of cultural heritage could entail criminal liability. Thus, unless the Criminal Code provides otherwise, Article 45(1) (a) of the Heritage Protection Proclamation provides a punishment of either fine (up to 1500 birr) or simple imprisonment not exceeding six months or both, against anyone who transfers or receives the transfer without prior written notification to the Authority.⁴⁸

Concerning archives, ‘private archives’ could be transferred to another person through sale, donation, or succession after notifying the Ethiopian National Archives and Library Agency.⁴⁹ In this regard, the Agency does not have a right of preemption over the sale of private archives. The Agency can, however, receive private archives through donation, sale, or succession.⁵⁰ Similarly, after notifying the Agency, the transfer of a ‘documentary heritage’ is possible.⁵¹ Although Proclamation 179/1999 allows the transfer of ‘private archives’ and ‘documentary heritage’, after notification to the Agency, failure to do so is neither backed by a criminal sanction nor supported by any other legal consequences.⁵² Therefore, while the Heritage Protection Proclamation criminalizes anyone who fails to notify the ARCCH before the transfer of cultural heritage, Proclamation 179/1999 does not criminalize those who fail to

⁴⁵ Ethiopian National Archives and Library Proclamation, Proclamation No. 179/1999, *Federal Negarit Gazette*, (29 June, 1999), Article 8(8). (Hereinafter, Proclamation 179/1999).

⁴⁶ Heritage Protection Proclamation, *supra* note 6, Article 23(1).

⁴⁷ *Ibid*, Article 23(2).

⁴⁸ Proclamation 179/1999, *supra* note 45, Article 18(3). See also, Heritage Protection Proclamation, *supra* note 6, Article 21. An act of receiving will fall under stage four of the trafficking network.

⁴⁹ Proclamation 179/1999, *supra* note 45, Article 18(3); Transfer of private ‘documentary heritage’ is also possible after notifying to the Agency. See, Article 3(20) and 21(1) of Proclamation 179/1999.

⁵⁰ *Ibid*, Article 18(2)

⁵¹ *Ibid*, Article 21(1)

⁵² Article 25(6) of Proclamation 179/1999 might have intended to refer to Article 21(1) rather than Article 22(1) of the Proclamation.

notify the Agency while transferring ‘private archives’ and ‘documentary heritage’.

b) Commercial Sale

As stated under Article 24 of the Heritage Protection Proclamation, commercial sale or purchase of cultural heritage is prohibited.⁵³ In effect, according to Article 45(1)(c) of Proclamation, a person who commercially purchases or sales a cultural heritage will be penalized by fine (10,000-15,000 birr) or rigorous imprisonment of three to five years or with both unless the Criminal Code provides a more severe penalty.⁵⁴

Concerning commercial sale and purchase of cultural heritage, Ethiopia’s law slightly differs from the 1970 UNESCO Convention.⁵⁵ Article 10 of the Convention requires States to provide either an administrative or penal sanction on antique dealers who failed to keep a register of transactions or who failed to inform purchasers as to export prohibition if there is any. The Convention seems to presuppose the existence of commercial dealings of cultural properties while using terms like ‘antique dealers’ and ‘keep a register of transactions’. On the contrary, Ethiopia’s law criminalizes commercial sale or purchase. Doing so is not a violation of the treaty obligation as the Convention does not oblige member states to permit commercial dealings. It seems that the international legal regime may tolerate the prohibition of commercial dealings. For instance, Article 2(7) of the 2001 UNESCO Underwater Convention forbids commercial exploitation of the underwater cultural heritage although it does not necessarily require criminalization.⁵⁶

The concept of commercial sale or purchase is not defined under the Heritage Protection Proclamation. Presumably, it refers to the purchase or sale of a cultural heritage mainly with a profit motive. An act of sale primarily for the sake of profit could reasonably be taken as an economic undertaking. In this respect, the Proclamation places the economic role of the cultural heritage at a subsidiary level. Especially, Article 22(1) of the Proclamation allows the use of

⁵³ Commercial sale conducted after recording of the cultural heritage in the form of film or other digital form is not prohibited subject to the regulations and directives to be issued. See, Heritage Protection Proclamation, *supra* note 6, Article 24(2).

⁵⁴ However, Proclamation 179/1999 does not prohibit nor criminalize commercial sale of private archives.

⁵⁵ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, adopted at Paris, 14 November 1970, entered into force on 24 April 1972. (Hereinafter, 1970 UNESCO Convention). See also, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property Ratification Proclamation, Proclamation No. 374/2003, *Federal Negarit Gazette*, (28 October 2003).

⁵⁶ Convention on the Protection of the Underwater Cultural Heritage, adopted at Paris, (2 November 2001)

cultural heritage primarily for ‘science, education, culture, and fine arts.’ Exceptionally, Article 22(2) of the law states that ‘the use of cultural heritage for economic and other purposes may only be allowed if such use is not detrimental to its preservation and does not impair its historical, scientific and artistic values.’⁵⁷ Thus, one can reasonably interpret that criminalization of commercial sale and purchase is a logical extension of the idea of the subsidiary role of economic use of a cultural heritage which is embodied in the proclamation.

The 2016 Cultural Policy nevertheless tends to make equilibrium between economic development on the one hand⁵⁸ and the development of science, education, fine art, and culture on the other hand. Preamble 2 of the 2016 Cultural Policy underlines that one of the main reasons that necessitated the revision of the First Cultural Policy is a result of a lesser emphasis on the economic role of cultural heritage. To give full effect to the law, it is possible to positively correlate the Proclamation and the Second Cultural Policy. Thus, the subsidiary role of the economic use of cultural heritage under Article 22(1) of the Heritage Protection Proclamation could be understood within the meaning of sustainable development. Therefore, it would be fair to understand that the prohibition of commercial sale under Article 24 of the Heritage Protection Proclamation aims to avoid the risk of exploitation of cultural heritage by short term profit-driven sale which is to be conducted at the expense of the development of science, education, research, culture, and fine arts. The economic advantage, within the meaning of sustainable development, could be obtained through tourism or scientific study and similar activities by excluding commercial sales. In this way, the proclamation could be interpreted in a meaningful way.

At this juncture, it is worth reminding that criminalization cannot be a means of achieving a policy of sustainable development although it can be considered as one of the many factors that could help to assess the criteria of ‘common good’ within the meaning of ‘prevention of a crime’.⁵⁹ Criminalization is essentially

⁵⁷ Article 22(2) of the Heritage Protection Proclamation restricts one of the objectives of the ARCC which is stipulated under Article 4(3) of the same law, i.e., facilitating the heritage for the economic development of the country.

⁵⁸ Cultural Policy (2016), *supra* note 5, Preamble 2.

⁵⁹ Goal 16.4 of the 2020 United Nations Sustainable Development Goals underlines the importance of adopting policies that aim to promote culture and tourism. To that effect, it underlines the need to combat all forms of organized crime. See, UN General Assembly, Transforming our World: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1, available at <https://www.refworld.org/docid/57b6e3e44.html>, last accessed on 15 September 2020. Similarly, the UNODC highlights that states need to combat illicit cultural heritage trafficking by stressing the nexus between cultural heritage protection and sustainable development. See, UNODC, *Practical Assistance Tool to Assist in the Implementation of the International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences*, Vienna, (2016), Preface, p. V, available at: <https://www.unodc.org/documents/organized->

guided by the prevention of a crime for the sake of the ‘common good’ to protect the security, peace, and order of the society. The legislature has, however, enough reason to justify criminalization by examining the test of common good given the criminological support for regulation including criminalization of illicit acts, by the criminal code, in this stage of the trafficking network.

c) Transfer of ‘State Archives’

In relation to ‘state archives’, any form of transfer including buying, selling, and donating is prohibited.⁶⁰ Consequently, according to Article 25(4) of Proclamation 179/1999, any person who involves in buying, selling, donating, or devolving in the inheritance of state archives will be liable for one to three years imprisonment and a fine of 10,000 to 20, 000 Birr unless the Criminal Code provides a more severe penalty. This law does not indicate whether the penalty of imprisonment refers to a simple or rigorous one. But it could be understood as simple imprisonment in line with the principle of interpretation in favor of the accused in cases of doubt when there are conflicting interpretations of the law.⁶¹

d) Illicit Export

In addition to some restrictions on the transfer of cultural property within the country, taking them out of the country is also prohibited and criminalized. In principle, the export of cultural heritage is prohibited.⁶² Also, Article 6(1) of Directive 15/2006 prohibits the export of cultural heritage by way of loan.⁶³ Similarly, Proclamation 179/1999 prohibits ‘taking documentary heritage out of the country, in a way contrary’ to the Proclamation.⁶⁴ Although the export of

[crime/trafficking_in_cultural/16-01842_ebook.pdf](#), last accessed 16 September 2020. (Hereinafter, UNODC, Practical Assistance Tool).

⁶⁰ Proclamation 179/1999, *supra* note 45, Article 18.

⁶¹ See, Article 22(2) of the ICC statute. See, Antonio Cassese, *International Criminal Law*, 2nd edition, Oxford University Press Inc., (2008), p.50; The principle of interpretation in favor of the defendant aims to protect the human rights of the accused. Thus, it can reasonably be used to domestic cases considering that major international human rights norms and standards are part and parcel of the domestic legal system. [It must be noted that buying or receiving the archives in the form of donation or inheritance falls under the final stage of the trafficking network.]

⁶² Heritage Protection Proclamation, *supra* note 6, Article 27.

⁶³ There are exceptional situations that permit loan of cultural heritage, within the country, for research, educational, exhibition, protection, and preservation purposes. (See, Ministry of Culture and Tourism, Directive 15/2006, (March 2006 E.C.), Article 5(1)). In addition to loan, there is a possibility of transferring cultural heritage, with in the country, through donation to or exchange with the relevant domestic research or educational institutions or museums whenever the Heritage Collection Center deems that the items are over-redundant or beyond the required number. (See, Ministry of Culture and Tourism, Directive 10/2006, (October 2006 E.C), Articles 2(3) and 5).

⁶⁴ Proclamation 179/1999, *supra* note 45, Article 22(2). Contrary reading of Article 8(9) of the Proclamation implies that the Agency may permit temporary export of ‘original archives and

cultural heritage is prohibited, the Minister of Culture and Tourism, however, may temporarily permit the export of cultural heritage for scientific study, cultural exchange, or exhibition.⁶⁵ In such cases, the ARCCH is mandated to follow up on the cultural properties that are temporarily exported for legitimate purposes.⁶⁶ In general, except for export possibilities permitted by law for those specified purposes, any other mode of export is prohibited.

Consequently, failure to observe export prohibitions will be met by a criminal sanction. To that end, Article 45(1)(c) of Heritage Protection Proclamation provides a penalty of three to five years rigorous imprisonment or fine (10, 000 to 15, 000 Birr) or both, unless the Criminal Code provides a more severe penalty, against anyone that commits illicit export of cultural heritage in violation of Article 27 of the Proclamation. Similarly, Article 25(3) of Proclamation 179/1999 provides a penalty of three to ten years rigorous imprisonment and a fine (10,000 up to 20, 000 birr), unless the Criminal Code provides a more severe penalty, against anyone illegally takes out of the country archives, books or documentary heritage. In addition to criminal sanction, Article 25(3) of Heritage Protection Proclamation provides administrative measures. Accordingly, the ARCCH can expropriate any cultural heritage that has been seized ‘while being taken out of the country’.

It is worth reminding that imposing both criminal law and administrative measures does not contravene the 1970 UNESCO Convention. This is because the Convention sets a minimum requirement in the form of alternative obligations. The Convention requires states to take either penal or administrative measures on anyone who exports cultural heritage without attaching an export certificate.⁶⁷ In effect, Ethiopia’s law is more stringent and demanding than the minimum requirement of the Convention.

2.3. Crimes Committed at the Third-stage

Crimes in this stage are committed by individuals who are specialists in avoiding the worries of collectors. Art historians, accountants, lawyers, and academicians could involve in various capacities in the process of disguising the illicit object as a legal object. Thus, concealing the real provenance of an object by an art historian could be taken as a laundering activity and be criminalized.

documentary heritage’. Also, the Agency could permit export of copies of archives and documentary heritage.

⁶⁵ Heritage Protection Proclamation, *supra* note 6, Article 27; Directive 15/2006, Articles 6(2), 6(3), 6(5), 5(5).

⁶⁶ Ministry of Culture and Tourism, Directive 9/2006, (October 2006 E.C), Article 22.

⁶⁷ 1970 UNESCO Convention, *supra* note 55, Articles 8 and 6(b).

However, Ethiopia's law does not specifically criminalize individuals who launder cultural heritage items. This group of individuals could be liable for their participation in secondary capacity in line with Article 37 of the Criminal Code. In reality, under Ethiopia's law, accomplices shall be punished by a similar penalty with the principal criminal unless there are mitigating circumstances specified in the Criminal Code.⁶⁸ Additionally, Article 478 of the Code which criminalizes 'conspiracy' to commit a crime could also be relevant to control launderers of artifacts.⁶⁹ Article 478(1) the Code states that 'whoever conspires with one or more persons to prepare or commit serious crimes against...property, or persuades another to join such conspiracy, is punishable, provided that the crime materializes, with simple imprisonment for not less than six months, and fine.'⁷⁰ This provision applies only to cases of conspiracy to commit 'serious crimes' which are punishable with five years of rigorous imprisonment or more. Thus, Article 478(1) of the Criminal Code can apply to cases such as 'conspiracy' to commit, for instance, illicit (commercial) purchase of cultural heritage.

In many cases, artifacts specialists may directly serve as intermediaries. The act of smuggling and facilitating in the capacity of a late-stage intermediary could be criminalized as an 'art laundering' crime. That is why Giovanni Nistri suggested that the transfer of a cultural object to another country, to conceal its real provenance 'should be punished as a laundering crime.'⁷¹ Ethiopia's law, however, does not provide 'art or antiquities laundering crime' as a distinct crime category.

2.4. Crimes Committed at the Fourth-stage

The crimes in this stage are committed by collectors that might be museums, galleries, private artifacts collectors, and art enthusiasts.

a) 'Commercial Purchase' and 'Failure to Notify during Transfer by the Receiver'

The discussion that is made at the second stage of the trafficking network, in Sections 2.2. a and 2.2.b is also relevant for this section. For instance, acts of

⁶⁸ Criminal Code, *supra* note 29, Articles 37(4) and 179.

⁶⁹ Also, Article 274 of the Criminal Code could be relevant.

⁷⁰ Article 478(2 and 3) of the Criminal Code provides additional possibility of increasing the amount of penalty. It is worth noting that Article 35 of the Criminal Code could negate the principle of individual criminal liability unless care is taken while shifting the burden of proof to the accused in cases where collective crimes including the crime of conspiracy are committed.

⁷¹ Giovanni Nistri, The Experience of the Italian Cultural Heritage Protection Unit, in Stefano Manacorda and Duncan Chappell(eds.), *Crime in the Art and Antiquities World Illegal Trafficking in Cultural Property*, Springer Science+Business Media, (2011), p. 189 at foote note no. 3.

commercial sale and purchase are criminalized by a single provision. According to Article 45(1)(c) of the Heritage Protection Proclamation, anyone who commercially purchases a cultural heritage will be penalized by a fine (10,000-15,000 birr) or rigorous imprisonment of three to five years or with both.⁷² Also, according to Article 45(1)(a) of the Proclamation, unless otherwise the Criminal Code provides a more severe penalty, anyone who is becoming a transferee, either by donation or purchase, without notifying the Authority, will be punished by a penalty of either fine (up to 1500 Birr) or simple imprisonment not exceeding six months or with both.⁷³ Thus, the alternative minimum amount of penalty provided for commercial purchase and the ‘receiving of artifacts without notification’ is much lower than the crime of theft.

b) Receiving

Although not specifically prescribed in the heritage protection instruments, the Criminal Code’s provision related to the criminalization of handling of stolen goods could also apply for related acts on cultural heritage. According to Article 682, ‘receiving’⁷⁴ of a thing which is the proceeds of a crime is criminalized. Article 682(1) states:

Whoever receives a thing, which he knows is the proceeds of a crime committed against property by another, or acquires the thing, or receives it on loan, as a gift, in pledge or in any manner whatever, or consumes it, retains or hides it, resells it or assists in its negotiation, is punishable with simple imprisonment, or in more serious cases, with rigorous imprisonment not exceeding five years, and fine.

If the crime of ‘receiving’ is committed negligently, according to Article 682(3) of the Criminal Code, the penalty shall be simple imprisonment not exceeding one year. Article 682 deals with receiving a ‘thing’, which is the proceeds of a crime, without specifying the type of property. In this case, it could be reasonable to include ‘receiving’ of illicitly obtained cultural heritage since the term ‘thing’ is an all-inclusive term, and there is no justifiable reason to exclude cultural items from the scope of protection of this provision.

⁷² Proclamation 179/1999 does not prohibit nor criminalize commercial purchase of ‘private archives’. However, according to Article 25(4) of Proclamation 179/1999, anyone who is buying a state archive will be punished by fine (10,000 to 20, 000 Birr) and one to three years imprisonment unless the Criminal Code provides a more severe penalty.

⁷³ Proclamation 179/1999 does not clearly require notifying the Agency while purchasing or receiving private archives in the form of donation or inheritance.

⁷⁴ If the purpose of ‘receiving’ of the thing is for facilitating its transfer to collectors through laundering, the crime of receiving may fall under the category of Stage-3 of trafficking network.

The crime of ‘receiving’ could serve as a vital tool to combat the illicit trafficking of cultural heritage at least for two reasons. First, the crime includes a broad category of acts such as ‘receiving’ of proceeds of a crime by way of loan, pledge, gift or in any other manner, or acts such as using, hiding, retaining or reselling, or acting as assistance in the negotiation of the thing. Second, the inclusion of ‘negligent receiving’ as a crime could help to address the problem related to proof of the mental element of the crime since proving negligence is much easier than proving the intention of an accused.

To sum up, the abovementioned key crimes are summarized as follows.

Stages	Crimes	Articles	Minimum Penalty	Maximum Penalty
First-stage	Theft	45(2)(a), Proc.	7 years	10 years
	Aggravated Theft	669(1)(a), C.C.		15 years
	Illicit Excavation	45(2)(b), Proc.	1500 Birr	6 months
	War Crime	Removal of artworks Pillage, looting	670(j), C.C. 273/674, C.C.	5 years
Second-stage	Failure to notify during sale	45(1)(a), Proc.	1,500 Birr	6 months
	Commercial sale	45(1)(c), Proc.	10,000 Birr	5 years
	Illicit Export	45(1)(c), Proc.	10, 000 Birr	5 years
	Illicit Import	-	-	-
Third-stage	Facilitating/laundering	-	-	-
Fourth-stage	Failure to notify during purchase	45(1)(a), Proc.	1,500 Birr	6 months
	Commercial purchase	45(1)(c), Proc.	10, 000 Birr	5 years
	Receiving	682, C.C.	10 days	5 years

Table 1: List of crimes related to cultural heritage trafficking [in the Criminal Code (C.C.) and the main heritage protection law (Proclamation 209/2000/Proc.)].

As it can be observed from the table, the alternative minimum penalty (fine) prescribed for illicit excavation, crimes categorized in the second and the fourth stages are much lesser than the amount attached for the crime of theft. Also, the alternative maximum penalty prescribed for illicit excavation is disproportionately smaller than the maximum amount provided for other major crimes. Moreover, illicit importers and the third stage actors (a crime of art and antiquities laundering) are not specifically criminalized. In the next section, the author analyzed the above-mentioned findings, as indicated in the table, with their possible impacts in establishing comprehensive criminalization and consistent penalties.

3. Gaps on Criminalization of Illicit Cultural Heritage Trafficking: Incomprehensive Criminalization and Inconsistent Penalties

Ethiopia's law has endeavored to criminalize all stage actors of the illicit cultural heritage trafficking network. However, Ethiopia's law shows some gaps when it is evaluated in light of the four-stage networking model of cultural heritage trafficking and the transnational and organized nature of the crime. The main defects are non-comprehensive criminalization and inconsistent penalties. These gaps will be discussed in this section.

3.1. Gaps Related to Comprehensiveness

The illicit acts to be committed in each of the four-stages are harmful conducts which are essential for the success of a transnational cultural heritage trafficking process. As it is explained in the preceding section, Ethiopia's law fails to criminalize some critical illicit acts of cultural heritage trafficking.

For instance, in the first and second stages of the trafficking network, key criminal acts are not criminalized. Specifically, in the 'war crime' category, the law only criminalizes those acts that are to be committed at the first stage. That means unlawful removal or abstraction of works of art, pillage or looting could be a war crime as per Article 270(j) and 273 of the Criminal Code. However, illicit smuggling or export of cultural heritage from the occupied territories during situations of armed conflict could have a similar effect in impoverishing and damaging artifacts. Thus, the illicit export of cultural heritage could be included within a war crime category.

In terms of import prohibition, the 1970 UNESCO Convention required parties to provide either a criminal or an administrative sanction on those who are illicitly importing cultural heritage that is stolen, after the coming into force of the Convention, from institutions of a foreign state so long as they appear in the inventory of a foreign state.⁷⁵ Although the scope of import prohibition part of the Convention is highly controversial, which resulted in divergent understanding among states, it requires some level of import prohibition requirement.⁷⁶

When we see the Ethiopian case, as stated under Article 28 of the Heritage Protection Proclamation, the government will protect any cultural heritage that is brought into the country for reasons such as cultural exchange or exhibition.

⁷⁵ 1970 UNESCO convention, *supra* note 55, Article 8 and 7(b)(i).

⁷⁶ Craig Forrest, *International Law and the Protection of Cultural Heritage*, Routledge, (2010), p. 177-180

However, Ethiopia's law does not criminalize the illicit import of cultural heritage.⁷⁷ The laws adopted in all of the three successive Ethiopia's governments⁷⁸ followed a similar approach by not criminalizing the illicit import of cultural heritage. One cannot exclude the possible impact of criminalization of illicit import of cultural properties on the long-standing position of the state that has been trying to repatriate cultural properties that were stolen, looted, and taken out of the country especially during foreign occupations. Ethiopia's laws have consistently been favoring the repatriation of the country's cultural heritage that is held in foreign countries. For instance, in line with cultural policy frameworks, Article 26(1) of the Heritage Protection Proclamation emphasizes the need to repatriate cultural properties that are illegally held in other countries.⁷⁹

Nonetheless, repatriation of looted or illegally exported cultural heritage is not an easy task as it requires political efforts in addition to following the legal routes. While countries like Ethiopia are ardently supporting the repatriation of items during colonial times,⁸⁰ some foreign countries that are possessing looted cultural properties, during colonial times, may reject repatriation.⁸¹ In this case, there may be a case where an item, that was originally part of Ethiopia's heritage but illegally held in a foreign state, is returned to Ethiopia without following a proper legal or diplomatic path. Ethiopia's law prefers to remain silent on the fate of this item. The silence may be intended to avoid the risk of preventing repatriation of Ethiopia's heritage that is illegally held in a foreign

⁷⁷ Article 351(1)(a) of the Criminal Code is applicable only when it is related to concealment of a government revenue.

⁷⁸ The Reign of Haile- Selassie I, the Derg, and the EPRDF governments.

⁷⁹ Article 26(2) of the Heritage Protection Proclamation envisaged for gathering and publicizing of data related to cultural heritage items that are held in foreign countries.

⁸⁰ 'Cultural Property Nationalism' supports the national character of heritage items, export control, retention and repatriation. See, John Henry Merryman, Two Ways of Thinking About Cultural Property', *The American Journal of International Law*, Vol. 80, No. 4, (1986), p. 832; Craig Forrest, Cultural Heritage as the Common Heritage of Human Kind: A Critical Re-evaluation, *Comp. & Int'l L.J.S. Afr.*, Volume 40, No.1, (2007), p.132; Lyndel V. Prott, The international Movement of Cultural Objects, *International Journal of Cultural Property*, Vol. 12, No. 2, (2005), p. 233, 239. [I suggest that the looted, stolen and illegally exported Ethiopia's cultural heritage should be repatriated irrespective of time limit]

⁸¹ Antiquity NOW (a Blog), To Repatriate or Not to Repatriate, that is the Question.... James Cuno's Case Against Repatriating Museum Artifacts', available at <https://antiquitynow.org/2015/02/10/to-repatriate-or-not-to-repatriate-that-is-the-question-james-cunos-case-against-repatriating-museum-artifacts/>, last accessed on 18 September 2020.

'Cultural Property Internationalism' (cosmopolitanism) advocates for the liberalization of the art market to preserve cultural heritage and reduce black market. See, John Henry Merryman, Cultural Property Internationalism, *International Journal of Cultural Property*, Vol. 12, No. 1, (2005), p. 11. It is also stated that the two views are not necessarily mutually exclusive and both are essential for the development of local, national and global policies. See, Raechel Anglin, The World Heritage List: Bridging the Cultural Property Nationalism-Internationalism Divide, *Yale Journal of law and Humanities*, Vol. 20, No. 2, (2013), p.242

state as a result of colonial looting or other illegal means. Such fear is justifiable given that some market states are reluctant to return looted cultural heritage items, especially those looted items during colonial times and before the adoption of the 1970 UNESCO convention.

Ethiopia's law could criminalize the illicit import of cultural heritage upon the fulfillment of two cumulative conditions. First, for import prohibition purposes, the law could make a differential treatment by dichotomizing cultural heritage items into 'purely foreign' cultural heritage items on the one hand and the looted or illegally exported Ethiopia's cultural heritage items on the other hand. Thus, it can criminalize the illicit import of only 'purely foreign' cultural properties while at the same time advancing the policy of repatriation of Ethiopia's cultural heritage from foreign states. Second, it can apply the requirement of reciprocity.⁸² The legislature can criminalize the illicit import of cultural items from countries that have a reciprocal import prohibition law that is accompanied by criminalization. That means if state X criminalizes the illicit import of Ethiopia's cultural heritage items, Ethiopia's law could also respond in the same way by criminalizing the illicit import of state X's cultural item. This could be implemented through a bilateral agreement or by providing, within the law, a general clause that contains the mandatory requirement of the principle of reciprocity. Also, the UNTOC's system can be employed so far as the concerned states are willing to apply the convention for cases of cultural heritage trafficking.

In reality, Ethiopia is a source state and the chronic problem is illicit export than cases of illicit import of cultural properties. But there may be cases of illicit import of cultural heritage given that the Addis Ababa airport is a hub for the international airline industry. The UNODC states that the East African region, most notably the Addis Ababa and the Nairobi airports are increasingly becoming a transit point, for drug-trafficking criminal syndicates, from West Africa to South-East and South-West Asia.⁸³ Usually, criminal activities are interconnected with each other. In this case, a cultural heritage could serve as a laundering mechanism of proceeds other crimes including drug crimes. It is reasonable to expect that the drug transit spots may also have a probability of serving as a transit point for cultural heritage trafficking.

⁸² The 1970 UNESCO Convention does not provide a mandatory criminalization obligation on illicit import of cultural objects.

⁸³ Drug Trafficking Patterns to and from Eastern Africa, available at <https://www.unodc.org/easternafrika/en/illicit-drugs/drug-trafficking-patterns.html>, last accessed on 21 September 2020

In addition to the aforementioned problem in the earlier stages of the trafficking process, the third stage of the trafficking phase is also given little attention. In the third stage, crimes are mainly committed by those who have specialized knowledge in art history or other laundering mechanisms.⁸⁴ The crimes in this stage are committed by individuals who are experts mainly situated in art market countries such as New York, Paris, London, Amsterdam, and to some extent located in transit countries including Singapore and Hong Kong.⁸⁵ These individuals could, however, be located in Ethiopia. In many forms, launderers may create nexus with cultural heritage items that are stolen or trafficked from Ethiopia. The fact that the criminals are located in a foreign state does not mean that they will not have the connection to crimes initiated from Ethiopia's territory.

It might be suggested that when launderers assist the collectors by way of expert advice or any other form of support, they may be liable for being an accomplice to the principal criminal, as per Article 37 of the Criminal Code. However, this does not fully resolve the problem of cultural heritage trafficking. This is because the liability of the accomplices is dependent upon the conviction of the principal criminal. Art launderers could independently be liable without the need to prove the liability of a principal criminal. Due to their critical role in the completion of the cultural heritage trafficking process, launderers could be specifically criminalized as a principal criminal.

Also, Article 478 of the Criminal Code could help to deter laundering specialists who conspire with illicit purchasers of the cultural heritage. Nevertheless, this scenario is not enough to fully address the problem of facilitation of cultural heritage trafficking. It is because the crime of conspiracy requires proving the existence of an agreement between two or more persons which could be a difficult task for law enforcement authorities. Furthermore, the crime of conspiracy will be fulfilled if the intended crime is materialized.⁸⁶ Launderers or facilitators in the illicit artifacts market could actively involve in the illicit antiquities market by transforming the illicit object into a licit one before the collectors make a deal with launderers. Thus, the crime of laundering could be committed irrespective of the launderer's agreement with a collector. But, until a

⁸⁴ Campbell, *supra* note 14, p. 132. The internet is also increasingly used as a third stage medium. (See, Campbell, *Id.*, p. 131). This area needs to be further studied within the context of cybercrime.

⁸⁵ Kenneth Polk, *supra* note 17, p. 213.

⁸⁶ Article 478 of the Criminal Code shows some anomaly since it requires that the intended crime be materialized while the offense is considered as a conspiracy crime which is supposed to be a preparatory offense.

distinct crime of ‘cultural heritage laundering’ is introduced, article 478 could play a role to combat the trafficking problem.

Article 478 of the Criminal Code could also apply to every stage of the trafficking network. For instance, the crime of conspiracy to commit theft or illicit export of artifacts could be governed by the provision. It does not, however, cover the crime of ‘conspiracy to commit illicit excavation’ of cultural heritage since the intended crime is punishable with only six months maximum imprisonment. Guideline16 (e) of the UNDOC, however, calls for states to consider criminalizing and making appropriate penalties against ‘anyone’ who commits ‘conspiracy or participation’ in an organized group for cultural heritage trafficking without singling out specific types of offenses in the trafficking network. This will help to control the frequent involvement of organized groups in cultural heritage trafficking.⁸⁷ Additionally, it also will enable to enhance international co-operation, for instance, by way of reducing refusal for extradition request ‘due to lack of the proportionality and the dual criminality requirements.’⁸⁸ Therefore, Ethiopia’s legislature could reconsider the specific and explicit criminalization of criminal conspiracy to commit major cultural heritage trafficking offenses including illicit excavation.

3.2. Inconsistent Penalties

This article does not focus on how to fix the amount of punishment for each of the crimes of illicit cultural heritage trafficking based on the theories of punishment. It is rather an evaluation of the pattern reflected on the crimes throughout the trafficking process by considering the transnational and organized nature of the crime.

Thus, the crimes incorporated, indicated in the laws, have shown a level of inconsistency in a way that does not take into account the nature of the trafficking network. It seems, however, fair to provide a lesser penalty for the crime of omission—failure to notify during a transfer of ownership of cultural heritage. This is in line with the trend reflected in the transnational and organized crime suppression instruments as many of them do not even require criminalization of omission except in grave situations such as corruption offenses and environmental regulations.⁸⁹ When omission is criminalized, the amount of penalty is expected to be lesser than the crimes that are committed by

⁸⁷ UNODC, Practical Assistance Tool, *supra* note 59, p. 41

⁸⁸ *Ibid*

⁸⁹ Neil Boister, *An Introduction to Transnational Criminal Law*, 2nd edition, Oxford University Press, (2018), p. 23

way of commission. This pattern is also reflected in Ethiopia's Criminal Code. However, for other crimes of commission in the trafficking network, there is a visible inconsistency that would potentially threaten or impact international mutual co-operation.

There is a possible scenario that the crimes in the illicit trafficking network, other than crimes of omission, could legitimately be perceived as 'serious crimes' by considering the spirit of the UNTOC and the UNODC model guidelines. The requirement of seriousness within the context of the UNTOC is measured in terms of the maximum penalty of the crimes in question. However, the Convention also indicates that the crimes should be treated as 'serious' leaving the discretion to determine the minimum penalty for each member state. This idea is further consolidated by Guideline 16 of the UNDOC's model non-binding guideline that aims to regulate crimes related to cultural heritage trafficking. The notion of 'serious crime' is loaded with the idea that the international co-operation regime could be triggered when the crimes are grave enough to justify the cooperative response. Thus, it is noticeable that further research is needed, that is based on the principles and theories of punishment, to determine the minimum penalty within the meaning of 'serious crimes' as indicated in the UNTOC.

However, the author of this article considers one possible scenario with which the concept of 'serious crime' could justifiably be understood under Ethiopia's criminal law. Serious crime under Ethiopia's legal system could be understood as those crimes that are punishable with a minimum of one-year rigorous imprisonment. This scenario is based on the assumption that the idea of 'serious crime' under the UNTOC could be interpreted, under Ethiopia's Criminal Code, to mean 'crimes punishable with rigorous imprisonment'. In effect, the alternative minimum penalty stipulated for the crimes of illicit export, commercial sale/purchase, and illicit excavation could be at least one-year rigorous imprisonment within the meaning of Article 108(1) of the Criminal Code rather than providing a fine as an alternative minimum penalty. The minimum alternative penalty for the crimes of illicit excavation, 'commercial sale and purchase of cultural heritage', and 'illicit export of cultural heritage' is only a fine of 1500 Birr, 1500 Birr, and 10,000 Birr respectively. In these crimes, although rigorous imprisonment is provided, the penalty of fine is provided as an alternative penalty.

Almost all of the aforementioned crimes have a significant effect to elevate the crime of illicit cultural heritage trafficking into the status of transnational and organized crime. They can be treated as 'serious crimes' although it is not fair to

expect that the penalties attached to these crimes be exactly similar to the crime of theft. The fact that these crimes incorporate rigorous imprisonment, though it is provided in the form of alternative punishment, implies that the legislature partially treats the crimes as serious ones. But it is fair to fully treat them as ‘serious crimes’ to avoid internal anomaly within the same offense and external anomaly (between these crimes and the crime of theft). Such inconsistency of the law is against the spirit of the UNTOC and the UNODC guidelines that require legislatures to treat each of the major crimes stated above to be treated only as serious crimes. For instance, Guideline 16 of the UNODC model non-binding guideline pointed out that crimes including illicit export, illicit import, illicit excavation, conspiracy, theft, laundering, and trafficking in cultural properties need to be treated as serious crimes. Thus, there is a possibility that Ethiopia’s law could be aligned with this trend by treating the aforementioned crimes as serious offenses with sufficient care not to artificially and unjustifiably elevate the minimum penalty.

A lesson could also be drawn from Proclamation 179/1999 which is one of the heritage protection laws. Article 25(3) of the Proclamation could provide a better picture of how the illicit acts in the cultural heritage trafficking network could be justifiably be treated as serious offenses.⁹⁰ The provision provides a minimum penalty of three years of rigorous imprisonment and a fine of 10, 000 Birr for the crime of illicit export of archives, books, and documentary heritage. On the contrary, Article 45(1)(c) of the Heritage Protection Proclamation provides an alternative minimum penalty of 10, 000 birr (less than \$300) for the crime of illicit export of cultural heritage. It seems that there is a manifest anomaly to have such differential treatment of the same act—which is an act of illicit export—without sufficient justification. This is because there may be an overlap between the two provisions. For instance, an ancient Memo written by an Emperor which is considered as a state archive could at the same time be taken as a cultural heritage. In this case, a crime of illicit export could fall under the scope of the two proclamations. In effect, it is fair to suggest that the penalties prescribed for the same illicit act need to be fairly consistent. The anomaly is also reflected within the same provision.

In addition to discrepancies related to the minimum penalty, there is also a related problem of inconsistency in the maximum amount. The maximum

⁹⁰ Also, a further lesson could be drawn from the repealed legislation to consolidate the idea that the penalty for the illicit export of cultural heritage can be rigorous imprisonment while interpreting the concept of ‘serious crime’. Article 31(2) of the repealed Proclamation 36/1989 had stated that ‘whosoever takes out of the country any antiquity in contravention of Article 14 of the proclamation shall be punishable with rigorous imprisonment not exceeding fifteen years.’

penalty to be imposed on the illicit excavation is only six months. On the contrary, the maximum penalty for the crimes of illicit export, commercial sale/purchase of cultural heritage is five years of rigorous imprisonment. In some cases, fixing the maximum amount of penalty only for six months of rigorous imprisonment could have an adverse consequence for international cooperation. For instance, UNTOC's cooperation framework relies on the transnational and serious nature of the crime.⁹¹ Unless the crime is 'serious' enough entailing a maximum of at least four years of deprivation of liberty, states are not obliged to cooperate in criminal matters so long as they rely on the Convention for co-operation purposes.

Concluding Remarks

This article has examined Ethiopia's Criminal Law regulating cultural heritage trafficking in light of the Network Model that explains the nature of this transnational and organized crime. Accordingly, it is found that although the law regulates the illicit acts as a transnational and organized crime, it also contains gaps related to non-comprehensive criminalization and inconsistent penalties. The article, therefore, suggests that it is essential to contemplate the possibilities of fixing these two gaps. To that end, the legislature could benefit from international emerging trends, especially from the UNODC non-binding model guidelines and the UNTOC, as a guide to criminalization.

The international non-binding guidelines are issued under the auspices of the UNODC and adopted by the General Assembly Resolution 69/196 in 2014.⁹² Specifically, Guideline 16 requires states to "consider criminalizing, as serious offenses, acts such as (a) trafficking in cultural property; (b) illicit export and illicit import of cultural property; (c) theft of cultural property (or consider elevating the offense of ordinary theft to a serious offense when it involves cultural property); (d) looting of archaeological and cultural sites and/or illicit excavation; (e) conspiracy or participation in an organized criminal group for trafficking in cultural property and related offenses; (f) laundering, as referred to in Article 6 of the Organized Crime Convention, of trafficked cultural property." Also, states are required to criminalize 'damaging or vandalizing cultural property or acquiring, with conscious avoidance of [their] legal status' (Guideline 17), failure to report the 'suspected cases' of cultural property trafficking (Guideline 18), and failure to report the discovery of archeological objects and other cultural objects (Guideline 18).

⁹¹ UNTOC, *supra* note 12, Articles 2(b), 3(1)(b), 16, 18.

⁹² Operational Guidelines, *supra* note 27

These guidelines could serve as a very important input for Ethiopia's legislature for two major reasons. First, the Guidelines regulate almost key illicit acts in all the four-stages of the illicit artifacts trafficking network. Hence, they offer a 'comprehensive instrument against offenses related to cultural property'.⁹³ Second, the guidelines are the embodiment of current initiatives and state practices as well as 'principles and norms' extracted and refined from the analysis of international instruments that have relevance to the protection of cultural heritage.⁹⁴ Therefore, Ethiopia's legal system could benefit from these refined Guidelines while framing its laws and institutions in the area of cultural heritage trafficking. It must, however, be underlined that the ultimate test used to criminalize illicit acts is the criterion of protection of 'public good' which is embodied under Article 1 of the Criminal Code. However, international initiatives are important reference tools in the process of evaluating the 'common good' criteria.

Also, Ethiopia's legislature can use the UNTOC as a guide to address the gap related to inconsistent penalties. The UN, through the resolution of Conference of Parties to the UNTOC⁹⁵ and the UN General Assembly,⁹⁶ encourages states to treat cultural heritage trafficking as a "serious crime", within the meaning of Article 2(b) of the UNTOC, carrying a 'maximum penalty of deprivation of liberty of at least four years or more.' Also, UNODC's Guideline 21 indicates that states may consider the application of UNTOC to impose criminal sanctions in line with Article 2(b) of the Convention to meet the required level of gravity of a crime that would entail the imposition of custodial sentences.⁹⁷

Even though the UNTOC mainly concerns about fixing the maximum penalty, it also uses the term 'serious crime'. Thus, international co-operation, in the field

⁹³ UNODC, Practical Assistance Tool, *supra* note 59, p. V, Preface

⁹⁴ *Id.* p.1

⁹⁵ The Conference of the Parties to the UNTOC, Combating Transnational Organized Crime Against Cultural Property, Resolution 5/7, 2010, available at https://www.unodc.org/documents/organized-crime/COP_5_Resolutions/Resolution_5_7.pdf, last accessed on 20 June 2020]. See also, Para. 9 of the UNSC Resolution 2347(2017). Some, however, suggested care for this approach for fear of over-penalization. See, Neil Boister, *supra* note 89, p. 28.

⁹⁶ UNGA, Strengthening Crime Prevention and Criminal Justice Responses to Protect Cultural Property, Especially with Regard to its Trafficking, Resolution 66/180, (19 December 2011), available at https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/2010-2019/2011/General_Assembly/Resolution_66-180.pdf, last accessed on 15 June 2020.

⁹⁷ It must also be noted that there are states who are not willing to extend the scope of UNTOC to cultural heritage trafficking cases. See, Greg Borgstede, 'Cultural Property, the Palermo Convention, and Transnational Organized Crime', *International Journal of Cultural Property*, Vol. 21, No. 3, (2014), p. 286-287. Manacorda also calls for caution while resorting to the robust use of criminal law and reminds us of the need to properly consider individual liberties in line with proportionality and *ultima ratio* principles of criminal law. See, Stefano Manacorda, The Criminal Law Dimension in the Protection of Cultural Goods in Stefano Manacorda and Duncan Chappell(eds.), *Crime in the Art and Antiquities World Illegal Trafficking in Cultural Property*, Springer Science+Business Media, (2019), p. 43-45.

of combating cultural heritage trafficking, mainly focuses on countering serious offenses rather than minor crimes. This is not surprising since states may not be willing to waste resources and jointly respond in fighting offenses that are not serious enough to threaten a protected interest. Thus, there is a legitimate reason for Ethiopia's legislature to treat every key crime in the four stages of the cultural heritage trafficking network, other than crimes of omission, as a 'serious offense' within the meaning of Article 108 of the Criminal Code and Article 2(b) of the UNTOC. The penalties should not, however, be artificially inflated.

To sum up, this article mainly analyzes Ethiopia's law from the viewpoint of countering transnational and organized crimes by considering contemporary global trends. It does not, however, rely on the theories and principles of criminalization and determination of punishment. Thus, the author opines that further research is needed to consolidate the law in question from the perspective of the principles of criminalization and punishment.