Bahir Dar University Journal of Law
የባሕር ዳር ዩኒቨርሲቲ የሕግ መጽሔት

ISSN (e): 2709-5827 ISSN (P): 2306-224X

ቅጽ ፲፪ ቁጥር ፪		ሰኔ ፳፻፲፬
Vol. 12 No. 2		**June 2022**

In This Issue

Articles

በዚህ ዕትም

ጥናታዊ ጽሁፎች

A Biannual Law Journal published by Bahir Dar University, School of Law
Established in 2010
በባሕር ዳር ዩኒቨርሲቲ ሕግ ትምህርት በዓመት ሁለት ጊዜ የሚታተም የሕግ መጽሔት
በ፳፻፪ ዓ.ም. ተመሠረተ

MESSAGE FROM THE EDITORIAL BOARD

The Editorial Board is delighted to bring Vol. 12. No. 2 of Bahir Dar University Journal of Law. Bahir Dar University Journal of Law is meant to serve as a forum for the scholarly analysis of Ethiopian law and contemporary legal issues. It is dedicated to engender a culture of knowledge creation, acquisition and dissemination in the field of law and in the justice system of our country in general.

The Editorial Board appeals to all members of the legal profession, both in academia and practitioners, to contribute scholarly manuscripts. It is commendable to conduct a close scrutiny of the legal and institutional reforms that are still underway across the country. The Editorial Board extends its gratitude to manuscript contributors, reviewers, and others who participated in different capacities.

Bahir Dar University Journal of Law
የባሕር ዳር ዩኒቨርሲቲ የሕግ መጽሔት

Law School Academic Full Time Staff

Abraham Mamo	LLB (Asst. Lecturer)
Adam Denekew	LLB, LLM (Lecturer)
Addisu Genet	LLB, LLM (Lecturer)
Alebachew Birhanu	LLB, LLM (Assoc. Professor)
Asirar Adem	LLB, LLM (Lecturer)
Asnakech Getnet	LLB, LLM, PhD Candidate
Belayneh Admassu	LLB, LLM (Assoc. Professor)
Dessalegn Tigabu	LLB, LLM (Lecturer)
Eden Fiseha	LLB, LLM (Asst. Professor)
Enterkristos Mesetet	LLB, LLM (Lecturer)
Essubalew Molla	LLB (Asst. Lecturer)
Fikreabinet Fekadu	LLB, LLM (Asst. Professor)
Gizachew Silesh	LLB, LLM (Asst. Professor)
Gojjam Abebe	LLB, LLM (Lecturer)
Mamenie Endale	LLB, LLM (Asst. Professor)
Mihret Alemayehu	LLB, LLM (Asst. Professor)
Mohammode Doude	LLB, LLM (Asst. Professor)
Mulugeta Akalu	LLB, LLM (Asst. Professor)
Tajebe Getaneh	LLB, LLM (Lecturer)
Tegegne Zergaw	LLB, LLM (Asst. Professor)
Temesgen Sisay	LLB, LLM (Asst. Professor)
Tessema Simachew	PhD (Asst. Professor)
Tewachew Molla	LLB, LLM (Lecturer)
Tikikil Kumlachew	LLB, LLM (Lecturer)
Worku Yazie	LLB, LLM (Asst. Professor)
Yenew Bitew	LLB, LLM (Lecturer)
Yihun Zeleke	LLB, LLM (Asst. Professor)
Zewdu Mengesha	LLB, LLM (Asst. Professor)

Law School Academic Staff on Study Leave

Addisu Gulilat	LLB, LLM (Lecturer)
Endryas Getachew	LLB (Assistant Lecturer)
Gedion Ali	LLB, LLM (Lecturer)
Misganaw Gashaw	LLB, LLM (Asst. Professor)
Nega Ewunetie	LLB, LLM (Assoc. Professor)
Tefera Degu	LLB, LLM (Lecturer)
Yohannes Enyew	LLB, LLM (Lecturer)
Tilahun Yazie	LLB, LLM, PhD Candidate
Belay Worku	LLB, LLM, PhD Candidate
Solomon Shumetu	LLB (Asst. Lecturer)
Yabisra Alemeneh	LLB (Asst. Lecturer)
Yibekal Tadesse	LLB, LLM (Lecturer)

Part-time Staff

Biniyam Yohannes	LLB, LLM (ANRS Supreme Court Judge)
Geremew G/Tsadik	LLB, LLM (ANRS General Attorney)
Tsegaye Workayehu	LLB, LLM (ANRS Supreme Court Judge)

Bahir Dar University Journal of Law
የባሕር ዳር ዩኒቨርሲቲ የሕግ መጽሔት

ቅጽ ፲፪ ቁጥር ፪		ሰኔ ፳፻፲፬
Vol. 12 No. 2		June 2022

Content

Articles

Socio-economic and Human Rights Implications of Development-Induced Displacement in Addis Ababa----------133

Manaye Zegeye Meshesha

Core Crimes and the Characterization of Mai-Kadra Atrocities in Ethiopia----------178

Bereket Eshetu Messele

The Quest for Remedies for Violations of IDPs` Right to Land and Property in Ethiopia ----------221

Misganaw Gashaw Beza & Alelegn Wondem Agegnehu

Land Law Responses towards Arbitrary Eviction on Non-Indigenous Rural Peasants in Benishangul-Gumuz Region ----------261

Bezabih Tibebu Checkol

The Taxation of Miscellaneous Income Sources under the Federal Income Tax Proclamation of Ethiopia: A Critical Analysis----------303

Belete Addis Yemata

Address

Bahir Dar University Journal of Law
School of Law, Bahir Dar University
P. O. Box- 5001
Tel- +251588209851
E-mail- bdujol@yahoo.com
Bahir Dar, Ethiopia

Websites:

https://journals.bdu.edu.et/index.php/bdujl
http://ejol.ethernet.edu.et/index.php/BDUJOL

Socio-economic and Human Rights Implications of Development-Induced Displacement in Addis Ababa

Manaye Zegeye Meshesha[θ]

Abstract

This article evaluates the socio-economic and human rights implications of Development-induced Displacement (DID) in the City of Addis Ababa. Development- induced Displacement is a broad concept and policy framework used by governments to justify the displacement of people in meeting their development activities. A redevelopment program is one of the common policy justifications of DID in urban settings to improve the living and working conditions of people. In principle, displacement of people from their homes, land, and community is not allowed unless a compulsory public interest requires such moves. If displacement becomes unavoidable, the rights and benefits of those displaced shall be regulated by adequate legal framework guaranteeing due process and effective remedy. Within the human rights framework of the right to development, the central subject, ultimate participant, and beneficiary are the people who are called to leave their land, home, and community. In light of these principles and legal framworks, this article examines the processes and outcomes of a redevelopment programms in three sites of Addis Ababa. The evidences from the qualitative investigation revealed that the redevelopment program was not backed by an adequate legal framework, the practices are incompatible with international human rights standards and principles cited for unavoidable DID. Particularly, the program did not recognize those individuals whose livelihoods have been

[θ] Manaye Zegeye Meshesha LLB, LLM, Ph.D, Assistant Professor in Human Rights, Department of Social Science, Addis Ababa Science and Technology University. The author can be reached via: manayert56@gmail.com.

affected by the program as the central subject, ultimate participants, and beneficiaries of its process and outcomes. , At worst, the program becomes a cause for human rights violations, destabilizes social systems, and creates impoverishment risks in the lives of displaced urban poor. The article recommends policy, legal, and practical reform to alleviate further socio-economic impacts and human rights abuses sponsored in the name of development.

Keywords: Redevelopment, Public Interest, Impoverishment Risk and Reconstruction Model, Rights-Based Approach, the Right to Development, Forced Eviction, Addis Ababa.

Introduction

Displacement of people as a result of development interventions has been identified as one of the major forms of forced migration problem worldwide.[1] Populations living both in urban and rural settings of many developing countries are displaced due to development projects such as infrastructure expansion, redevelopment, gentrification, and urbanization programs. [2] Inherent to this development moves is the effect of taking the land rights of citizens and the process of redressing the latter. As such, the transfer of land through such processes affects the human rights of evicted people, , resulting in varying socio-economic consequences. .

Displacement from land possession is a recurrent phenomenon in Ethiopia's urban and rural settings. It is taken as an important policy intervention by the

[1]Eguavoen I & Wini Tesfai. Social Impact and Impoverishment Risks of the Koga Irrigation Scheme, Blue Nile basin, Ethiopia *(Africa in focus — Volume 25, N0.* 1 (2012), pp. 39-60

[2]Dhru Kelly, *Acquisition of Land for Development Projects in India: The Road Ahead*: Gurath, Research Foundation for Governance, (2010).

government in the pursuit of economic development. At the same time this phenomena is the most important subject of policy debate in the country. The debate takes the rights of evictees against displacement on the one hand, and the uncontested power of government to displace citizens from their possession on the other.

Recent empirical evidences have indicated that development projects such as agricultural investments, dam constructions, urban restitution, and infrastructure expansions such as roads, urban drinking water, electricity, and housing have caused displacement of thousands of people in rural and urban areas.[3] For instance, a study conducted on the first Gilgel Gibe dam construction shows that more than 10,000 people were displaced.[4] Similar study on the Koka dam and irrigation scheme indicated the displacement of a large population of pastoralists in the Awash Valley.[5] Yet evidences from other investigations on urban displacement and relocation in Addis Ababa revealed eviction of a significant number of urban dwellers from the inner city

[3] Eguavoen I & Wini Tesfai, *supra* note1.

[4] Gebremeskel Zinawi, The Impact of Slum Renewal on the Livelihood of Displaced People in Addis Ababa: The Case of People Relocated to Jomo Resettlement Site. MA Thesis, Addis Ababa University, School of Graduate Studies: Addis Ababa, (2012). Kassahun, Kebede, Re Relocation and Dislocation of Communities by Development Projects: The Case of Gilgel Gibe Dam (1962-2000) in Jimma zone.MA Thesis, Addis Ababa University and School of Graduate Studies: Addis Ababa, (2011). Etenesh, Melesse, Impact of Development-Induced Displacement on Female Headed Households in Inner City Slum Areas of Addis Ababa: The Case of Sheraton Addis Expansion Project: MA Thesis, Addis Ababa University, School of Graduate Studies: Addis Ababa, (2007). Desalegn, Keba, The Socio-Economic and Environmental Impacts of Large Scale (Agricultural) Land Acquisition on Local Livelihoods: A Case Study in Bako Tibe Woreda of Oromia Region, Ethiopia; MA Thesis, Centre for Development and the Environment University of Oslo Blindern, Norway, (2011). Berhanu, Zeleke, Impact of Urban Redevelopment on the Livelihoods of Displaced People in Addis Ababa: The case of Casanchis Local Development Plan, MA thesis, Addis Ababa University, (2006)

[5] *Id.*

to the outskirts.[6] The majority of these people − even though their exact number is unknown[7] − are the urban poor who have resided in neglected quarters of urban areas, slums, and, often inner-city places.[8]

It is recognized that the urban redevelopment program has positive impacts and unintended consequences. Some argue that slum clearance fosters economic growth through the provision of land for private investment. [9] Others also hold that redevelopment may create a suitable urban space for work and residence thereby raising its standards.. Addis Ababa , the capital of the federal government and the seat of the Africa Union and other international organizations, needs suh development program that raise the standards of its infrastructure and services.[10] The redevelopment program also aims to combat the deep-rooted housing problems, and to improve the poor environmental quality of the city .[11] However, the socio-economic and human rights costs of those directly affected by the redevelopment projects have been causing serious concerns.

Evidences show that relocated households pay the price without reaping significant benefits from the redevelopment programs.[12] Among others, the forced evictions and relocations destroy people`s traditional life.[13] It disrupts

[6] *Id.*
[7] *Id.*
[8] Abebe, G., Resettlement of slums dwellers in contemporary Addis Ababa*:* The perspectives of relocated households. MA. Thesis, Vdm Verlag, Saarbriicken, (2010)
[9] Mathewos Asfaw, *supra* note 7.
[10] The Addis Ababa City Government Revised Charter, Proclamation No. 361/2003, Federal *Negarit Gazeta*,(2003), Para 1.
[11] Federal Democratic Republic of Ethiopia, Plan for Accelerated and Sustained Development to End poverty, 2005/6-2009/10.Ministry of Works and Urban Development Plan for Urban Development and Urban Good governance
[12] Parasuraman S. *The Development Dilemma: Displacement in India*, Palgrave Macmillan, London, (1999).
[13] *Id.*

their jobs, source of incomes, and their established social networks. [14] Most had to move from their areas of work, disconnected from their social networks , and face additional costs for transport and schooling. Further, they experienced loss of benefits from prior connections such as home-based small businesses and clients and site-related opportunities, which in turn resulted in entire interruption of income, unemployment and other socio-economic complications.[15]

Of course, taking a different perspectives, others argue that urban redevelopment projects increase the value of land, higher-income people displace low-income residents, creating inaccessible housing market for the urban poor.[16] They add that, with high-income groups moving into city centers, low-income communities are further marginalized and forced to the outskirts of the city, where they lack access to public infrastructures, transport,, jobs, and schooling.[17]

Studies have been investigating the processes and outcomes of such programs. As the impacts of DID in Addis Ababa are multi-dimensional, most prior studies have been fundamentally concerned with the socio-economic consequences of redevelopment programs to low-income

[14]Dolores Koenig, Development-caused forced displacement and resettlement in urban India, *India Resettlement News Network, New Delhi. Resettlements News,* No .19, (2006).

[15]Ashenafi Gossaye, Addis Ababa: *In progress or crisis? Ethiopian Review: Ethiopian News and Opinion Journal*, (2008) (http://www.ethiopianreview.com/content/2983) (accessed June 15, 2022), see also Haregewoin, Y. Integrated housing development programs for urban poverty alleviation and sustainable urbanization. The case of Addis Ababa. W17-Housing and Sustainable Urbanization in Developing Courtiers. International Conference, Rotterdam (25-28 June 2007)

[16]UN-Habitat, Situation Analysis of Informal Settlement in Addis Ababa, United Nations Human Settlements Program Nairobi, (2007).

[17]*Id.*

population and the most vulnerable.[18] However, the legal and human rights dimensions have not been sufficiently researched. It is equally true that there is a need to get more research in different disciplines to deeply understand the interaction between redevelopment programs, actors involved, land and property rights, and housing tenure. Therefore, the lack of research evidences on human-rights-based approach to development in the context of Addis Ababa redevelopment program gave the impetus to this study . As such , the study investigates the subject with a particular focus on the socio-economic and human rights implications of the program. The investigation employed a a case study research approach covering three redevelopment sites: American Gibi, Cassanchis No.2, and Dejach Wube Sefer. Focus group discussion and In-depth interview were used a major data generating tools. Three focus group discussions with 12 members each have been conducted from American Gibi and Dejach Wube redevelopment sites. These subjects were selected on non-random basis, yet arranged on the basis of sex, marital status, employment, and possession in the house demolished.

A total of 82 individuals, who know the redevelopment program process, were interviewed . The majority of these people (62) are evicted citizens, whle the remaining 20 are officials working in the city administration, and experts at the woreda level. The study also used a human rights-based approach to assess the feasibility of legal and policy frameworks within international standards and models relevant to DID.

2. Redevelopment as a Cause of DID

Urban Redevelopment program is one of the causes of DID claimed by governments while meeting their commitment to development. It is the main

[18]Gebremeskel, *supra* note 4.

constituting in-built element in DID that creates an environment for the displacement of individuals and communities from their homes and land in urban settings. It is also an important intervention designed to improve urban residents' living and working environments by abolishing slum areas and dilapidated neighborhoods.[19]

As evidences from some studies indicate, millions of people are displaced annually by development projects contrary to international principles and human rights norms.[20] While such projects can bring enormous benefits to society at large, they also impose costs, which are often borne by its poorest members.[21] The severity of these risks and the vast number of people affected every year make displacement one of the most pressing human rights issues associated with development. A growing body of human rights protection for displaced people and standards for the prevention and mitigation of displacement-related risks is emerging to challenge flawed moral and economic assumptions that allow such massive hardship to be justified in the name of development. One of the efforts against DID is to respond to the human rights impacts and risks of DID by formulating a variety of guidelines and laws essentially designed to address the constituting factors that define DID. According to the Committee on Economic, Social, and Cultural Rights, general comment No. 7(1997) on the right to adequate housing: [22]

[19] The Federal Democratic Republic of Ethiopia Urban Plans Proclamation, Proclamation No 574/2008, *Federal Negarit Gazetta* (2008), Art. 40(1).

[20] Human program (UN Habitat), Assessing the Impact of Eviction, (UN 2014), http:// www.un-habitat.org**,** (accessed June 10, 2022).

[21] *Id.*

[22] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 7:The Right to Adequate Housing (Art.11.1): Forced Evictions*, E/1998/22(20May1997), https://www.refworld.org/docid/47a70799d.html.

Forced eviction is the permanent or temporary removal against the will of individuals, families, and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.

The elements that constitute forced eviction are not only inclined to use force; rather, they separately or cumulatively define forced eviction. According to the definition above, forced eviction comprises permanent or temporary removal from housing, land, or both. The removal is carried out against the will of the occupants, with or without the use of force. It can be carried out without the provision of proper alternative housing and relocation, adequate compensation, and/or access to productive land, when appropriate; it is carried out without the possibility of challenging either the decision or the process of eviction, without due process and disregarding the state's national and international obligations.

As such forced eviction involves displacement of people in the absence of appropriate legal rules designed to manage the processes of a development program and further remedies which in particular guarantee due process and participation for those evicted. .

Looking into the redevelopment program in Addis Ababa in this light, one could see much of these elements characterizing this phenomenon. Among others, there is no specific law regulating the redevelopment program. The evictees were not empowered to make decisions concerning the process. They have no procedural guarantee to contest their removal through a court of law. The compensation schemes underway in line with the redevelopment program were not able to restitute the evictees or better their livelihoods if not impossible leading to impoverishment. There was also clear coercion against the evictees without respect for the right to adequate housing, tenure security,

and property rights. In many of its forms, the redevelopment program of Addis Ababa under this research site explains the existence of forced evictions. Accordingly, it should also be noted that the displaced may not challenge the eviction practically in any form. Failure to resistance for eviction does not constitute the legality of eviction.

3. Development-induced Displacement: an International Perspective

The phenomena of DID as a category of involuntary mobility of people was first raised by American sociologist Eugene M. Kulischer.[23] The first extensive study on this subject , was devoted to an exploration of the consequences of urban relocation in the USA. Such evidences were instances that illustrate the costs of DID on the livelihoods of evictees.[24] The World Bank guideline on involuntary resettlement adopted in 1980 and other scholarly moves coming under the theme of "putting people first: sociological variables in rural development" in the late 1980s further initiated more advanced studies on the subject.[25]

Such scholarly moves continue to this day as DID has become a global phenomenon of the modern time, affecting people of both developed and developing nations. Of course, there are disparities among countries in the analysis of displacement and mechanisms of managing its effects. In some countries, it is a cause of socio-economic problems leading to violations of human rights and a significant reduction in the level of individual and

[23]Bogumil Terminski, *DID and Resettlement: Theoretical Frameworks and Current Challenges*, Geneva, May (2013).
[24] *Id.*, p.43.
[25] Michael Cerenea.M. (ed.), *Putting People First: Sociological Variables in Rural Development*, World Bank & Oxford University Press, Oxford-Washington, 1985, (1991).

community security, while in others it cause little or no harm.[26] The determining factor for the variation is the difference in the standards of implementating relevant domestic rules and international standards. Further, the form of government, the principles of economic development and environmental protection policies, property rights, the level of respect for human rights, the level of development of civil society, the relation of government to social inequalities, and the margins of society are some of the factors affecting the nature and consequences of DID.[27]

Scholars such as Oliver(2009) argue that be it in rural or urban rich or poor countries, the overwhelming majority of victims of evictions are members of the poor and marginalized communities.[28] This , according to the writer, is rooted in their socio-economic status. The fact that they lack formal tenure security can make them immediately vulnerable to removal from land, home, and community. The fact that they lack the power of influence can make them targets of least resistance during development planning processes. The fact that they live under terrible conditions can in itself become grounds for their eviction.[29] Cernea (1999) in her urban renewal study supported the views of Oliver, stating :

> *The problem the planners tackled was not how to undo poverty but how to hide the poor. Urban renewal was designed to segment the city so that barriers of highways and monumental buildings protected the rich from the sight of the poor and enclosed the*

[26] *Id.*
[27] *Id.*
[28] Oliver-Smith, A. (ed.) *Development and Dispossession: The Crisis of Forced Displacement and Resettlement.* Santa Fe, New Mexico, School for Advanced Research, Advanced Seminar Series, (2009).
[29] *Id.*

> *wealthy center away from the poor margin. New York is the American city that best exemplifies this transformation.*[30]

Given the fact that most urban residents in the inner city of Addis Ababa are poor, it is tenable to argue that their socio-economic status exposed them to displacement in the outskirts of the City. Being in poverty is one of the self-challenge barriers that preclude the evicted residents not to be heard as well as receiving displacement as the best option for their next livelihoods.

The impacts of DID are multidimensionally ranging from socio-economic to psychological damages as well violations of human rights and fundamental freedoms. According to Cornea and Mathus, displacement de-capitalizes the affected population, imposing opportunity costs in the forms of lost natural capital, lost man-made physical capital, lost human capital, and lost social capital. They add that these losses could not be replaced even if there are remedies after/before eviction.[31] They conclude that the dominant outcome of displacement is not income distortion but impoverishment.[32] Further, these scholars point out that the human costs of forced displacement fundamentally result in a wide range of negative consequences on the livelihoods of those affected. This includes multiplying individual and social impoverishment such as homelessness, physical, physiological and emotional trauma, insecurity for the future, high transportation costs, removal of children from school, loss of faith in the legal and political system, loss of significant cultural sites, higher housing costs, and absence of a choice of alternative

[30] Michael M. Cernea, Capacity building for Resettlement Risk Management: Risk Analysis and the Risks and Reconstruction Model in Population Resettlement Training Course, Asian Development Bank, Manila, (2008).

[31] Micheal M. Cernea, The Risk and Reconstruction Model for Resettling Displaced Populations*:* World Development. World Bank, *Elsevier Science Limited*, Vol. 25. No 10, (1997).

[32] *Id.*

accommodations and criminalizing self-help housing.[33] The majority of the human costs of displacement were realities in the redevelopment sites of Addis Ababa in which this research is undertaken.

Turning to the other perpective of analyzing modern DIDs, one finds its contradiction with the principles of human rights and fundamental freedoms of evictees. A considerable number of International laws explicitly recognizes the right to security of tenure and adequate housing as major immediate effects posing adverse impacts on the lives of evictees.Yet displacement actions are made in ways that, directly and indirectly, violate the full spectrum of human rights recognized in major human rights instruments.

Forced displacement of people attains international recognition as being a global problem and practice that constitutes a gross and systematic violation of human rights. For instance, the UNHRC in its resolution 1993/77 declared forced displacement as a gross violation of human rights.[34] The Committee on Economic, Social, and Cultural Rights in its General Comment No. 4 stated that practices of forced displacements are prima facie incompatible with the requirements of the ICESCR.[35]

The severity of the risks emanating from DID and the eviction of a vast number of people every year makes displacement one of the most pressing human rights issues associated with development programs today. Due to this, the international communities including the UN agencies, multilateral

[33] Michael M. Cernea (ed.), *The Economics of Involuntary Resettlement: Questions and Challenges*. World Bank, Washington D.C, (1999).

[34] Office of the High Commissioner for Human Rights , Forced évictions Commission on Human Rights resolution,e-cn-4-res-1993-77 doc 1993/77, (67th meeting, 10 Mar 1993) https://ap.ohchr.org (assessed June 25, 2022).

[35] Office of the High Commissioner for Human Rights, CESCR, General Comment 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant) (Sixth session, 1991).

financial institutions, NGOs, and others have taken different measures that help to manage such programs and to address the rights of affected people. One of the fundamental steps in this regard is the formulation of standards and guidelines aimed at balancing the risks and benefits of DID, particularly protecting the rights of displaced people and preventing, mitigating, and challenging the risks of displacement pursued in the name of development.[36]

Human rights violations resulting from DID may manifest in two ways . The first violation is related to the specific nature of rights that are linked to displaced people. The most significant human rights instruments in this regard are the Declaration on the Right to Development (DRTD), the Declaration on the Rights of Indigenous Peoples (DRIPs), and the African Charter on Human and Peoples′ Rights' (ACHPR). As such, the right to development in general and the right to participation in development, in particular, are core components of the rights violated in the design, implementation, and evaluation of development projects that cause displacement. If displaced people are denied their right to participate in the processes of development projects, it follows that other fundamental freedoms and human rights begin to be violated. Therefore, it can be argued that the non-observance of people's right to participation in development is a root cause for the denial of other human rights. DID has a direct implication for the right to development, which violates the autonomy of individuals and communities as active

[36] Among the prominent instruments, those most cited in response to the human rights impacts and risks of DID are the UN Basic Principles and Guidelines on Development-Based Evictions and Displacement, the UN CESCR General Comment No. 4 and 7 on the right to adequate housing and, Eviction Guidelines for Aid Agencies on Involuntary Displacement and Resettlement and the Report of the World Commission on Dams; Comprehensive Human Rights Guidelines on Development-Based Displacement, Guiding Principles on Internal Displacement, Basic Principles and Guidelines on the Right to Remedy and Reparation, and so on.

participants, central subjects, and beneficiaries in the process of development.[37]

DID violates the human rights and fundamental freedoms of evictees recognized under general human rights instruments. The provision relevant to rights during displacement include Articles 17 and 25 of the UDHR. Articles 11(1) and 2 of the ICESCR and CESCR General Comment No. 7 documented in 2010.These provisions lay down the property right of citizens,the prohibition of arbitrary deprivations,the right to adequate housing, the right to adequate standard of living including adequate food, clothing, and housing, and to the continuous improvement of living conditions.

Apart from such scocio-economic impacts, DID substantially threatens several rights enshrined under the international covenant on civil and political rights (ICCPR). Particularly, it violates the rights to life (ICCPR, Art 6(1)), freedom from cruel, inhuman, and degrading treatment (ICCPR, Art.7), and the right to security of the person (ICCPR, Art.9(1)), the right to non-interference with privacy, home and family (ICCPR, Art.17), freedom of movement and to choose one's residence (ICCPR, Art.12(1)), the right to health (ICESCR, Art.12), the right to education (ICESCR, art 13), the right to work (ICESCR, Arts. 2.3 and 26), the right to vote and take part in the conduct of public affairs (ICESCR, Art.25), and the right to self – determination (common art. 1 of ICCPR and ICESCR).

In most cases, DID denies the right to remedy and to judicial or other accountability mechanisms including challenging the reasons for forced eviction that results in further human rights violations related to access to

[37] General Assembly Resolution 41/128, Declaration on the Right to Development A/ Res 41/128 (December 1986)https:// www.ohchr.org (accessed June 2022) See preamble para 12 and Art. 2(1).

justice. However, there are also state legislations and practices allowing the evictees the right to challenge arbitrary eviction. The case in point is the Indian Constitution which gives power to ordinary courts to apply international principles in adjucating eviction cases. To this effect, in *Sudama Singh and others vs the government of Delhi*, the High Court of Delhi invoked the UN Basic Principles and Guidelines on Development-Based Evictions to argue that an eviction should not take place without the provisions of alternative land and housing. Further, the court ruled that evictees should not be placed in a worse situation after eviction.[38]

With a similar legislative intent ,the Constitution of South Africa provides a clear constitutional right to adequate housing and corresponding prohibition on forced eviction.[39]Accordingly, the constitutional court of South Africa is vested with the power to entertain such cases. In another instance, Article 47 of the Constitution of the Land of Brander burg, Germany provides an obligation for the realization of adequate housing and prohibits eviction unless alternative accommodation is fulfilled.[40]

Forced evictions also have been condemned by decisions of regional human rights mechanisms. For instance, the African Human Rights Commission passed a valid decision in similar cases prohibiting forced eviction through the

[38] Sudama Singh and others vs the government of Delhi, WP(C) Nos.8904/2009, 7735/2007,7317/2009 and 9246/2009, High Court of Delhi at New Delhi, Https://Indiankanoon.Org (11th February, 2010).

[39] Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg V City Of Johannesburg and Others (24/07) [2008] Constitutional Court of South Africa Zacc 1; 2008 (3) Sa 208 (Cc); 2008 (5) Bclr 475 (Cc) (February19, 2008).

[40] African Commission on Human and Peoples' Rights, Centre for Minority Rights in Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Communication No. 276/2003, (February 4, 2010).

readings of Articles 14,16 8(1), and 22 of the ACHPR.[41] Similarly, the Inter - American Commission on Human Rights through the consideration of Articles 11 and 21 of the ACHR, the European Court of Human Rights based on Article 8 of the ECPHRFF and Article 1 of its protocol, and the European Committee of Social Rights as per Articles 16 and 31 of the European Social Charter have addressed the issue of evictions and disregard it as a state legitimate right implemented in all conditions.

As pointed out in the beginning of this section, DID is one of the contemporary problems threatening the lives and livelihoods of individuals, groups, and communities worldwide. The existing international laws, standards, and obligations of states in such instruments are far-reaching in creating precedence to stop or mitigate arbitrary evictions. In line with this, social anthropologists have developed theoretical frameworks and eviction impact assessment (EIA) practice as a way to guide the process of displacement through testing or contesting the feasibility of redevelopment projects.

Scholars claim that EIA to be a powerful tool for designing development projects that are compatible with principles of human rights and redress the problems of those targeted in the process.[42] It promotes the development of creative and viable alternatives to planned evictions and serves to formulate risk mitigation and remedial strategies as part of the planning of unavoidable displacement.

[41] Inter-American Commission on Human Rights, Press Release N° 114/10, (November18, 2010).

[42] UN Habitat, *Losing Your Home: Assessing the Impact of Eviction*, (2011).

3.1 International Principles and Standards for DID

3.1.1 UN Basic Principles and Guidelines on DID

The United Nations Basic Principles and Guidelines on Development-Induced Evictions emanate from the obligations of states in numerous international human rights instruments. The guidelines address the human rights implications of DID in urban and rural areas. More specifically the basic principles and guidelines are based on international human rights law, General Comment No. 4 (1991), and General Comment No. 7(1997) of the committee on ESCR, the Guiding principles on internal displacement, the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Cross Violations of International Human Rights Law, and Serious Violations of International Humanitarian Law, and the Principles on Housing and Property Restitution for Refugees and Displaced Persons.

The basic principles and guidelines can be seen in two ways: (1)The principles related to the obligations of states and (2) the principles and guidelines that focused on procedures that must be followed during DID. [43] The guidelines lay down three fundamental principles that must be followed by states in the pursuit of development that resulted in displacement. The first principle is the prohibition of displacement.[44] The principle did not guarantee states a right to displace persons in the name of development. The second principle is an exception to the first principle in that it allows displacement in exceptional conditions where prevention of displacement is unavoidable due to compelling public interests.[45] The third principle flows from the second

[43] Miloon Kothari, The UN Basic Principles and Guidelines on Development-Based Evictions and Displacement presented in the annual report to the UN Human Rights Council by the UN Special Rapporteur on adequate housing, (2007).
[44] *Id.*
[45] *Id.*

principle where displacement becomes the last resort, any eviction must be authorized by law, carried out in accordance with international human rights law, undertaken solely for the purpose of promoting the general welfare; reasonable and proportional, ensure due process, fair and just compensation and effective judicial remedy among other things.[46]

3.2 Impoverishment Risk and Reconstruction Model (IRR)

Development practitioners confirmed that most socio-economic consequences of DID have a direct impact on the human rights of displaced persons.[47] Thus, the proper management of costs and risks of displacement using the IRR model will make DID compatible with international human rights norms and principles.

Scudder and Colson(1982) formulated a theoretical model of settlement processes distinguishing four stages: recruitment, transition, development, and incorporation/handing over. [48] The Scudder Colson diachronic framework was built around the key concept of "stage"; it focused on settlers' stress and their specific behavioral reactions in each stage. Initially, the model was formulated to apply to voluntary settlement processes. Subsequently, Scudder extended it to some involuntary resettlement processes as well, but only to those involuntary relocations that succeed and move through all four stages, as the model is not intended to apply to resettlement operations that fail and do not complete the last two stages.

[46] *Id.*

[47] W. Courtland Robinson, Risks and Rights: The Causes, Consequences, and Challenges of DID, The Brookings Institutions, SAIS Project on Internal Displacement, *Occasional Paper*, (2003).

[48] Michael M. Cernea, Understanding and Preventing Impoverishment from Displacement: Reflections on the State of Knowledge, *Journal of Refugee Studies*, Vol.8:No.3, *Oxford University Press*, (1995).

Different from the Scudder-Colson model, the IRR model does not attempt to identify different stages of displacement but aims to identify the impoverishment risks intrinsic to forced displacement and the processes necessary for reconstructing the livelihoods of the displaced. Cernea developed the IRR model as a conceptual and methodological tool to perform several essential functions in support of analytical operational development work.[49]

The framework enables project planners to focus from the outset on the poverty issues that are at the heart of involuntary displacement.[50] The IRR model does not promote displacement but rather argues that human displacement as a result of development projects is to be avoided wherever possible. The maximum effort to avoid displacement is one of the approaches of the theory in the response to the risks of development projects. The model has a dual aim to identify and analyze risks and then match or reverse these with viable countermeasures during project planning. Accordingly, Cernea identified eight major impoverishment risks namely landlessness, joblessness, homelessness, marginalization, increased morbidity and mortality, loss of access to common property, and social disintegration.[51] Rober Muggah and

[49] Michael M Cernea, The Risks and Reconstruction Model for Resettling Displaced Populations, i*n World Development,* Vol.25:No.10, (1997), pp.1569-1589.

[60] Michael M. Cernea, Impoverishment Risks, Risk Management, and Reconstruction: A Model of Population Displacement and Resettlement*-Paper Presented to the UN Symposium on Hydropower and Sustainable Development, (Beijing, October 27-29, 1990).

[61] W. Courtland Robinson, Risks and Rights: The Causes, Consequences, and Challenges of Development-Induced Displacement, the Brookings Institution-SAIS Project on Internal Displacement, *Occasional Paper*, (2003).

[51] M Cernea, Bridging the Research Divide: Studying Development Ousters, in Tim Allen(ed), In Search of Cool Ground: War, Flight, and Homecoming in Northeast Africa (London: United Nations Research Institute for Social Development, Africa World Press and James Currey), (1996).

Theodore Downing suggested additional two risks such as loss of access to community services and violations of human rights.[54]

3.3 Human Rights-based Approach to Development

A human rights-based approach to development is a conceptual framework for the process of human development normatively based on international human rights standards and operationally directed to promoting and protecting human rights.[52] A rights-based approach integrates the norms, standards, and principles of the international human rights system into the plans, policies, and process of development. It emphasizes the indivisibility of human rights and development and has brought about a paradigm shift in the conceptualization of development as well as in the understanding of poverty. [53] More importantly, the approach urges the need to link development with human rights and empower people to participate in the development, and ensure fair distribution of benefits from its processes. To realize a rights-based approach to development, the policy and legal framework of a country must be formulated in a way that can appropriately ntegrate human rights into development processes.

There are three attributes used to evaluate the existence of appropriate national development policy within the human right to development framework. A national development policy is said to be appropriate if it is a comprehensive and human-centered development policy, participatory human

[52] Julia Hausermann. *A Human Rights Approach to Development*, London: *Rights And Humanity*, (1998), p. 32.

[53] Fifth Report of the Independent Expert on the Right to Development Open-ended Working Group on the Right to Development (Geneva, 7-18 October 2002). U.N. Doc E/CN.4/2002/WG.18/6 (September 18, 2002) Para. 46.

rights process,ensuring social justice.[54] Such policies and strategies should also include explicit provisions for the realization of all human rights in general and indicate its approach towards human rights when national development policies and strategies are implemented.[55]

The model and nature of the development of countries is marked by various development policies across the world. However, a working development policy must ensure the constant improvement of the well-being of the entire population and of all individuals based on their active, free and meaningful participation, and fair distribution of benefits from development.[56] The human rights-based approach is envisaged where there is a clear rule in policy and legal frameworks, justifying the relevance of human rights as a standard setting in every aspect of government efforts. According to Arjun Sengupta, the human rights-based approach brings to development work the realization that the processes by which development aims are pursued should themselves respect and fulfill human rights.[57]

Looking into the Ethiopian legal and policy landscape in light of these insights, one would find hosts of inconsistencies and ambiguities in the move to deal with consequences of DID in Ethiopia. The FDRE Constitution, the supreme law of the country, recognizes human rights as a standard-setting norm in pursuing government activities. As such, it sets the stage to adopt a

[54] Right to Development criteria and operational sub-criteria/HRC/15/WG.2/task force/2 add.2, (February 2010).

[55] Study on the current state of progress in the implementation of the right to development submitted by. Arjun. Sengupta, Independent Expert, Fifty-sixth Session Open-ended Working Group on the Right to Development (Geneva, 13-17 September 1999), U.N. Doc. E/CN.4/1999/WG.18/2, (July 27,1999) Para. 47.

[56] General Assembly Resolution 41/128, Declaration on the Right to Development A/ Res 41/128 (December 1986)https:// www.ohchr.org (accessed June 2022) Art. 2(3)

[57] Arjun Sengupta, Right to Development', Note by the Secretary-General for the 55th session, August A/55/306,(2000b), pp.21-22.

human rights-based approach to development activities.[58] However, the formulation of the Ethiopian national development policy approach meets neither the international human rights standards nor the country's constitutional framework. It is not clear whether human rights and fundamental freedoms are taken as a framework for the realization of development endeavors or are progressively ensured along with other aspects of development. More importantly, the national development policies consecutively endorsed for the last years did not make a clear provision entailing the status of human rights via the country's development processes.

The formulation of the country's national development policies did not indicate the integration of the norms, standards, and principles of international human rights into the plans, policies, and process of development. The country's trend in formulating national development policy and strategy is dominantly followed an economic growth-centered approach committed to achieving it on a broad-based basis. For instance, the plan for Accelerated and Sustained Development to End Poverty (PASDEP) which was implemented for five consecutive years before GTP1 has a principal objective of scoring accelerated, equitable, and sustainable economic growth.[59]

The government formulated the two Growth and Transformation Plans (GTPs) from 2010/11-2014/15 to 2016-2020 to carry out the unfinished important strategic directions pursued in times of PASDEP.[60] The existing 10 years national development plan which will be endorsed for the periods 2021-2030 failed to mainstream the human–rights-based approach as a strategic

[58] FDRE Const, preamble para 2, arts 9(1,4), 10, 13, chapter 3, Arts. 85 and 89.

[59] The Federal Democratic Republic of Ethiopia, Ministry of Finance and Economic Development, plan for Accelerated and Sustainable Development to End poverty (PASDEP), 2005/6 2010.

[60] There is no clear provision or any approach that indicates the integration of human rights and development in the county`s successive GTP1 and GTP2.

framework to realize its vision. Of course, it is equally true that the human rights records of the country early at the beginning of the reform after March 2018 repeatedly got worse than ever.[61] Yet the policy moves from that time on is characterized by clear deviation from the spirit of the FDRE Constitution . This is evident in such high-profile policy policy docuuments. The second practical challenge for the government with regard to a right-based approach to development at the national level is the poor integration of human rights in the commencement of development projects. As some case studies revealed, development projects carried out at the national level are not participatory and human rights-based.[62] Large-scale land acquisition programs in Gambella and Benishagul- Gumuz Regional States displaced local communities from their land and communities. According to some studies, thousands of hectares of land for commercial agricultural investment have been transferred to investors in those regions without proper consultation with the local communities and in the absence of fair compensation made to them.[63] Such government practice threatens the economic, cultural, and ecological survival of local communities that depend on customary forms of land access and control,.[64] Among others, the disruption of fundamental rights of those communities whose livelihoods are dependent on natural resources violates the United Nations Convention on Biodiversity and the Declaration

[61] Federal Democratic Republic of Ethiopia, Planning and Development Commission, Ten years Development Plan, a pathway to prosperity, (2021-2030).

[62] For instance, the sugar development projects in Tana Beles and Arjo Dedessa caused the displacement of more than 2800 rural farmers without their involvement in the processes. (The office of Federal Ombudsman on February 04, 2016 released its report to EBC concerning the problems associated to the displacement of rural peasants from their land due to government sugar projects.

[63] Desalegn Rahmato. *Land to Investors: Large-scale Land Transfers in Ethiopia,* FSS Policy Debates 1, Addis Ababa: Forum for Social Studies, 2011; Tsegaye Moreda. Large-scale Land Acquisitions, State Authority and Indigenous Local Communities: Insights from Ethiopia, *Third World Quarterly, Vol. 38, No. 3, (2017),* PP. 698–716.

[64] *Id.*

on the Rights of Indigenous Peoples. Similar other recent instances can be mentioned to indicate that the development activities of the Government of Ethiopia are conducted contrary to the human rights norms and standards.

5. Socio-Economic and Human Rights Implications of DID Program in Addis Ababa

5.1. Addis Ababa in Context

Addis Ababa, founded by Emperor Minilik II in 1887, served as the seat of government for different regimes and used as the industrial, commercial, and cultural center of the country. Addis Ababa has long been Ethiopia's socio-economic and political center and will continue to be for some time in the future. It is the largest city in Ethiopia and one of the fastest-growing cities in Africa; Addis Ababa plays an important role in promoting the well-being of the country and economic prosperity in the region. Despite its economic importance and contribution to the country, Addis Ababa faces various challenges including deep-rooted urban poverty, manifesting in many ways such as joblessness, inadequate housing, severe overcrowding and congestion, undeveloped physical infrastructure, and lower level of standard of living for many residents of the city of Addis Ababa. The problem is largely associated with quality of governance which continuously become a major concern for ts resident; this contributes to the erosion of trust between the Government and citizens in the city with a long-term adverse impact on the realization of the City`s vision.

The other overwhelming problem of the city is its multiple identities. The city administration is accountable to the federal government contributing to the multiple characteristics of the city as both a self-governing entity, the capital city of the federal government, and the city to look for the special interest of

the State of Oromia.[65] This contingency makes the administration of the City more politicized. The Polarization of the leadership approach based on party and ethnic affiliation in the service delivery in public institutions has produced two interrelated and mutually reinforcing consequences. With a vision of fast-growing Addis Ababa and little credit for merit and competence as the ultimate pre-requisite to establish responsive institutions, the governance of the city remains frustrating for most citizens.

The geographical land escape of Addis Ababa relative to the State of Oromia is an issue worthy of critical examination as a backdrop to other explanations. Addis Ababa is founded in the middle of the state of Oromia. This made most of its development moves a contested issue, and a challenge for its long vision. The FDRE Constitution under Article 49(5) together with the Charter of the city Administration recognizes such an enduring phenomenon between these two administrations. No subsidiary law has been enacted following Article 49(5) of the FDRE Constitution. However, the influence of the existing political setup brings a continuous existential threat to the administration of Addis Ababa and its residents.

Yet another challenge and main concern in this article is the problems related to the redevelopment program of the City. The redevelopment program of the City is taken as the main priority concern of the City Administration and the Federal Government alike . The City of Addis Ababa has a total of 54,000 hectares of land, out of which slums constitute 15000 hectares covering 70-80 percent of the geographical area of the inner city in the years 2004/2005. Between 60 and 70 percent of the residents of the City who become the main

[65] FDRE Const., Art. 49 (2).

target for urban redevelopment live in those slum areas.[66] According to some reports, the percentage of slums has decreased from 70 percent to 35 percent in the years 2009/2010. [67] However, demolishing continues in a complicated, unclear way, and without clear and specific law although there being no latest data indicating the coverage of slums in the City.

5.2. Socio-economic Consequences of the Redevelopment Program

5.2. 1. An overview

The legal regimes designed to regulate the different interests that evolved under DID have different gaps. These shortcomings can be seen in two ways. The first relates to problems of justifications by the government in pursuing displacement in development projects. The justifications associated with the public purpose for expropriation, lease, and urban redevelopment program are narrow and fall under the exclusive discretionary power of administrative agencies. The second problem in addressing DID is the rights of evictees against displacement. The FDRE Constitution under Articles 40 (4 & 5) recognize the right not to be displaced from land possession in principle. It is stated under this same provision that the specific rules used to implement the right will be set out in subsidiary laws. However, This same Constitution defeats the right to protection against eviction by guaranteeing the government the power to displace citizens from their land in the absence of restrictions on the former′s claim. Therefore, the principle of the prohibition of eviction and the power of the government to displace persons from their

[66] Basha Woldie Chilot No.1, Redevelopment Cost Evaluation, Social And Economic Benefit Analysis, Addis Ababa Urban Redevelopment and City Renewal Agency (2016).

[67] Federal Democratic Republic of Ethiopia Ministry of Urban Development and Construction 'Integrated Urban Redevelopment Operational Manual', Addis Ababa (2014).

possession holds the conclusion that DID could not be contested as a prohibited act even if the protection against eviction is a right under the Constitution.[68]

The new expropriation proclamation, i.e., Expropriation of Landholdings for Public Purposes, Payments of Compensation, and Resettlement Proclamation No.1161/ 2019 and its implementing Council of Ministers Regulation No. 472/2020 are not different from the previous proclamations regarding its ideology on land rights. It is founded , like its predecessors, on the rule that land is the basic instrument for the Government to pursue its economic and social development programs.[69] As can be read from the preamble of the proclamation, the Government has constitutional legitimate power to displace land possessors from their holdings through the payment of compensation. The competent body has the power to expropriate rural or urban landholdings for a public purpose where it believes that it should be used for better development projects.[70] The new proclamation has not provided the standard used to decide the expropriation of land and it leaves several issues unaddressed . For example, it is practically difficult to determine the extent to which a "better development project" ensures direct or indirect benefits for people from the use of land in the absence of clear scientific measurement mechanisms .

The mere priority rights to develop land for the landholders is another derision on the principles of justice. The government allows this right of developing

[68] See the contents of land related laws of the FDRE, they are not enacted in way that prohibits displacement in principle.

[69] Expropriation Proclamation No.1161/2019, *supra* note 6: The Federal Democratic Republic of Ethiopia Expropriation of Land for Public Purposes and Valuation, and Resettlement, Council of Ministers Regulation No. 472/2020, *Federal Negarit Gazetta* (2020).

[70] Expropriation Proclamation No.1161/2019, *supra* note 6, Art. 5.

the land to the landholders while it knows that they cannot afford the required capital for better development.[71] Using such rules , it takes the current market value of the land from the holders. As such, the policy is not human-centered; it rather follows the justice of covetous capitalism whose targets are land and money, not people.

Apart from such unjust unspinning against individual land holders, the proclamation is more nebulous in the lack of clarity in ensuring whether every better development project would meet the objectives of public purpose. The proclamation does not allow landholders to object to the decisions of the 'competent' body as far as the decision for expropriation is made in line with the master plan to ensure public purpose.[72] Displaced persons also have no right to express their views before the appropriate body that makes a decision against their possession for expropriation. [73] They are called on only to listen to the decision of the Government within one year and less than one year if the land is required urgently for investment.[74] Informing the decision of the Government without involving the displaced in its initial plan and denying them to give informed consent as regards the need for expropriation does not constitute participation.[75] The proclamation restricts the rights of displaced persons to participate even if the decision of the Government on expropriation affects their interests.

Now we turn to the scheme of compensation . Subsidary laws of compensation were in place over the decades. They have been amendment mad to such laws. While the scope of compensation becomes broad overtime,

[71] Better development requires economy (financial capacity), not only an interest to better the environment. How can it possible for the urban displaced poor.
[72] *Id.*, Art. 5(1, 2, and 4).
[73] Expropriation Proclamation No.1161/2019, *supra* note 6, Art. 8 (1(a)).
[74] *Id.*, Art. 8 (1 (a), (b)).
[75] Art. 2(3) of Declaration on the Right to Development.

its ultimate objective is not changed ; it is mainly construed as payment of pecuniary compensation that indemnifies only limited category of losses, leaving others unaddressed. For example, it does s not guarantee onsite relocation for urban citizens either in the provision of substituted land or rehousing schemes . Also, it does not make displaced citizens part of the development benefits obtained from the land dispossessed. Its ultimate purpose is designed to pay money for whatever loss they encountered due to expropriation.

All complaints arising out of expropriation cannot be entertained by ordinary courts. Courts do not have first-instance jurisdiction on matters regarding the decision of an appropriate body on expropriation. Courts have appellate jurisdiction over cases emanating from an expropriation order or a claim or interest on the property expropriated.[76] A party aggrieved by the decision of the Regional High Court or the Federal First Instance Court has the right to file an appeal upon surrendering of his landholding entailing that the appellate court has no power to see reasons for expropriation.[77] The proclamation under Art. 5(4) allows landholders to file objections against the decisions on expropriation by the appropriate body in the absence of the fulfillment of the requirements of public purpose and master plan. However, they have no right to lodge complaints against the facts that establish the existence of public purpose to expropriate the land. The criteria that determine the existence or absence of public purpose are left to the exclusive jurisdiction of an administrative body in which no claim is allowed in this regard. Furthermore, the remedy does not include the rights of evictees related to participation, fair distribution of benefits from development, and the objection against expropriation.

[76] Expropriation Proclamation No.1161/2019, *supra* note 6, Art. 20(2).
[77] *Id.*

The proclamation is sometimes used to translate expropriation into its Amharic version as DID. In this context, if expropriation is claimed as a justification for development, it is subject to international principles, standards and procedures called for DID. If the case is so, better development to meet public purposes cannot be a justification for the displacement of people from their homes and land unless there is an unavoidable compelling public interest. If displacement is possible in such compelling circumstances, the process shall respect participation and due process. The proclamation is essentially a replica of the previous problematic expropriation proclamation in that it gives the government uncontrolled discretionary power without defining and setting sound criteria to determine direct and indirect benefits, better development, and definition of public purposes. Like the previous land-related proclamations, the new proclamation still restricts substantive rights of landholders; most importantly, the right to participation, effective judicial remedy, and protection against eviction.

The other inconsistency in evaluating the democratic nature of the system is the commitment and levels of protection of private property rights of displaced citizens upon redevelopment. The property right is a fundamental human right stipulated under Article 40 of the FDRE Constitution. However, the absence of clear procedures in monitoring redevelopment programs as to land tenure security and property interests of evicted urban dwellers creates an environment for the loss of assets of those displaced. As witnessed by evicted informants, the demolition of homes brought a significant impact in destroying valuable properties that are not either restituted by schemes of compensation or through the efforts of evictees

The hosts of socio-economic damages outlined so far demonstrate that the redevelopment process and outcomes practiced in the city of Addis Ababa is inconsistent with the widely acclaimed principles and intents of development.

The meaning, principles, and policy orientation that constitute development have critical affinity in determining the consequences of DID. Development is a comprehensive concept encompassing economic, social, cultural, and political processes aimed at the constant improvement of the well-being of the entire population and all individuals based on their meaningful participation and fair distribution of benefits from its process. Furthermore, the right to development underlined that the human person is the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development.[78] Similarly, the basic aim of development activities as stipulated under Article 43(4) of the FDRE Constitution is to enhance the capacity of citizens for development and to meet their basic needs. The empowerment of the individuals within society as independent actors determining their development fate and ensuring benefits from its process is the main constituting element that explains the contemporary concept of development.

As the redevelopment program is one of the justifications for claiming DID, its purpose and effects on the livelihoods of those displaced determine the nature of development that the government engages with. The approach can be further examined by raising three interconnected issues, namely, the purpose of redevelopment, the primary beneficiaries from its outcome, and the approaches to its implementation. The main purpose of the redevelopment program in Addis Ababa is to upgrade the standards of the city as the seat of the Headquarters of the African Union and international institutions as well as to create a conducive environment for its residents for working and living. It has also the objective of opening urban space for private developers' access to land by abolishing slums and dilapidated areas. However, the fate of the urban poor living in slums has been given less emphasis. The purpose of the

[78] Art. 2(1) Declaration on the Right to Development.

redevelopment program failed to address the interest of the main actors in its process. Evicted citizens were not taken as ultimate beneficiaries in the redevelopment process, a factor that failed to regard international standards recognized under international law. The approach of the program was economic growth centered manifested by promoting the prevalence of government interest as a prime factor over the rights of evictees. Evicted urban dwellers were not participants in making decisions in the process of the program nor did they get benefits from its outcomes.

The last issue worth considering is the importance of a theory-led (IRR) eviction impact assessment (EIA) approach. As has been observed in the redevelopment sites of this research, EIA was not conducted before the displacement program come into effect. The absence of such a scientific approach made the consequences of displacement complicated. The majority of the risks encountered by the evictees can be avoided or possibly minimized where there is EIA conducted before the commencement of displacement. In summary, this problem along with the other attendants outlined in this section make the purpose, process, and effects of the redevelopment program in Addis Ababa inconsistent with international standards and norms.

5.2 .3. The Human Rights Consequence of DID

The second significant issue in the redevelopment program is the manner in which human rights are treated. As discussed earlier, the FDRE Constitution is the fundamental supreme law that gave greater credit for human rights and fundamental freedoms in Ethiopia. The Constitution is a basic framework that boldly disciplines all government actions to follow its very provisions and aspirations. One of the critical challenges in lieu of this paradigm is the gaps that existed between the premises of the Constitution with that of subsidiary laws and the economic development program of the government in general.

Accordingly, the most citable source of the problem that underpins the strength of human rights enforcement in this research is the inconsistency between the intents of the Constitution and the national development policies and subsidiary laws. This inconsistency apparently makes government bodies less likely observe and ensure human rights as per the words of the Constitution, The argument, therefore, flows from the fact that the poor conception and practice of human rights in the redevelopment program is the byproduct of the government approach characteristically geared towards growth–centered economic development.

The factor that aggravates the human rights violation in the redevelopment program is thus manifested by the government`s failure in integrating human rights with its economic development land-related subsidiary laws. The lack of clear and specific laws that are committed to upholding human rights in the redevelopment program is the core of the problem. More importantly, the practical gap between the constitutional human rights-based approach on one hand and the government`s economic growth-centered approach on the other gradually gave practical legitimacy for the government to compromise economic development over rights.

As observed in its practice, redevelopment program is a cause for violations of a significant number of human rights, the majority of which are infringed as a consequence of socio-economic impacts. The rights violated in this program can be categorized into two levels. The first and most obvious right violated in this regard is the right to development. The right to development is an umbrella of all other rights including its constituent elements of the right to participation in development

As the evidences from the informants show, the evictees in the redevelopment sites of this research did not participate in the decision-making process of the

program. They were not taken as the central subject of the redevelopment process, nor were they participants and beneficiaries in its outcomes. The right to development is the primary right that is used to balance the costs and benefits of development by taking the human element as its central thesis. Therefore, failure to recognize affected citizens in the planning, implementation, and evaluation of the redevelopment program and denying benefits obtained from its outcomes constitutes a clear violation of the right to development as stipulated under the Declaration on the Right to Development and Article 43 of the FDRE Constitution.

The right to participation in development is a fundamental specific right violated in the redevelopment program. The evictees in the redevelopment sites of this research were not taken as main components of the program and also were not empowered to decide on matters of their concern. Therefore, the two important human rights that are cited in any DID have been violated in the redevelopment sites of this study.

The second categories of rights violated in the redevelopment sites of this research are immediate consequences of the failure to comply with the right to development and the right to participation in development. The redevelopment program did not recognize the urban evictees as a major component of its process. This approach violates the rights of evictees to the continuous improvements of their living standards (ICESCR Article 11(2). A growth-centered approach in the program could not represent the constant improvement and well-being of the evictees. This right is further rooted in many international human rights instruments such as the right to adequate standard of living for the health and well-being of all people including the right to adequate housing, security of tenure, and property rights. Some of the urban poor in the redevelopment sites of this research get poorer due to the intervention. The evictees become homeless and lost their previous means of

livelihood. The scheme of arrangement to continue the life standards of the evictees is poor and unbalanced (ICESCR Article (11(1).

The evictees are denied their right to remedies against displacement in a court of law. They have no right to claim protection against eviction. It is also clear that the evictees could not get the opportunity to claim against displacement conducted in the absence of their participation. The right to get fair compensation upon displacement is also violated. The protection against interference of one's privacy, children's right to education, and other rights are clearly infringed in the process of the program.

Generally, the redevelopment program is one of the reasons for claiming development, its process did not meet the international principles and standards relevant to DID. The program failed neither to justify the absence of alternatives except for displacement nor to respect the right to participation, due process, and fair distribution of benefits for the evictees. It is further prone to socio-economic impacts on the livelihoods of the displaced urban poor and violates their fundamental freedoms and human rights, particularly the right to development and the right to participation in development.

5.2.3. Socio-economic consequences of DID

DID is ethically unacceptable for it is against the general purpose of development and in its several forms promotes the marginalization of the already excluded groups as a result of displacement. The data under Table 1 below is taken from the Land Development and Urban Renewal Agency to illustrate the number of evictees from three redevelopment sites.

Table 1:Some data indicating redevelopment sites of Addis Ababa

Name of redevelopment site	area	Year of start	No. evictees	Kinds of possession			Types of Compensation			
				Private	kebele	Pub. house agency	Condominium house	Kebele house	Substitute Land	Monetary compensation
Senga tera firde bet	26	2001	1442	373	1018	7	949	160	261	119,768,578.70
Senga tera no.2	17	2003	619	78	496	25	427	59	55	35,105,096.8
Shebele jerba	10.43	2006	428	53	284	91	175	36	24	11,989,659.52
Tekele haimanot	33	2007	2733	536	2100	97	1190	219	132	102,615,856.85
Sheraton Masfafiya	25	2002	1944	473	1471		934		421	179,383,769.90
E.C.A masfafiya	2	2010	321	81	174		140		245	11,195,307.74
Africa Union no. 1	23	2010	145	33	109	3	49			22,999,839.00
Africa Union no.2	12	2011	639	141	476	22	352	70		40,626,530.78
Wello Sefer	9.8	2009	537	180	346	1	133	9	168	42,462,879.03
Meskel megebiya	3.2	2009	223	26	198		162	16	75	12,900,000.00
Cassanchis no.3	23	2015	2793	524	1833	100	1337	111	280	21,075,236.94
Felege Yordanos	17.1	2016	909	163	849	17				1,935,177.03
Basha woldie no.1	27	2010	1640	262	1027	53	962	194	204	37,933,158.10
Basha Woldie no.2	14	2010	1319	270	713	12	853	2	62	42,514,471.16
Aroge kera no.1	9	2014	1874	168	935	3	326		77	20,678,822.30
Aroge kera no.2	45	2015	1246	224	841	181	789	110	168	49758375.41
Sheraton masfafiya	17	2010	1342	389	985	4	873	318	286	39,814,113.76

Parlama masfafiya	4	2010	319	70	259	5	191	69	48	3.591.051.76
Gedam Sefer	13.9	2016	1012	147	685	93				31,633,116.25
Dejache Wube	11.6	2016	762	121	568	70	373	149		11,084,116.33
America Gibi	22.7	2016	2167	289	1517	195	1542		204	55,208,618.30
Cassanchis no.2	26	2016	687	145	474	68	241	1		43,335,437.41

Source: Urban Renewal and Land Development Agency report, 2017-20

A closer look into the data shows that the redevelopment sites of Addis Ababa largely target slums in the inner city. Comparing the status of the evictees across the redevelopment sites, the majority of the evictees lived in kebele houses. Out of the 25,101 households, 17,358 lived in kebele houses, 1047 in public rentals, and 4746 in private houses. Among the evictees, 10,927 have got condominium houses, 1523 substituted kebele houses and 2710 got substitution land to re-house them. From the total number of evictees who were displaced from Dejache Wube Sefer, American Gibi, and Cassanchis No. 2 sites, 373, 1542, and 241 households' got condominium houses respectively.

The data further implies that living in kebele houses for the majority of families is a manifestation of poverty. It is their poverty that made them perpetually live in an unsafe, decayed, and crowded area and also exposed to displacement. The total number of households displaced from three redevelopment sites is 3616 : −American Gibi (2167), Dejach wube Sefer (762), and Cassanch No..2 (687). Out of this total number of households, 2559 houses were administered under the kebeles. The remaining 333 and 555 were subjected to government housing agencies and private ownerships respectively.

Out of the households displaced from Dejache Wube, 46 households who lived in kebele houses and 70 households in public rental houses are not covered either in a condominium or substituted kebele houses. The data also did not indicate whether private landholders in this site got substitution for their holdings. Similarly, 203 households displaced from kebele houses and 195 evictees who lived in public rental houses in American Gibi did not get replacement houses. The fate of 85 private landholders displaced from this site is not known according to the data. The data also did not indicate the whereabouts of 231 evictees in the Cassanchis site who lived in kebele houses and 68 evictees in public rental houses. No evidence can be found as to whether or not 145 private urban landholders on this site got as a substitution for their holding.

The case in Addis Ababa in its redevelopment program has witnessed similar effects on the livelihoods of the displaced that DID is commonly classified for. The citizens displaced in the inner city of Addis Ababa are leveled as poor who lived for decades in low-quality infrastructure, overcrowded and old houses, poor sanitation, congested slums, and dilapidated areas.

The redevelopment program of the city of Addis Ababa has the plan to renew the status of the city by removing 15,000 hectares of slum areas as of the year 2020. However, the fates of the urban poor displaced in such areas have become another assignment for the city administration that determines the quality of redevelopment processes and governance.

The evictees in the redevelopment sites have faced deterioration of livelihoods. The deterioration of livelihoods as a consequence of the implementation of redevelopment programs has brought multi-generational and irreversible effects. Urban dwellers for many generations organically

linked with their social system are forcefully displaced and compelled to change their site-related economic model and social ties significantly.

The relocation often entails the loss of access to site-related business opportunities. The urban evictees from American Gibi, Cassanchis No 2, and Dejache Wube Sefer redevelopment sites had a similar complaint on their site-related business activities before displacement. Voicing his grivances to this effect, one of the informants from this site remarked ;

We were engaged in different economic activities from street trade to hotels and restaurants and have a significant number of customers established for decades. Due to the redevelopment program, we were forced to leave this opportunity and many of us could not start business again.

Informants added that making business in American Gibi, Cassanchis or Dejache Wube is quite different from other outskirts of Addis Ababa. The former business were lucrative enough to sustain their lives. This was mainly because they were located in the inner city with sustainable customer flow. This flow of custemers is drastically declined in the same business located in the new sites. Complaining about the damage, one of the informats remarked.'the scale of interruption of [custemers] is unimaginable' , Further, most of the informats reported that the program cost their site-related economic activities, an opportunity that could not be reinstated anywhere in the peripheries of the city.

The other economic impact of the redevelopment program is related to the interruption of daily job opportunities. According to informants displaced from American Gibi, the lower level daily income earners lost their livelihood subsistence because the redevelopment detaches their existence from Merkato. The daily incomes of most families in the American Gibi were associated with the market transactions of Merkato. Once they were displaced

from American Gibi, the means of income of families and dependents were crippled while their attachment to Merkato was set aside due to displacement.

Yet another negative consequence of this program is extra cost of schooling parents faced to bear. Due to the inadequacy of facilities available in the relocation sites, the urban poor families displaced are forced to enroll their children in an expensive private school. This incidence disrupted the livelihoods of most displaced citizens who had been educating their children in public schools based on their economic capacity.

The redevelopment program also caused the loss of properties of the evictees. According to informants, the prevalence of force to demolish houses and the insufficient time given for vacating their properties were potential threats for most evictees to lose assets and properties. The different items of properties have been damaged and lost during the demolishing of their homes. According to informants from American Gibi and Dejache Wube Sefer, the process of demolishing homes was unplanned. Because of this, they were not in a position to save their properties at times of demolishing processes.

Still other segments of the evctees remain homless because of the deficiencies and injustice underlying the schemes of compensation for private landholding. The purpose and amount of compensation payable upon expropriation for the properties situated on private landholding are not aimed at securing livelihood improvements. The over-fluctuation and escalation of the price of construction materials, labor force, and the requirements of standards of buildings together with the inadequacy of compensation to meet all these requirements meant that most displaced were unable to re-house themselves. The displaced urban poor who lived in kebele houses or public rental houses has been given the priority to buy condominium houses. However, the huge gap between monthly payments for Bank mortgages and

their real income was a critical challenge for most households. For instance, 347 evictees from American Gibi who have the chance of buying condominium houses in the Kara Qore Haji Amba condominium site faced the problem of paying monthly installments to the Bank.

As per the obligation emanating from the law concerning condominium houses, those displaced urban poor will not have the chance to remain in the house unless they can save the specified amounts within the specified time.[79] According to some informants, the inability to save payments in the Bank pushes displaced urban poor to sell their houses informally and choose to live in private rental houses. This coincidence at the same time may lead to the risk of homelessness for those who failed to find other income opportunities.The government , while it is taking away the market value of their land, does not devise a mechanism to protect them from such risks of homelessness.

The destruction of social networks is among the prevailing list of repercussion of this program. The citizens displaced from the three sites lived for decades in those areas and established strong social systems such as Idir, Ikub, and Mahiber. These are social systems that tie the urban poor with remarkable traditional values rooted in their lives. One of the members of the focus group discussion conducted at American Gibi stated the following.

I am now 67. I was born here and my family had lived here before . We have developed a significant number of values shared between us seeking help and support for each other. We considered each other as having a similar psychological makeup in times of peace and difficult conditions. However, the redevelopment program crashed our important social systems and forced

[79]The Federal Democratic Republic of Ethiopia Condominium Proclamation No. 370/3003, *Federal Negarit Gazetta*, (2003).

us to start a new way of life in a new place with citizens whom we did not know before.

Accordingly, the preservation of social systems as a core component of people's culture was taken as an elementary issue in the redevelopment process. The possibilities of legitimate on-site relocation and upgrading options were not duly considered by development planners. This kind of development approach not only affects people's values developed over time but also creates inconvenience in the life of evictees.

Psychological disturbance and instability were serious problems for evictees as a consequence of the redevelopment program. Such psychological trauma is associated with other problems that were often encountered by the processes of redevelopment. The inadequacy of consultation schemes together with the lack of genuine power of the evictees to influence the processes resulted in problems in the psychological state of the evictees.

Conclusion

Looking into the hosts of evidences revealed through varying mechanisms, one would argue that development-induced displacement in Ethiopia is a principle that did not impose any restriction on the government to find alternatives and limit the scope of displacement. The legal regimes designed to regulate the different interests that evolved under DID have different gaps. The first relates to problems of justifications by the government in pursuing displacement in development projects. The justifications associated with the public purpose for expropriation, lease, and urban redevelopment program are too narrow and fall under the exclusive discretionary power of administrative agencies. The second problem relates to the lack of a Constitutional guarantee for urban dwellers in cases where there is arbitrary eviction from their possession. While the FDRE Constitution recognized the protection against

eviction as a fundamental human right for peasants, semi-pastoralists, and pastoralists, there is no such right for urban residents. This is a clear discrimination against land rights and tenure security for citizens of one country. The third problem relates to the absence of legal and judicial remedies for those who are displaced from their land and home contrary to human rights standards and norms.

The existing legal regime and practice do not allow citizens to invoke ground of arbitrary displacement before a court of law. It rather narrowly allows to claim the amount of compensation assessed related to displacement. To put it differently, land-related laws that are enacted to reflect and realize the power of the government on land indescribably trump the rights of persons on land.

The fourth, and perhaps, the most damaging problem of the redevelopment program ,stems from the economic-growth-centered approach of the country. The human-rights-based approach is a development framework recognized as a fundamental principle in the FDRE Constitution as well as in many international human rights instruments. However, the development approach of the country did not give priority to human well-being but rather economic –growth centered as witnessed by its legislative and practical experiences. Thus, the existing redevelopment program in all its legal and practical applications did not satisfy the requirements of the general principles, standards, and practical models called for DID and below international human rights norms which in turn become a cause for impoverishment risks and violation of fundamental rights of urban citizens.

Recommendations

- A.s stipulated in the FDRE Constitution, the Government of Ethiopia has committed itself to respect, protect, and fulfill human rights and

fundamental freedoms endorsed by major international human rights instruments, recognizing the international human rights norms as fundamental principle of the same constitution. Indeed, the development processes of the country in major economic projects in general and the redevelopment program of Addis Ababa, in particular, are commenced against a right-based approach to development in the name of development focusing on capital returns or to open opportunities for others while disregarding the fates and rights of the displaced poor and the vulnerable.. Non-observance of such an approach as the trend of government – both in theoretical and practical process – contradicts its international commitment, taking it to a category of principal violator of human rights norms and pushing the larger public to question the legitimacy of such development activities in Ethiopia.

- The displacement of citizens from their land and home in the absence of specific laws in the inner-city of Addis Ababa makes the redevelopment program illegitimate and controversial which created unbalanced risks and benefits for the actors involved in the process. The existence of clear specific laws to regulate the processes of redevelopment programs at any level is a timely response from the relevant legislative body.

- Displacement of citizens from their homes, land, and community should not be undertaken as a primary option in any economic development program in general and redevelopment program in particular. The program shall be designed in a way to find alternatives that can avoid displacement. Together with this, the claim for displacement must be justified with clear requirements indicating the existence of unavoidable compelling public interests, implementation strategy, and compliance with human rights norms, international standards, and principles.

- The right to land, security of tenure, adequate housing, and protection against eviction are fundamental human rights recognized in major international human rights instruments to which Ethiopia is a party. However, these rights have not got proper recognition and protection in the Ethiopian constitutional law experience and requires amendment of the FDRE Constitution in line with international human rights norms.

Core Crimes and the Characterization of Mai-Kadra Atrocities in Ethiopia

Bereket Eshetu[θ]

Abstract

Atrocity crimes have become a regular incident over the past four years in Ethiopia. It worsened especially after the outbreak of the war between the Federal Government and Tigray Region on November 4, 2020. The Mai-Kadra incident was one of such situations where heinous mass killing was committed against civilians on November 9, 2020, shortly after the outbreak of the war. Different bodies reported the atrocities committed during the incident and tried to characterise the situation in different ways. This article characterises the material facts of the Mai-Kadra incident in light of International Criminal Law rules, case law, and jurisprudence. A doctrinal research methodology is employed to gather data from reliable reports and human right organisations. Accordingly, the study uncovers the potential characterization of the Mai-Kadra incident as 'crimes against humanity' and 'war crimes'. It is however less likely that the incident qualifies as 'genocide' mainly because of the difficulty to infer special genocidal intent from the circumstances of the case.

Keywords: Characterization, Attrocity Crimes, Mai-Kadra, Genocide, Crimes Against Humanity, War Crimes

[θ] LL.B, LL.M, Lecturer in Law, School of Law, Bahir Dar University. The author can be reached at eshetubeka@gmail.com.

Introduction

Atrocity crimes fall under most serious crimes committed against humans and often occur in countries where there is some level of violence or instability. It is related to the three legally defined International Crimes, i.e. Genocide, Crimes against Humanity and War Crimes.[80] Atrocity crimes have been committed in different parts of Ethiopia for a long time although it has become very common recently. In the past, the country has applied the persecution mode of transitional justice through establishing ad-hoc "*red-terror trials*" for the former Derg officials. In these trials, the major crimes at issue were genocide and war crimes.[81]

After the overthrow of the Derg regime, the Tigray People Liberation Front (TPLF) ruled Ethiopia for over 27 years by establishing and dominating Ethiopia's ruling coalition named Ethiopian People Democratic Revolutionary Front (EPDRF) from 1991 to 2018. Despite the fast economic growth of the country, EPRDF ruling was known for prevalent violations of

[80] These crimes are defined in different international treaties and national laws. Some of major international treaties include Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force 12 January 1951; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993), (Hereinafter the ICTY Statute); Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994), [Hereinafter the ICTR Statute]; UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, (ICC Statute) and The 1949 Four Geneva Conventions and the 1977 Additional Protocols.

[81] See generally, Tadesse Simie Metekia, Prosecution of Core Crimes in Ethiopia: Domestic Practice vis-à-vis International Standards, University of Groningen, PhD thesis, published (2020); Marshet Tadesse, Prosecution of Politicide in Ethiopia: The Red Terror Trials, International Criminal Justice Series, Asser Press (2018).

human rights.[82] It has held several elections, but all of them were generally considered unfair and used repressive laws such as the anti-terrorism law (Proclamation No. 652/2009), Civil Societies law (Proclamation No. 621/2009) as well as draconian provisions of the Criminal Code to silence critics and close opposition political parties, NGO's and human rights organizations.[83] Because of the repressive ruling of the party, the country was hit by a wave of protests in December 2015. In response, the EPRDF imposed a nation-wide state of emergency several times between 2016 and 2018 in which both federal and regional security forces injured, killed, and detained thousands of protestors.[84] The protests continued across the country until the sudden resignation of the then Prime Minister Hailemariam Desalegn in February 2018.

[82] In particular, excessive violations of civil and political rights that has become a hallmark of the EPRDF government. See Amnesty International, Ethiopia: 25 Years of Human Rights Violations, Public Statement, AI INDEX: AFR 25/4178/2016 (2 June 2016).

[83] Hilary Matfess, Ethiopia: Counter-Terrorism Legislation in Sub-Saharan Africa, Small Wars Journal (April 11, 2017), http://smallwarsjournal.com/jrnl/art/ethiopia-counter-terrorism-legislation-in-sub-saharan-africa accessed on December 20, 2021.

[84] Ethiopian Human Rights Council (EHRCO), 142 Special Report: Human Rights Violations Committed During the State of Emergency in Ethiopia: Executive Summary 6–11 (May 28, 2017), https://ehrco.org/wp-content/uploads/2017/07/HRCO-142nd-Special-Report-English-Executive-summary-2.pdf (the full report is available in Amharic only at https://ehrco.org/wp-content/uploads/2017/05/የሰብዓዊ-መብቶች-ጉባዔ142ኛ-ልዩ-መግለጫ-ግንቦት-2009-ዓ%E3%80%82ም.pdf; Human Rights Watch, "Fuel On The Fire": Security Force Response to the 2016 Irreecha Cultural Festival (September 19, 2017), available on https://www.hrw.org/report/2017/09/19/fuel-fire/security-force-response2016-irreecha-cultural-festival,accessed on December 20, 2021; Human Rights Watch, 'Such a Brutal Crackdown: Killings and Arrests in Response to Ethiopia's Oromo Protests', (June 2016) 21 – 45, available on: https://www.hrw.org/report/2016/06/15/such-brutal-crackdown/killings-and-arrests-responseethiopias-oromo-protests accessed on December 20, 2020.

Subsequently, Abiy Ahmed (Dr.), Chairman of the EPRDF's Oromo People's Democratic Organization (OPDO), sworn-in as new Prime Minister of Ethiopia in April 2018. He received wide-spread support because of the immediate changes he brought about in the country. For instance, he immediately called for reconciliation and reform in the country including liberalisation of the political system in general.[85] Accordingly, his administration freed hundreds of political detainees, dropped terrorism charges against opposition party leaders in exile, and allowed them to return home.[86] Despite all significant legal, political and economic policy transitions, the country was however knocked by violence, armed conflict and extensive practice of mob justice by non-state actors. This eventually resulted in degenerating peace and security, and rule of law in the country. Anti-reform elements within Ethiopia's leadership circles also pushed back, showing their dissent in the reforms.[87]

Violence in several parts of the country has killed hundreds of people and displaced thousands since 2018. In October 2019 and June 2020, ethnically and religiously motivated conflicts took hundreds of innocent lives and destroyed properties in many parts of Ethiopia. In particular, the occurrence of

[85] Ahmed Soliman, Ethiopia's Prime Minister Show Knack for Balancing Reform and Continuity, Chatham House (April 27, 2018), available on https://www.chathamhouse.org/expert/comment/ethiopia-s-prime-minister-shows-knack-balancingreform-and-continuity, accessed on December 21, 2021.

[86] Aaron Maasho, Exiled Ethiopian opposition group holds talks with government, Reuters (May 14, 2018), https://af.reuters.com/article/topNews/idAFKCN1IF220-OZATP; Mahlet Fasil, News: Ethiopia frees Andargachew Tsige, drops charges against Berhanu Nega, Jawar Mohammed and two media orgs (May 28, 2018), available on, http://addisstandard.com/news-ethiopia-frees-andargachew-tsige-dropscharges-against-berhanu-nega-jawar-mohammed-and-two-media-orgs/, accessed on December 19, 2020.

[87] Ethiopia's Reforms Challenged by Party in Ruling Coalition, New York Times [AP] (June 13, 2018), https://www.nytimes.com/aponline/2018/06/13/world/africa/ap-af-ethiopia-new-prime-minister.html, accessed on December 19, 2020.

atrocity crimes has tremendously increased.[88] Over those years, political tension between the Federal Government and TPLF was mounting and finally resulted in the outbreak of a deadly armed conflict in the Tigray region on November 4, 2020, which also extended to Amhara and Afar Regions. The war took place for more than two years until a peace agreement is signed between the two parties in Pretoria, South Africa on November 2, 2022 and numerous heinous and inhuman attacks were committed against civilians, most of which could fall under International Crimes.

This article specifically examines atrocities committed in the Mai-Kadra incident on the 9th of November 2020, shortly after the armed conflict between the Federal Government and Tigray Region started and characterise them in light of core crimes as proscribed under the domestic and International Criminal Law. The Mai-Kadra incident is selected because of two reasons: first, there are sufficient reliable sources of reports about the incident, and second, different bodies characterize the situation generally in different ways. For instance, the UN High Commissioner for Human Rights, Michelle Bachelet, stated that 'if verified, the attack could amount to a war crime'.[89] On the other hand, the EHRCO generally indicated the probability that the atrocities committed in Mai-Kadra incident could be characterized in

[88] The country has ranked as the 7th most likely country in 2019-2020 growing from 32nd place in the previous 2018-2019 assessment to experience a mass killing. See generally, Early Warning Project https://earlywarningproject.ushmm.org/countries/ethiopia. The UN has also been repeatedly warning such. See for instance, Michelle Nichols, U.N. official warns of high risk of atrocities in Ethiopia, Press release, Reuters, New York, available on https://www.reuters.com/article/us-ethiopia-conflict-un/u-n-official-warns-of-high-risk-of-atrocities-in-ethiopia-idUSKBN2A60BG accessed on 24 Dec. 2021.

[89] R2P Monitor, A Bimonthly Bulletin by the Global Centre for the Responsibility to Protect, Issue 54, (15 November 2020), p. 16.

three ways i.e. War Crimes or Crimes Against Humanity or Genocide.[90] On the other hand, the Joint Investigation Team (EHRC and the UN Office of the United Nations High Commissioner for Human Rights (OHCHR)) report showed that the acts may amount to Crimes Against Humanity and War Crimes.[91] Thus, different bodies tried to characterise the atrocities of Mai-Kadra in divergent ways. Against this backdrop, this article has critically examined the atrocities committed in light of the core crimes proscribed under the Statute of ICTR, ICTY, and ICC including the relevant case laws and jurisprudence of International Criminal Law.

The first section sets the scene through discussions on the general context of the conflict, notably the dynamics before the deadly conflict started between the Federal Government and Tigray Region. The next section meticulously describes what happened in Mai-Kadra on November 4, 2020, shortly after the war started. The third section then presents the legal characterization of the Mai-Kadra incident in light of the definitional elements of each of the core crimes i.e. Genocide, Crimes Against Humanity and War Crimes.

[90] የኢትዮጵያ ሰብዓዊ መብቶች ጉባኤ (ኢሰመጉ) ማይካድራ ሑመራ አብደራፊ አብርሃ-ጅራ ዳንሻ ኢሰመጉ ታህሳስ አዲስ አበባ፣ ኢትዮጵያ የምዝገባ ቁጥር 1146 (2014 ዓ.ም) (Hereinafter, EHRCO Full Report), pp. 34-36.

[91] Report of the Ethiopian Human Rights Commission (EHRC)/Office of the United Nations High Commissioner for Human Rights (OHCHR) Joint Investigation into Alleged Violations of International Human Rights, Humanitarian and Refugee Law Committed by all Parties to the Conflict in the Tigray Region of the Federal Democratic Republic of Ethiopia, published on 3 November 2021(Hereinafter, JIT Report), p. 5.

1. Setting the Scene: Brief Background of the Mai-Kadra Atrocity

1.1 Overview of Ethnic Conflicts in Ethiopia

Under the leadership of Prime minister Meles Zenawi,[92] the EPRDF government was known for both repression of Human Rights and rapid economic growth through the Developmental State (DS) path. The EPRDF had controlled the larger socio-economic and political sphere of the country through its undemocratic machinery, This was a major source of dissatisfaction among citizens which later led to popular uprisings.

Conflicts also took place in various parts of the country,[93] and often they were associated with the claim for land in the boundaries between territorialized ethnic groups.[94] The state structure which is based on ethnic federalism contributes to tensions and conflicts between various ethnic groups.[95] Ethnic groups engage in competition on various historical, political, cultural, and social issues. Inter-ethnic conflicts arose across the boundaries of regional

[92] Meles Zenawi left his study at the Addis Ababa University in 1975 together with others to join TPLF and fight the Derg regime and was chairman of the TPLF since 1985. He later became a head of EPRDF and Prime Minister of Ethiopia from 1991-2012.

[93] Major causes of the conflict were: disagreements on the possession or use of land, grazing land or water resources, and settlements, regional autonomy, access to public resources and use of language in education and administration. Lovise Aalen, The politics of Ethnicity in Ethiopia: actors, power and mobilisation under ethnic federalism, African Social Studies Serious, V. 25, Leiden, Boston, Brill, 2011, p. 70.

[94] Jon Abbink, Ethnicity and Conflict Generation in Ethiopia: Some Problems and Prospects of Ethno-Regional Federalism', Journal of Contemporary African Studies, (2006) 24 (3).

[95] Bekalu Atnafu Taye, Ethnic Federalism and Conflict in Ethiopia, African Journal for Conflict Resolution AJCR 2017/2, (2017), available on: https://www.accord.org.za/ajcr-issues/ethnic-federalism-conflict-ethiopia/ accessed on February 15, 2022.

states.[96] Although different considerations are provided under the Constitution to demarcate and form boundaries of the regional administrations,[97] language is mainly used to delimit demarcations which, in turn, contributes to ethnic and political division in the country. The regional administrations arranged through an ethno-linguistic grid against the population with a history of mobility eventually led to an increased inter-ethnic conflict in the country.[98]

Following the sudden death of PM Meles Zenawi, Hailemariam Desalegn was elected as Prime Minister and led the federal government for about six years. During his period, the country was frequently hit by anti-government protests mainly in the Oromia region and some parts of Amhara.[99] As a result, PM Hailemariam Desalegn resigned in February 2018 and Dr. Abiy Ahmed sworn in as Prime Minister on April 2, 2018. Abiy received popular support as he showed interest to reform the country and remorse for extensive human rights abuses. As highlighted before, he promised to settle the deeply entrenched problem of ethnicity and political division by releasing political prisoners, allowing opposition political parties in exile to enter the country, and revising different laws which unduly restrict the civil and political rights of citizens. Another outstanding achievement is the resolution of the enduring

[96] Jon Abbink, *supra* note *15*, 390; Tigabu Legesse, Ethnic Federalism and Conflict in Ethiopia: What lessons can other jurisdictions draw? Africa Journal of International and Comparative Law, (2015) 23 (3), p. 2.

[97] Constitution of the Federal Democratic Republic of Ethiopia, 1995, Federal Negarit Gazzeta, Proc. No. 1, 1st Year, No.1, Art. 46 (2).

[98] David Turton, Ethnic Federalism: The Ethiopian experience in comparative perspective, Oxford, James Currey, (2006), p. 14.

[99] The main causes of anti-government protest were briefly explained in the introductory section above.

border dispute between Ethiopia and Eritrea following the peace agreement in July 2018.[100]

1.2 Escalation of Mass Outrages and Political Divisions

As outlined above, despite reforms introduced in Ethiopia since PM Abiy Ahmed came to power in April 2018, the country still stood at a crossroads where horrendous crimes have been frequently committed. Subsequently, lack of peace and security become the fundamental challenges to realize the reform package. Almost in every region, heinous crimes are committed. Long-suppressed claims over access to land and perceived injustices from the past resulted in violent conflicts.[101] Powerful non-state actors lead insurrection and irregular youth movements commit grave crimes. Ethnically motivated attacks have been committed throughout the country. Several such incidents, which possibly raise the application of international criminal law can be mentioned.

In one of such instances, an inter-communal clash in the Ethiopian Somali Region in 2018 displaced over three million people. The incident was the world's largest conflict-related internal displacement in one country that year.[102] Since 2018 ethnic Amharas have been killed and displaced at different times by an armed group from West Welega Zone in the Oromia region. For instance, on November 2, 2020, in the Oromia Region, West Wollega Zone, Guliso Woreda, Gawwa Qanqa village, an armed group called Onag Shene (also call itself Oromo Liberation Front- OLF) brutally killed

[100] Especially because of this achievement he was awarded the Nobel Prize for Peace in 2019.

[101] The existing claim over the areas known as Wolakait and Raya is a typical case of dispute between the Amhara and Tigray Region in Ethiopia.

[102] UN OCHA, 'Ethiopia: Oromia –Somalia Conflict-Induced Displacement, Situation Report No. 4, 20 June 2018.

hundreds of ethnic-Amharas after gathering them for assembly in a school compound.[103] Similarly, in Benishangul-Gumuz Region Metekel Zone, an insurgent group has been frequently killing civilians belonging to *Shinasha, Amhara, Agewu,* and *Oromo* ethnic groups.[104] Following the death of popular Oromo Singer named Hachalu Hundessa, more than 239 people died, many were injured and thousands fled from their homes from June 29 to July 2, 2020, due to the security crisis in the Oromia Region.[105] The Ethiopian Human Rights Commission (EHRC) investigative report concluded that the attacks met the elements of Crimes against Humanity[106] While the investigative report made by the Ethiopian Human Right Council (EHRCO) similarly regarded it as mass atrocity in which the final stages of the crime of genocide has occurred.[107]

Meanwhile, the TPLF and Federal Government disputed on different political matters. One of the major issues was the establishment of a single party called the Prosperity Party (PP). The constituent parties of EPRDF[108] moved to merge into PP and PM Abiy called on TPLF to join the new party. Yet TPLF declined to join the new coalition, setting a major line of dissent with the prime minister and the federal government. The other source of hostility is

[103] Joint investigation report, *supra* note *12*, p. 5.

[104] Thousands of innocent people were killed in this Region, especially in the area named Metekel. Still the killing has also been taking place despite an intervention made by the Federal Government. The attack was frequently made by a group of persons who were armed with heavy and silent weapons including arrows.

[105] Ethiopian Human Right Commission (EHRC), 'It Did Not Feel Like We Had A Government': Violence and Human Rights Violations following Musician Hachalu Hundessa's Assassination, Investigation Report, (2020), p. 54.

[106] *Id.*

[107] የኢትዮጵያ ሰብዓዊ መብቶች ጉባኤ (ኢሰመጉ) ኢትዮጵያ፡ በዘር ማጥፋት ወንጀል አፋፍ ላይ! [147ኛ ልዩ የሰብዓዊ መብቶች ዘገባ] ጥቅምት 2013 ዓ.ም አዲስ አበባ፣ ኢትዮጵያ, p. 67.

[108] These are the Oromo Democratic Party (ODP), Amhara Democratic Party (ADP) and Southern Ethiopian Peoples' Democratic Movement (SEPDM).

related to the postponement of the 6th national election by the Federal Government because of the COVID-19 pandemic. In response to the actions of the Federal government, TPLF opposed the decision and conducted its election in Tigray Region and became the winner. The Federal Government then declared the election unacceptable and subsequently suspended the Tigray Regions budget except for lower administrative units. As the tension escalated, both started to conduct heavy military preparation and training which finally resulted in a full-fledged war on the 4th of November 2020.

2. The Mai-Kadra Atrocity Incident

On November 3, 2020, Tigray forces attacked the Northern Command of the ENDF and controlled large amounts of weapons.[109] In response, PM Abiy Ahmed declared a law enforcement operation against TPLF and its force on November 4, 2020. Since the war started, mass atrocities and gross human rights violations have been committed. Mai-Kadra is one of the main incidents where atrocities took-place on 9 November 2020, shortly after the outbreak of the war.

2.1 What Happened in Mai-Kadra?

2.1.1 Brief Description of Mai-Kadra Town

Mai-Kadra is a small rural town situated in the Northwest part of Ethiopia, close to the border areas of Sudan. Before the armed conflict, the town was part of the administration of the Tigray Region, in the Western Zone, Hafta Humera Woreda. More than 45,000 people live in the Mai-Kadra town and the two ethnic groups, i.e. Tigrayan and Amhara dominantly constitute the

[109] JIT Report, *supra* note *12*, p. 3.

population of the town.[110] Most of the residents of the town speak Amharic and Tigrigna languages. Mai-Kadra is largely known for huge seasonal sesame and millet farming. Thus, individuals from different parts of the country (especially from the Amhara region) go to Mai-Kadra each year in September to work as daily labourers and are traditionally named '*Saluks'*. Commonly, they live together often in a group of 5-10 people within a single house. According to both EHRC and EHRCO reports, it was this group of persons (specifically men) who were the principal targets of the massacre.[111]

2.1.2 Preparation for the Attack

When the war started between the Federal Government and the Tigray Region on November 4, things quickly changed in the Mai-Kadra town and the preparations for the massacre began. Especially when it was heard that the Federal Government and its allied forces were approaching the Mai-Kadra town in the north-western part, the local administration, police, and militia forces closed the four main exit routes of the town.[112] As part of the preparation for the attack, members of an informal ethnic Tigrayan youth group called '*Samri' were* set-up and stationed at all checkpoints of the town by local administrations and police.[113] A week before the massacre, they had identified and taken a record of ethnic Amhara residents of the town. Due to the interruption of electricity and telephone services since the war started, mobile phone network service functioning via Ethiopian SIM cards has

[110] It is further indicated that the people identified as Wolkaite were also residents of the town which is in fact the local name for people of Amhara who were born or have long resided in the area called Wolkait. See Ethiopian Human Right Commission (EHRC), 'Rapid Investigation into Grave Human Rights Violation in Mai-Kadra', Preliminary Findings, (24 November 2020) (Hereinafter, EHRC Preliminary Investigation), p. 1. See also, EHRCO Full Report, *supra* note *11*, p. 11.

[111] *Id.*

[112] *Id.*, p. 13.

[113] JIT Report, *supra* note 12, p. 30; EHRC Preliminary Investigation, *supra* note 31, p. 2.

stopped working in the town. Since Mai-Kadra is near the Sudanese border and most people also had Sudanese SIM cards, the local police and the Tigray Special Forces conducted a door-to-door search and destroyed such SIM cards to disable communication.[114] Ever since the war started those who tried to escape to the adjacent areas of the Amhara region, particularly *Saluks* and other non-Tigryans were forced to stay within the town as the local militia and Tigray Special Forces controlled and closed each exit route.[115]

2.1.3 Execution of the Attack

Acts that led to the immediate execution of the atrocity in Mai-Kadra started in the late mornings of November 9, 2020. The incidence can be described in two phases. Starting from around 11:00 AM, local administration police started to identify non-Tigrayan ethnic residents by checking their identity cards mainly in those specific areas of the town known as "Genb Sefer" and ''Kebele 1 Ketena 1'' where ethnic Amharas largely live.[116] After the door-to-door raid, around 60 people were detained in one place since they are suspected of using Sudanese SIM cards on their mobile phones against the police order to communicate or call for help. EHRC further reported that women and children belonging to ethnic Tigrayan were made to leave the town a few hours before the attack started.[117]

[114] EHRCO Full Report, *supra* note *11*, p. 13. The joint investigation report by the EHRC and OHCHR indicates that such an act also continued until the day of the massacre. See, JIT Report, *supra* note 12, p. 81.

[115] EHRC Preliminary Investigation, *supra* note *31* p. 2. Moreover, EHRCO investigative report indicated that individuals belonging to Tigryan ethnic group were armed by the regional administration in the nearby towns called Humera and Dansha apart from Mai-Kadra. See, EHRCO, Preliminary Investigation, *supra* note 11, p. 1.

[116] EHRC Preliminary Investigation, *supra* note 31, p. 2.

[117] *Id.*

The actual attack started after 3:00 PM when the *Samri* along with local police and militia raided "*Genb Sefer*".[118] Before that, particularly ethnic-Amharas were told to stay at home and keep their doors shut, soon after which *Samri*, accompanied by police and local militia, carried out house-to-house raids, spoke to victims in Tigrigna, identified those who could not respond and began an attack.[119] According to EHRC, the first attack was directed against a former soldier who opposed to re-join the TPLF in the war and was killed in front of his family.[120] Following that, the *Samri* started attacking persons they identified before as Amharas. But also it is reported that few other minority ethnic groups were targeted.[121] The attack was mainly carried out by stabbing with knives, machetes, axes, and hatchets and strangling them with ropes.[122] The actual civilian massacre using such materials was conducted by several *Samri* groups consisting of 20 to 30 youths. They were also accompanied by 3 or 4 local police and militias who shoot at those trying to leave the town.[123] As mentioned above, *Saluke* were the main targets of the attack and since most of them live in a group of 5-10 people within a single house they were easily attacked.[124]

The attack which began on November 9 around 3:00 pm continued throughout the night until the perpetrators left the Mai-Kadra town on early

[118] *Id.*

[119] JIT Report, *supra* note *12* p. 30. See also, EHRCO, Preliminary Investigation Report on Major Human Rights Violations in and around Maikadra, (December 2020) 2.

[120] This person is known as Abiy Tsegaye who ethnically belongs to Amhara. See EHRC Preliminary Investigation, *supra* note *31* p. 2.

[121] Katharine Houreld, Michael Georgy and Silvia Aloisi, 'How ethnic killings exploded from an Ethiopian town, A Reuters Special Report, (June 2021), available on: https://www.reuters.com/investigates/special-report/ethiopia-conflict-expulsions/ accessed on February 20, 2022.

[122] JIT Report, *supra* note 12, p. 30.

[123] EHRC Preliminary Investigation, *supra* note 31, p. 3.

[124] *Id.* See also, Amnesty International, 'Ethiopia: Investigation reveals evidence that scores of civilians were killed in massacre in Tigray state,' November 12, 2020.

November 10.[125] The number of people killed in the atrocity was not precisely known due to the ongoing new finding of dead bodies. EHRC estimates 600 deaths in its preliminary investigation of Mai-Kadra town only.[126] On the other hand, some confirm that around 767 civilians were killed.[127] Under EHRCO's report, more than 1,100 civilians were killed in the attack, which includes victims from two other neighbouring towns named Humera (30 KM from Mai-Kadra) and *Dansha*.[128] The EHRC field observation further confirms victims who suffered grave physical, whose bodies were maimed by sharp objects or severely bludgeoned and those dragged on the ground with their necks tied to a rope.[129]

According to EHRCO, it took more than five days – for relatives, Amhara Special Force and Ethiopian National Defence Forces to search and bury the corpus. Burial spots are found at different points in the town and the surrounding. For example, at Abune Aregawi Church, 86 spots each with an average of 5 to 10 bodies buried together are found.[130] It is also confirmed that human bodies buried in mass graves were found in several places.[131] Furthermore, EHRCO investigation team spoke to six women who were raped by more than 10 youths who carried out the attack.[132] Moreover, mass

[125] *Id.*, p. 4.
[126] EHRC Preliminary Investigation, *supra* note 31, p. 3.
[127] Katharine Houreld *et al.*, *supra* note 42.
[128] EHRCO, Preliminary Investigation Report, *supra* note 40, 3.
[129] Its team also spoke to survivors who managed to escape by hiding inside roof openings, pretending to be dead after severe beatings, fleeing to and hiding in the desert plains. EHRC Preliminary finding, *supra* note 17 p. 3.
[130] EHRCO, Preliminary Investigation Report, *supra* note 42, 2. See also, JIT Report, *supra* note *12, p.* 30.
[131] According to EHRCO for instance, 42 people are buried near the Abune Aregawi church compound, 57 people in the area known as *Selela Mesmer*, 56 people on Wolde-Ab Road, 6 people near Kebele 04 bridge area, and 18 people near the flooding area. See, EHRCO, Preliminary Investigation Report, *supra* note 40, p. 2.
[132] *Id.*, p. 3.

destruction of property and looting are also reported.[133] On the other hand, TPLF has denied the allegations about the commission of all the above acts by its allies and rather accused the Amhara forces.[134]

3. Legal Characterization of the Mai-Kadra Atrocities

3.1 Introduction

There is no doubt that the Mai-Kadra incident constitutes a mass atrocity. Yet, the question is how the material acts committed in the incident can qualify to determine its possible category. The fact that the incident happened in the wake of armed conflict coupled with other factors widens its chance to be characterised in different ways.[135] Accordingly, the analysis in this section relies on the reported material facts and the law indicated above which will help us to draw a good understanding of the potential legal qualification of crimes committed.[136] The case law of ad-hoc tribunals and the ICC are

[133] The commission of these acts was also reported before the actual attack was carried out. According to the Joint Investigation Team report 'between November 6&9, 2020 Tigray forces attacked farms belonging to non-Tigrayans in nearby areas to Mai-Kadra. The attackers burnt the harvest of 5,000 quintals of sesame in one case and 620 in another. The attacks were considered ethnicity-based, targeting Amharas'. See, JIT Report, *supra* note 12, p. 68.

[134] The New York Times, They Once Ruled Ethiopia. Now They Revolt, 16 November 2020; BBC News, Ethiopia Tigray Crisis: Rights commission to investigate 'mass killings', 14 November 2020.

[135] This is because, as it is known, while genocide and crimes against humanity can be committed either in an armed conflict or peace time, war crimes can only be committed during an armed conflict. This poses the question whether the Mai-Kadar incident can be qualified in different ways, which is dealt with subsequently.

[136] There is on-going investigation by the Federal Office of Attorney General, now renamed as the Ministry of Justice including other incidents that occurred in the war between the Federal Government and Tigray Region. According to the Joint Investigation Report, a total of 202 suspects were identified, charged and were still on trial as of August 2021, Only 30 suspects were in custody while others continued to be tried in absentia. Joint Investigative Report, *supra* note 12, 366.

consulted to assess acts committed in the incident, although they are not binding on the Ethiopian courts.[137] It should be underlined that this is a general way of characterising the incident as a whole in light of the elements of core crimes. Hence, the conclusions may not certainly be applied to establish individual guilt since it must be proved by a Court that the accused personally possessed the required intent to commit the crime.[138]

3.2 Genocide

Genocide is ordinarily conceived as a mass killing of a large number of civilians where a state is often involved in such incidents.[139] Looking into the acts committed in Mai-Kadra atrocity, one could notice some constitutes these elements as the local administration was involved in organising a killing

[137] Both Tadesse and Marshet, who made extensive study on the area, acknowledged that Ethiopian courts never referred to the decision and judgments of International Courts and Tribunals in so far as the practice is concerned. For instance Tadesse avowed that 'in entering the country's first genocide conviction at the beginning of 1999 in *Geremew Debele* case, the FHC did not make a single mention of the landmark genocide judgment delivered sixth months before by the ICTR in the case of Akayesu.' See Tadesse, *supra* note 2, p. 223; Marshet, *supra* note 2.

[138] The person may not also satisfy the requisite intent of the commission of the crime. For instance, although the Trial Chamber of the ICTY in *Krstic* case has generally qualified the killing against the Bosnian Muslims as genocide, the Appellate chamber in contrast has ruled that General *Krstic* is not liable for genocide since he did not personally have a genocidal intent. ICTY, *Prosecutor v. Radislav Krstic* (Appeal Judgement), IT-98-33-A, (19 April 2004), para. 58.

[139] See for instance, Mark Drumbl, 'The Crime of Genocide' in Brown, Research Handbook, 38; Hans Vest, 'A structure-based Concept of Genocidal Intent' Journal of International Criminal Justice, Volume 5, Issue 4 (2007), 877. Furthermore, the ICTR in *Kayishema and Ruzindana case* held that "given the magnitude of this crime", it was "virtually impossible" for genocide to be committed without State involvement. See ICTR, *Prosecutor v Kayishema and Ruzindana*, Trial Chamber (Judgement) 95-1-T, 21 May 1999, para. 94.

squad called the *Samri*.[140] Nevertheless, it is difficult to conclude that higher officials were individually involved in the process of organising the group and directing the attacks. Hence, the rules on individual criminal responsibility indisputably require proving the acts of officials who ordered, planned, or participated in any form in the atrocity.

The legal elements of Genocide appear to be proscribed in identical phrasing in the texts of Article 6 of the ICC, Article 4(2) of the ICTY, Article 2(2) of the ICTR, and Article II of the Convention. Likewise, the Ethiopian Criminal Code follows the same approach although it has a few peculiar aspects notably, the extra list of protected groups.[141] In all these instruments, three fundamental elements constitute the crime: First, the underlining *acts* must be committed with the requisite *mens rea*; secondly, this act should specifically be targeted against national, ethnic, racial, or religious *group*, as such, and thirdly, that the act is committed with *intent* to destroy, in whole or in part, the targeted group.[142] The next sections look into Mai-Kadrs incident in light of these constituting elements.

[140] See section 2.1 above. See also, EHRC Preliminary Investigative Report, *supra* note 31, p. 3.

[141] Apart from the four list of protected groups under the genocide Convention, the Ethiopian Criminal Code has recognized additional categories of *political, nation, nationality, and colour groups*. The *chapeau* of Art. 269 of the 2004 Criminal Code reads as follows:

Whoever, in time of war or in time of peace, with intent to destroy, in whole or in part, a *nation, nationality, ethnical, racial, national, colour, religious or political group*, organises, orders, or engages in (Emphasis added).

[142] ICTR, *Prosecutor v. Seromba*, Trial Chamber, (Judgement), ICTR-2001-66, 13 December 2006, para. 316; ICTR, *Prosecutor v Bagilishema*, Trial Chamber I (Judgement), ICTR-95-1A-T, 7 June 2001, para 55.

3.2.1 Material Acts

In the Mai-Kadra incident, two acts namely, killing and serious bodily injury are mainly reported to have been committed.[143] The acts indeed constitute the *actus reus* of the crime of genocide. Particularly, the acts are committed with genocidal intent.[144] If the acts are committed with specific genocidal intent even the killing of a single victim is sufficient to regard it as genocide. The element 'killing members of the group' is not of course defined anywhere in the aforementioned instruments. However, the case law of the ad-hoc Tribunals, which contributed to the development of the definition of the individual acts of genocide, can be invoked in this respect. To this effect, the ICTR, in its several decisions, noted that the individual act of killing is limited to the intentional causing of death or murder.[145] Intentional killing of individuals belonging to members of the protected group is sufficient to regard an act as genocide in so far as it is possible to prove genocidal intent to destroy the group. This could be quite different from the ordinary definition of homicide under Article 538 (1) of the Ethiopian Criminal Code which also includes causing death through negligence. The ICTR in the *Akayesu* case excluded unintentional killing and interpreted the term 'homicide' in Article 2(2)(a) of the Statute as an act "committed with the intent to cause death".[146]

[143] See section 2 above.

[144] See Art. 6 (a) of the ICC, Art. 4(2) (a) of the ICTY, Art. 2(2) (a) of the ICTR and Art. 2 (a) of the Genocide Convention, and Art. 269 (1) the Ethiopian Criminal Code.

[145] ICTR, *Prosecutor v Musema*, Trial Chamber (Judgement and Sentence), ICTR-96-13-T, 27 January 200, para. 155; ICTR, *Prosecutor v. Jean-Paul Akayesu* Trial Chamber (Judgement), ICTR-96-4-T, 2 September 1998, para. 521; ICTR, *Bagilishema*, Trial Chamber I, *supra* note 63, para 58.

[146] See, *Akayesu*, Trial Chamber (Judgement), *supra* note *66*, para. 501. In this particular case, the Court looks into both the English and the French version of the Genocide Convention and decided that the French term ('*meurtre'*) was to be preferred over the English term 'killing', as the latter could refer even to unintentional homicides.

Hence, killing, as an individual act of genocide has to be understood as the deliberate killing of members of a protected group.

In Mai-Kadra, the killing of *Saluks* by the *Samri* group which particularly belongs to the Amhara ethnic group represents the most common act. It was carried out by stabbing with knives, machetes, axes, and hatchets and strangling with ropes which shows the perpetrators' intent to cause death or serious bodily injury. The ICTR is inclined to interpret the term 'killing' broadly 'not only entailing acts that are undertaken with the intent to cause death but also includes acts which may '*fall short of causing death*.'[147] Hence, it might not be difficult for the Prosecutor to show that when the victim is hit using such instruments, he/she probably loses his life or suffers a serious injury. However, the Prosecutor still needs to show that the perpetrators have intentionally killed one or more members of the protected group and that the victims 'must belong to a protected group or considered as such because of mistaken identities' by the perpetrators during the attack.[148] The issues surrounding members of protected groups are discussed in the subsequent section.

Investigative reports also indicated that several people sustained serious injuries following the Mai-Kadra incident.[149] The term 'causing serious bodily harm' to members of the protected group is also not defined anywhere in the above instruments. The ICTR defined that "causing serious bodily harm refers to serious acts of physical violence falling short of killing that seriously injure the health, cause disfigurement, or cause any serious injury to the

[147] ICTR, *Prosecutor v. Muvunyi*, Trial Chamber, (Judgment), ICTR 2000-55A-T, 15 September 2006, para. 482.
[148] ICTR, *Prosecutor v. Semanza*, Trial Chamber III (Judgement) ICTR-97-20-T, May 15, 2003, para. 319.
[149] See section 2.1.3 above.

external or internal organs or senses."[150] During the Mai-Kadra incident, it is submitted that several people who suffered grave physical injuries received treatment in different hospitals such as Abrhajira, Sanja, and Gondar.[151]

Generally, the circumstantial evidence reported in the Mai-Kadra incident precisely shows the fact that the act of killing and serious bodily harm was committed against members of ethnic Amharas. The specific pieces of evidence include the widespread killings of ethnic Amharas mainly in the *Gimbe Sefer* of the Mai-Kadra town, field observation reports of human rights bodies indicating heaps of bodies everywhere in the town in the aftermath of the attack, the manner of perpetration (by stabbing with sharp instruments), presences of seriously injured persons who sustained wounds in their face and neck in the hospital.[152]

3.2.2 Protected Group: Ethnicity

Ethnicity is one of the protected groups against the crime of genocide. The ICTR Trial Chamber defined an ethnic-group as 'one whose members share a common language and culture; or, a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including

[150] Akayesu, Trial Chamber (Judgement), *supra* note *66*, para. 50; Kayishema and Ruzindana, Trial Chamber (Judgement), *supra* note *60*, para. 109; *Musema*, Judgement and Sentence, *supra* note *63*, para 156; *Semanza*, Trial Chamber III, *supra* note *69*, para 315. See also, *Seromba*, (Trial Chamber), *supra* note *66*, para. 317. The person is guilty of causing serious bodily harm even if the injury suffered by the victim is not of a permanent or irremediable nature. See, *Prosecutor v. Muvunyi*, Trial Chamber, *supra* note *68*, para. 487; ICTR, *Prosecutor v Kamuhanda*, (Trial Chamber), January 22, 2004, para. 634; ICTR, *Prosecutor v Kajelijeli*, (Trial Chamber), December 1, 2003, para. 815.

[151] EHRC Preliminary Investigation Report, *supra* note 31, p. 2.

[152] The ICTR has employed these grounds in the renowned *Akayesu* case. See, *Akayesu*, Trial Chamber (Judgement), *supra* note 66, para. 116. See also *Kajelijeli*, (Trial Chamber), *supra* note *71*, para 835.

perpetrators of the crimes (identification by others).'[153] Hence, the victim must identify themselves as belonging to a certain ethnic group or the perpetrator believed that the victim belonged to the group. This is otherwise called 'subjective distinction' based on perception.[154] On the other hand, there is 'objective identification' of a protected group on factual distinction by looking into the conventional reality of its existence.[155]

Although ICTR previously employed an objective approach, eventually it adopted a combination of both subjective and objective approaches in the *Semanza* case.[156] It is also suggested in practice to combine both approaches as mere reliance on the subjective one could be used to protect even fictitious groups.[157] During the Mai-Kadra incident, the main targets of the attack were ethnic Amharas.[158] The prosecutor may not certainly face difficulty to prove that Amharas are ethnic-group since it is an objectively identified fact.[159] It is

[153] Kayishema and Ruzindana, Trial Chamber (Judgement), *supra* note 60, para. 98. See also Akayesu, Trial Chamber (Judgement), *supra* note 66, para. 513.

[154] The ICTR Trial Chamber employed a subjective test in the *Akayesu* case. See, *Akayesu*, Trial Chamber (Judgement), *supra* note 66, paras 512-515

[155] Robert Cryer, *et al*, An Introduction to International Criminal Law and Procedure, Cambridge University Press, 4th Revised edition, (2019).

[156] Semanza, Trial Chamber III, *supra* note 69, para, 317. See also ICTR, *Prosecutor v. Brđanin*, Trial Chamber, (Judgement), 1 September 2004, para. 209; *Kayishema and Ruzindana* Trial Chamber (Judgement), *supra* note 60, para. 98. See also, Robert Cryer, *et al*, *supra* note 76, 214.

[157] *Id.*

[158] Some of the reports (esp. EHRC) separately indicate that 'Welkaites' are involved in the incident. However, Welkaite is the local name of the area in the west part of the then Tigray administration and there is no such ethnic identity officially recognized as 'Welkaite' under the Ethiopian context. See, EHRC Preliminary Investigation *supra* note *31* p. 3.

[159] Amharas as ethnic identity is officially recognized by institutions such as the Central Statistical Agency and the House of Federations. See, Central Statistical Agency of Ethiopia, 'Census 2007 Report: National Statistical', 72-73, available on http://www.csa.gov.et/census-report/complete-report/census-2007, accessed on 30 April 2022. In establishing a federal state structure of Ethiopia in 1994, the FDRE

also conceivable considering that both ethnic groups -Amharas and Tigiryans predominantly live in the area. Although these ethnic groups had years of intermarriage and coexistence, still ethnic grid distinction is not blurred. Equally, the perpetrators identified ethnic Amharas for an attack as opposed to the group they belong to, i.e. ethnic Tigrayans which also forms a subjective approach as decided by the ICTR in *Bagilishema* case.[160] Be that as it may, there is room in both ways to establish that the acts in the Mai-Kadra incident were mainly directed against a protected group- ethnic Amharas. In practice, Ethiopian courts showed a predisposition towards the objective requirement.[161]

It is yet indicated that few other minority ethnic groups notably from the South were also part of the Mai-Kadra attack.[162] One may think that the presence of these groups may dilute the requisite *intent* to destroy the group. However, this might not pose a problem since during the Nazi Holocaust, while the majority of victims were Jews, other minority groups namely, Roma (Gypsies), homosexuals, Jehovah's Witnesses, and people with disabilities suffered damages from the Nazi genocidal acts.[163] Similarly, during the Rwandan genocide few minorities such as Twa, and moderate Hutu were

Constitution restructured the country into nine Regional States composed of different ethnic groups to which the 'Amhara Region' is the major one.

[160] The ICTR in *Bagilishema* case held that in cases where 'it is difficult to give a definitive answer as to whether or not a victim was a member of a protected group… if a victim was perceived by a perpetrator as belonging to a protected group, the victim should be considered by the chamber as a member of protected group, for the purpose of genocide'. See, *Bagilishema*, Trial Chamber I, *supra* note *63* para 65.

[161] Tadesse, *supra* note 2, p. 232.

[162] Among the 176 lists indicating the name of individuals killed, 4 were identified as South/Debube, without explicit mention of their specific ethnic identity. See, EHRCO Full report, *supra* note 11 p. 16-22.

[163] Minority Victims of the Holocaust, Holocaust Museum Houston Library, available on, https://hmh.org/library/research/minority-victims-guide/, accessed on 28, April 2022

killed.[164] Equally, the Prosecutor can refer to the ICTR's ruling of the subjective test that the inclusion of members of a few other ethnic groups is because the perpetrators erroneously believe that they belong to the ethnic-Amharas.[165] Furthermore, if these victims had a mixed identity such as half Amhara and half other ethnicities, there is still the possibility to say that they were targeted because of their membership in a protected group as it was held by the ICTR in the *Ndinababahizi* case.[166] Nevertheless, it is still possible for the defence to raise the inclusion of a few other ethnic groups as a challenge for the absence of the requisite *mens rea* of intent to destroy a group on the part of the perpetrators. The prosecutor thus owes the burden to prove otherwise.

3.2.3 The Mental Element

Establishing Genocidal intent is perhaps the most daunting task in the prosecution of such cases. As such, there is always a double *mens rea* requirement for the crime of genocide, i.e. the commission of an act 'with intent to destroy a protected group' and the requisite *mens rea* for the commission of the underlining acts. Several people may participate in the act, but for an individual to be regarded as a *genocidaire*, he/she should commit the act with the required genocidal intent.[167] Without confession, determining the special intent of the accused is often a difficult task since items of evidence that directly prove such intent may not be easily found. Because of this, the ICTR and the ICTY held in various judgments that genocidal intent can be inferred from several presumptions of fact or circumstantial

[164] Rwandan Genocide, History.com Editors, Last updated April 19, 2022, available on. https://www.history.com/topics/africa/rwandan-genocide accessed on May 12, 2022

[165] *Semanza*, Trial Chamber III (Judgement), *supra* note *69*, para. 319.

[166] ICTR, *Prosecutor v. Ndindabahizi*, Trial Chamber, (Judgement and Sentence), ICTR-2001-71-I, 15 July 2004, paras 469

[167] *Kayishema and Ruzindana* Trial Chamber (Judgement), *supra* note *60*, para 170.

evidence.[168] Similarly, the ICTR in its various cases indicated different factors that need to be considered to infer a genocidal intent. The Court's decision in the *Nchamihigo* case seems to compressively encompass these factors. It held that:

In the absence of direct evidence, the following circumstances have been found, among others, to be relevant for establishing intent: the overall context in which the crime occurred, the systematic targeting of the victims on account of their membership in a protected group, the fact that the perpetrator may have targeted the same group during the commission of other criminal acts, the scale and scope of the atrocities committed, the frequency of destructive and discriminatory acts, whether the perpetrator acted on the basis of the victim's membership in a protected group and the perpetration of acts which violate the very foundation of the group or considered as such by their perpetrators.[169]

While most of these factors also occurred in Mai-Kadra, it is still difficult to prove the others. The preparatory acts before the execution of the actual attack notably, the closure of the four main exits of the Mai-Kadra town followed by an order to make every Amhara Ethnic member stay at home, and let women and Children of Tigrayan ethnic origin leave the town possibly shows initial

[168] The ICTR, in its several cased held that intent may be inferred/proven by circumstantial evidence -where it is impossible to adduce direct evidence of the perpetrator's intent to commit genocide, such intent may be inferred from the surrounding facts and circumstances. See for instances, *Prosecutor v. Muvunyi*, Trial Chamber (Judgement), *supra* note *68*, para. 480; *Kayishema and Ruzindana* Trial Chamber (Judgment), *supra* note *60*, para. 93; *Kajelijeli*, Trial Chamber, *supra* note *71*, para. 806. See also, *Akayesu*, Trial Chamber (Judgement), *supra* note *66*, para. 523.

[169] ICTR, *Prosecutor v. Nchamihigo*, Trial Chamber, (Judgement) ICTR-01-63-T, November 12, 2008, para. 331. See also, ICTR, *Prosecutor v. Zigiranyirazo*, Trial Chamber, ICTR-01-73-T, December 18, 2008, para. 398; *Prosecutor v. Muvunyi, Trial Chamber (Judgement), supra* note *68*, para. 480.

measures taken to carry out the attack.[170] Further, *Samri's* attacks on ethnic Amaharas (*Saluks*), mainly residing in identified places before this incident, indicate the systematic nature of the attack against victims on account of their membership in an ethnic group. Hence, one may argue that the perpetrators are aware of their attack being directed against ethnically identified groups. Similarly, several factors show the broader scope of the atrocity namely, the number of deaths and serious bodily injuries, mass graves and burial sites, dead bodies found scattered on streets, and the gravity of the attack are evidence from which genocidal intent can be inferred.[171]

Conversely, it appears quite difficult to establish special intent considering the overall context in which the crime occurred and whether the perpetrator's actions constitute violation of the foundation of the group. The fact that the Mai-Kadra atrocity occurred in the period of an armed conflict opens doubt as to whether mass killings are committed with genocidal intent or to win the war. This is not to say that crime of genocide is not committed during the war. Although the Mai-Kadra act is committed following the outbreak of war between the Federal Government and the Tigray Region. If it is committed with the intent to defeat the opposing party, such act indeed does not satisfy the requisite special *mens rea* to qualify as genocide. This might be the case if the killing of *Saluks*-ethnic Amharas (who are mainly male members of the society) is to remove them from joining the enemy force that was approaching the town and avert a future military threat.

To appraise the above two factors, it is vital to see the Mai-Kadra incident in light of the Bosnian case in which military-aged male members of Muslim Srebrenica were killed by the Bosnian Serb forces. The defence team in the *Krstić* case argued that the purpose of the killing was not to destroy the group

[170] See section 2.1.2 above.
[171] *Id.*

as such but to remove a military threat as male members of military age had been targeted.[172] Nevertheless, both the Trial and Appellate Chambers of the ICTY held that such killings did constitute genocide justifying that Bosnian Serb forces effectively destroyed male members of the Bosnian Muslim community in Srebrenica and eliminated all the likelihood that it could ever re-establish itself on the territory.[173] Such ruling of the Court is much related to the second factor indicated by the ICTR above, i.e. ' about the perpetration of acts that violate the foundation of the group or as to whether they are considered as such by their perpetrators'. Accordingly, the following similar features can be drawn between the Mai-Kadra and Bosnian incidents: the attacks occurred during an armed conflict; the attack was committed against male members of the society (though not entirely in Mai-Kadra); the attack is directed against a protected group (ethnic-Amharas in case of Mai-Kadra and Muslim in case of Bosnia), the scope of the attack (more than 1000 persons killed in less than a day in Mai-Kadra while 7000-8000 persons were killed in less than two weeks in Bosnia) and burial of bodies in mass graves.

In contrast, it appears however very challenging to infer the genocidal intent in Mai-Kadra based on the grounds laid down by the ICTY above. This is mainly because of two reasons. First, the ICTY has required a high threshold standard of *mens rea*, and second, it has taken other important factors to conclude that the killing of Bosnian Muslims did constitute genocide. One can find these justifications together in the Court's ruling which says that 'the Bosnian Serb forces knew by the time they decided to kill all the military-aged men, that the combination of those killings with a forcible transfer of the

[172] ICTY, *Prosecutor v. Krstić*, Trial Chamber, (Judgement) IT-98-33, 2 August 2001, para 597.

[173] Furthermore, the Court held that 'the Bosnian Serb forces had to be aware of the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society'. *Id.*

women, children and elderly would inevitably result in the physical destruction of the Bosnian Muslims population at Srebrenica.'[174] Accordingly, it might be hardly possible to say that selective destruction of male members of ethnic Amharas in Mai-Kadar was carried out in a way that would have a lasting impact upon the entire group in the town or violate the foundation of the group. This is because, unlike the Bosnian situation, the Mai-Kadra incident is of relatively low in gravity and also there is no report about the forcible transfer of children and women or similar other underlining acts of genocide.

Moreover, intent can also be indirectly inferred from the perpetrator's use of derogatory language or overt statements towards members of the group.[175] In Mai-Kadra too, it was reported that the perpetrators used derogatory words during the attack.[176] However, ICTY held that each piece of evidence has to be taken commutatively (than individually) with others such as the use of discriminatory animus, type of attack, and persons targeted not to 'obscure the proper inquiry' of justice.[177] Hence, that makes it still difficult to infer genocidal intent from derogatory statements.

[174] *Id.*

[175] ICTR, *Prosecutor v. Muhimana*, (Trial Chamber), ICTR-95-1B-T, April 28, 2005, para. 496; See also ICTR, *Prosecutor v. Karera*, (Trial Chamber), ICTR-01-74-T, December 7, 2007, para. 534; ICTR, *Prosecutor v. Mpambara*, (Trial Chamber), ICTR-01-65-T, September 11, 2006, para. 8.

[176] According to the EHRCO, it is also taken as one of the factor that indicates the circumstances for the commission of 'crime of genocide'. See, EHRCO, full report, *supra* note 17.

[177] ICTY, *Prosecutor v. Stakić*, Appeals Chamber (Judgement), 22 March 2006, IT-97-24-A, para 55.

3.2.4 Intent to Destroy in 'Whole or in Part'

The other important element of the crime of genocide is the intent to destroy the protected group '*in whole or in part'*. Two important issues are raised about this element: the geographical scope of the attack and the extent to which the term '*part'* of the group is determined.

Looking into the case of Mai-Kadra, one could find no such complexity concerning the first issue since it is acknowledged by International Criminal Law[178] and the ICJ that 'genocide may be found to have committed where the intent is to destroy the group within a geographically limited area'.[179] The principal targets of the attack, ethnic-Amharas, were geographically limited to the area of Mai-Kadra at the time when the atrocity had happened, as Tutsi were considered everywhere in Rwanda during the attack by Hutu genocidaires although they encompass the whole territory of the country.[180] There is no need for the *Samri* group to target other ethnic Amharas all over the country or the Amhara region itself. What matters is to establish the intent to destroy the group in the geographic area it is found.

Relatively, the contested issue is the second one, i.e. the extent to which the term '*part'* of the group is determined. The reference here is not the quantitative threshold of the physical act of the perpetrator but rather his/her

[178] Trial Chamber of the ICTY in *Jelisic* case held that "international custom admits the characterization of genocide even when the exterminatory intent only extends to a limited geographic zone." See ICTY, *Prosecutor v. Jelisic*, Trial Chamber (Judgement) IT-95-10-T, (Dec. 14, 1999) para. 83.

[179] ICJ, *Bosnia and Herzegovinia v. Serbia and Montenegro*, Case concerning the application of the Convention on the Prevention of and Punishment of the Crime of Genocide, Judgment of 26 February 2007, para 199.

[180] This is because, it is not necessary to prove that the perpetrator intended to achieve the complete annihilation of a group throughout the world in order to say that genocide is committed. See, *Akayesu*, Trial Chamber (Judgement), *supra* note *66*; ICTR, *Seromba*, Trial Chamber, (Judgement), *supra* note *71*, para. 319.

intent to destroy the protected group. The actual number of victims might however be still relevant 'to assist the trier of fact to conclude the intent based on the behaviour of the offender'.[181] The ICTR explicitly indicated that intention must be targeted towards at least a '*substantial'* part of the group.[182] Likewise, the ICTY in *Jelisic* held that genocide must involve the intent to destroy a '*substantial*' part, although not necessarily a '*very important part*'.[183] Nevertheless, the meaning of the term '*substantial'* remains difficult to interpret. In *Krstic's* case, the ICTY ruled that 'if a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as *substantial'*.[184] Accordingly,

[181] William Schabas, Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia, Fordham International Law Journal, Volume 25, Issue (2001) 40. He further explained that 'The greater the number of actual victims, the more plausible the deduction that the perpetrators intended to destroy the group, in whole or in part.' *Id.*

[182] *Semanza*, (Trial Chamber III), *supra* note *69*, para 316. The Court in the *Kayishema* case also said 'that 'in part' requires the intention to destroy a considerable number of individuals'. See, ICTR, *Kayishema*, Trial Chamber, (Judgment), *supra* note *60*, para. 96&97. See also, ICTR, *Prosecutor v Bagosora et al*, Trial Chamber (Judgement), ICTR-98-41-T, 18 December 2008, para 2115.

[183] *Jelisic*, Trial Chamber (Judgement), *supra* note *99*. See also, ICTY, *Prosecutor v. Radoslav Brđanin*, Trial Chamber (Judgment), IT-99-36-T), 2004, para. 701. The ICJ also indicated that 'the part targeted must be *significant* enough to have an impact on the group as a whole' ICJ, *Bosnia and Herzegovinia v. Serbia and Montenegro*, Case concerning the application of the Convention on the Prevention of and Punishment of the Crime of Genocide, (2007), at 198. In general, the intended destruction must refer at least to a "*substantial part*" of the relevant group seems accepted very well.

[184] ICTY, *Prosecutor v. Krstić*, Appeals Chamber, (Judgement), IT98-33-A, 19 April 2004, para. 12. Such decision of the Appellate Chamber has affirmed the Trial Chamber has conclusion that, in terms of the requirement of Art. 4(2) of the Statute that an intent to destroy only 'part' of the group must nevertheless concern a substantial part thereof, either numerically or qualitatively, and the military aged Bosnian Muslim men of Srebrenica do in fact constitute a substantial part of the Bosnian Muslim group, because the killing of these men inevitably and fundamentally would result in the annihilation of the entire Bosnian Muslim

'the fate of Srebrenica Muslim is regarded as emblematic of that of all Bosnian Muslims',[185] in a sense that the specific part of Srebrenica Muslims is essential to the survival of the overall group –Bosnian Muslims. True that ethnic Amharas living in Mai-Kadra town constitute part of the protected ethnic Amharas in Ethiopia, yet it remains difficult to determine whether the targeted population is *substantial* enough to have an impact on the survival of whole Amharas to infer requisite genocidal intent.

The other relevant factors in determining '*substantiality,'* according to the Appellate Chamber of ICTY in the *Krstic* case, are the prominence of the targeted individuals within the group and the number of the targeted population. This means both quantitative and qualitative considerations should be taken into account.[186] In both cases, the assessment of substantiality has to consider the effect that the targeting of this part has on the group as a whole.[187] The qualitative aspect is plainly expressed by the same Court in the case of *Sikirica* in which relatively small numbers of killings occurred in concentration camps. The Trial Chamber in this case observed that "they do not appear to have been persons with any special significance to their community, except to the extent that some of them were of military age, and therefore could be called up for military service."[188] In the Mai-Kadra case, the *Saluks*, ethnic Amharas, who were the principal target of the attack, are seasonal labourers who work on large sesame and millet farms in the borders of the town.[189] Indeed these persons are of military age and could be called

community at Srebrenica. See *Krstić*, Trial Chamber, (Judgement), *supra* note *93*, para 595.

[185] Robert Cryer, *et al*, *supra* notes *76, p.* 224.

[186] *Id.*

[187] *Jelisic*, Trial Chamber (Judgement), *supra* note *99*, para 82.

[188] See ICTY, *Prosecutor v. Sikirica*, Trial Chamber (Judgement), IT-95-8-I, Aug. 3, 2001, para. 80

[189] See section 2.1 above.

and possibly join the Federal Government/Amhara Special force approaching the Mai-Kadra town at the time. However, it would be doubtful to say that the *Samri* Groups' choice of *Saluks* arose from a clear reason to destroy either the most significant figures of the ethnic-Amharas community in Mai-Kadra or to threaten the survival of the community in Ethiopia as a whole.[190] Hence, such determination rather needs strong evidence which helps to infer the intention of members of *Samri* Groups with certainty that the killing of *Saluks* -men members of ethnic Amhrans, inevitably and fundamentally resulted in the annihilation of Amharas at Mai-Kadra and impacted the survival of the community as such.

Furthermore, the ICTY Chamber in the Bosnian case has also taken into account the fact that women and children were transferred from the area to affirm that 'part' of the group was the Bosnian Muslims of Srebrenica. In contrast, during the Mai-Kadra incident, there was no such specific report evidencing the transfer of women and children by the perpetrators unless they were part of the attack and victims of rape in some places of the town. As opposed to the discussions above, Ethiopian Courts in practice did not consider the 'substantiality' requirement and it was simply supported that any attack conducted with the intent to destroy could constitute genocide.[191]

[190] In similar fashion, the ICTY Trial Chamber in *Jelisic* case noted that it might be possible to infer the requisite genocidal intent from the "desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such." But, the Court finally found that it was not possible "to conclude beyond all reasonable doubt that the choice of victims arose from a precise logic to destroy the most representative figures of the Muslim community in Brcko to the point of threatening the survival of that community.'" See *Jelisic*, Trial Chamber, (Judgement), *supra* note *99*, paras. 82&. 93.

[191] Tadesse, *supra* note *2* p. 280.

3.3 Crimes Against Humanity

The customary international law definition of crimes against humanity requires the commission of listed inhuman acts in the context of a 'widespread or systematic attack directed against a civilian population'.[192] The act of killing and causing bodily injury, which was widely committed in Mai-Kadra, are at the forefront of the list of inhuman acts both under the ICC statutes and tribunals. Although the Mai-Kadra incident happened during an armed conflict, such an aspect is not required under the current International Criminal Law.[193] Hence, even in the absence of an armed conflict, the Mai-Kadra incident may still qualify as such provided that other requirements were fulfilled notably, 'widespread or systematic attack'. The same is also true for the requirement of discriminatory grounds (only stated under the ICTR statute) which is relevant except in the specific case where the crime of persecution is itself an underlining offense. Then, the remaining question requiring more inquiry is whether the Mai-Kadra incident fulfills the threshold of widespread or systematic attack to qualify as a crime against humanity? If so, how? The subsequent section addresses these and other issues.

3.3.1 Widespread or Systematic Attack against Civilian Population

[192] The ICTR further indicated that any act which is 'inhuman' in nature and character may be qualified as crimes against humanity provided that the *chapeau* elements of such crime are met. See, *Akayesu*, Trial Chamber (Judgement), *supra* note *66*, para. 585.

[193] The ICTY Statutes restrict the application of crime against humanity to those committed during an armed conflict. Yet, the ICTR statutes, national case laws, views of experts do not provide the requirement of armed conflict in the definition of crime against humanity. See, Robert Cryer, *et al*, *supra* note 76, p. 231.

The terms 'widespread or systematic' are non-cumulative requirements defined in different ways under International Criminal Law. The term 'widespread' commonly refers to the ' scale of the act perpetrated and the number of victims'.[194] Yet, there is no clear upper and lower numerical limit. It can be satisfied by the commission of numerous acts or a single act of exceptional gravity.[195] It simply connotes the large-scale characteristics of an attack, involving many victims. As indicated before, the Mai-Kadra atrocity is carried out by the *Samri* group with considerable seriousness and directed against a multiplicity of victims on a massive scale. This is certainly evidenced by a large number of killings and serious bodily injury, dead bodies on the streets, various burial sites, and mass graves following the incident. Consequently, one can safely conclude that the scale of the attack satisfies the element of 'widespread' as defined in pertinent human rights instruments.

Turning to the term 'systemic, one could see that it is also qualified through several attributes drawing a line between such acts and others. The ICTR in *Seromba* and other cases defined 'systematic' as [a criminal act] thoroughly organised, following a regular pattern, based on a common policy, and involving substantial public or private resources.[196] In Mai-Kadra, reports

[194] ICTR, *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 920; *Bagosora et al*, Trial Chamber (Judgement), *supra* note *103*, para. 2165; ICTY, *Prosecutor v. Tadić,* (Trial Chamber II), IT-94-1-T, 7 May 1997, para 206; *AI Bashir Arrest Warrant*, Pre-Trial Chamber I, ICC-02/05-01/09-3, (2009), para. 81.

[195] ICTY, *Prosecutor v. Blaskic*, Trial Chamber (Judgement), IT-95-14-T, 3 March 2000, para. 206; ICTY, *Prosecutor v. Dario Kordic, Mario Cerkez* (Trial Chamber), IT-95-14/2-T, 26 February, 2001.

[196] *Seromba*, Trial Chamber, (Judgement), *supra* note *63*, para. 356; ICTR, *Prosecutor v. Bisengimana*, Trial Chamber, (Judgement) April 13, 2006, para. 45; ICTR, *Prosecutor v. Simba*, (Trial Chamber), December 13, 2005, para. 421; ICTR, *Prosecutor v. Kamuhanda*, Trial Chamber, (Judgement), ICTR-95-54A-T, 22 January 2004, para. 666. Whereas, the ICTY in *Blaskic* case included other factors

indicated that the attacks against victims by the *Samri* group were made in an organised way in which a group of 20 to 30 youth individuals, each accompanied by an estimated 3 to 4 armed police and militia, carried out the massacre.[197] Before the actual attack started, preparatory acts were made by the police such as checking residents' identity cards in the areas known as 'Genb Sefer' and the neighbourhood where ethnic Amharas largely reside. In addition, they detained those ethnic Amharas who were caught using Sudanese SIM card service to access the Mobile Phone network and communicate as such to prevent any communication or call for help.[198] These circumstances manifestly indicate the systematic and organised pattern of conduct, as distinguished from random or isolated acts committed by independent actors.

The involvement of local administration and police in organising the *Samri* group could also indicate the use of substantial public or private resources for the commission of the attack. In particular, the assistance and participation of police and militia in the carnage by shooting at those who attempted to escape behind the attack of the *Samri* group proves the involvement of state machinery. More importantly, the two most relevant grounds emerging in recent cases Laws of International Criminal Law, i.e. the organised nature of the attacks and improbability of their random occurrence[199] were manifestly shown during the Mai-Kadra incident. Finally, it seems that there is no controversy about the civilian nature of the victims as far as the Main-Kadra

such as plan or object and implication of higher level authorities. See ICTY, *Prosecutor v. Blaškić*, Trial Chamber, (Judgement), IT-95–14-T, (2000).

[197] See section 2.1.3 above.

[198] *Id.*

[199] ICTR, *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), November 28, 2007, para. 920; *AI Bashir Arrest Warrant*, Pre-Trial Chamber I, *supra* note 125, para. 81.

incident is concerned since the attack was apparently carried out against a civilian population who was not in any way involved in the war.[200]

3.3.2 Mental Element: The Link between the Perpetrators and the Attack

It is the 'widespread or systematic' context of the attack against a civilian population that makes an act a crime against humanity. Accordingly, the perpetrator's knowledge/awareness of the context is necessary to make the person responsible, unlike other ordinary crimes.[201] The perpetrator should know the broader context of the attack and his/her acts form part of the attack. While the tribunals require the perpetrator to knowingly take the risk that his/her action is part of an attack.[202] under the ICC, the perpetrator is not required to have detailed knowledge of the attack or the characteristics of the policy.[203] The perpetrators need not pursue the goals or purposes of the overall attack. The law requires their knowledge of the context and even motive is not required.[204] The knowledge can be inferred from the relevant facts and circumstances.[205]

In this consideration, it seems quite easy (if not definitively possible) for the prosecutor to prove the perpetrator's knowledge about the widespread or systematic attack in the Mai-Kadra incident. When several *Samri* groups consisting 20 to 30 youth groups were organised to attack civilians in

[200] See section 2.1.1 above.
[201] *Semanza*, (Trial Chamber III), *supra* note *69*, para. 332; ICTY, *Prosecutor v. Tadić*, Trial Chamber II, (Judgement) IT-94-1-T, 7 May 1997, para. 656; ICTY, *Prosecutor v. Kupreskic et al.* (Trial Judgement), IT-95-16-T, 14 January 2000, para 138.
[202] *Id.*
[203] ICC Elements of Crime, Art. 7, Crime against Humanity 'Introduction', para. 2.
[204] ICTY, *Prosecutor v. Tadić,* Appellate Chamber, (Judgement), IT-94-1-A, 15 July 1999, para. 272.
[205] ICC Elements of Crime, 'General Introduction', para. 3.

identified places, it was factually reasonable to say that members of the group acted in the knowledge of such wide-spread or systematic context of the attack. Hence, in such a conceivable situation, it would hardly be possible for the perpetrators to credibly deny that his/her action forms part of the broader attack against civilians. Furthermore, it is reasonable to say that the perpetrators know the likely consequence of their acts i.e. by stabbing victims with sharp instruments they intended to cause either death or serious bodily harm. Generally, one can logically infer from above the perpetrators' awareness of the broader context in which their act occurred.

3.3.3 Material Act: Extermination

One of the underlying offences of crimes against humanity is extermination.[206] It is similar to murder as both involve killing, however, extermination signifies mass or large-scale killing.[207] Hence, the commission of extermination requires elements of mass destruction while murder crimes against humanity 'can occur on the basis of a single killing which is committed in the context of wide spread or systematic attack'.[208] Although there is no minimum number of victims to qualify as an act of extermination, the ICTY Trial Chamber in *Lukić* case held that killing of at least 60 people in Bikavac was 'killing on a large scale and [met] the element of mass destruction required for extermination.'[209] One can reach the same conclusion as the crimes against humanity of extermination committed in the Mia-Kadra

[206] See, Art. 5 (b) of the ICTY Statute, Art. 3 (b) of the ICTR Statute and Art. 7 (b) of the ICC Statute.

[207] *Kayishema and Ruzindana*, Trial Chamber (Judgement), *supra* note *60*, para. 147. ICC, Elements of Crime, Art. 7(1)(b). ICTY, *Prosecutor v. Lukić and Lukić*, Trial Chamber III (Judgment), IT-98-32-1-T, 20 July 2009, para. 938.

[208] Robert Cryer, *et al*, *supra* notes *76*, *at* 243. See also, Guénaël Mettraux, International Crimes and the Ad hoc Tribunals, OUP, Oxford 2005, p. 177.

[209] ICTY, *Prosecutor v. Lukić and Lukić*, Trial Chamber III (Judgment), IT-98-32-1-T, 20 July 2009. The Appellate Chamber has also confirmed such.

incident in which more than 1000 civilians were killed in mass by the *Samri* group on November 9 and 10, 2020.

3.4. War Crime

By definition, a war crime can only be committed during an armed conflict which is a *serious* violation of the rules and regulations of warfare.[210] This section, as a way to analyse the Mai-Kadra situation, explores common elements across all types of war crimes. Such crimes are largely established by showing the existence of an armed conflict, identifying the type of armed conflict, establishing the nexus between the conduct and the armed conflict, and defining the status of both the perpetrators and the victims. The issue of the existence of armed conflict is not a question as such in the Mai-Kadra incident as the atrocity happened on the fourth day of the outbreak of full-fledged armed conflict between the Federal Government and the Tigray Region.[211] Likewise, the issue of the type of armed conflict is not relevant in this case since the Ethiopian Criminal Code does not provide a distinction based on the type of armed conflict (international and non-international).[212]

[210] Such as deliberate killing, torture, rape or deportation of protected people, namely civilians.

[211] This also fairly similar with the ICC ruling in *Lubanga* case in which it held that "an armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organised armed groups or between such groups within a State". See, ICC, *Prosecutor v. Lubanga*, ICC, Trial Chamber I, (Judgement), ICC-01/04-01/06, 14 March 2012, para. 533.

[212] Unlike the ICC where such distinction is clearly prescribed, the Ethiopian Criminal law provisions on war crimes are applicable irrespective of the nature of the conflict. Although there is no such a clear indication, the implicit exclusion of the nature of an armed conflict in the application of provisions on war crimes under the Criminal Code can be inferred from Art. 270. The provision does not define or classify the application of the subsequent Art.s on war crimes based on the nature of the armed conflict. More interestingly, this is crucial because the recent atrocities committed in the country including Mai-Kadra are indeed the result of internal armed conflict between the Federal Government and Tigray Region although it may be characterised

Regardless of such categorization, which is a controversial issue in the area, the rules and customs of war recognized equally apply if any war crimes were committed in Mai-Kadra during the period of the conflict. The other two common elements rather relevant to the case are considered in the ensuing sections.

3.4.1 The Nexus Element

Conducts committed in an armed conflict must have a nexus to the armed conflict to be qualified as war crimes.[213] If the conduct lacks this nexus, it can be qualified as an ordinary crime or under exceptional and extreme cases as crimes against humanity. The Mai-Kadra attack was carried out during the period of an armed conflict and the conduct occurred while the armed conflict was approaching the town although there was no military activity at the time between the Federal Government and Tigray Region. In this respect, the ICTY held that there is no need for military activities at the time and place of the crime and it can be temporary and geographically remote from the actual fighting.[214]

as an 'internationalised' as well due to the involvement of Eritrean troops later. In practice, the Federal High Court in the *Legesse Asfaw et al* case similarly applied the 1957 Penal Code provisions of war crime despite acknowledging the non-international character of the armed conflict. See, Tadesse, *supra* note *2* at 309. Likewise, pursuant to the definition given by ICTY armed conflict does not only encompass armed conflict between two or more states but also includes 'protracted armed violence between governmental authorities and organised groups or between such groups within a state'. ICTY, *Prosecutor v. Tadić,* Appellate Chamber, (Judgement), IT-94-1-A, 15 July 1999, para. 77. See, ICC, *Prosecutor v. Lubanga*, Trial Chamber, (Judgement), ICC-01/04-01/06, (2012), para. 533.

[213] This is more clearly indicated under the ICC Elements of Crime under Art. 8(2) (a)-I, which reads 'in the context of and associated with'.

[214] ICTY, *Prosecutor v. Kunarac*, ICTY Appellate Chamber (Judgment), 12 June 2002, para 57.

The next issue is the specific nexus between the conduct of the perpetrator and the conflict. The ICTY requires that the conduct must be 'closely related to the conflict.[215] To establish such link, the tribunal in the *Kunarac* case devised the test of whether the presence of an armed conflict 'played a substantial part in the perpetrator's ability to commit it, his decision to commit it, how it was committed, or the purpose for which it was committed.[216] It is also necessary that the perpetrator acted in furtherance of or under the pretext of the armed conflict.[217]

Looking into the Mai-Kadra incident and, the context in which the conduct is committed, one cannot say that the *Samri* group was involved in the attack because of a private dispute or personal conflict. Instead, the purpose of the attack outwardly seems to attack those victims deemed to be on the side of the enemy. Furthermore, it may probably be because of the perpetrator's (*Samri* group) assumption that the principal targets of the attack (*Saluks*) would join the Federal Government force and fight against the Tigray Region, to which the *Samri* belong. This can also be justified by the fact that the victims were disproportionately male, on account that they would most likely join a party to the conflict and engage in hostilities. Therefore, it can be tenably concluded that the conduct of the perpetrator during the Mai-Kadra atrocity was committed in the context of and associated with an armed conflict.

3.4.2 The Status of the Perpetrators

When it comes to the status of the main perpetrators, i.e. *Samri* group during the Mai-Kadra atrocity, a question may arise whether they are a member of an

[215] *Tadić,* Appellate Chamber, (Judgement), *supra* note 133, para 70.
[216] Robert Cryer, *et al*, *supra* note *76, at* 275; ICTY, *Prosecutor v. Kunarac et al*., Appeals Chamber, (Judgement), 12 July 2002, IT-96-23/1-A, para. 58.
[217] *Id.*

armed force or combatants to show the nexus of their conduct with the conflict. This is however not a requirement under the case-law of the International Criminal Law as it was held by the ICTR in the *Akayesu* case.[218] Like combatants or members of armed conflict, the conduct of civilians can be a war crime, if the nexus requirement is met.[219] The only requirement is the perpetrator's knowledge of the factual existence of an armed conflict and that such an attack is directed toward protected persons/property under the rules of International Humanitarian Law.[220] Hence, one can say that members of the *Samri* group were aware of the existence of the ongoing armed conflict between the Federal Government and the Tigray Region which was officially declared by both sides and known across the country. As shown above, the atrocity was committed while the conflict was approaching Mai-Kadra town.

With regard to the issue of victims, several war crimes require that the victim is in the hands of or in the power of the adverse party during the commission of the alleged crime.[221] Article 4 of Geneva Convention IV defines civilian persons as those who are in the hands of an adverse party to the conflict or occupying power of which they are not nationals.[222] The provision appears to apply to state-to-state armed conflicts. However, the ICTY in *Tadić* ruled that ethnicity rather than nationality can also serve as a ground to regard that

[218] ICTR, *Prosecutor v Jean-Paul Akayesu*, Appellate Chamber (Judgement), ICTR-96-4-A, 1 June 2001, para. 445.

[219] *Id.*

[220] The ICTY requires that the perpetrator was aware that his or her acts were linked to a conflict of an international nature. See, ICTY, *Prosecutor v. Naletilić and Martinović*, Appellate Chamber, (Judgement) IT-98-34-A, 3 May 2006, para 120. Whereas, the ICC Statute only requires the awareness of the factual circumstances that established the existence of an armed conflict in accordance with its Elements of Crime under Art. 8(1) (a) (i). However, it appears that the situation in Mai-Kadra can be justified in both cases.

[221] See, Geneva Convention IV, Art. 4; Geneva Convention III, Art 4, ICC Statute Art. 8(2) (b) (x)-I, Element 4.

[222] Geneva Convention IV, Art. 4

victims were in the hands' adverse party.[223] The Court emphasises the substance of relation between the victims and the party to the conflict who held them.[224] In Mai-Kadra, too, ethnic Amharas were killed, seriously injured, and detained by the *Samri* group which belongs to the Tigryan ethnic group even though all of them were Ethiopian nationals.

3.4.3 Material Acts

The most common conduct which was committed during the Mai-Kadra incident and can amount to war crime is murder or wilful killing.[225] The basic elements of the crime are the same and also resemble the crimes against humanity of murder. The other is wilful causing of serious bodily injury or health hazards.[226] This category of offense definition also includes acts committed in the incident that deliberately cause permanent or long-lasting and serious harm without amounting to torture.[227] Moreover, the destruction and looting or pillage of civilian property before and after the incident may also fall under the act of war crime. But all of the acts need to be serious in gravity to criminalise as such.

Conclusion

The commission of the underlying offense of genocide i.e. killing and serious bodily injury against the protected group- ethnic Amharans in the Mai-Kadra incident is justifiably determined in this article. However, it is hardly possible to infer genocidal intent from the circumstances of the case mainly because of

[223] *Tadic*, Appellate Chamber, (Judgement), *supra* note *133*, para 166.
[224] Robert Cryer, *et al*, *supra* note 76, p. 277.
[225] See section 2.1.3 above.
[226] *Id.*
[227] See for instance, *Akayesu*, Trial Chamber (Judgement), *supra* note 66, para 502; ICTR, *Prosecutor v. Blastics*, ICTY Trial Chamber I, (judgement) 3 March 2000, para 156.

the uncertainty in the context in which the crime occurred and whether the perpetrator's act is in violation of the very foundation of the Ethnic group. The absence of strong material facts justifying these issues mainly leaves doubt as to the existence of genocidal intent on the part of the perpetrators. It is found that the Bosnian Muslim genocide in Srebrenica and the Mai-Kadra atrocity have some common features. but the latter becomes relatively low in gravity and hence it appears way more difficult to satisfy the 'substantiality' test to infer genocidal intent from the circumstances of the case. In respect of crime against humanity, the decisive elements, i.e. 'widespread or attack and the perpetrators' knowledge of the context during the attack as developed under customary law were fairly satisfied based on the determination of material facts of the case. Moreover, the incident can also qualify as a war crime since it was committed in the context of and associated with an armed conflict. Notably, factual circumstances indicate the perpetrators' awareness of prohibited acts against civilians such as killing, serious bodily injury, unlawful detention, and forceful transfer.

The Quest for Remedies for Violations of IDPs` Right to Land and Property in Ethiopia

Misganaw Gashaw Beza[ר] & Alelegn Wonedem Agegnehu[*]

Abstract

The predicament of IDPs has emerged as one of the great human tragedies in the world today, including in Ethiopia. Millions of people have been forced to abandon their houses, land and other property because of conflicts, disasters, and development projects. This made them more vulnerable to homelessness, economic hardship, social disarticulation, psychological trauma, and various forms of severe deprivation of human rights. However, there remains a lack of an effective mechanism to respond to the multiple claims of IDPs. This doctrinal article examines the extent to which the existing international, regional, and national legal instruments are applicable to remedy violations of IDPs' right to land and property in Ethiopia. The article emphasizes inadequate policy, legal, and institutional framework as one of the critical gaps in providing and enforcing judicial and administrative remedies upon violations of the rights in question. Compared to development-induced displacement, where the Expropriation Proclamation has made a good start, remedies and reparations for conflict and disaster-induced displacements are still inadequate and found scattered in the various substantive and procedural laws of the country. A review of related literature also informs that the problem is exacerbated by other practical challenges such as lack of awareness and political will, the prevailing culture of impunity for human

[ר] LL.B, LL.M, PhD Candidate, Assistant Professor of Law, School of Law, Bahir Dar University. The author can be reached via: misgepower@gmail.com

[*] LL.B, LL.M, PhD, Institute of Land Administration, Bahir Dar University. The author can be reached via: alelegn38@gmail.com.

rights violations, issues in land registration and formalization of property rights, the absence of separate fund and procedural difficulties to lodge actions. The article underlines the need to introduce a comprehensive legal framework, ensure land and property registrations, establish a separate fund, and strengthen Public Interest Litigation (PIL) and class action as key reform priorities.

Keywords: IDPs, Land and Property Rights, Violations, Remedies, Ethiopia

1. Introduction

Internally Displaced Persons (IDPs) are persons or groups of persons who have been forced to leave their residences and have not crossed an internationally recognized State border.[1] What makes IDPs different from other persons of related situations, such as refugees, is that they stay within their own country and remain under the protection of their government, even in cases where the government is responsible for the displacement. Although accurate data remain unknown, Ethiopia has one of the largest Internally Displaced People (IDPs) in Africa, with an estimated 4.2 million as of September 2021 and 4.7 million as of October 2022.[2] Political instability and ethnic conflicts, natural disasters (such as drought, floods, and locusts), and expansion of development projects are the primary and underlying causes of

[1]United Nations High Rights Office of the Higher Commissioner, Guiding Principles on Internal Displacement, 1998, (E/CN.4/1998/53/Add.2), (Hereinafter UN Guiding Principles) 2nd Paragraph. Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), African Union, 2009, Art. 1(1)

[2] International Organization for Migration (IOM), 'Ethiopia Crisis Response Plan: 2022', https://crisisresponse.iom.int/response/ethiopia-crisis-response-plan-2022 (accessed August 25, 2022); Camp Coordination and Camp Management (CCCM), 'Ethiopia', < https://cccmcluster.org/operations/Ethiopia > (accessed February 15, 2023).

internal displacement challenges in the country.[3] Empirical evidence shows that conflict is the primary (over 85%) driver of displacement, followed by natural disasters and climatic shocks.[4] There are also cases of development-induced displacements undergoing in Ethiopia.[5] However, compared to other types, there is a clear set of legal procedures, and remedies for this type of displacement for the FDRE Constitution and other legislations provide for participation and consultation rights as well as compensation and rehabilitation rights.[6] However, the remedies available for conflict and climate-induced displacements are less apparent even though they persist most in Ethiopia. These two causes form the focus of this article.

[3] Mister Sew, 'Internally Displaced People and Humanitarian Crisis in Ethiopia', (August 30, 2021, https://www.ethiopia-insight.com/2021/08/30/internally-displaced-people-and-humanitarian-crisis-in-ethiopia/> (accessed August 25, 2022); Benyam Masresha, Thriving to Survive: Resettlement of Internally Displaced Persons in Sululta Town of Oromia Regional State, MSc Thesis, Addis Ababa University, (2020). Tadele Akalu, Internal Displacement in Ethiopia: A Scoping Review of its Causes, Trends and Consequences, *Journal of Internal Displacement*, Vol. 12 No. 1, (2022), pp. 2-31. Endris Jafer et al, Post Conflict-Induced Displacement: Human Security Challenges of Internally Displaced Persons in Oromia Special Zone Surrounding *Finfinne*, Ethiopia, *Cogent Social Sciences*, Vol. 8 No.1, (2022). Mehari Taddele, Causes, Dynamics, and Consequences of Internal Displacement in Ethiopia, German Institute for International and Security Affairs Working Paper No. 8, (2017).

[4] IOM, *supra* note 2.

[5] Almaz Mekonnen, Development Induced Displacement of Urban Dwellers in Addis Ababa: An Implication for Rebuilding Social Capital, MSc Thesis, Addis Ababa University, (2019). Negera Gudeta, Human Rights Impacts of Development Induced Displacement in Addis Ababa: The Case Study of Kirkos Sub City, *Journal of Poverty, Investment and Development*, Vol. 57, (2020).

[6] The Constitution of Federal Democratic Republic of Ethiopia (hereinafter FDRE Constitution), Proclamation No.1/1995, Federal Negarit Gazeta, (1995), Arts. 40 (8), 43 (2) & 44 (2); Expropriation of Landholdings for Public Purposes, Payments of Compensation and Resettlement of Displaced People (hereinafter, Expropriation Proclamation No.1161/2019), Proclamation No. 1161/2019, Federal Negarit Gazetta, (2019).

Ethiopia has been exposed to numerous natural and artificial disasters (such as droughts, floods, pests, epidemics, and earthquakes) that caused 202, 202 (in 2019) and 240, 000 (in 2021) internal displacements in the different parts of the county.[7] As indicated above, Ethiopia's biggest displacement problem appallingly comes from conflict and violence. There is a growing consensus among researchers and policy-makers that the ethnic-based federal system[8] is the primary responsible factor for inter-communal conflicts in the country.[9] The politics of "othering" and mega-ethnic syndrome have led to escalating grievances, animosities, and severe competitions that exacerbate ethnic-based violence and repeated displacements never happened in history.[10] Even though the federal system in Ethiopia is said to empower ethnic groups by recognizing the right to self-determination, it fails to pay the required attention to the 'non-indigenous' (non-native) residents of the regional states.[11] The federal system does not provide systems of protection to these millions of

[7] Internal Displacement Monitoring Centre (IDMC), 'Country Profile: Ethiopia', https://www.internal-displacement.org/countries/ethiopia, (accessed February 19, 2023); United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), Ethiopia National Displacement Report 9, Round 26: June - July 2021 https://reliefweb.int/report/ethiopia/ethiopia-national-displacement-report-9-round-26-june-july-2021, (accessed February 15, 2023).

[8] FDRE Constitution, Arts. 46 and 47.

[9] Takele Bekele Bayu, Is Federalism the Source of Ethnic Identity-Based Conflict in Ethiopia? *Insight on Africa*, Vol. 14, Iss. 1, (2022), pp. 104–125; Dereje Regasa et al, In Search of the Invisible People: Revisiting the Concept of "Internally Displaced Persons" in Light of an Ethiopian Case Study, *Refugee Survey Quarterly*, Vol. 41, Iss. 2, (2022), pp. 320–341.

[10] IOM, Rapid Response Assessment Benishangul Gumuz/ East and West Wellega: Round 1, (February 8-16, 2019), https://dtm.iom.int/reports/ethiopia-%E2%80%94-benishangul-gumuz-east-and-west-wellega-rapidresponse-assessment-1-8-%E2%80%94-16 > (accessed August 26, 2022)

[11] Yonatan Tesfaye and Van Der Beken, Ethnic Federalism and Internal minorities: The Legal Protection of Internal Minorities in Ethiopia, *African Journal of International and Comparative Law*, Vol. 21, No. 1, (2013), pp. 32-49. Beza Dessalegn, The Right of Minorities to Political Participation under the Ethiopian Electoral System, *Mizan Law Review*, Vol. 7. No.1, (2013), pp. 75-78.

Ethiopians ('non-natives') who find themselves in politically wrong regional states.[12] In some regional states, the problem has a constitutional basis in that some ethnic groups are legally recognized as owners of the region while others labelled as are late-comers to the region and as such deprived of the status recognized for the former ones.[13] Such Constitutional stipulations have let post-1990s nationalist political groups kill or displace millions of ethnic Amhara residents from Oromia, SNNPR, and Benishangul-Gumuz regions.[14] In 2018, around 900,000 people were displaced because of the inter-clan conflicts between Oromia and Somali regions.[15] In 2019, a conflict broke out between West *Guji* (Oromia region) and *Gedeo* (Southern Nations, Peoples, and Nationalities region) that displaced an estimated 1.4 million people.[16] Ethiopia's IDPs have increased dramatically since 2021 due to the armed conflict that broke out in northern Ethiopia and displaced over 2.11 million people in Tigray, Amhara, and Afar regions.[17]

During conflict and natural hazards, people often leave their residences at short notice and cannot secure their property rights. Their land, house, and property may be vulnerable to robery, destruction, or arbitrary seizure by

[12] Getachew Assefa, Federalism and Legal Pluralism in Ethiopia: Preliminary Observations on Their Impacts on the Protection of Human Rights, *East African Journal of Peace and Human Rights*, Vol. 17 No. 1, (2011), p. 180.

[13] Benishangul-Gumuz Regional State Revised Constitution, Proclamation No. 31/2002, Art. 3. Harari People Regions State Revised Constitution, Proclamation No. 46/2002, Art. 8; Oromia National Regional State Revised Constitution, Proclamation No 46/2002, Art. 8

[14] Gizachew Wondie, Indigenous' and 'Non-indigenous' People's Rights in Benishangul-Gumuz Regional State: The Right to Political Participation of 'Non-Indigenous' People in Bambasi Woreda, (MA Thesis), Addis Ababa University, (2015).

[15] Addis Ababa University Institute for Peace and Security Studies (IPSS), Peace and Security Report, Ethiopia Conflict Insight, Vol. 1, (2020)

[16] Id

[17] *Id.*

authorities. [18] In conflicts, land and property are destroyed or appropriated by others as instruments of warfare or ethnic cleansing.[19] In the same way, violations of deprivation of land and property rights are deliberate ethnic, political, or military strategies aimed at terrorizing, punishing and displacing particular communities and altering the ethnic or religious composition of a specific community or area. [20] In addition to the physical property, there can be loss or destruction of property titles, personal identity or residence cards, civil registries (such as birth, marriage, divorces, or deaths of relatives) and other documents that represent rights.[21] In the same way, public offices that keep records of property rights and related documents might be destroyed. Violations of the land and property rights of the IDPs would severely compromise their ability to earn a living and easily expose them to various risks such as poverty, family disintegration, social breakdown, loss of identity, marginalization, harassment, exploitation, lack of adequate food and safe water, and lack of essential public services such as education and health care.[22] IDPs face the same terrible situations while in camps or whenever they try to return to their homes.[23]

[18] Global Protection Cluster Working Group (GPCWG), Handbook for the Protection of Internally Displaced Persons, GPCWG, (2007). Menno de Vries, Natural Disasters and Property Rights Theory, Dutch NGO Practice and Recommended Strategies', (MSc Thesis), Wageningen University, (2010); Walter Kälin, Guiding Principles on Internal Displacement: Annotations, The American Society of International Law, (2008)

[19] *Id.*, GPCWG

[20] Endris, *supra* note 3; IPSS, *supra* note 15; Belayneh Worku, Internal Displacement in Ethiopia since 2016: Challenges and Prospects of Local Integration in Sekela Woreda, Amhara Region, (MSc Thesis), Bahir Dar University, (2020)

[21] *Id.*

[22] Dereje, *supra* note 9 ; Endris, *supra* note 3.

[23] United Nations Organization for the Coordination of Humanitarian Affairs, 'Ethiopia: Humanitarian Needs Overview', https://www.humanitarianresponse.info/en/operations/ethiopia/document/ethiopiahu

Protecting the land and property rights of IDPs and providing remedies for violations is the primary responsibility of the government under international and national laws. This is particularly important in countries like Ethiopia, where land is the source of all material wealth in both urban and rural contexts. Indeed, the restoration of land and property is one of the critical conditions in providing durable solutions to internal displacement. However, there is general negligence in protecting IDPs and providing remedies for violations of their rights during displacement.[24] Compared to the refugees, IDPs do not enjoy clear and robust legal and institutional protections and access to remedies at the national and international levels.[25] As a result, millions of Ethiopians affected by internal displacement are left without appropriate remedies for the harm they sustained to their land and property. To the authors' best knowledge, no single claim is presented for courts in quest of remedies such as restitution, compensation, or guarantee of non-repetition for violations of land and property rights of IDPs. The issue of IDPs

manitarian-needs-overview-(january-2020), (accessed August 26, 2022); Jacky Habib, Ethiopia Set a World Record for Displacements in a Single Year: 5.1 million in 2021', (May 28, 2022), https://www.npr.org/sections/goatsandsoda/2022/05/28/1100469734/ethiopia-set-a-world-record-for-displacements-in-a-single-year-5-1-million-in-20 (accessed August 25, 2022).

[24] Benyam, *supra* note 3; Bereket Godifay, Socio-cultural and Economic Impacts of Development Induced Displacement on Resettled People: The Case of Welkayt Sugar Factory in Tigray Region, Ethiopia', International *Journal of Sociology and Anthropology*, Vol.12 No. 4, (2020), pp. 94-103. Enguday Meskele, The Adequacy of Law and Policy Frameworks on Internal Displacement in Ethiopia: A Critical Appraisal, In: Romola Adeola (eds) National Protection of Internally Displaced Persons in Africa, Sustainable Development Goals Series, *Springer*, (2021). Solomon Tekle, Displacement from Land as a Limit to the Realization of the Right to Development in Ethiopia', *Journal for Juridical Science*, Vol. 45 No. 1, (2020). Abdi Mohammed, The Protection of Internally Displaced Persons (IDPs) in Ethiopia: The Analysis of Legal and Institutional Frameworks, (LL.M Thesis), Ethiopian Civil Service University, (2020)

[25] *Id.*, Enguday; Solomon

remains a crosscutting lifesaving humanitarian agenda than a durable legal question. The recent ratification of the Kampala Convention and attempt to enact various non-binding frameworks (such as the peacebuilding strategy, voluntary return program and durable solution strategy) are still inadequately put into effect due to institutional problems.[26] Coming to academia, save some works on the legal protection of IDPs in general, the issue of land and property rights and available remedies in cases of violations remain an unexplored legal issue in the country.

Against this backdrop, this article aims to identify and examine the various judicial and administrative remedies available in cases of violations of IDPs' right to land and property in Ethiopia. It relies on employing a doctrinal legal research method to critically review the literature and analyze legal instruments at national, regional, and international levels. The article is organized into five sections, including this introduction. Section two briefly presents an initial synopsis of the legal regime governing the land and property rights of IDPs, including remedies in cases of violations. Section three discusses the nature and importance of remedies. Section four is about the system of remedies available in Ethiopia. Section five identifies significant gaps in the law and the practice, and the final section provides for concluding remark.

2. Understanding the Land and Property Rights of IDPs, State Obligations and Remedies

Given the dearth of scholarly articles on the area, this section intends to highlight the land and property rights of IDPs and state obligations as a foundation for discussion on available remedies in cases of violations. Despite the increasing scope of the problem, there is no legally binding international

[26] Mistir, *supra* note 3.

instrument that explicitly confers rights and imposes obligations in relation to IDPs under international law.[27] Some even reject the need to enact a separate international legal instrument, like the 1951 Geneva Convention for refugees, for the issue of IDPs is an internal matter that must be left to domestic legal order.[28] Yet, the rights of IDPs squarely fall within the domain of international human rights and humanitarian laws and enjoy protections like other human beings. And, governments must respect, protect and fulfill the human rights of all persons, including IDPs, without discrimination.[29] IDPs' rights to land and property are protected under the existing internal human rights and humanitarian law. The international and regional human rights laws protect the property rights of IDPs under several instruments.[30] These instruments protect the right to peaceful enjoyment of land and property including the right to own, acquire, manage and enjoy property without arbitrary interference and discrimination. However, it should be noted that the

[27] Enguday, *supra* note 24; Walter, *supra* note 18.
[28] Enguday, *supra* note 24; Abdi, *supra* note 24.
[29] Walter, *supra* note 18.
[30] UN General Assembly, Universal Declaration of Human Rights (UDHR), (1948), Arts. 12 and 17; UN General Assembly, International Covenant on Civil and Political Rights (ICCPR), (1966), Art. 17; UN General Assembly, International Covenant on Economic, Social and Cultural Rights (ICESCR), (1966), Arts. 1 (2) & 11; UN General Assembly, The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), (1979), Arts. 16, 15 and 23; UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), (1969), Art. 5; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), (1984); Convention on the Rights of the Child (CRC), (1989); International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), (2010); OAU, African Charter on Human and Peoples' Rights (ACHPR), (1981), Art. 14; European Union, European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), (1950), Arts. 1 and 8 (Protocol No. 1); American Convention on Human Rights (ACHR), (1969), Arts. 11 & 21.

right to land is not expressly enshrined in international instruments[31] and the fact that property right is not expressly mentioned under ICCPR and ICESCR has long been a challenge to enforce land and property rights.[32] Moreover, they need more specificity to address IDPs' real situations and questions.[33]

In the same way, as internal displacements may occur in times of armed and non-armed conflicts, the international humanitarian law, which regulates the conduct of parties engaged in conflict (*jus in bello*), provides protections by requiring parties to a conflict to protect civilian objects, not to destruct property or not to use property to shield military operations.[34] Recently, countries have applied the doctrine of *jus post bellum* to socio-economic rights in post-conflict situations to return the victims to the legal *status quo ante* and ensure lasting, just and sustainable peace.[35] However, IHL does not expressly regulate the right to land, housing, or property to the extent

[31] This is except for International Labor Organization (ILO) Convention No. 169/ 1989 concerning indigenous and tribal peoples and the Declaration on the Rights of Indigenous Peoples, (2007), which recognizes the importance of land for those who own it collectively for whom it is part of their culture.

[32] Elisenda Martínez and Aitor Anabitarte, Right to Land, Housing, and Property, in Carsten Stahn and Jens Iverson (eds), 'Just Peace After Conflict: Jus Post Bellum and the Justice of Peace', Oxford Scholarship Online, (2021). Although Art. 17 of the UDHR established the right to own property and non-arbitrary deprivation, the ICCPR is silent, and the ICESCR mentions it indirectly as a 'means of subsistence' and 'adequate standard of living' under 1 (2) and Art. 11.

[33] Abdi, *supra* note 24; Belayneh, *supra* note 20.

[34] International Conferences (The Hague), Hague Convention Concerning the Laws and Customs of War on Land (Hague Convention), (1907), Art. 28; International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), (1949), Arts. 33-34 and 53; International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), (1977), Arts. 51-52; UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010) (Rome Statute), (1998), Art. 2(b) (xvi).

[35] Elisenda and Aitor, *supra* note 32.

required; instead, it protects objects indispensable to the civilian population's survival. Thus, the existing international humanitarian and human rights instruments need to be more adequate to address the issues of IDPs' land and property rights . Many writers thus suggest the development of clear and specific legal instruments at an international and regional level, just like the 1951 Geneva Convention for refugees.[36]

Such understanding has led to the development of two crucial soft laws: the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons and the UN Guiding Principles on Internal Displacement.[37] Although these instruments are not legally binding, they provide more specific stipulations for the protection of land and property rights of IDPs as well as claims of remedy during violations of the rights (such as restitution and compensation).[38] In particular, the *Pinheiro Principles* are praised for providing helpful guidance on the international standards governing the effective implementation of housing, land and property restitution programs and mechanisms. Accordingly, the property rights of IDPs, including all types of rights (to use, control, transfer and enjoy), are available to all types of holders of rights (owners, tenants, cooperative dwellers, customary land tenure owners and users, casual sector dwellers and squatters without secure tenure) in the statutory or customary regimes.[39] Based on these principles, the recently agreed Kampala Convention developed more innovative formulations and regulatory standards about IDPs and their land and property rights in particular.[40] It requires State parties to

[36] Abdi, *supra* note 24; Enguday, *supra* note 24.
[37] Walter, *supra* note 18; UN Guiding Principles, *supra* note 1; Centre on Housing Rights and Evictions, United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (Hereinafter the Pinheiro Principles), (2005).
[38] UN Guiding Principles, Principle 21& 29; The Pinheiro Principles, Principle 2 & 21
[39] *Id.*, Pinheiro Principles.
[40] Kampala Convention, *supra* note 1.

take necessary measures to protect individual, collective and cultural property left behind by displaced persons and in areas where IDPs are located.[41]

In addition to international and regional instruments, experiences show that domestic legislative actions play a crucial role in domesticating rights and providing procedures to enforce the rights. As Dirikgil rightly argues, the "right not to be arbitrarily displaced" has to be specified in the national laws to strengthen pre-displacement and prevention tasks, and thereby addressing the root causes.[42] The UNHCR also recommends and supports states to adopt, update and strengthen their legal, policy and institutional framework as part of their specific commitment to IDPs and providing durable solutions. [43] According to Phil Orchard, as of 2017, forty States have passed laws and policies directly related to internal displacement taking the Guiding Principles and the *Pinheiro Principles* as a benchmark. [44] In Africa, Kenya and Uganda have registered successes in protecting rights and providing remedies during violations by specific domestic legislations and policy frameworks. [45]

Ethiopia has yet to develop such specific legal and policy frameworks so far.[46] Yet, the various land and property rights of IDPs can be read from the Constitution and other land and property laws of the country that recognize

[41] *Id.,* Art.. 9

[42] Naziye Dirikgil, Addressing the Prevention of Internal Displacement: the Right Not to Be Arbitrarily Displaced, *Journal of International Migration and Integration*, (2022).

[43] UNHCR, Global Trends 2013: War's Human Cost, UNHCR, (2014), p. 72

[44] Phil Orchard, The Role of National Legislation and Policies in Protecting Internally Displaced Persons, Submission to the UN Secretary General's High-Level Panel on Internal Displacement, https://www.un.org/internal-displacement-panel/sites/www.un.org.internal-displacement-panel/files/published_phil_orchard_submission.pdf (accessed February 16, 2023)

[45] Alelign Wondim and Misganaw Gashaw, Protection of Land and Property Rights of IDPs in Ethiopia: Lessons from Other Countries, *International Migration*, (2023), Forth Coming Edition.

[46] *Id.*

the right to access, use, control and transfer. The country has also ratified most of the above-mentioned human rights and humanitarian instruments that form an integral part of the law of the land.[47] The FDRE Constitution recognizes the right to free access to land and protections of property rights as;

"[e]very Ethiopian citizen has the right to private property ownership. Unless prescribed otherwise by law on account of public interest, this right shall include the right to acquire, use, in a manner compatible with the rights of other citizens, and to dispose of such property by sale or bequest or to transfer it otherwise".[48]

Without discrimination or arbitrary deprivation, this right is available to every citizen, including the IDPs. The Constitution further protects access to land and full right to permanent improvements.[49] These constitutional stipulations are further documented in the various subsidiary rural and urban land laws at federal and regional levels. [50] However, these legislations need to address the land and property rights of IDPs in the language of the Guiding Principles and the *Pinheiro Principles* discussed above. They need to provide specific remedies in cases of violations. Indeed, the new expropriation proclamation provides remedies (i.e., compensation payments and resettlement) for violations during development-induced displaced peoples. Its implementation remains haphazard and firefighting due to problems in the institutional

[47] FDRE Constitution, Art. 9 (4).
[48] *Id.*, Art. 40 (1)
[49] *Id.*, Art 40 (3 &7)
[50] *Id.*, Art. 40(4-6); FDRE Rural Land Administration and Land Use Proclamation, Negarit Gazetta, 11th Year No. 44, Proclamation No. 456/2005 (Hereinafter Proclamation No. 456/2005); FDRE Urban Land Lease Proclamation, Federal Negarit Gazetta, 18th Year No 4, Proclamation No. 721/2011 (Hereinafter Proclamation No. 721/2011)

framework and the judiciary's enforcement of human rights in general.[51] However, if displacement has occurred due to conflict or natural disaster, the country has no clear legal frameworks to treat loss of property rights. There are only a few scattered substantive and procedural provisions, as will be discussed in section four.

From the discussion in this section, one can safely conclude that, with all inadequacies, the land and property rights of IDPs can be implied from the various national, regional and national human rights instruments. Under these instruments, the rights of IDPs impose correlative tripartite human rights obligations on government bodies: to respect, protect and fulfill in their respective jurisdictions.[52] The FDRE Constitution also emphasizes that human rights are inviolable and inalienable, and government organs must respect and enforce them at all levels.[53] The Constitution requires the government to take measures to avert any natural and man-made disasters and, in the event of disasters, to provide timely assistance to the victims.[54] Governments should not only arbitrarily deprive land and property rights but also protect the right from illegal interference (such as theft, destruction, or arbitrary seizure) by individuals or groups.[55] They must take legislative, administrative and judicial measures to the best realization of IDPs' right to land and property and provide an effective remedy (such as restitution and compensation) for arbitrary deprivation. [56] States also have to assist IDPs with

[51] See Expropriation Proclamtion No. 1161/2019, *supra* note 6.

[52] Erin Mooney, Realizing National Responsibility for Internally Displaced Persons, the Brookings Institution, (2004) ; Human Rights Committee, General Comment 31: The nature of the general legal obligation imposed on States Parties to the Covenant', Eightieth session, (March 29, 2004)

[53] FDRE Constitution, Arts. 10 (1) and 13 (1)

[54] *Id.*, Art.. 89(3)

[55] UN Guiding Principles, *supra* note 1.

[56] *Id.*.

returning and recovering their lost properties and possessions. When recovery (or restitution) is impossible, appropriate compensation or other forms of fair reparation should be envisaged.[57] The Kampala Convention also requires states to seek lasting or durable solutions in three possible locations (voluntary return, local integration, or resettlement/relocation) based on sustainability, safety and dignity.[58]

Secondly, the right of IDPs entails what is known as the right to an effective remedy in cases of violations. In the international human rights system, the "right to a remedy" was first expressed under UDHR, which guaranteed every person "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"[59] and subsequently affirmed in numerous other international[60] and regional[61] instruments. Although the ICESCR does not include an explicit right to domestic remedies, the UN Committee on Economic, Social and Cultural Rights (CESCR) has repeatedly found that the obligation to realize economic and social rights "by all appropriate means" under article 2 entails the domestic provision of "judicial or other effective remedies".[62] The right also finds its root under instruments of international humanitarian law.[63] The FDRE also recognizes the right to remedy as part of the provision on access to justice and fair trial. [64] Despite its recognition under the international, regional and national human rights systems, devising remedies for violations of IDPs

[57] GPCWG, *supra* note 18.
[58] Kampala Convention, Art.. 11.
[59] UDHR, *supra* note 30, Art. 8.
[60] ICCPR, *supra* note 30, Arts. 2 & 26; ICERD, *supra* note, Art. 6.
[61] ACHPR, *supra* note 30, Art. 7; ACHR, *supra* note 30, Art. 25 ; ECHR, *supra* note 30, Art. 13.
[62] ICESCR, *supra* note 30, Art.2; UNCHR, General Comment No. 3, (1998).
[63] Hague Convention, Art. 3; Protocol Additional, Art. 91; Rome Statute, Arts. 68 & 75.
[64] FDRE Constitution, Art. 37.

rights has been the most challenging, legally and practically.[65] This is because none of the above instruments define the types and normative content of the remedies and procedures for dealing with alleged violations. [66] Some, for example, interpret the right to remedy to include the right to restitution and compensation for the lost property as reinforced by other specific rights such as "the right to return", "the right to choose one's residence", "the right to freedom of movement", "the right to respect for the home", and "the right to an adequate standard of living".[67] In this way, national and international adjudicators have arbitrarily applied various preventive, compensatory, and restorative remedies over the years. It is the United Nations Commission on Human Rights that, for the first time, recognized the interests of victims of human rights violations by adopting the "Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law".[68] This instrument

[65] Rhodri Williams, The Contemporary Right to Property Restitution in the Context of Transitional Justice, International Center for Transitional Justice, (2007); Dinah Shelton, Remedies in International Human Rights Law, Oxford University Press, (2015); Christine Evans, The Right to Reparation in International Law for Victims of Armed Conflict, Cambridge University Press, (2012).

[66] Scott Leckie, Housing and Property Issues For Refugees and Internally Displaced Persons in the Context of Return: Key Considerations for UNHCR Policy and Practice', *Refugee Survey Quarterly*, Vol. 19, No. 3, (2000), pp. 5-63; Jon Unruh et als, A Digital Advance for Housing, Land and Property Restitution in the War-Affected States: Leveraging Smart Migration', *Stability International Journal of Security & Development*, Vol. 6 No. 1, (2017), pp. 1-17*;* Tetyana Antsupova, Post-Conflict Reparation: Ukrainian Restitution Remedies for Property and Restitution Complaints before the European Court of Human Rights, *Kyiv-Mohyla Law and Politics Journal*, No. 2, (2016), pp 217-226; Felix Torres*,* 'Reparations: To What End? Developing the State's Positive Duties to Address Socio-economic Harms in Post-conflict Settings through the European Court of Human Rights, *The European Journal of International Law*, Vol. 32 No. 3, (2021).

[67] Jon, *Id.*; Tetyana, *Id.*

[68] UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and

underlines the importance of recognizing remedies in domestic legal systems and identifies and spells out five reparations: restitution, compensation, rehabilitation, satisfaction and guarantee of non-repetition.[69] According to Theo van Boven, these forms and modalities are not exclusive (more than one form of reparation may be commended at a time) and often involve a mix of judicial and non-judicial as well as monetary and non-monetary forms.[70] As far as the IDPs are concerned, the nature of the right to a remedy is recently elaborated in the *Pinheiro Principles*, which recognizes forms of reparations including restitution and compensation.[71]

3. On the Nature and Importance of Remedies

As discussed in section two, the State must ensure the availability of remedies to IDPs whose land and property rights are violated due to internal displacement. This section intends to highlight the nature and importance of the remedies. Restitution, which is recognized as an effective and preferred remedy, is defined as an instrument to restore the victim to the original situation before the violations occurred.[72] In the sense of IDPs' right to land and property, restitution includes the return to one's residence and the return of property that existed before the occurrence of the displacement.[73] The issue of housing and property restitution **(***restitutio in integrum***)** for IDPs has received considerable attention as preferred remedies to the increased

Serious Violations of International Humanitarian Law (Hereinafter, Basic Principles and Guidelines), Resolution 60/147, (2005)

[69] *Id.*, Guideline 19-23.

[70] Theo van Boven, 'Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines, in Ferstman etal (eds.), Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity, Koninklijke Brill NV-Netherlands, (2009), pp. 19-40.

[71] Pinheiro Principles, Arts. 12 & 13.

[72] Basic Principles and Guidelines, Guideline 19.

[73] UN Guiding Principles, Principle 29.2.

destruction of property, arbitrary confiscation of housing and violations of property rights. [74] If effectively enforced, it restores the victims to the actual situations by a warranting return to the original residence and restoration of land and property. The right to return is recognized by human rights instruments such as Art 13 of the UDHR and Art 12 of the ICCPR as a necessary part of the right to freely choose one's place of residence or the right to adequate housing.[75] This right of IDPs is also asserted by UN Security Council (1993) in dealing with Bosnia and Herzegovina by stating that "all displaced persons have the right to return in peace to their former homes and should be assisted to do so".[76] Restitution has been preferred for several reasons. In the first place, restitution can redress the wrong done. Secondly, it facilitates return and reintegration in the area of origin. Third, land and other property may have a symbolic, cultural, or religious value that other remedies, such as compensation, can rarely address. Paraskeva indicated that the right to restitution is not restricted to those holding legal title or ownership but also other property rights such as tenancy, occupancy, or user rights in the collective or communal property.[77] Although it is the preferred form of reparation for violations of land and property rights of IDPs, it is not always possible to restore the situation that would have existed but for the violation. Sometimes, the land or property of IDPs might be in the hands of legitimate third parties, who acquired it in good faith, and restoring the thing to the original owners indulges a legal question for restitution affects third parties. This also happens when the property of IDPs is destroyed. In such cases, the

[74] Tetyana, *supra* note 66; Felix, *supra* note 66.
[75] United Nations High Commissioner for Refugees (UNHCR), Global Consultation on International Protection, Voluntary Repatriation, (2002).
[76] Felix, *supra* note 66.
[77] Costas Paraskeva, Protecting Internally Displaced Persons under the European Convention on Human Rights and Other Council of Europe Standards: A Handbook, Council of Europe & ACCESS, (2017).

victims should be provided with other forms of reparation, including compensation.

Compensation, in cash or kind, is another form of reparation. The various forms of damage (such as physical and mental or moral harm, lost opportunities and costs incurred) caused by displacement are assessed and settled up with IDPs instead of or along with restitution.[78] The compensation shall reflect the property's current value, moral damage, and costs and expenses.[79] Article 20 of the Basic Principles and Guidelines provides that compensation shall be appropriate and proportional to the violation's gravity and the case's circumstances. Although cash compensation is often viewed as administratively simple, there are doubts that it can adequately redress the problem due to cost, fairness and ethics-related problems. In particular, it can be challenging to calculate the value of the lost property for the value of land and property changes with time. There is also a fear that compensation might have the effect of institutionalizing or recognizing the problem, especially in post-conflict property issues. With these limitations, the World Bank recommends that states and other actors bypass cash compensation except in well-justified instances and look for creative measures such as constructing residences or building materials.

As mentioned above, where the damage cannot be made good by restitution or compensation alone, rehabilitation, satisfaction, guarantees of non-repetition and other appropriate modalities can be considered as additional remedies to the violation of the land and property rights of IDPs.[80] As

[78] Elena Katselli, The Right to Return Home and the Right to Property Restitution under International Law, In Elena Katselli Proukaki (eds), Armed Conflict and Forcible Displacement: Individual Rights under International Law, Routledge, (2018).

[79] *Id.*

[80] Scott, *supra* note 66.

stipulated under Article 21 of the Basic Principles and Guidelines, rehabilitation includes medical and psychological care and legal and social services. Satisfaction, as one can refer to Article 22 of the Basic Principles and Guidelines, consists of a broad range of measures, from those aiming at the cessation of violations to truth-seeking, the search for the disappearance, the recovery, and the reburial of remains, public apologies, judicial and administrative sanctions, commemoration, human rights training, etc. In the same way, a guarantee of non-repetition is a form of reparation requiring the cessation of existing violations and putting in place mechanisms for preventing future violations. This can be done by requiring the State to provide assurances and guarantees of non-repetition. According to Article 22 of the Basic Principles and Guidelines, guarantee of non-repetition comprises broad structural measures of policy nature, such as institutional reforms aiming at civilian control over military and security forces, strengthening judicial independence, the protection of human rights defenders, the promotion of human rights standards in public service, law enforcement, the media, industry, and psychological and social services.

On the other hand, other remedies can be considered to better protect and enforce IDPs' rights in relation to land and property.[81] For example, interim remedies such as injunctions and declaratory reliefs can be considered if there are acts of governments or laws that violate the land and property rights of IDPs. In addition, courts can impose a duty on states to consult the people concerned or launch community development funds to solve the problems and sustainably rehabilitate the victims. The common challenge such remedies face is that the executive may refuse to respond to the injunctive order or declaration of incompatibility. It should be noted that courts have

[81] Kent Roach, Remedies for Laws That Violate Human Rights, in Kent Roach (eds), Remedies for Human Rights Violations: A Two-Track Approach to *Supra*-national and National Law, Cambridge University Press, (2021), pp. 177-237.

different powers in different countries and there are good experiences from domestic court practices. [82] For example, in the UK, courts should have continued to award damages when Parliament refused to respond to a declaration that a ban on prisoner voting was inconsistent with rights. The South African Constitutional Court (2007) also declared that indigenous people are entitled to land where they are displaced in favour of a large commercial farm. However, it has frequently been argued that domestic courts are reluctant to grant interim relief to enforce land and property rights because balancing the relief to the plaintiff against the injury that the defedent will sustain is not something every court can afford. [83] In this regard, supra-national courts are generally more prepared for they readily address concerns about the balance of convenience and governments report to them about the measures taken to comply with interim measures. [84] The Inter-American Court of Human Rights is apprised to order various forms of relief for violations of IDPs, such as cessation of ongoing violations, land restitution, apologies, memorials, legislative reform, training programs for state officials, and community development schemes. The African Court of Human and Peoples' Rights (2013) has issued provisional measures to restrain the eviction of 15,000 Ogiek people from their traditional lands.

4. Remedies Available in Ethiopia

From the long-standing doctrine of state responsibility, the Ethiopian government is primarily responsible for protecting the land and property rights of IDPs and effective remedies when they are violated by holding

[82] *Id.*

[83] Kent Roach, Remedies for Violations of Indigenous Rights, in Kent Roach (eds), 2021, Remedies for Human Rights Violations: A Two-Track Approach to *Supra*-national and National Law, Cambridge University Press, 2021 PP. 454-515.

[84] *Id.*

perpetrators accountable. As discussed above, politically motivated and ethnically targeted attacks and displacements have continued as a common phenomenon in the country. Consequently, there have been various forms of violations against land and property rights and the victims remain without remedies. Despite the government's repeated pledge to provide a lasting solution, millions of IDPs are still displaced and found in temporary camps or other areas without necessities and tangible choices for their future. Returnees faced the same problem: their land and property are taken by others, lost or destroyed. According to a study by IOM, the house and property of most IDPs (77.7%) are damaged or destroyed and exposed to a lack of livelihood and food insecurity.[85] On the other hand, as experience shows, international and regional forums such as The International Court of Justice (ICJ) and the African Court on Human and Peoples' Rights (African Court) are not accessible and reachable by the poor IDPs in Ethiopia, and the role of NGOs and public-spirited individuals is also limited in bringing violations to such forums.[86]

This section identifies the possible ways IDPs, individually or in a group, can claim and enforce remedies for land and property rights violations against State or non-state actors in Ethiopia. In this regard, domestic systems are supposed to offer a more accessible and effective forum for victims of violations. However, as briefly explained by Theo Van Boven and Avitus A.

[85] International Organization for Migration (IOM), 'Ethiopia National Displacement Report Round', (October 23, 2019) https://dtm.iom.int/reports/ethiopia-%E2%80%94-national-displacement-report-1-june-%E2%80%94-july-2019 (accessed August 25, 2022).

[86] Fikire Tinsae, Justiciability of Socio-Economic Rights in Ethiopia: Exploring Conceptual Foundations and Assessing the FDRE Constitution and Judicial Perspective, *Beijing Law Review*, 9, (2018), pp. 322-344; Sisay Alemahu Yeshanew, The justiciability of human rights in the Federal Democratic Republic of Ethiopia, *African Human Rights Law Journal*, Vol. 8, (2008), pp. 273-293.

Agbor, the right to effective remedies has both substantive and procedural components.[87] Dealing with these substantive and procedural components requires far greater effort and time. One of the most commonly presented justification is the absence of clear and specific substantive and procedural laws that provides for remedies in Ethiopia.[88] This section attempts to identify and examine the different judicial and administrative remedies available in the Ethiopian legal system as it stands now. First, the various remedies discussed above are mainly found in soft international laws, and the government shall domesticate new legal and policy documents. Domestic laws that provide for remedies are found scattered. Secondly, judicial and quasi-judicial organs must be empowered to conduct a thorough and effective investigation and provide unhindered and equal access to justice.

4.1. Judicial Remedies

Everyone has the right to bring a justiciable matter to the Court and to obtain a decision or judgment by a court of law or any other competent body with judicial power.[89] The FDRE Constitution establishes an independent judiciary and exclusively vests judicial powers, both at federal and State levels, in the courts.[90] The Constitution also provides that the House of Federation (HoF) can interpret the Constitution and adjudicate constitutional disputes with the assistance of the Council of Constitutional Inquiry, mainly composed of legal experts.[91] Thus, if the claims of IDPs invoke a constitutional matter, the HoF may award claimants the remedies discussed above. With this power of HoF,

[87] Theo, *supra* note 70; Avitus Agbor, Pursuing the Right to an Effective Remedy for Human Rights Violation(s)' In Cameroon: The Need for Legislative Reform, Potchefstroom Electronic Law Journal, Vol. 20 No. 1, (2017).
[88] IOM, *supra* note 85.
[89] FDRE Constitution, Art. 37.
[90] *Id.*, Arts. 78 & 79.
[91] *Id.*, Arts. 62 & 82 – 84.

courts often avoid adjudicating cases involving human rights or interpreting the Constitution and international human rights instruments.[92] Litigants also avoid referring to these legal instruments before the courts even when they are directly relevant.[93] However, the power of HoF does not take away the power of courts to enforce the Constitution or decide the unconstitutionality of administrative acts.[94] This is an inherent business and a definite duty of courts under Articles 9(4) and 13(1) of the FDRE Constitution. The Federal Courts Proclamation provides explicitly that courts can interpret and settle disputes based on international treaties and may render the decision to protect justiciable human rights specified under chapter three of the Constitution.[95] The Cassation Division of the Federal Supreme Court has recently passed landmark decisions regarding applying the Constitution and international human rights treaties by courts of law in Ethiopia.[96] Recently, the Federal High Court has established a special division that entertains human rights violations under Chapter three of the FDRE Constitution. Judges thus must take judicial notice of domestic and international human rights instruments in adjudicating cases and provide various remedies to address violations of the land and property rights of IDPs.[97] In addition, the lack of a predictable, coherent and clear legislative regime for judicial review of administrative

[92] Sisay, *supra* note 86.
[93] Fikire, *supra* note 86.
[94] Tsegaye Regassa, Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights In Ethiopia, *Mizan Law Review*, Vol. 3 No.2, (2009), pp. 288-330.
[95] Federal Courts Establishment Proclamation, Proclamation No. 1234/2021, Federal Negarit Gazeta, (2021), Arts. 3(2) and 6(1) (a).
[96] Miss Tsedale Demissie Vs. Mr Kifle Demissie, Federal Supreme Court Cassation Division, File 23632, (November 6, 2007); G. Agri POC PLC and Getahun Asfaw Vs. Ethiopian Revenues and Customs Authority, Federal Supreme Court Cassation Division, File 84623, (June 12, 2012).
[97] Federal Negarit Gazeta Establishment Proclamation, Proclamation No. 3/1995, Federal Negarit Gazeta., (1995), Art. 2(2) and (3).

decisions that violate the rights and interests of citizens has long been a problem.[98] The new Federal Administrative Procedure allows individuals to apply for judicial review of administrative decisions to the Federal High Court, which shall establish special benches for this purpose.[99] Meaning, courts may revoke administrative acts that lead to internal displacement and, as a result, violate the land and property rights of IDPs. There is nothing that can prevent courts to order restitution, compensation and other forms of remedies for violations in relation to the land and property rights of IDPs.

For litigation often take some time to be concluded, it is a general principle of law that courts and tribunals provide discretionary provisional, protective or interim remedies to preserve rights, prevent violations, and grant effective relief.[100] IDPs can claim provisional and protective remedies in both civil and criminal proceedings to protect their land and property rights from being disposed of, alienated, removed, or damaged. The Civil Procedure Code bestows courts with such powers and provides two most common provisional measures: attachment of property and injunction.[101] In criminal proceedings, restraint, freezing, or seizure orders can restrain assets suspected of criminal proceeds. Request for such remedies can be initiated at any stage of the suit, including at the time of the claim lodging or appeal. Its compliance is supposed to be high for the violation of the measures is punishable under

[98] Khushal I. Vibhute, 'Non-Judicial Review in Ethiopia: Constitutional Paradigm, Premise and Precinct', *African Journal of International and Comparative Law*, Vol. 22, No. 1, (2014) PP. 120-139.

[99] Federal Administrative Procedure Proclamation, Proclamation No. 1183 /2020, Federal Negarit Gazeta, (2020), Arts. 20*ff*.

[100] Eva Rieter, Preventing Irreparable Harm Provisional Measures in International Human Rights Adjudication, *Intersentia*, (2010).

[101] Civil Procedure Code of the Empire of Ethiopia, (Hereinafter CvPrC), Decree No. 52/1965, Negarit Gazeta (1965), Arts. 151 & 154.

criminal law.[102] However, in provisional orders, the defendant's intent is crucial but often difficult to prove. Moreover, the Court may order withdrawal whenever the defendant furnishes the security required.[103] According to Gebreyesus, Courts in Ethiopia have yet to formulate clear standards for deciding on provisional measures or withdrawing the same.[104]

4.2. Administrative Remedies

The Ethiopian government has established various institutions and branches following the federal structure with the responsibility to protect and enforce fundamental rights and freedoms. The most direct government institution in this regard is the Ministry of Peace which is principally responsible for preventing and resolving conflicts replacing the former Ministry of Federal Affairs. Administrative remedies can be sought from these government institutions.[105] It is also mandated to make appropriate preparations for natural and man-made disasters and take post-displacement measures in collaboration with the National Disaster Risk Management Commission.[106] In 2019, Ethiopia Launched a National Durable Solutions Initiative for IDPs, which was supposed to support interventions in areas of legislative reform and institutional strengthening, voluntary return, relocation or local integration, and access to livelihoods. In practice, IDPs are offered three choices: local

[102] Id, Art. 156(1); FDRE Criminal Code Proclamation, Prcolamation No.414/2004, (Hereinafter Criminal Code), Federal Negarit Gazeta, (2004), Art. 449.

[103] CvPrC, *supra* note 101, Art. 153.

[104] Gebreyesus Abegaz Yimer, Standards for Provisional and Protective Measures in Civil Litigation: What Ethiopian Courts May Learn from US Courts, *African Journal of International and Comparative Law*, Vol 24 No.3, (2016), pp. 329–345.

[105] FDRE Definition of Powers and Duties of the Executive Organs Proclamation, Proclamation No. 1097/2018, Federal Negarit Gazeta, (2018).

[106] National Disaster Risk Management Commission Establishment Council of Ministers Regulation, Regulation No. 363/2015, Federal Negarit Gazeta, (2015).

integration, relocation, or voluntary return to their home village.[107] The study by IOM indicates that 78% of IDPs prefer to integrate locally, while 12% and 10% prefer to return and relocate, respectively.[108] In all possibilities, the recognition of land and property rights and effective remedies are mandatory for claims of restitution of property, compensation for lost or destroyed property, cessation of violations, etc., are inevitable. The question is whether and in what form such claims can be addressed. The ministry and the commission are political organs that often need more competence and expediency in deciding constitutional and legal matters. In Ethiopia, internal displacement is a political problem, and very often, a lack of progress in effectively responding to internal displacement is attributed to a lack of political will. The Ministry and the Commission have no binding authority over the regional states and are often criticized for being toothless institutions. Thus effective legal remedies cannot be expected from these institutions. If there is any meaningful measure that the political body is willing to take, it shall be based on the recommendation of national and international human rights institutions. In Ethiopia, the human rights commission and the office of the ombudsman are known to provide policy guidelines, study human rights problems, codify norms of human rights protection, monitor the observance of human rights and independently investigate alleged violations of rights. These institutions, as part of their mandate to protect and promote human rights, are supposed to provide an easily-accessible forum for the implementation and enforcement of IDPs' right to land and property through quasi-judicial and administrative procedures. The law clearly empowered the Ethiopian Human Rights Commission to ensure that all citizens, organs of the State, political organizations, and other associations respect citizens' human rights, including

[107] IOM, *supra* note 85
[108] *Id.*

IDPs.[109] It has also the power to receive and investigate complaints on human rights violations and seek a remedy through the courts or other administrative means. In the same way, the Institution of Ombudsman is established to prevent or rectify unjust decisions and orders of executive organs.[110] The institution can ensure that the laws and decisions of the executive do not contradict citizens' constitutional rights.[111] In this regard, IDPs can approach the ombudsman if the internal displacement is caused by the decisions or rules of a government body or if the government body wrongly assesses the claims of IDPs in relation to their land and property.

Establishing these institutions with the mandates mentioned above could contribute to the enforcement of the land and property rights of IDPs. However, while they entered into force in 2000[112], the institutions have yet to be fully operationalized so far.[113] Except that they play facilitative and intermediary roles, both institutions do not have the power to rectify the injustice by granting compensatory or other remedies.[114] They still need to apply human rights treaties and the provisions of the Constitution for better protection and promotion of human rights as well as the provision of remedies in cases of violations.[115] Both institutions face problems that relate to the execution of their recommendations or decisions and a shortage or lack of

[109] Ethiopian Human Rights Commission (EHRC) Establishment Amendment Proclamation, Proclamation No. 1224/2020, Federal Negarit Gazeta, (2020), Art. 6.
[110] The Ethiopian Institution of the Ombudsman Establishment Amendment Proclamation, Proclamation No. 1142/2019, Federal Negarit Gazeta, (2019), Art. 6.
[111] *Id.*
[112] Ethiopian Human Rights Commission Establishment Proclamation, Proclamation No. 210/2000, Federal Negarit Gazeta, (2000); Institution of the Ombudsman Establishment Proclamation, Proclamation No. 211/2000, Federal Negarit Gazeta, (2000).
[113] Abdi, *supra* note 24.
[114] *Id.*
[115] Id .

manpower and facilities that are needed for their effective functioning.[116] Their track record in the past few years also indicates that the two institutions are not immune from the problem of ignoring atrocities including ethnically motivated mass violations of IDPs right to land and property. This is a pure act of fear of investigation and reinforces the culture of impunity. Thus, by resolving these limitations and expanding the branch offices over the country, the two institutions can offer easily-accessible and speedy quasi-judicial remedies to violations of IDPs' rights to land and property.

4.3. Establishing Individual Legal Liability

Individualization of liability is one of the indispensable requirements in both civil and criminal justice administrations. It is thus essential to establish individual legal liability as far as the violations of the land and property rights of IDPs are concerned. This section intends to shed light on the importance of and limitations in establishing liability at an individual level in the Ethiopian civil and criminal justice administration system.

4.3.1. Violations of the Land and Property Rights of IDPs as a Crime

The various provisions of the Criminal Code establish the acts of displacing and violating the land and property rights of IDPs as a criminal act punishable with imprisonment and/or fine. The law provides that confiscation, destruction, or appropriation of property constitutes war crimes against the civilian population and is punishable with rigorous imprisonment from five years to twenty-five years, or, in more severe cases, with life imprisonment or death.[117] It's also stipulated that causing injury to the property of others (buildings, inhibited houses, crops or agricultural products, forests, timber, or

[116] *Id.*
[117] Criminal Code, *supra* note 102, Arts. 270 & 273.

any other object) by setting fire and provocation of natural disaster (such as flood or submergence, a landslide, a fall of rock or earth, a collapse or any other like catastrophe) that create a danger to the property is punishable by rigorous imprisonment not exceeding fifteen years.[118] Violations of the privacy of domicile, house, or premises are also punishable acts under the law.[119] The details of different crimes against property and rights in property with respective punishments are clearly provided under Book VI of the Criminal Code.[120] It is the obligation of the State, particularly the Ministry of Justice or Regional Justice Bureaus, to prosecute those who commit crimes and violate human rights.[121]

The Criminal Code states that the victims of crime are entitled to civil remedies and that any property that the criminal has acquired by the commission of the crime or any fruits of a crime shall be forfeited to the State.[122] Moreover, where a crime has caused considerable damage, restitution and compensation can be claimed as a remedy.[123] For this purpose, such a civil claim can be joined with the criminal suit and entertained in the criminal justice administration.[124] However, the victim shall meet requirements, specify the claim amount, and provide evidence under pain of dismissal.[125] After evaluating the evidence adduced, the Court may order the defendant to pay compensation, court fees, and other costs. [126] The other good

[118] Id, Arts. 494 & 495.
[119] Id, Art. 604.
[120] Id, Arts. 662 *ff*.
[121] Federal Attorney General Establishment Proclamation, Proclamation No. 943/2016, Federal Negarit Gazeta, (2016), Art. 16 .
[122] Criminal Code, *supra* note 102, Arts. 98 & 100.
[123] Id, Arts. 101 and 102.
[124] Criminal Procedure Code of Ethiopia Proclamation, Proclamation No. 185/1961, Negarit Gazeta, (Hereinafter CrPrC), (1961), Arts. 154-157.
[125] Id, Arts. 155-157.
[126] Id, Art. 159.

thing is that once admitted, the acquittal of the accused does not extinguish the compensation claim; instead, it changes the nature of the suit, from a criminal suit to a civil suit.[127] Where it appears that compensation will not be paid by the criminal or those liable on his behalf on account of the circumstances of the case or their situation, the Court may order that the proceeds or part of the proceeds of the sale of the articles distrained, or the sum guaranteed as surety, or an amount of the fine or the yield of the conversion into work, or confiscated property be paid to the injured party.[128] The claim of the injured party who has been compensated shall be assigned to the State, which may enforce it against the person who caused the damage. This being the case with the black letters of the law, setting criminal justice in motion will not be an easy task. This is because most of the displacements in the country are political, deliberate, and associated with the state apparatus in one way or another.[129] The police and justice departments may not impartially investigate crimes and prosecute those who commit crimes and violate the land and property rights of IDPs.

4.3.2. Violations of the Land and Property Rights of IDPs as a Tort

The Ethiopian legal system devises a civil or tort liability regime by which private entities and government organs will be held accountable for the harm they inflict on IDPs with or without fault. [130] The laws in Ethiopia prohibit the violent or unlawful incursion of one's land, house, and property, except as is provided by law.[131] The country's urban and rural land laws also provide various rights to control, use, enjoy and transfer shorn of arbitrary

[127] Id, Art. 158.
[128] Id, Art. 102 .
[129] Endris, *supra* note 3; Tadele, *supra* note 3; IOM, *supra* note 3; Dereje, *supra* note 9.
[130] Ethiopian Civil Code Proclamation (Hereinafter, Civil Code), Proclamation No. 165/1960, (1960), Arts.. 2035 *Cum* 2168-2178.
[131] FDRE Constitution, Art. 26; Civil Code, Art. 13.

deprivation.[132] Acts of interference (a trespass or assault on the property) against the economic interest of the owner or the holder amounts to violations of the land and property rights of IDPs and constitute tort under the civil code.[133] As the saying goes, where there is a right, there is a remedy, and remedies such as restitution and compensation can be granted to put the IDPs in a position they would have now had not the injury-causing event occurred.[134] The Ethiopian tort regime contains all forms of reparations mentioned above. The Civil Code recognizes compensation (for material and moral damage) as a form of reparation and lays down rules applicable to its assessment and determination.[135] The law also recognizes restitution as another form of reparation for the breach of the property right.[136] The courts can make injunctions and other orders, which can be considered satisfaction or guarantees of non-repetition.[137]

The Ethiopian Civil Code also incorporates provisions applicable to unjust enrichment to protect the rights and interests of property.[138] Art 2162 of the Civil Code sets the general principle as follows:

"[w]hosoever has derived a gain from the work or *property of another without a cause justifying* such gain shall indemnify the person at whose expense he has enriched himself to the extent of the latter's impoverishment and within the limit of his enrichment." (Emphasis added)

[132] See generally FDRE Constitution, Art. 40 (1 & 2); Federal Urban Lands Lease Holding Proclamation, Proclamation No. 721/2011, Federal Negarit Gazeta, (2011); Federal Rural Land Administration and Land Use Proclamation, Proclamation No. 456/2005, Federal Negarit Gazeta, (2005).
[133] Civil code, *supra* note 130, Arts. 2053 and 2054.
[134] *Id.*, Arts.1161, 1164 and 2118.
[135] *Id.*, Arts. 2090-2104 and 2105-2117.
[136] *Id.*, Art. 2126 (2).
[137] *Id.*, Arts. 2120-2122.
[138] *Id.*, Art.s 2168-2178 .

A person who has unjustly enriched himself from the displacement shall make restitution or compensation to the IDPs. The problem with this option is that the gain derived might be far less than what the IDPs impoverished. Moreover, enforcing civil liabilities, in general, is more complex than it may seem. In the first place, proving the cause of the damage (causal-effect relationship) or enrichment is provided as a mandatory prerequisite, ignoring the situations that give rise to the displacement and realities of IDPs. The second challenge relates to the assessment of the damage. The harm sustained by IDPs often demands a remedy beyond the rules of compensation provided under tort law. In other words, land and property rights violations often caused a series of mishaps and defilements of other rights and to the IDPs. Finally, even though tort and unlawful enrichment solutions can be claimed with all the limitations, procedural and technical limitations might bare complete remedies. As mentioned above, most internal displacements are political and deliberate cleansing of specific rights based on ethnic identity.[139] Thus, government institutions, including the judiciary, may need to be open to properly investigating and determining the quantum of damage IDPs sustained or the amount others unlawfully enrich themselves.

5. Major Gaps, Challenges and Reform Priorities

The discussion under section four indicated that the existing rules providing protections and procedures to claim remedies and reparations for violations of land and property rights are inadequate and scattered in the different substantive and procedural laws in the country. It should be noted here that for development-induced displacement, with all the limitations, the new expropriation proclamation provides the types of compensable properties and

[139] Endris, *supra* note 3 ; Belayneh, *supra* note 20; Mistir, *supra* note 3 ; Tadele, *supra* note 3 ; IOM, *supra* note 3 ; Dereje, *supra* note 9.

various forms of reparations (such as property compensation, displacement compensation, displacement assistance, economic loss compensation, and social ties discontinuance and moral damage compensation) and resettlement packages.[140] However, there is no clear and comprehensive legal framework by which restitution, compensation, and other remedies can be awarded for disaster and conflict-induced displacements as provided under the *Pinheiro Principles* and the UN Guiding Principles. Similar to other forms of human rights violations, the different reparations and orders can only be inferred from the various criminal and tort laws provisions.[141] The country's attempt to promulgate specific laws on IDP remains incomplete.[142]

While completing the draft law at the earliest possible moment is one thing, the full realization of IDPs' right to land and property, as well as remedies in cases of violations in domestic legal systems, is often determined by the relationship between international law and national law.[143] In the literature, there are two primary schools of thought regarding the relationship between international law and municipal law.[144] The Monist approach in the

[140] See generaly Expropriation Proclamation No.1161/2019.

[141] Abdi Jibril, Remedies for Human Rights Violations: A Reform Proposal for Addressing Victims of Criminal Proceedings in Ethiopia', *Northwestern Journal of Human Rights*, Vol 19, No 1, (2020); Kidus Meskele, The Right to Reparation for Human Right Violation in Ethiopian Legal Framework, *Journal of Poverty, Investment and Development*, Vol 31, (2017); Khushal Vibhute, Compensating Victims of Crime in Ethiopia: A Reflective Analysis of the Legislative Paradigm and Perspective, *Journal of the Indian Law Institute*, Vol. 51, No. 4, (2009), pp. 439-466.

[142] Alelign and Misganaw, *supra* note 45.

[143] Getachew Assefa, The Place of International Law in the Ethiopian Legal System', In book: Ethiopian Yearbook of International Law, (2017).

[144] Joseph Starke, Monism and Dualism in the Theory of International Law', in Stanley L. Paulson (ed.), Normativity and Norms: Critical Perspectives on Kelsenian Themes, Oxford University Press, (1999); Wilfred Mutubwa, Monism or Dualism: The Dilemma in The Application of International Agreements Under the South African Constitution, *Journal of CMSD*, Vol. 3 No. 1, (2019).

application of international law essentially entails the direct observance of international law as part of the laws of the State without the necessity of domesticating the enabling treaty or convention. On the other hand, the dualist states provide that international law instruments entered into by the State do not automatically form part of the state party's sources of law and become applicable only after domestication through domestic statutes and legislative processes. The dualists' approach is criticized for snubbing the automatic application of rights recognized under international and regional frameworks. Ethiopia has acceded to almost all the major international human rights treaties, and its legal system adopts a hybrid approach to implementing international law. While Article 9 (4) of the FDRE Constitution provides that all international treaties ratified by Ethiopia are integral parts of the law of the land, Article 13 (2) of the same Constitution requires that international human rights treaties must be interpreted in a manner conforming to the principles of the International Covenants adopted by Ethiopia. In other words, the provisions of international instruments would supplement the Constitution or be taken as Ethiopian law, primarily until the promulgation of laws on IDPs. Thus, the inadequacy or scattered nature of the laws regulating the rights and remedies should not be taken as a defense for the non-observance of IDPs' land and property rights and the absence of remedies during violations. The Constitution requires all Federal and State legislative, executive and judicial organs at all levels to respect and enforce the land and property rights of IDPs including the provision of remedies.[145]On top of legal framework gaps, there are several practical challenges that limit the quest for effective remedies for IDPs in Ethiopia. These challenges are so severe that they can hamper the IDPs from legally claiming reparations judicially or administratively. They can restrict governments' attention and resources to temporary and firefighting humanitarian measures rather than securing remedies through

[145] FDRE Constitution, Art. 13 (1).

formal proceedings and durable solutions. It also compels stakeholders in the area (such as researchers, private attorneys, justice offices and courts) to attach less weight to criminal charges and civil suits for reparation involving IDPs in general and violations of land and property rights in particular.[146] Thus, despite the growing problem of human rights violations, it is uncommon for courts or other organs with judicial powers to entertain claims of reparations such as restitution, compensation, or other remedies such as rehabilitation, satisfaction, and guarantee of non-repetition.[147] In particular, although the country set a world record for displacements for consecutive years, to the authors' knowledge, no federal or regional government organ is held accountable for the problem. In the same way, no individuals or groups are held criminally or civilly liable for violations of the land and property rights of IDPs. There are only informal attempts. For example, based on the study by IOM on the availability of reparation mechanisms in Ethiopia, compensation and restitution mechanisms were available for damaged or destroyed housing or land only in 251 villages (38%) and in 457 villages (69%), respectively.[148] From the reading of contemporary literature, this section identifies three significant practical challenges that should be considered as governments' reform priorities.

The first challenge is the culture of impunity, especially when the perpetrator is a government organ or official. The pervasive culture of impunity in the country continues to be a significant challenge in realizing remedies for human rights violations in general.[149] On the one hand, questions about IDPs and remedies to violations of land and property rights are easily politicized among the elites. On the other hand, the general public needs to be more

[146] Abdi, *supra* note 24.
[147] Khushal, *supra* note 141; Kidus, *supra* note 141.
[148] IOM, *supra* note 85.
[149] Abdi, *supra* note 141.

aware of the rights and remedies. This is especially true in the case of conflict-induced IDPs. The second challenge relates to the large size of informal land holdings and unclear property rights in the country. In Ethiopia, like much of Africa, land administration in general and land registration and cadastral systems, in particular, are found rudimentary, largely informal, and not developed well.[150] It is easier to realize access to justice and provide an effective remedy to IDPs with land registration and formalization of property rights. As the study IMO indicates, more than 75% of returning IDPs have access to tenure documentation and evidence of their housing, land, and property rights before displacement. In contrast, the rest of the returning IDPs have no access to tenure documentation.[151] The problem of legal access is also exacerbated by the loss or destruction of property titles, personal identity or residence cards, and civil registries during or after displacement. In the same way, public offices that keep records of property rights and related documents might be destroyed. The third challenge is the need for funds for compensation, rehabilitation and other measures. This is a common challenge facing institutions working on IDPs in developing countries. [152] The different remedies and government measures cannot be successful without a proper funding mechanism or a separate fund dedicated to reparation for the victims. The experience from Kenya and Colombia is beneficial in establishing a separate fund dedicated to IDPs.[153] In the same way, there has yet to be a

[150] Melkamu Belachew, Formalization of Customary Tenure or Informalization of Non-Custmary Tenure? Paradox in the Cadasteral System Development Efforts in Most od Africa, *The International Journal of Ethiopian Legal Studies*, Vol.4, No. 1, (2019).

[151] IOM, *supra* note 85.

[152] Internal Displacement Monitoring Centre (IDMC), Global Report On Internal Displacement', (MAY 2022) https://www.internal-displacement.org/publications/2022-global-report-on-internal-displacement (accessed July 8, 2022).

[153] Alelign and Misganaw, *supra* note 45.

dedicated national budget for internal displacement in Ethiopia. The sources of such a fund can be voluntary contributions and donations from individuals, private organizations, and international donors. Violations against the land and property rights of IDPs were redressed. In summary, given the rampant abuses of the land and property rights of IDPs and gross disregard for the remedies, there shall be strategies to curb the prevailing toxic culture of impunity, politicization of problems, lack of awareness, issues related to land and property registration and certification, and lack of separate and adequate funding must be tackled for justice to prevail.

Finally, given the challenges mentioned above in the law and the practice, the authors believe that Public Interest Litigation (PIL) and class action (CA) are beneficial instruments in the quest for remedies for violations of IDPs' right to land and property in Ethiopia.[154] PIL (also known as public law litigation, social action litigation, and strategic impact litigation) is a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or a class of the community has interest by which their legal rights or liabilities are affected.[155] The Ethiopian legal system was introduced to the concept in 2002 as part of environmental protection efforts.[156] A class action is a related procedural device whereby one or more members of a class are allowed to sue or be sued on their own behalf and on behalf of all other members of the class even while some class members are absent or unaware of the matter.[157] It has been recognized under the Ethiopian

[154] Yenehun Birlie, Public Interest Environmental Litigation in Ethiopia: Factors for its Dormant and Stunted Features, *Mizan Law Review*, Vol. 11, No.2 (2017); Kassahun Mulatu, The place and Relevance of Public interest litigation in Ethiopia', (LL.M Thesis), Addis Ababa University, (2017).

[155] *Id.*

[156] Id .

[157] Getacbew Aberra, The Scope and Utility of Class Actions under Ethiopian Law: a Comparative Study, *Journal of Ethiopian Law*, Vol. 20, (2000).

legal system since the adoption of the Civil Procedure Code and further strengthened with the adoption of the FDRE Constitution.[158] While class actions are basically joinder devices, PILs gain increasing attention worldwide because it improves access to justice for marginalized groups like IDPs. Both PIL and Class action are very important for developing countries like Ethiopia, where there are escalating problems of IDPs. Still, there is a vast law enforcement deficit, and conventional litigation is expensive, burdensome, and unpredictable due to the nature of IDP problems and the relief sought.[159] PILs and class action help to manage procedural questions in relation to *jurisdiction* easily (question of whether the Court has competence), *standing* (question of whether the party has a cause of action or vested interest), and *justiciability* (whether the matter is adjudicated in Court). They also help to avoid inconvenience caused by an assortment of suits and injustice caused by the impossibility and impracticability of joining all persons with the same question of law and fact in a case. PIL and class action are thus particularly important for conflict and disaster-induced displacements where a single measure or cause causes the land and property rights of thousands or millions of IDPs. However, little progress has been recorded in practicing and developing PIL and class action as a litigation tool due to gaps in judicial activism, legal culture, political will and the absence of strong civil society and public-spirited individuals.[160]

Concluding Remark

Save for the absence of specific treaties for IDPs, the land and property rights of IDPs and remedies for violations of the rights are spelled out under international and regional human rights instruments. The right to an effective

[158] Ethiopian Civil Code, Art. 38 ; FDRE Constitution, Art. 37 (2) (b).
[159] Dereje, *supra* note 9.
[160] Yenehun,*supra* note 154; Getachew, *supra* note 157.

remedy is central to enhancing the protection and promotion of the rights. As a party to most of the instruments, Ethiopia is bound to adopt measures aimed at giving effect to the land and property rights of IDPs as well as remedies for violations. This article has tried to assess the various international, regional, and national instruments applicable to the protection of land and property rights of IDPs, state obligations and remedies, and reparations available in cases of violations. It concludes that the absence of clear and specific policy and the legal and institutional framework in Ethiopia has been a critical challenge to providing and enforcing judicial and administrative remedies upon violations. Remedies for conflict and disaster-induced displacements are still inadequate and found scattered in the country's different substantive and procedural laws (such as criminal, tort and administrative laws). Other practical challenges, such as a lack of awareness and a prevailing culture of impunity for violations, issues in the land registration and formalization of property rights, and the absence of separate and adequate funds, exacerbate the problem. Moreover, most of the displacements in the country are political, deliberate, and associated with the state apparatus in one way or another. The article underlines the need to introduce a comprehensive legal framework for IDPs and the use of PIL and class action as key reform priorities to improve access to justice and realize the quest for remedies for violations of IDPs' right to land and property in Ethiopia.

Land Law Responses towards Arbitrary Eviction on "Non-Indigenous" Rural Peasants in Benishangul-Gumuz Region

Bezabih Tibebu Checkol[Θ]

Abstract

The FDRE Constitution established ethnic federalism supposedly to accommodate and protect various rights of NNPs of Ethiopia. Among others, the land resource becomes the common property of NNPs of the Ethiopian ethnic groups. Following the adoption of ethnic based structure Benishangul-Gumuz Regional States (BGRS) revised Constitution has classified peoples, based on ethnicity, as "indigenous" Vs "non-indigenous"("owner" Vs. "non-owner") to the region, and land resource found in region belongs to "indigenous nationalities." However, Ethiopian rural peasants have Constitutional rights to access arable land without fees and are guaranteed from arbitrary eviction without indigenous-non-indigenous dichotomy. So this study aims to investigate legal responses towards the protection against arbitrary eviction to non-indigenous peasants from their land rights. To achieve this objective, study employed qualitative research approach. The findings showed there is arbitrary eviction of "non-indigenous" peasants in the region. The land rights of non-indigenous peasants are restricted and face decentralized despotism. The root cause for arbitrary evictions of the non-indigenous rural peasants is the false indigenous/non-indigenous people dichotomization on the one hand, and ambiguous nature of land policy and pitfalls of ethnic federalism on the other hand. Neither FDRE Constitution

[Θ] LL.B, LL.M on Environment and Land Law, Lecturer, School of Law Gambella University. E-mail: bezabihtibebu12@gmail.com.

Acronyms: *FDRE-Federal Democratic Republic of Ethiopia; BGRS-Benishangul-Gumuz Regional States; NNPS-Nations, Nationalities, and Peoples.*

nor BGRS Constitution provide for legal mechanism to avert arbitrary eviction of non-indigenous peasants from their land rights. Therefore, the FDRE Constitution and BGRS revised Constitution must be revisited in order to avoid indigenous/non-indigenous false dichotomy so that the land rights of non-indigenous peoples shall be protected.

***Keywords*:** Eviction, Ethnicity, Non-indigenous, Land, Benishangul-Gumuz

Introduction

Ethiopia is a multicultural state whose people are so intertwined due to a long history of mobility, internal migration and voluntary or forced settlement by government policy. During the pre-1991 political arrangement, individuals and groups migrated and settled in different parts of the country for various reasons. They had established permanent, shared economic and political resources; participated in policy decision making regardless of their ethno linguistic and cultural background.[1] However, this situation could not persist after the introduction of ethnic-based federalism. With the advent of ethnic federalism via the 1995 FDRE Constitution, Nations, Nationalities and People (herein after NNPs) are guaranteed the right to self-administration up to secession.[2] The right of self-administration and sovereign power in the hands of NNPs of Ethiopian ethnic groups are the backbone of Ethiopian ethnic federalism.[3] To realize these rights, the FDRE Constitution depicts Regional States delimited based on the settlement patterns, language, identity and consent of the people concerned. It structured Ethiopia's federalism mainly

[1] Takele Bekel, Ethnic conflict in Ethiopia: Federalism as a Cause AND Solution, South-South Section | *Peer Reviewed*, Vol. 6 No. 30, (2021), p. 3.
[2] The Constitution of Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, *Federal Negarit Gazetta*, (1995),Art. 39 [hereinafter FDRE Cons.].
[3] *Id.*, Art. 46/2.

based on the criteria of ethnicity.[4] For the practical implementation of the rights NNPs, the FDRE Constitution gives a political sprit-based definition for NNPs of Ethiopia. NNPs are defined as:

> *A Nation, Nationality or People for the purpose of this Constitution, is a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable predominantly contiguous territory.*[5]

Regional States have their own regional constitutions which are largely the replication of the federal Constitution. The state constitutions provided for the reconfiguration of the State into Zone and Woreda levels based on ethnicity, except the Amhara Regional State revised Constitution. One of the gears for the expression of self-administration for each Regional State is giving land resources to NNPs of the Ethiopian ethnic groups.[6] Land is undivided common property of ethnic groups in the country.[7] Thus, an individual can exercise his/her land rights within the undivided common property of ethnic groups via membership of identified ethnic groups. Despite the existence of a constitutionally recognized right on self-determination, there are two unsettled challenges under an ethnic based federal arrangement which are the causes for arbitrary eviction.

The first challenge is the question of the relationship between the Ethiopian State and NNPs. i.e; the problem of balancing and reconciling dual identity;

[4] *Id.*, Art.46/2 & Art. 39/5.
[5] *Id.*, art 39/5.
[6] Minutes of Constitutional Assembly, Volume 5, Unpublished, HPR Library, Addis Ababa, Ethiopia, 1994, p. 75.
[7] FDRE Cons., *supra* note 2, Art. 40/3.

belonging to a particular nationality, and belonging to the Ethiopian state. In contemporary Ethiopia, to participate in Ethiopian political life an individual citizen must first identify him/her self as being a member of a given ethnic group implying that individual citizens cannot simply be considered as Ethiopians rather they belong to the state because of their prior membership of a particular NNPs. But many Ethiopians have mixed identities, being descended from different ethnic groups. Under the new ethnic based federal structure they have to identify themselves as belonging to one group or another. Hence, the re-construction of ethnic identity in post-1991 Ethiopia have led to the emergence and re-emergence of a new locally based fragmented identity with no sign of ending. This not only impacts cultural coexistence and harmony between ethnic groups but also the integrity of the Ethiopian state.

The second challenge is the question of ethnic groups' relationships. For instance, when one looks at the ethnic boundary demarcation, territories historically shared between and commonly administered by the Somali and Oromo are now arranged under a fixed boundary to one group and exclude the other. With this framework, citizens' access to resources, political power, and local governance can easily create conflicts that did not exist before because ethnicity is made the basis for governance.

The BGRS Constitution recognizes different ethnic groups and unequivocally categorizes them into two groups: namely, ethnic groups as owners of the region-the so called indigenous nationalities of the region (Bertha, Gumuz, Shinasha, Mao, and Komo) [8] on the one hand, and other peoples residing in the region labeled as non-indigenous ethnic groups that are not recognized as

[8] The Benishangul Gumuz Regional State Revised Constitution Proclamation, No. 31/2003, *Lisan Hig Gazeta*, 2003, preamble para, 1-4, (hereinafter BGRS Revised Cons.).

owners of the region.[9] The Constitution indisputably recognized self-determination for owner/indigenous ethnic groups to the region without any exclusion or restriction on non-indigenous ethnic groups' socio-economic and political rights.

Since the advent of ethnic federalism, there is an attempt for land resource regionalization based on ethnicity. The central problem has been the competing interests between the indigenous nationalities and non-indigenous ethnic groups regarding the universally recognized constitutional principle of access to arable land and protection from arbitrary eviction. The problem emanates from indigenous/owner versus non-indigenous/non-owner dichotomy, resource rivalry, legal and policy paradox and so on. Specifically, the BGRS Constitution depicts nationalities that are considered to be the "owners" of the Regional State coupled with an exclusionary political economy practice. It relegated others to second class citizens which extremely undermines the notion of "unity in diversity", and goes against the universal constitutional principle of access to agricultural land and protection from arbitrary eviction.[10] This has created a room for the regional government officials to abuse their authority to achieve their political goals along ethnic lines.

The BGRS and FDRE Constitution edict the right to free movement of peoples and freely engage in any economic activity. But from time to time, forceful evictions of non-indigenous peasants in the BGRS has increased substantially which ultimately violates the economic rights of non-indigenous

[9] Id, Art. 2&39.

[10] FDRE Cons. *Supra* note 2, Art. 40/ 3&4 and Art. 4 of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) clearly states that everyone has the right not to be forcibly evicted from his or her housing, land and property and shall be protected against arbitrary displacement.

rural peasants. In this case, one can remember the repeated forceful eviction of non-indigenous peasants from their landholding in Benishangul-Gumuz in 2013, 2017, 2019, 2020, and 2021 in Metekel and Kemashi Zonal Administration.[11]

Following the problems mentioned above, the objectives of this article are to scrutinize land law and policy response towards the protection of arbitrary eviction of rural peasants from their land holding right under the ethnic federal system in general and in BGRS in particular. Based on this general objective, specifically, this article explores the impact of indigenous and non-indigenous dichotomy on land rights of rural peasants, and the rationale behind the dichotomy. To achieve these objectives, a qualitative research approach was used. Both primary and secondary data were collected. As a primary data source, key informant interviews with the non-indigenous rural peasants who are residents of BGRS, arbitrarily evicted persons, indigenous people to the region and government officials were interviewed. Respondents from indigenous/owner and non-indigenous/non-owner to the region were purposively selected who were old enough to have direct experience. In-depth and key informant interviews were also conducted with the leaders of the association formed to represent the arbitrarily evicted population and who were therefore in a position to provide insights into the subsequent attempts at dispute resolution. Representatives of the displaced non-indigenous ethnic group also provided extensive documentation relating to their appeals to government officials and the government's attempts to resolve the dispute. This written documentation constitutes a vital source of data enabling triangulation of interview testimony.

[11] FDRE Cons., *Supra* note 2 Art. 40/3& 39 & Assefa Fiseha, 'Intra-Unit Minorities in the Context of Ethno-National Federation in Ethiopia ', *Utrecht Law Review*, Vol. 13, Issue 1, (2017), pp, 170-189, p. 171 [hereinafter Fiseha, 'Intra-Unit Minorities in the Context of Ethno-National Federation in Ethiopia ']

This article contains three sections. The first section began by scrutinizing the Ethiopian Ethnic Federal System, the essence of indigenousness in international and regional contexts, and the genesis of indigenous and non-indigenous dichotomy under the Ethiopian ethnic federal system. The second section depicts protections of non-indigenous rural peasants under the Ethiopian Constitution, constitutional design and recognition of non-indigenous peasants in BGRS and the nature of land ownership and its implication on recognition of land rights. The third section explores the constitutional right of freedom from arbitrary eviction of non-indigenous peasants, and then follows the conclusion.

1. The Ethiopian Ethnic Federal System: An Overview

Since 1995 Ethiopia established an ethnic federal system that gave full recognition to ethnic autonomy and at the same time aiming to maintain the unity of the state.[12] Regional states are structured based on ethno linguistic criteria in order to accommodate and empower various NNPs primarily through the provision of territorial and political autonomy to geographically concentrated ethnic groups.[13] The major ethno-national groups have established their regional states and the Constitution mandates them to design ways to realize their own socio-cultural, economic and political rights including the right to both internal and external self-determination.[14] As provided under the Establishment of National/Regional Self-Government Proclamation during the transitional period and the FDRE Constitution the internal aspect of self-determination within the federation signifies the right to use and develop one's language, promote one's culture, and history (socio-

[12] FDRE Cons., *supra* note 2, Art. 39&47.
[13] *Id.*
[14] *Id.*, art 39.

cultural self-determination).[15] Besides, NNPs of Ethiopia have the full measure of self-government that allows each people the right to establish organs of the state to run their affairs in the territory they inhabited and to be represented fairly in the organs of the federal government (political self-determination).[16] However, the issue of land resources is not explicitly dealt with under article 39 of the FDRE constitution (economic self-determination). However, when one read the provisions of article 40 of the same Constitution and the Preamble of proc. No. 7/1992 which provided for the Establishment of National/Regional Self-Government, economic self-determination is recognized for NNPs-Ethiopian ethnic groups, giving a clear understanding of the economic self-determination of ethnic groups. First, land resource is recognized as a group right by proclaiming land as a common property of NNPs of Ethiopia, and autonomous ethnically structured states administer this common property of land resource. Second, ultimate sovereign power is given to those primordially identified ethnic groups in their region by allowing self-rule to exercise their affairs. Third, when one ethnically arranged state wants to secede from the federation, it can exercise without any limitation which refers to the external aspect of self-determination. When we come to each polity state all socioeconomic and political self-determination is given for the indigenous ethnic group to the concerned ethno-linguistically arranged region. For instance, in the Afar and Harari revised Constitutions, the internal and external aspect of self-determination is given for Afar and Harari ethnic group respectively.[17] Oromia and Somali revised Constitutions

[15] Id; The Transitional Government of Ethiopia a proclamation to provide for the establishment of National/Regional Self-Governments Proc. No 7/1992, *Federal Negarit Gazeta* (1992), preamble, para 3.

[16] FDRE Const., *supra* note 2, Art. 39.

[17] Afar Regional State Revised Constitution, preamble para, 1-5 &Art. 8,39, Hareri Revised Regional Constitution, Art. 8&39.

followed the same approach.[18] However, non-indigenous ethnic groups are excluded from both aspects of the rights to self-determination. Even they fail to be given recognition of their existence.

Even the naming of regional states, eight of them out of the eleven Regional States (Afar, Oromo, Amhara, Tigray, Somali, Benishangul-Gumuz, Sidama and Harar), directly represent specific ethnic groups which manifestly shows the arrangement is ethnic federalism.[19] Hence, NNPs of Ethiopia are a group of people who share a common culture or similar customs, mutual intelligibility of language, belief in common or related identities, a common psychological makeup, and inhabit an identifiable contiguous territory which are essential components of the formation of ethnicity.[20] Article 46/2 of the FDRE Constitution provides that the federation units are delimited on the basis of the settlement patterns, language, identity and consent of the peoples concerned. That is why ethnicity is at the center of restructuring federal, regional and local governments under the Ethiopia federal system.

So, the ethno-national group that enjoys autonomy in the form of self-rule identifies itself in exclusion to non-indigenous ethnic group within territory they control.[21] The key mechanism for the realization of the right of self-administration of an ethnic group is giving land as a common property for the identified ethnic group which has collective identities. Regional states are usually perceived as an exclusively identified ethnic group's homeland. In this

[18] The Oromia Rreginal State Revised Constitution, Proclamation No.46/2001, [(hereinafter ORS Revised Cons.], preamble para 1 and Art. 2; The Somali Rregional State Revised Constitution, [hereinafter SRS Revised Cons.], preamble, Para 1 and art. 2.

[19] Jon Abbink, 'Ethnicity and Conflict Generation in Ethiopia: Some Problems and Prospects of Ethno-Regional Federalism', *Journal of Contemporary African Studies*, Vol.24, No. 3,(2006), p. 398.

[20] *Id.*

[21] FDRE Const., *supra* note 2, Arts. 46&39.

regard territorial self-rule reinforces a sense of empowerment for the dominant ethnonational group. However, it will have an exclusive meaning for non-indigenous peoples who are not members of an identified ethnic group in the region when they exercise their socioeconomic and political rights. This exclusivist conception of territory and transforming ethno-national group into a political majority in the constituent unit or at the local level pose a structural and systematically designed law and policy threat to non-indigenous ethnic groups leading to arbitrary eviction from their home and land. Undeniably, over the past three decades internal displacement and arbitrary evictions of non-indigenous ethnic groups in Ethiopia are the outcomes of such systemic dichotomy[22] between the titular ethnonational groups and non-indigenous ethnic groups.

Under BGRS's revised Constitution, economic self-determination including the utilization and administration of the land resource is one aspect of the rights exclusively attached to indigenous nationalities.[23] This right is not extended to non-indigenous peoples which directly affect the nature of the ownership and related land right of non-indigenous peasants. Therefore, a land resource found in Benishangul-Gumuz Region is given to the identified indigenous nationalities. In such circumstances, all land-related rights were delineated and implemented based on the interest of indigenous nationalities.

1.1. The Essence of Indigeneity under International Law

Under international law, one of the intricate and problematic concepts is who indigenous peoples are? And who are not non-indigenous? And what are the

[22] Assefa, *supra* note 11, p. 178.
[23] BGRS Revised Cons., *supra* note 8, Arts. 2 and 39.

parameters to determine those peoples?[24] Though various legal experts have proposed several definitions, universally accepted and obligatory legal definitions deas not yet exist.[25] In such circumstances, it is much more appropriate and helpful to attempt and outline the major features which help us identify who indigenous peoples are at the international and regional level and equally to understand the non-indigenous peoples. The notion of 'indigenship' in international law has been largely associated with the rest of colonialism.[26] Jose Martínez-Cobo, who were the UN special rapporteur-offerred a description of indigenous peoples which is usually accepted and frequently cited by many legal experts, scholars and activists. He provides that:

[24] Ojulu, Ojot, *Large-scale Land Acquisitions And Minorities/Indigenous Peoples' Rights under Ethnic Federalism in Ethiopia: A Case Study of Gambella Regional State, (*PhD Thesis, University of Bradford, Unpublished 2013, p.42).

[25] *Id.*, p. 42.

[26] See also Art. 1(b) of the Indigenous Tribal Peoples Convention, 1989 (No.169) Adopted on June 27, 1989 by the General Conference of the International Labour Organization at its seventy-sixth session, entry into force: September 5, 1991(hereinafter Indigenous Tribal Peoples Convention, 1989). As defined in the 2003 report of the African Commission which the AU endorsed in 2005, the term 'Indigenous' does not mean first habitants in a country or on the continent 'as natives understood in the Americas or Australia but those people who are dominated and exploited due to colonization. Art. 1 (b) of the 1957 and 1989 Indigenous and Tribal populations Convention reads as "members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization and which, irrespective of their legal status , live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong.". See also the UN Declaration on the Rights of indigenous Peoples[UNDRIP] preamble para.6 where the concept of Indigenous peoples is understood concerning dispossession of their land by colonization which is not existent in Ethiopia as indicated in this article.

> *Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural, social institutions and legal systems.*[27]

Based on the above parameters, to be considered as indigenous peoples, there must be a historical continuity between peoples under consideration and societies that existed before the invasion of external forces. Further, in order to understand the historical continuity of indigenous peoples, the group needs to show one or more of the following factors: a) full or partial occupation of ancestral lands; b) common ancestry among the original occupants of these lands; c) having distinct culture or way of life and language, e) residence in certain parts of the country, or in certain regions of the world; f) other relevant factors.[28]

The International Labour Organization (hereinafter ILO) Convention No.169 of June 27, 1989 tries to pinpoint the major feature of indigenous peoples. This Convention emphasizes that indigenous peoples have their descent from the populations which inhabited the country, or a geographical region to which the country belongs at the time of conquest or colonization or the establishments of present state boundaries and who, irrespective of their legal

[27] Martinez Cobo's definition first appeared in 1986 in his study of the problem of discrimination against indigenous populations (UN Doc E/CN.4/Sub.2/1986/7).
[28] *Id.*

status, retain some or all of their own social, economic, cultural and political institutions.[29]

According to the UN Declaration on the Rights of Indigenous Peoples (hereinafter UNDRIP), there are two key components in the description of indigenous peoples: those are the original residence of the land and their means of livelihood highly tied with the land resource such as using a land resource for herding, agriculture, hunting and fishing.[30] UNDRIP recognized that that indigenous peoples have suffered from historic injustices due to colonization and dispossession of their lands, territories and resources, thus preventing them from exercising in particular their right to development by their own needs and interests.[31] From this instrument one can appreciate that indigenous peoples' rights to lands, territories and natural resources carry far-reaching implications in every aspect of human development. To effectively realize their rights, UNDRIP acknowledges that indigenous peoples have the right to self-determination in all affairs and it is considered a corner-stone of their right to exercise their affairs.[32] The other essential point of this instrument is that indigenous peoples have equal rights to non-indigenous peoples.[33] United Nations General Assembly (UNGA) has a fundamental declaration that acknowledges indigenous peoples have the right to self-determination in all affairs and they are considered as decisive of their right at international level. This implies that giving special treatment and legal protection for indigenous communities aims to enhance their rights rather than create new rights. Hence, by taking into account the historical experience of

[29] Indigenous Tribal Peoples Convention, 1989, *supra* note 26.
[30] United Nations Declaration on the Rights "Indigenous peoples", Res.61/295 General Assembly on 13 September 2007, Art. 26 (hereinafter United Nations Declaration on the Rights of Indigenous Peoples), preamble para, 2-6
[31] *Id.*, preamble para, 2-6
[32] *Id.* Arts.3&ff.
[33] *Id.*, preamble para. 2.

discrimination, recognition of their rights overall is fully justified from the ambits of equality and non-discrimination perspective that is enshrined under international human rights instruments. However, it does not clearly explain who indigenous peoples are within a given nation; rather, it outlines the major parameters to identify indigenous peoples from the rest of the existing community in the world. Besides, it does not show up to what extent the utilization of natural resources by indigenous people exercised or does the recognition of the right over natural resources implies the exclusion of the rest of communities. Lastly, the declaration has no legally binding force on the state parties which highly resembles the imposition of political commitments. Therefore, pertaining to the above assumption all Indian and White peoples residing in South Africa during the colonial operation have been considered non-indigenous people. In contrast, only Black South African peoples are indigenous in light of international laws.

Based on the above understanding in international law, one can claim that all Ethiopian NNPs are considered indigenous people.[34] Hence, Ethiopia is the only African country that was not colonized by any external body. Indeed, in Africa, there is no one ethnic group that can claim 'indigenousness' to be the African continent, and impossible to find a single group that could claim the status of 'indigenousness' people' to one African country due to colonization.[35] African peoples' history is characterized by massive

[34] Since the first 1957 Indigenous and Tribal Populations Convention which is revised in 1989, opted to define 'indigenous peoples concerning 'colonization' which is actually absent in Ethiopia, the Indigenous and Non-indigenous false dichotomy does not have a practical and historical justification existing in Ethiopia and therefore all Ethiopians are indigenous. The enclosure of the preceding false dichotomy under the BGRS constitution seems intentional with no reason just to emasculate the socioeconomic rights of the so called labeled non-indigenous Peoples.

[35] One can clearly understand that No African Country has ratified the UN Declaration on the Rights of Indigenous Peoples nor the African Charter on Human and Peoples

migrations and inter-ethnic marriage relation that making it difficult to determine which group might be descendants of the first inhabitants.[36]

1.2 Regional and National Legal Instruments on the Essence of Indigeneity

The European Union (hereinafter EU) is committed to promoting human rights, and democratization and the development fight against racism and discrimination lie at the heart of that commitment.[37] The union recognizes that many indigenous peoples live in developing countries where they often experience economic, social and political marginalization and are exposed to more recurrent human rights violations than non-indigenous people.[38] To realize the commitment to promote human right, the EU Main Guidelines for Support to Indigenous Peoples recognize the importance of "self-development" provided that indigenous peoples have the right to be able to develop their own socioeconomic and political affairs unlike that of the UNDIPR which focus on the right to self-determination.[39]

On the other hand, the formal legal recognition and status granted by Asian states to indigenous peoples vary from country to country.[40] Though almost

Rights does expressly include indigenous peoples within its ambit except a working group on Indigenous peoples/communities in the continent.

[36] Muluneh Kassa, 'The Paradox of Administration of Nationalities in Post-1991 Ethiopia:The Case of BenishangulGumuz Regional State', International Journal of Advancements in Research & Technology, Vol. 6, Issue 2, (2017), p.39.

[37] The European Union: Human Rights and the Fight Against Discrimination, Pamphlet No. 14, at https://www.ohchr.org/Documents/Publications/GuideMinorities14en.pdf, (last accessed on May 14/2022).

[38] European Commission,, Implementing EU External Policy on Indigenous Peoples, joint staff working document,Brussels, 2016, p.7-8.

[39] The European Commission Working Document "On Support for Indigenous Peoples in the Development Cooperation of the Community and Member States, 1998.

[40] *Id.*

all states in Asia voted for the adoption of the UNDRIP many of them refuse to respect and implement the indigenous peoples' collective rights, especially to their lands, territories and resources and to self-determination because several Asian states are underpinned by legal systems inherited from colonial history that does not recognize the historical customary land tenure system and use of land resources that they have nurtured and managed for centuries based upon their inherent rights and tradition.[41] Due to this challenge different Asian governments refer to the peoples concerned like aboriginal tribes'(Taiwan), 'aborigines' (peninsular Malaysia), 'cultural minorities' (Philippines), 'hill tribes' (Thailand), 'minority nationalities' (China), 'natives' (Malaysian Borneo) and 'scheduled tribes' (India) rather than using the term indigenous in their domestic laws.[42]

Like that of the Asian continent, identifying indigenous peoples in Africa based on an international perspective remains a contested notion and inappropriate due to the history of colonization.[43] Traditionally, people of Africa remain tied to their land resources, with distinct ethnic groups demanding certain terrain.[44] Migration of Peoples from one region to another in reaction to climatic change and conflict has been the other salient feature of the African community for centuries. Colonization imposed by European-dominated political and economic systems on populations indigenous to the territory of Africa subsequently results in marginalization via colonization.[45]

[41] European Commission, Implementing EU External Policy on Indigenous Peoples, Joint staff working document, Brussels, 2016, p.7-8.

[42] Asia Indigenous Peoples Pact, Overview of the State of Indigenous Peoples in Asia, (2014), p. 2.

[43] Laura A. Young and Korir Sing'Oei, Access to Justice for Indigenous Peoples in Africa, p.90.

[44] *Id.*

[45] Imai Shin and Buttery Kate, 'Indigenous Belonging: A Commentary on Membership and Identity in the United Nations Declaration on the Rights of Indigenous People', p.4

Further, except Ethiopia and Liberia, all African countries were colonized.[46] The facts mentioned above made it difficult to apply the concept of indigenous people's rights under international frameworks of indigenous people's rights in African context. [47]

Applying the international and regional definition of indigenousness under the Ethiopian ethnic federal arrangement is not much complicated.[48] Hence, Ethiopia was never colonized and did not share the history of colonialism like many African countries making the direct applicability of indigenous peoples' rights as framed in the international arena.[49] Muluneh Kassa explains that every Ethiopian is an indigenous person.[50] Wubshet also argues that though some regions try to understand some ethnic nationalities as being indigenous based on ethnolinguistic federal arrangement, the concept of indigenousness is irrelevant in Ethiopia.[51] Hence, currently, all Ethiopian NNPs have the right to self-determination and have their region.[52] There are no legally recognized indigenous nationalities for a certain region in Ethiopia based on the international understanding of indigenous peoples governing legal frameworks.[53] Instead, when ethnic federalism was established since 1995, legally the FDRE constitution generously recognized the right to self-

[46] *Id.*
[47] Ojulu, *supra* note 2, p.43.
[48] See the meaning given to 'indigenous people under the first 1957 and 1989 revised convention, Indigenous and Tribal Populations Convention, *supra* note, 26.
[49] *Id.*
[50] Muluneh, *supra* note, 36, p.40
[51] ዉብሸት ሙላት, *አንቅጽ ሰላሳ ዘጠኝ፣የራስን እድል በራስ መወሰን*ጽሞጀሞሪያ እትም፣ አዲስ አበባ፣ ኢትዮጵያ፣ 2007 ዓ.ም ከገጽ 1-341፣ ገጽ 47 [ከዚህ በኃላ ዉብሸት ሙላት, አንቅጽ ሰላሳ ዘጠኝ፣የራስን እድል በራስ መወሰን].
[52] *Id.*
[53] See the meaning given to 'indigenous people under the first 1957 and 1989 revised Convention, Indigenous and Tribal Populations Convention, 1989, *supra* note 26.

determination for all ethnonational groups without any distinction.[54] Hence, there are three types of ethnic groups created within the country. The first category of ethnic groups refers to those who are politically cohesive in a nation but culturally separate even in language.[55] That is why except Gambella and South NNPs, Oromia, Amhara, Somali, Tigray, Afar and BGRS are predominantly composed of the dominant and large number of ethnic groups that gave rise to using their name to name the regional state. [56]

The second category of ethnic group refers to recognized ethnic minorities with guaranteed cultural independence and other related rights within the dominant ethnic group.[57] That is why different regional constitutions allow establishment of special Woreda or Zonal administrations within their respective region.[58]

The third category of the ethnic group is composed people that moved, over the last 150 years, from one ethnically autonomous region to the other region by resettlement program, economic, social or other pulling and pushing factors and their descendants.[59] In our case, they reside under one of the ethnically structured and territorial autonomous region/*kilil*/. Regarding to this category of people many regional constitutions make a dichotomy by using

[54] FDRE Const. *Supra* note 2, Art. 39.

[55] Jürgen H.P. et al, 'The Concept of Ethnicity and its Operationalization in Cross-National Social Surveys', *Metodološki zvezki*, Vol. 7, No. 2, (2010), p. 111.

[56] Christophe Van Der, 'Federalism, Local Government and Minority Protection in Ethiopia: Opportunities and Challenges ', *Journal of African Law*,Vol.59:No. 1, (2014), p. 153.

[57] *Id.*

[58] For instance the Kemisie Special Zone, Argoba Special Woreda within the Amhara region, The special woreda for Mao and Komo in BGRS and the Opo and Como special Woreda in Gambella Regional State.

[59] Jürgen et al, *supra* note 55, p.111.

the terms *"we" and "others".*[60] BGRS revised Constitution uses the terminology of indigenous and non-indigenous people dichotomy to the region. Based on this dichotomy, different scholars have put their conceptual definitions for these two groups of people. For instance, Van der Beken explains non-indigenous people as groups of people or individuals who moved to the region in more recent or past and to be seen as internal migrants to the ethnically arranged and autonomous region.[61] Hence, the spirit of the FDRE Constitution assumes that all Ethiopian ethnic groups have their place of origin in a certain area of the country, which is located in one of the eleven regions.[62]

The rational usage of the above terminology by scholars is not to show the international and regional understanding or identification of indigenous peoples from non-indigenous ones. Instead, when the federation units are structured ethno-linguistically, there are certain ethnic groups to which priority right is given to the assigned region. Some peoples have inferior rights and are not a member of ethnically arranged region in all socioeconomic, political and cultural rights.[63] Hence, the false dichotomy between indigenous/non indigenous peoples in BGRS which emanated from the FDRE constitution clearly contradicted the international legal framework and understanding of the concept of indigenous people.

Therefore, for this article, non-indigenous peasants are peoples or communities who moved into the territory of BGRS and other regions by

[60] See *supra* note 18.

[61] Christophe Van Der, 'Ethiopian Constitutional protection of Ethnic minorities at regional level', *African Focus*, Vol.2. No. 1(2007), p.16.

[62] *Id.*

[63] Beza Desalegn, 'Wherein Lies the Equilibrium in Political Empowerment? Regional Autonomy versus Adequate Political Representation in the Benishangul-Gumuz Region of Ethiopia ', (2015), p. 38.

different pulling and pushing factors, and government settlement programs to sustain their livelihood or groups which have moved into this territory in exercising their freedom of movement or forced to move and become a part of this territory, and sustain their livelihood based on agriculture.

Taking the above working definition, article 2 of BGRS's revised Constitution conferred the term *indigenous nationalities'* to Berta, Gumuz, Shinasha, Mao and Como ethnic groups without giving any reasons for the usage of the terminology. Such categorization makes it difficult to assert whether such terminology covers the protection accorded to indigenous peoples within the international and regional frameworks. However, principally, the application of the terminology of indigenous peoples in the BGRS is far more extensive than the simple usage of the language. This is true as article 39 of the revised Constitution of BGRS gives the right to self-determination for five indigenous nationalities.[64] Besides, ownership right over the region is reserved for the above five identified ethnic groups-nationalities only.[65] Hence, such systemic and deliberately designed exclusion affects non-indigenous peasants' land right and freedom from arbitrary eviction, and impaires enjoyment of equal rights at the national and regional level.

1.3 Rasion D'etre of Defining 'Indigeneity'

As discussed above, despite the problem of adopting a uniform definition of "indigenous peoples", the attempts of defining and identifying by different scholars, and regional and international instruments have almost the same objective. They assumed that several of indigenous peoples are economically poor and live in inaccessible, marginal and risk-prone rural surroundings

[64] BGRS Revised Cons., *supra* note 8, Art. 39.
[65] *Id.*, Art. 2.

because of historical facts and colonization.[66] supposedly, many of them lack fundamental rights and freedoms, access to basic facilities as well as opportunities to participate in policy-making; their indigenous economies often depend on subsistence and characterized by limited access to land and other natural resources.[67] So they face discrimination, cannot participate fully in public life, and do not maintain their distinctive identities, cultures, languages and ways of life like the rest of world's community.[68] Hence, the aim is to push states to support and protect the different aspects of indigenous people's rights to overcome the historical injustices and current patterns of discrimination so that they can equally exercise their rights like that of non-indigenous peoples.[69]

2. Protection of Non-indigenous Peasants under the Ethiopian Constitution

Since the adoption of ethnic federal system in post-1991, Ethiopia was structured into nine regions/*Kilil*/; now, they are increased to eleven regions, eight of which had specific tribal designations to the specific region. By using the idea of ethnic homelands with political and property rights covenants, the government exceeded the threshold for a redemptive use of ethnicity to build unity in diversity in the Ethiopian state. Hence, the *Kilil* concept incubated three serious dangers that would present challenges for the realization of the rights of non-indigenous peoples rather than accommodating and protecting it. First, it creates dual citizenship problems and "decentralized despotism" in the Kilils, with a serious implication on people who are unable or unwilling to

[66] FAO Policy on Indigenous and Tribal Peoples, (2010), p. 7.
[67] *Id.*
[68] The United Nations Development Group's Guidelines on Indigenous Peoples' Issues, Inter-Agency Support Group (IASG), (2009), p. 12.
[69] *Id.*

claim belongingness to any tribal grouping.[70] Second, it installs systemic marginalization of all Ethiopians who do not squarely fit into the characterization in country's laws and policies that one must belong to an identified ethnic group. Third, it brings spatial disintegration and developmental dysfunction of the country as a whole.[71]

First, the primordial identification of ethnic groups in Ethiopia predominantly depends on ethnolinguistic criteria to delineate regional boundaries designed to create a perfect fit between ethno-linguistic groups and territorial boundaries. Consequently, the FDRE constitution gives the identified and regionally structured ethnic group the right to administer its own affairs including natural resources and self-determination.[72] That is why the sovereign power is given to ethno-linguistically arranged states rather than individual citizens.[73] Ethiopian federalism implies that individuals are first and foremost citizens of ethnolinguistic structured regions rather than that of Ethiopian which makes an individual to claim or benefit from group rights such as land resources when he/she becomes a member of one of the ethnically arranged *Kilil*.[74] Within ethnically arranged federation units, each ethnic group has its home region. Consequently, non-indigenous peasants have no or weaker claim of their land right than indigenous ethnic groups and nowhere were their issues addressed.[75] The spirit and operational reality of the

[70] Assefa Mehretu, Ethno symbolism and the Dismemberment of the State in the Horn of Africa: The Ethiopian Case of Ethnic Federalism , *International Conference on African Development Archives*, (2009), p.132.
[71] *Id.*
[72] FDRE Cons., *supra* note 2, Art.46.
[73] Alemante G. Selassie, ' Ethnic Federalism: Its Promise and Pitfalls for Africa', (2003), p. 55.
[74] Tom Lavers, 'Responding to Land Based Conflict in Ethiopia: The Land Right of Ethnic Minorities Under Federalism', (2018), p.477.
[75] Christophe Van der Beken, 'Federalism, Local Government and Minority Protection in Ethiopia: Opportunities and Challenges',(2015), p.160.

FDRE constitution are designed for empowering territorially concentrated ethnonational groups without considering non-indigenous ethnic groups, which imposes a dogmatic conception of territorial autonomy.[76]

The second paradox is that giving land as common property for NNPs and the right to self-determination excludes the non-indigenous ethnic group from the benefits of land rights arising from the nature of common property. The third paradox is that the power of land administration is given to territorially self-autonomous ethno-linguistically arranged *Kilil*. Therefore the land resource in the region is believed to be solely for indigenous peoples, which does not have to be shared with non-indigenous peoples. That is why the repeated eviction of non-indigenous peasants of Amhara ethnic groups from the Oromia region started in the post-1995, which reportedly happened with the participation of ethnically intoxicated local administrative organs.[77] Arbitrary eviction of non-indigenous rural peasants in BGRS has still continued.[78] Nevertheless, the federal government has no legal mechanism to see to it that all federal land policies and laws, and human and democratic rights of rural peasants are properly and uniformly applied throughout the country.

2.1. Constitutional Design and Recognition of Indigenous-Non-Indigenous Disparity in BGRS

[76] Melese Chekol, 'Inclusion or Exclusion of Exogenous Political Communities at Local Level in Ethiopia', *Research & Reviews: Journal of Social Sciences*, Vol. 3 | Issue 3 |, (2017), p.200.

[77] Jon Abbink, 'Ethnic-Based Federalism and Ethnicity in Ethiopia: Reassessing the Experiment after 20 Years', *Journal of Eastern African Studies*, Vol. 5, No. 4, (2011), p.605.

[78] For instance, arbitrary eviction had happened in Benishangul-Gumuz Regional State during 2017- 2021.

The Ethiopian regional states have the competence to adopt their Constitutions to regulate the specific issues in context.[79] BGRS first adopted its Constitution in 1996 and then revised it in 2002. Gauging the BGRS constitution concerning the recognition of ethnic diversity, it is worth identifying the terms "peoples", "other peoples" and "indigenous nationalities" as used in the text of the Constitution. For instance, Article 9 of the Constitution uses the term peoples in ascribing sovereign power to the regional state by stating that "the peoples of the BGRS shall be the ultimate authority of the regional state." Again if one looks at the preamble of the Constitution it begins with the statement: "We, the nationalities and peoples of the region of Benishangul-Gumuz…" On the contrary, Article 2 sets a clear distinction between indigenous nationalities-the"owners" of the regional state, and other peoples, who are recognized as residents of the region, apparently considered guests hosted by the former. This is further corroborated by Article 39 of the Constitution which delineates the various aspects of the right to self-determination, extending it only to the indigenous nationalities.[80] The same is once again true if one goes to examine the organization of the region's Constitutional Interpretation Commission which is organized with a total seat of twenty members in which each indigenous nationality sends 4 representatives.[81]

From the above constitutional provisions it is plausible to argue that the Region's Constitution makes an intentional stratification between indigenous nationalities and non-indigenous communities of the region. The Constitution uses "indigenous nationalities" for the region's native identities and "other peoples" for the non-indigenous communities. In the same way, it is possible to argue that, when Article 9 of the Constitution uses the term "peoples" to

[79] FDRE Cons. *supra* note 2, Art. 50.
[80] BGRS Revised Cons., *supra* note 8, Art. 39.
[81] *Id.*, Art.71.

confer sovereign power over the region, it includes the indigenous nationalities and non-indigenous communities. Affirming this stance, Article 45 (3) of the Constitution stipulates the promulgation of additional laws following the Constitution to protect the special need for representation of the non-indigenous communities in the region. The recognition given to the non-indigenous communities can also be firmly argued from the preamble of the Constitution which mentions the region's "nationalities and peoples."

However, article 2 recognizes indigenous nationalities to own the regional state, and Article 39 only permits indigenous nationalities to benefit from the right to self-determination in the region. Therefore, ethnically based federations are rendered 'false federations', in which the socioeconomic and political consequences to the polity are calamitous. Such a situation will breed all sorts of inter-ethnic disharmony and mistrust as there would not be fair resource and power sharing between indigenous and non-indigenous ethnic groups within the region. This will also stir up nationalist sentiments among territorially concentrated ethno-national groups which their elites and nationalist leaders could use to stage secession claims by excluding non-indigenous ethnic group in the development of locally specific socio-political lifestyle such as self-identification with the local language, creation of ethnic-based political parties, resource utilization and so on. One of the natural consequences of ethnonational federations is that all questions of power and resource sharing which are federal political matters automatically become ethnic questions. That is why the non-indigenous ethnic groups repeatedly suffer from arbitrary eviction from their home and land in the region. [82]

[82] There had occurred massive arbitrary eviction and killing of the non-indigenous rural peasants of the Amhara and Agewu ethnic group in the Benishangul-Gumuz Region in 2013, 2017, 2018, 2019, and 2020.

2.2. Land Ownership and Its Implication on Recognition of Land Rights of the "Non-indigenous"

When the FDRE constitution was enacted in 1995 it declared that "… all rural and urban land, as well as all natural resources, is exclusively vested in the state and the people of Ethiopia. The land is a common property of the NNPs of Ethiopia and shall not be subject to sale or other means of transfer."[83] Depending on the above constitutional principle, the nature of the current land ownership and related land rights of non-indigenous peasants need to be clarified. Ownership right over land resources is given to the ethnically autonomous state and the peoples of Ethiopia. At the same time it declares that land is the *common property of NNPs of* Ethiopian ethnic groups.[84] Before addressing the land rights of non-indigenous peasants, it is critical to understand state and people's ownership. Here there are two possible arguments raised by different scholars. Many of them favor conceptualizing land ownership as being under State ownership because the state acts on behalf of the people.[85] Others treated land as being under joint ownership of the state and people.[86] As noted by Damite, two possible meanings can be given to the state and people ownership.[87] Initially, it may be argued that there is no distinction between state and people and the Constitution uses these

[83] FDRE Cons., *supra* note 2, Art. 40.
[84] *Id.*
[85] Achamyeleh Gashu, *Peri-Urban Land Tenure in Ethiopia',* Doctoral Thesis in Real Estate Planning and Land Law, Royal Institute of Technology, (2014), p.10.
[86] Daniel W. Ambaye: Land Right and Expropriation in Ethiopia, *Springer International Publishing*, (2015), p.4; Devereux Stephen et al, 'Too Much Inequality or Too Little? Inequality and Stagnation in Ethiopian', *Institute of Development Studies Bulletin*, Vol. 36 No. 2, (2005), p.121.
[87] Melesse Damite, as cited in Brightman G/Michael, *The Role of Ethiopian Rural Land policy and Laws in Promoting the Land Tenure Security of Peasants: A Holistic Comparative Legal Analysis* (LLM thesis, Bahir Dar University, School of Law, (2013).

terms to mean that land is a public property. The second thought is that the Constitution considers state and people separate entities so that land can be owned jointly. Here, the logical question raised is what is joint ownership which is owned by the above two legal entities? Joint ownership right denotes two or more persons persons jointly exercise, over the same object, all elements of ownership right.[88] Hence, if any benefit accrues from land resources, the concerned groups of NNPs of Ethiopia and the state must share the benefit. However, these scenarios in democratic government complicate the function and relationship of the state and people.

The nature of land ownership resembles public ownership. First, article 89/5 FDRE Constitution provided that the "Government must hold, on behalf of the People, land and other natural resources and to deploy them for their common benefit and development." Second, the constitutional prescription regarding acquisition of land by private investors based on payment arrangements and without affecting the common ownership rights of NNPs of Ethiopia signify that the nature of ownership of land is public ownership.[89]

The next issue worth clarification is the message of common property and who are NNPs of Ethiopia who exercise common property rights over the land under the current Ethiopian federal arrangement. Exploration of the above two questions gives the response on the nature of ownership issue on the one hand and land rights of non-indigenous peasants on the other hand. As, discussed above, to understand the land right of non-indigenous peasants the prime task is who are NNPs of Ethiopia under the ethnic federal system? The cumulative reading of article 39/5 and the preamble of the FDRE Constitution, NNPs of Ethiopia are a group of people formed based on their

[88] Daniel Behailu, Transfer of Land Rights in Ethiopia towards sustainable development policy framework, *Eleven International Publishing*, (2015), p.185

[89] FDRE Cons., *supra* note 2, Art. 40/6.

common language, culture or similar or customs, having a belief in common or related identities, common psychological makeup, and who inhabits an identifiable and predominately live on contiguous territory. This group of people owned land resources and land is *undivided common property of groups of NNPs in Ethiopia*.[90] Here one can understand land ownership is a group right and impossible for NNPs of Ethiopia to directly control and administer the land resources individually rather than exercise via ethnic-based regional governments. This depicts that an individual who belongs to NNPs in a certain region will have ownership right on land and can exercise his/her land right.

Following the identification of the groups of people who owned land, the next logical question is can non-indigenous ethnic groups residing in the federation unit claim membership to a group and benefit from the common property of land resource of NNPs of Ethiopia. Hence, the concept of common property is tied to group membership, it is not *everybody's property*; rather, it implies that the potential resource users can exclude those who are not members of group owners.[91] In other words, it refers to a resource owned collectively by all community members in which all members have equal rights to use the resource and the right to exclude non-members.

In general, the provision of the FDRE constitution regarding land rights lack clarity and have inherent structural problems to include and balance the land rights of a non-indigenous ethnic group with the group right of NNPs of Ethiopia over land resource, that has contributed for arbitrary eviction of non-indigenous peasants. First, the existing land resource is found in an ethno-linguistically arranged state on the one hand, and the common property of

[90] *Id.*

[91] Richard C. Bishop & S. V. Ciriacy-Wantrup, 'Common Property as a Concept in Natural Resources Policy', *Natural Resources Journal,(*1975), Vol. 15, iss4/7, p.715.

those ethno-linguistically identified NNPs of Ethiopian ethnic group on the other hand. Second, the primordial identification of NNPs of Ethiopian ethnic groups creates an ethnic boundary that excludes the non-member of the identified ethnic groups.[92] Third, ethno-linguistically identified NNPs of the Ethiopian ethnic group have ultimate sovereign power over their affairs, including land resources. Such intricacy emanates from the definition given for NNPs and the territorial implications of ethnic federalism introduced in the 1990s.[93]

However, when one carefully scrutinizes the design of the Constitution of each regional state there is a direct distinction and definition given for the indigenous and non-indigenous ethnic groups regarding different socioeconomic and political rights. Hence, establishing an ethnic federal system was designed to decentralize power and resources and resolve the age-old questions for greater inclusion of different ethnic communities in the economic and political affairs of state institutions in Ethiopia.[94] This decentralization of power would empower ethnic groups to determine their destiny via the right to self-determination freely. Therefore, giving land as a common property of NNPs of Ethiopia and administration and utilization of land resources can find a concrete expression through an ethnically autonomous regional state.[95] For example, Article 8 of the revised Constitution of Oromia grants sovereign power exclusively to the "*people of the Oromo Nation.*" Article 39 of this Constitution reserves the right to self-

[92] Henry E. Hale, 'Explaining Ethnicity', *Comparative Political Studies'*, Vol. 37 No. 4, (2004), p. 460.
[93] Lavers, *supra* note 74, p.463.
[94] Tilahun Weldie Hindeya, 'Large-scale agricultural land acquisitions and Ethiopia's ethnic minorities: A test for the rule of law' *African Human Rights Law Journal*, Vol. 18, (2018), p.349.
[95] *Id.*

determination to the "*people of the Oromo nation*". [96] This shows that the right to exercise self-determination including the land resource as provided by the regional constitution is reserved for the "Oromo people", excluding large numbers of non-indigenous ethnic groups from exercising the right to self-determination.[97] Similar provisions are also included in articles 9(1) and 39 of the Somali regional state Constitution.[98] Furthermore, article 46 of the Gambella Regional State Constitution identifies some ethnic groups as a "founder nation" of the region while the rest of the people are referred to as the "*non-founder nations."*[99] As noted above, Article 2 of BGRS's revised Constitution has made a clear distinction between indigenous and non-indigenous ethnic groups in which ownership right for the region is given to the five indigenous nationalities by denying non-indigenous ethnic group. Here, the concept of ownership includes a bundle of rights. Ownership of the region is not only limited to giving a prerogative right on the indigenous nationalities' social and political rights based on the region's ethnolinguistic arrangement but also includes the prerogative rights of the indigenous nationalities on economic rights which basically assumes land resources. This right is further strengthened by Article 39 of the Constitution that unequivocally delimits the various aspects of the right to self-determination extending it only to the indigenous nationalities as it declares "ownership rights of land resource found in the region is given to indigenous nationalities to the region."[100]

[96] The ORS Revised Cons., *supra* note 18, preamble, para 1 and Art. 8.
[97] *Id.*, Art.39.
[98] The SRS Revised Cons., *supra* note 18, arta.9&39, preamble paras. 1-4
[99] The Gambella Peoples National Regional State Revised Constitution, Proc. No. 27/2002 [hereinafter GPNRS Revised Const.], Art. 46 (1).
[100] BGRS Revised Cons., *supra* note 8, Art. 39.

In the Ethiopian context, both internal and external aspects of self-determination are unconditionally included under article 39 of the FDRE Constitution. The former aspect of self-determination within the federation signifies the right to use and develop one's language, and promote one's culture and history (socio-cultural self-determination). Besides, NNPs of Ethiopia have the full measure of self-government that allows each the right to establish organs of the state to run their affairs in the territory they inhabited and to be represented fairly in the organs of the federal government (political self-determination).[101] However, the issue of land resource is not explicitly dealt with in article 39 of the FDRE Constitution. However, when one reads the provisions of article 40 of the same Constitution economic self-determination is recognized for NNPs of Ethiopia. First, a land resource is recognized as a group right by proclaiming land as a common property of NNPs of Ethiopia and autonomous ethnically structured states administer this common property of land resource. Second, ultimate sovereign power is given for those primordially identified ethnic groups in their region by allowing self-rule to exercise their affairs. Third, when one of ethnically arranged state wants to secede from the federation, it can exercise without any limitation, which refers to the external aspect of self-determination.

In line with the constitutional principle that creates free access to rural land, the federal rural land administration and use proclamation declares that "peasant farmers and pastoralists engaged in agriculture for a living shall be given rural land free of charge" (Art. 5(1(a). A person, above the age of 18 years may claim land for agricultural activities. This principle of free access to rural land has also been reproduced in the regional land laws.[102] The

[101] FDRE Cons., *supra* note 2, Art. 39.

[102] See The Revised Tigray National Regional State Rural Land Administration and Use Proclamation, Proclamation No. 136/2007. Tigray Negarit Gazeta. Year 16 No.1.Art. 5(1); The Revised Amhara National Regional State Rural Land Administration and

conditions attached to this right are: first, the person must be willing to engage in agricultural activities. In other words, agriculture must be his/her main means of livelihood or profession. Secondly, s/he must reside where the agricultural land is located. Although this principle is not clearly seen in the FDRE Rural Land Administration and Use Proclamation (RLAUP), Regional RLAUPs have envisaged it.[103] Thus, age, residency and profession are the three important conditions to get rural land in Ethiopia. Since there is a shortage of agricultural land in rural areas, because of population pressure, giving land to those who live elsewhere (absentee owners) and those who earn income from other professions is not advisable. The criticisms raised against this rule are first, the principle of free access to rural land does not, in reality, work for the shortage of land in rural areas. Second, residency requirements in the law, land regulatory organs, government officials, and community use nativity as indigenousness to the region based on the ethnic-based federal arrangement. Thirdly, the person requesting land must attain a majority, 18 years and above (Art.5) (1)(b).

Under the current ethnic federalism, each regional state is structured based on the criteria of ethnicity (languge, identity and the like). The primary goals of regional state constitution including BGRS Constitution is designed to fulfil the interst of spesfic ethnic group- the so called indigenous ethnic group. Then, all regional laws, policies and institutional arragnments are designed in

Use Proclamation, Proclamation No. 133/2006. *Zikre Hig. Year 11, No.*18.Art. 5(2);Oromia Rural Land Use and Administration, Proclamation 130/2007. Art. 5(1); The Southern Nations, Nationalities and Peoples Regional State Rural Land Administration and Utilization Proclamation, Proclamation 110/2007, Debub Negarit Gazeta, Art. 5(1).

[103] See for example the Amhara National Regional State Rural Land Administration and Use Proclamation (hereinafter ANRS RLAUP) that uses the phrase "any person residing in the region…" as a condition to get agricultural land (Art.5(2), 6(1), 7(1); The Tigray National Regional State (hereinafter called Tigray RLAUP) uses similarly words like "any resident of the region" (Art. 5(1)

the interst of that specific ethnic group in the region. This arragnment in regional states would bring discrimination based on identity, i.e. discrimination against "non-indegiouness".[104] The discrimination is manifested in various forms including denial of access to arable land the region, and exclusion with respect to various socio-economic and political rights.[105]

The land right of NNPs of the region is one of the democratic right of ethnic groups.[106] Land resources are exclusively given to the region's regional state and indigenous nationalities.[107] BGRS rural land proclamation assures peasants, irrespective of whether (indigenous or non-indigenous), that they are able to access agricultural land through government allocation when they fulfill the requirement of age, interest to engage in agriculture and his/her means of livelihood depends on agriculture, and residency.[108] Here, beyond the two conditions attached under the FDRE RLAUP, various regional state rural land administration and use proclamations (hereafter Regional state RLAUP) added residence as a prerequisite to access arable land.[109] The reason that different regional states in general and BGRS RLAUP in particular attached the condition may emanate from scarcity of agricultural land in a rural area, so it may not be feasible to give land to those who are living somewhere else. Second, there may be a circumstance that people who have land in one region may move to the other region to claim an additional

[104] Tsegaye Regassa, 'Sub-national Constitutions in Ethiopia: towards Entrenching Constitutionalism at State Level, *Mizan Law Review*, Vol. 3 No.1, (2009), p.34.
[105] BGRS revised Cons., *supra* note 8, Art.11-44.
[106] *Id.*, Art. 40.
[107] BGRS revised Cons., *supra* note 8, art 40/3.
[108] Benishangul-Gumuz Amended Rural Land Administration and Utilization Proclamation No.152/2018, preamble para.5.
[109] See for instance Amhara Revised Rural Land Administration and Use Determination Proc. No. 252/2017, Art. 11.

plot of arable land. Despite the above two justifications the attached conditions have their inherent problems under an ethnic federal arrangement. Because when the regulatory organ of the regional state enacts and enforces regional laws they use "residency requirement by interpreting it as "indignity of a certain region" and deny land rights to peasants who are not indigenous to the region. Such types of the problem happened in BGRS in 2005,[110] and also repeated in 2017.[111] The same problem happened in the former South Nation, Nationality and Peoples Regional State at Gura Farda Woreda in 2012 which resulted in thousands of non-indigenous peasants of the Amhara ethnic group in the region being officially evicted from their landholding right under the pretext of illegal occupation. So the implication of ownership to the region for the identified indigenous nationalities resulted in conceptualization of the existing land and related resources becoming the undivided common property of the five indigenous nationalities. The pretext of indigenous vs.non-indigenous ethnic group classification is used to exclude and undermine the right claimed by non-indigenous peasants and landholding right is given for indigenous peasants.[112]

The question here is whether it is possible to claim and enjoy land right without having ownership right over the land resource which identified ethnic groups in the region own. Here, land rights of non-indigenous peasants remain up to the mercy of the regional state and indigenous ethnic groups. The utilization and administration of land resource benefits are given to the concerned indigenous nationalities using the legal, political and regulatory institutions for their advantage. That is why Endrias Eshete noted that to

[110] Daniel, *supra* note 86, p. 76.
[111] There were forceful eviction of non-indigenous peasants in Kamashi Zone, in Belo Jeganfoy Woreda.
[112] Interviewed Mr. Sintayehu Tadesse, Director of Benishangul-Gumuz Regional State Rural Land Administration and Use Directorate, March11, 2022.

confer the right to give sovereign power and self-determination up to secession for ethnonational group is to grant that a regional state's common property rights take priority over the property rights of non-indigenous peoples over land resources.[113] On the same vain, under BGRS revised constitution, economic self-determination including the utilization and administration of the land resource is one aspect of the rights identified to indigenous nationalities as inferred from articles 2&39 of the regional revised Constitution.

However, this right is not extended to non-indigenous peoples which directly affect the nature of the ownership and related land right of non-indigenous peasants. In such circumstances, all land-related rights were delineated and implemented based on the interest of indigenous nationalities. Land resource found in BGRS is given to the identified indigenous nationalities. Therefore, the dilemma of land policy and land rights of non-indigenous peasants continued and the region has no mechanism to balance the land right claimed by non-indigenous peasants on the one hand and the group rights of indigenous nationalities over land on the other hand, which ultimately bring land tenure insecurity and ethnic conflict in the region.[114] On the one hand, there is a direct contradiction between the universal principles of access to land and land rights of all Ethiopian peasants and the territorial implications of ethnic federalism on the other hand.[115] Hence, when the group land rights of indigenous people contradict with the non-indigenous ethnic group rights, the constitution gave priority for the group rights of indigenous peoples since the

[113] Endrias Eshete as cited in Lavers, *supra* note 74, p. 469.
[114] Mesfin Gebremichael, Federalism and Conflict Management in Ethiopia: Case Study of Benishangul-Gumuz Regional State, (Submitted for the Degreeof Doctor of Philosophy, University of Bradford, 2011), p.223.
[115] Lavers, *supra* note 74, p. 469.

FDRE Constitution gives priority to group rights.[116] The contradictions exposed non-indigenous peasants to insecurity, and are marginalized when the law operates on the ground via the functionary of ethnically arranged *kilili*.[117] Non-indigenous Ethiopian peasants are floated with no homelands for exercising their land rights, unlike indigenous peasants, who exercise the full measure of their land right via the functionary of membership to a certain ethnic group.[118] This is incompatible with the constitutionally recognized right in which every citizen has "…the right to engage freely in economic activity and to pursue a livelihood of his choice anywhere within the national territory and freedom of arbitrary eviction from their land holding."[119] Even it discards the general notion of citizenship rights of an individual within the country.

3. Protection against Arbitrary Eviction

Before exploring the legal protection of unlawful eviction of non-indigenous peasants in our context, it is important to see what forceful eviction implies. The UN Committee on Economic, Social and Cultural Rights (CESCR) defines forced eviction as the: "*permanent or temporary removal against the will of individuals, families or communities from their homes or land, which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.*"[120] People are often left homeless and destitute, without means of earning a livelihood, or effective access to legal or other

[116] FDRE Cons., *supra* note 2, preamble para.1.
[117] Beza, *supra* note 63, p. 39.
[118] Assefa, *supra* note 70, p.7.
[119] FDRE Cons., *supra* note 2, Art.41. .
[120] General Comment 7, 'The Right to Adequate Housing (Art. 11.1 of the Covenant): Forced Evictions', United Nations Committee on Economic, Social and Cultural Rights, (1997), at: http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+Comment+7.En?OpenDocument.

remedies. Forced evictions are often associated with physical and psychological injuries with specific impacts on targeted ethnic groups, women, children, persons already living in extreme poverty and other marginalized groups.[121] The practice of forced eviction denotes the involuntary removal of persons, families and groups from their property and land rights which brings global, regional and national crises on economic, social and fundamental human rights and freedoms.[122] Freedom from forced eviction and reinforcing this substantive right are basic rights under different international instruments such as UDHR, ICCPR, CEDAW, and ICESCR.[123] Those different international instruments impose negative and positive obligations on the state parties including Ethiopia to protect individuals or groups of people from forceful eviction.[124] Ethiopia as a part of the international community ratified different international instruments which become part and parcel of the law of the land that deals with the prohibition of forceful eviction.[125]

Hence, states are always legally responsible for forced evictions in their jurisdiction. Forced evictions can always be ascribed to states' specific decisions, legislation, or policies or the failure of states to intervene to halt forced evictions by third parties.[126] So when we come to our context as

[121] Committee on Economic, Social and Cultural Rights, General Comment No. 7 (1997), Forced Evictions Fact Sheet No. 25, Rev. 1 (Geneva 2014).
[122] *Id.*
[123] United Nations basic principles and guidelines on development-based evictions and displacement, Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living A/HRC/4/18, (1997).
[124] Transparency International, 'Forceful Evictions: an Intersection between Corruption, Land and Human Rights: Case Study of the Kenyan Perspective', *African Journal of Land Policy and Geospatial Sciences*, (2018), p.104.
[125] FDRE Cons., *supra* note 118 , Art.9/4.
[126] The Centre on Housing Rights and Evictions (COHRE), 'Successes and Strategies: Responses to Forced Evictions', Geneva, Switzerland, (2008), p.7

provided under article 9/4 of the FDRE constitution, Ethiopia ratified different international instruments which become part and parcel of the law of the land that deals with the prohibition of forceful eviction.[127] Beyond the international instruments, article 40/4 of the FDRE Constitution unequivocally prohibits forceful eviction. It states that ‘‘Ethiopian peasants have the right to…protection against eviction from their possession. The implementation of this provision shall be specified by law.”[128] Following this constitutional prohibition, all regional state constitutions incorporated provisions against forceful eviction of peasants from their landholding rights.[129]

Freedom from arbitrary eviction needs early or structural prevention which involves the creation of regimes or norms and standards of behavior to prevent resource and identity-based conflict, when certain socioeconomic and politically concerned land laws and policies are enacted. However, the lack of inclusive national land policies and ill-defined land rights results in the violation of rural peasants' fundamental rights and freedoms of rural peasants, excluding different ethnic groups from the benefits of land ownership.[130] Hence, discrimination related to ethnicity and natural resources can be manifested in three forms. At an individual level, it concerns the behavior of individuals of one ethnic group that treats members of another ethnic group differently/harmfully and involves exclusion.[131] From institutional level perspective, the policies of institutions dominated by politically autonomous ethnic groups and the behavior of individuals who implement these policies

[127] FDRE Cons., *supra* note 2, Arts. 9&13.
[128] *Id.*, Art.40/4.
[129] Amhara National Regional State The Revised Rural Land Administration and Use Determination Proclamation No.252/2017, Art.2/24.
[130] Robin Palmer, Literature Review of Governance and Secure Access to Land, *Governance and Social Development Centre,* (2007), p.5.
[131] John Schelhas, 'Race, Ethnicity, and Natural Resources in the United States ', *Natural Resources Journal*, Vol.42, (2002), pp.726-728.

and control institutions may treat members of other ethnic groups differently.[132] From structural perspective, discrimination signifies the policies designed for a certain ethnic group so that non-member ethnic groups become subordinate and protected differently/harmfully including arbitrary eviction.[133]

Freedom from arbitrary evictions of non-indigenous rural peasants under an ethnic federal structure requires managing ethnic relations, fostering democratization, political representation, responding to population displacement, protecting human rights, ensuring good governance, exercising the responsibility to protect, and proactively prevent arbitrary evictions of non-indigenous ethnic groups of rural peasants. Hence, the government should refrain from taking any draconian legislative and administrative measures which result in the arbitrary eviction of non-indigenous rural peasants in the one hand, and impose positive obligation to espouse all possible programs that protect rural peasants from eviction by the government itself on the other hand.[134] States are always legally responsible for arbitrary evictions on their jurisdiction because it always originates from the specific decisions, legislation, or policies of states, or the failure of states to intervene to halt forced evictions by third parties.[135]

The constitutional immunity against eviction given to the rural peasants signifies that every level of the government must protect peasants from the risk of losing their landholding right. This entails that existing land laws and policy must address and give legal guarantee for the land right of all rural

[132] *Id.*
[133] *Id.*
[134] United Nations, Forced Evictions , Fact Sheet No. 25/Rev.1, New York and Geneva, (2014), p 4-10.
[135] The Centre on Housing Rights and Evictions (COHRE), '*Successes and Strategies: Responses to Forced Evictions'*, Geneva, Switzerland, (2008), p.7.

peasants. The law must be able to counter actual and potential threats which amount to discrimination and harassment that lead to the eviction of rural peasants. On the other hand, when this right is violated, the state must provide all remedial mechanisms, irrespective of the nature of the land tenure system. Hence, the realization of the principles of free access to land and the protection of land rights of non-indigenous peasants can be achieved through constitutional guarantee, legislative protection, judicial application, and executive implementation.[136]

Legislative protection ensures that no violation can occur when non-indigenous peasants exercise his/her land right. If there is a violation of rights, the application and interpretation of the land right of non-indigenous peasants according to the law give assurance that there is a possible legal remedy by taking one's case in courts of law. However, the question is can courts exercise their power to adjudicate cases relating to the violation of a constitutional right against arbitrary eviction of non-indigenous peasants under the current ethnic federalism. Suppose the answer is in the affirmative in which case executive implementation relates to the certainty that all judicial injunctions and orders will be complied with, leading to an actual redress for the victim and a real sanction on the perpetrator of the violation or abuse.[137]

Hence, protection against arbitrary eviction of peasants needs detailed rules and regulations that answer specific issues which emanate from eviction. However, there are no detailed laws that address eviction and there is no legal mechanism has been devised for that porpose at both levels of

[136] Tsegaye Regassa, 'Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia', *Mizan Law Review*, Vol. 3 No. 2, (2009), p. 292.

[137] Yonas Girma, Implication of Ethiopian Federalism on the Right to Freedom of Movement and Residence: Critical Analysis of the Law and the Practice, (LL.M thesis, AAU, 2013), p.48.

governments.[138] Even the act of eviction itself is not acknowledged as a criminal act in the FDRE revised criminal code. However, when there is an expropriation for public purpose the affected persons have both substantive constitutional right and procedural mechanism designed to acquire "compensation commensurate to the value of the property."[139]

Conclusion

The article examines land law and policy responses towards better protection of property rights and immunity against arbitrary eviction of non-indigenous rural peasants in BGRS in the context of ethnic federalism. The article reveals that though protection from arbitrary eviction of rural peasants from their land right is recognized without any dichotomy, the current land law and policy cannot protect these rights due to the intermingling of ethnicity and land resource under the current ethnic federal arraignment. BGRS Constitution noticeably differentiates between indigenous nationalities and other peoples of the region in terms of "ownership" of the region. The dichotomy of indigenous-non-indigenous nationalities excluded non-indigenous communities in the economic, political and socio-cultural rights responsible for arbitrary eviction. Such problems has occurred in BGRS in 2005, 2017, 2018, 2019, and 2020. The same problem happened in the former South Nation, Nationality and Peoples Regional State at Gura Farda Woreda in 2012 which resulted in more than thousands of Amhara ethnic groups in the region being officially evicted from their landholding right under the pretext of illegal settlement. By vesting the ownership of the region for the identified indigenous nationalities, the existing land and related resource become the undivided common property of the five indigenous nationalities.

[138] *Id.*, p.111.
[139] FDRE Cons., *supra* note 2, Art. 40/8.

The classification of the indigenous-non-indigenous ethnic group to the region is used to exclude and undermine the right claimed by non-indigenous peasants. The protection of non-indigenous rural peasants from arbitrary eviction in Ethiopia in general and within BGRS in particular remain appalling. There is arbitrary eviction and systematic discrimination of non-indigenous peasants in the region. Such systemic discrimination related to ethnicity and land rights can be manifested in three perspectives. From an individual perspective, discrimination refers to the behavior of individuals of one ethnic group that treats members of another ethnic group differently/harmfully and involves exclusion. From institutional perspective, the policies of institutions dominated by politically autonomous ethnic groups discriminate other ethnic groups. The behavior of individuals who control an institution and implement these policies treats members of other ethnic groups differently. From a structural perspective, the policy may be designed for certain ethnic group and discriminates the non-indigenous ethnic groups that are treated as subordinate. Therefore, the federal and BGRS Constitutions need to be amended to accommodate the fundamental rights and freedoms of non-indigenous rural peasants.

The Taxation of Miscellaneous Income Sources under the Federal Income Tax Proclamation of Ethiopia: A Critical Analysis

Belete Addis Yemata*

Abstract

Schedule 'D' of the Federal Income Tax Proclamation No. 976/2016 taxes income sources that are not taxable under the other income tax schedules. The objective of this article was to create a better understanding of the taxable units and tax bases of the taxing provisions of this schedule and also to explain the many changes introduced under the current Schedule D. To this end, it mainly depends on the doctrinal legal research methods, by which it critically analyzes the relevant legislation, literature, and model tax rules. The discussion revealed that the current Schedule 'D' has undergone significant changes. Non-resident taxation is regulated in detail; they are taxed under exclusive provisions in the context of permanent establishment and as residents for their Ethiopian-source income. New tax bases are also added, such as repatriated profit and undistributed profit. The taxation of residual income is part of this introduction. The proclamation also came up with informative definitional provisions for a management fee, technical fee, interest, dividend, and royalty. These not only ease the characterization of the taxpayers and tax bases but also widen the scope of the respective taxation of these sources. The changes introduced in capital gains taxation are also significant in many ways, including widening the assets subject to capital gains tax and providing relatively detailed provisions for the valuation of capital gains. All these changes will be meaningful if the tax administration

* LL.B., LL.M. in Business and Corporate Law, Lecturer at School of Law at University of Gondar, PhD sudent at University of Melbourne.

on the ground is also reformed to reflect the positive changes introduced under the tax laws.

Keywords: Income Tax Proclamation, Schedule 'D', Other Income, Taxpayer, Tax base.

Introduction

The Federal Income Tax Proclamation No. 979/2016 (ITP) recognized five schedules: Schedules A, B, C, D," and E.[1] Only income that comes within the first four schedules is subject to tax, while schedule 'E' is not a taxing schedule but consists of income exempt from taxation in the first four schedules.[2] Schedules 'A', 'B', and 'C' have centered on a schedularization of income into three categories: employment, rental of buildings, and business income. However, several income sources do not fit one of these categories. Schedule 'D' is designed to capture these 'other/miscellaneous' incomes, which makes it a schedule of 'last resort'.

The ITP has introduced many changes to Schedule 'D' over its predecessor, including widening its scope or tax bases. There is a need to explain these changes and their significance and to point out gaps, if any, for further improvement. And establishing clarity in this regard and helping various stakeholders understand the essence of the provisions covered under Schedule 'D' is at the heart of this article. As a continuation of the author's commentary on the taxable units and tax bases of the ITP's income tax schedules, the discussion in this article also built around a critical analysis of how these two elements are characterized under the taxing provisions of Schedule D. The

[1] Federal Income Tax Proclamation No. 979/2016, Federal *NegaritGazzeta*, (2016), Art. 8 [hereinafter Income Tax Proclamation No. 979/2016].
[2] *Id.*, Art.65.

article largely employed a doctrinal legal research methodology by which it made a critical analysis of the relevant legislation, describing what the law is and the doctrinal interpretation of it. The author also made a review of related literature, model tax laws, and notes to strengthen its discussion and arguments.

To present the issues clearly, the rest of the article is organized into four main sections. Section one is dedicated to making brief introductory remarks about Schedule 'D' in terms of its basic features. The discussion under Section 2 is about non-resident taxation, while Section 3 discusses the newly introduced tax bases of Schedule D. Section four targeted the main amendments the ITP has brought to the pre-existing tax bases in Schedule D. The article closed its discussion with some concluding remarks.

1. Salient Features of Schedule 'D'

The first and most important feature of Schedule 'D' is that it is a 'miscellaneous' schedule. Schedules 'A', 'B', and 'C' have centered on a schedularization of income into employment, rental of buildings, and business income. However, there are income sources that do not fit one of these categories, and there come concerns as to the specification and taxation of these amounts. The legislative method by which these concerns may be addressed is to put these miscellaneous receipts under a certain schedule.[3] This is what Schedule 'D' is for.

The schedule is designed to capture income sources not covered by other schedules. Thus, it taxes only amounts not taxable under the other schedules, and any amount liable to tax under another schedule is explicitly excluded

[3] Lee Burns and Richard Krever, Individual Income Tax, *in* Victor Thuronyi (ed.), *Tax Law Design and Drafting*, International Monetary Fund, Vol. 2, (1998), p. 30.

from the domain of Schedule D'.[4] Consequently, if an amount is found taxable under both Schedule 'D' and either of the three schedules, priority should be given to taxation of the amount under Schedules 'A', 'B', or 'C', as the case may be. The title of the schedule, 'other income', itself signifies its 'last resort' nature or that it concerns miscellaneous income sources. Given its application to unrelated income sources, the Schedule has proven itself to be flexible to accommodate new sources of income and has been a principal tool to broaden the tax base of the Ethiopian income tax system.[5] For instance, the ITP came up with sources new to the schedule such as windfall profit, undistributed profit, repatriated profit, and recharged technical fees and royalties. Moreover, Art. 63 of the ITP, which taxes any income that is not taxable under any of the schedules or other provisions of Schedule 'D', assures this motive of the government.

The second basic feature of Schedule 'D' is that it lacks unifying features.[6]

Schedules 'A', 'B', and 'C' have their own unifying features in terms of their taxpayers, tax bases, tax brackets, tax rates, and methods of tax assessment and collection. However, Schedule 'D' lacks such unifying features.

The taxpayers under the schedule are diverse, and unlike the first three schedules, schedule 'D' by and large provides differential treatment for resident and non-resident taxpayers of the same tax source. For instance, dividends, interest, royalties, management fees, technical fees, and insurance

[4] Proclamation No. 979/2016, *supra* note 1, Art. 64 (1) (a).
[5] Taddese Lencho, The Ethiopian Income Tax System: Policy, Design and Practice, PhD thesis, University of Alabama, (2014), p. 424.
[6] *Id.*, pp. 422-423. Though, the comments in this material were made for Schedule 'D' of the repealed income tax laws, their contexts are valid to the current one too.

premiums are subject to separate provisions depending on whether they are derived by a resident or non-resident.[7]

In terms of the tax base, the Schedule taxes a dozen of unrelated income sources.[8] What is common for these tax sources is that most (if not totally) are irregular earnings or they are event-based. In addition, many of its taxable incomes such as royalty, dividends, interest, and capital gains are 'investment incomes'. However, it also taxes incomes not fitting into this category such as winnings from games of chance and windfall profits. Concerning taxation of 'investment incomes' under a schedular income tax system, there are two broad approaches to the inclusion of investment income (some jurisdictions also use the term "property income" or "capital income") in gross income.[9] First, the inclusion rule could refer to investment income, which is then separately defined by reference to specific categories of income, such as dividends, interest, rent, and royalties.[10] Where capital gains on the disposal of investment assets are included in the income tax base, investment income may also be defined to include such gains. Alternatively, the inclusion rule may refer to specific categories of investment income rather than to a collective notion of investment income.[11] This is the approach chosen by the ITP; schedule 'D' has no definition for investment income, but for specific sources, we may consider it as 'investment income'.

As the schedule's tax bases are diverse, so are the tax rates. But the rates across the schedule have two commonalities: they are flat and relatively low.

[7] See Proclamation No. 979/2016, *supra* note 1, Arts. 51, 54-56.
[8] *Id.*, Arts. 51- 63.
[9] Lee Burns and Richard Krever, Taxation of Income from Business and Investment, *in* Victor Thuronyi (ed.), *Tax Law Design and Drafting*, International Monetary Fund, Vol. 2, (1998), p. 16.
[10] *Id.*
[11] *Id.*

In terms of methods of tax assessment and collection, the schedule uses a combination of withholding and self-assessment. Though many of its tax sources are dependent on withholding agents, sources from casual rentals, capital gains, windfall profit, undistributed profit, and repatriated profit are potential subjects to the regime of self-assessment.[12]

Third, the tax imposed under schedule 'D' is a final tax on the income concerned.[13] Consequently, the income is not aggregated with any other income of the person deriving the income, or once, the income is taxed under Schedule 'D', no more income tax is to be imposed on that income. This is because, as discussed above, any amount will be taxable under Schedule 'D' only if it is not taxable under the other Schedules. Unlike Schedules 'B' and 'C, but like Schedule 'A', the tax under Schedule 'D' is imposed on the gross income; no deduction is allowed for expenditures incurred or losses sustained to derive the income, except in one case, the tax on capital gains under Art. 59. And similar to the three schedules, exempt income is not part of the tax base under any of the provisions of Schedule D.[14]

2. Taxation of Non-Residents of Ethiopia

Non-residents are subject to pay income tax in Ethiopia if two cumulative preconditions meet.[15] First, they should be "non-residents of Ethiopia". The ITP defines resident, not non-resident; thus, a non-resident is a person not fitting the alternative tests of "a resident individual" under Art. 5 (2) or "a resident body" set out under Art. 5 (5). About the tests for "Ethiopian Resident", the ITP is clearer and more detailed than its predecessor, especially

[12] Proclamation No. 979/2016, *supra* note 1, Art. 64 (5).
[13] *Id.*, Art 64 (2).
[14] *Id.*, Art 64 (1) (b).
[15] *Id.*, Art. 7 (2).

because it discarded unclear and also seemingly repetitive alternative tests. For instance, to characterize an individual as an Ethiopian resident, the repealed income tax proclamation had a "habitual abode" in addition to a "domicile".[16] The former was not clear, including its difference with domicile. It also appeared to be a repetition given that an individual who stays in Ethiopia for more than 183 days in a year (either continuously or intermittently) is considered a resident.[17] The ITP avoids this confusion by retaining "domicile" while discarding "habitual residence".[18] Also, in determining 'body residents', the repealed Income Tax Proclamation used "principal office" in addition to "place of effective management".[19] The difference between the two was not apparent. The ITP retains a "place of effective management".[20] If a body has a principal office in Ethiopia, so will its effective management. The second precondition to taxing a non-resident is that the income it derived should be "Ethiopian source income". To qualify as such, the amount should fall under the lists in Art. 6 of the ITP. Here again, the ITP is more advanced than its predecessor. The latter had a simple list of generic income categories (employment income, business income, etc.) without providing the instances, these will be "Ethiopian sources."[21] However, the ITP provides specific tests for each taxable source to qualify as Ethiopian source income. This eased the task of characterizing a certain amount as Ethiopian or foreign income. Ethiopian residents are subject to tax for both their Ethiopian source and foreign income (they are taxable on their worldwide income).

[16] Income Tax Proclamation No. 286/2002, Federal *Negarit Gazeta*, (2002), Art. 5 (1) [hereinafter Income Tax Proclamation No. 286/2002].
[17] *Id.*, Art 5 (2).
[18] Income Tax Proclamation No. 979/2016, *supra* note 1, Art 5 (2).
[19] Income Tax Proclamation No. 286/2002, *supra* note 16, Art 5 (3).
[20] Income Tax Proclamation No. 979/2016, *supra* note 1, Art 5 (5).
[21] Income Tax Proclamation No. 286/2002, *supra* note 16, Art. 6.

Most importantly, though non-residents were subject to tax under the repealed income tax proclamation too,[22] the ITP came up with far clearer and expanded prescriptions about the taxation of non-residents.

The ITP taxed non-residents who earned "Ethiopian source income," which was a mandatory requirement, in three ways. The first is in an exclusive setting; it has emerged with provisions exclusively dedicated to taxing non-residents (Articles 51–53). The second is in the context of permanent establishment, whereby non-residents are imposed with tax if they derive income from their permanent establishment in Ethiopia (Articles 54 (2), 55 (2), 56 (2), and 62). The third one is when non-residents are imposed with tax under the same provisions designed for Ethiopian residents, but this time whether they have a permanent establishment in Ethiopia does not matter (Articles 10 (1), 13 (1), 18 (1), 57 (1), 58 (1), 59 (1), and 63). From these, this section discussed provisions exclusively enclaved for non-residents. The remaining two are touched on under sections three or four, as the case may be.

2.1. The main taxing provision of Ethiopian non-residents

The main provision under Schedule 'D' that is exclusively dedicated to taxing non-residents is Art. 51. It levies taxes on non-residents (individuals or corporations) who receive six types of income from Ethiopia: dividends, interest, royalties, management fees, technical fees, or insurance premiums. According to the drafter of the ITP, Professor Lee Burns, the separate taxation of these amounts is necessary largely for administrative reasons..[23] A non-resident deriving these incomes from Ethiopia may not have any physical

[22] *Id.*, Art. 3 (2).

[23] Drafter's Technical Notes on the Final Draft of the Federal Income Tax Proclamation No. 979/2016 (unpublished) [here in after, Drafter's Technical Note on ITP's Final Draft].

presence in Ethiopia (such as an office or employees) or may be present for only a short time (in the case of services). Thus, the income cannot be efficiently collected on an ordinary assessment basis of, for instance, Schedule 'C'.[24] Further, if these items of income were taxed on an assessment basis, there are difficulties in the allocation of expenditures (particularly expenditures incurred outside Ethiopia) as deductions in working out the taxable income of the non-resident. It is very difficult for the Authority to police the allocation of foreign-incurred expenditures as deductions against such income.[25] For these reasons, a separate tax is imposed on the income at the time it is derived by the non-resident with the tax collected from the payer of the income by withholding.[26]

The taxation under Art. 51 of the ITP requires two conditions. First, the income derived must have the character of one of the six types of sources listed in the provision. Second, the income must be from Ethiopian sources. These are highlighted below, one by one. But, before that, it is important to note that if the six income sources are attributable to a permanent establishment in Ethiopia of the non-resident, they are not subject to tax under Art. 51 but under Schedule 'C' or the other provisions of 'D', as the case may be.[27] Thus, there is a need to distinguish between a non-resident and a non-resident having a permanent establishment in Ethiopia. However, the mere fact that the non-resident has a permanent establishment in Ethiopia is not a ground to exclude it from Art. 51's taxation, but if the income concerned is attributable to the permanent establishment.

[24] *Id.*
[25] *Id.*
[26] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 89.
[27] *Id.*, Art. 51 (3). 'Permanent establishment' is defined under Art. 4 of the ITP. For details about this definition, see discussion *infra* sub-section 3.4.

Now, returning to the six taxable items, the first tax base of Art 51 is 'dividend', hence, when non-residents received 'Ethiopian source dividend', they are required to pay income tax in Ethiopia. Art. 2 (6) of the ITP lists the types of profit distributions considered as 'dividends'.[28] And a dividend will be considered as Ethiopian source if it is paid to a non-resident person by a resident body.[29]

The second is income from 'interest', which is defined under Art. 2 (16) of the ITP.[30] Income from 'interest' is considered an Ethiopian source if the interest is paid to a non-resident by a resident of Ethiopia or by a non-resident as an expenditure of a business conducted by a non-resident through a permanent establishment in Ethiopia.[31]

Thirdly, "royalty," the characterization of which is provided under Art. 2 (20) of the ITP.[32] If the royalty is paid to a non-resident by a resident of Ethiopia or by a non-resident as an expenditure of a business conducted by the nonresident through a permanent establishment in Ethiopia, it is an 'Ethiopian source income'.[33]

The fourth tax base of Art 51 is 'management fee', which is one of the newly introduced tax bases by the ITP. 'Management fee' is defined as an amount paid as consideration for the rendering of any managerial or administrative

[28] For details about the definition of 'dividend' and its taxation, see discussion *infra* sub-section 4.2.
[29] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 6 (4) (a).
[30] For details about the definition of 'interest' and its taxation, see discussion *infra* sub-section 4.3.
[31] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 6 (4) (g).
[32] For details about the definition of 'royalty' and its taxation, see discussion *infra* sub-section 4.1.
[33] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 6 (4) (g).

service, other than an amount that is employment income.[34] It is an amount a non-resident received in exchange for managerial or administrative services, but not as an employee. The ITP has no clear benchmarks' to distinguish managerial or administrative service from employment service. We can approach this in that if the service provider fits the ITP's characterization of an employee (Art. 2 (7)), the amount received in exchange for the services is employment income, but, if the same services are given through forms other than employment (like as an independent contractor), it is a management fee.[35] If the services are provided by a body, there will be no confusion about whether to consider it a management fee, as employees are always natural persons..[36] Non-residents will pay tax on management fees if the source is Ethiopia, and this will be the case if the fee is paid by a resident of Ethiopia or a non-resident as an expenditure of a business conducted by a non-resident through a permanent establishment in Ethiopia.[37]

Fifthly, 'technical fee', which is defined as "a fee for technical, professional, or consultancy services, including a fee for the provision of services of technical or other personnel."[38] It will be considered Ethiopian source income if the fee is paid by a resident of Ethiopia or by a non-resident as an expenditure of a business conducted by the non-resident through a permanent establishment in Ethiopia.[39] Previously, to tax 'technical fee' the location of

[34] *Id.*, Art. 2 (17).
[35] See Belete Addis, Characterization of Taxable Units and Tax Bases under the Income Tax Schedules of Schedule 'A' and 'B' of the Federal Income Tax Proclamation of Ethiopia: A Commentary, *Bahir Dar University Journal of Law*, Vol. 8, No. 1, (2017), p. 55.
[36] The drafter noted that a management fee is commonly charged by a parent company to a subsidiary for centralised management services provided by the parent company to the subsidiary. Drafter's Technical Note on ITP's Final Draft, *supra* note 23.
[37] Proclamation No. 979/2016, *supra* note 1, Art. 6 (4) (g).
[38] *Id.*, Art. 2 (23).
[39] *Id.*, Art. 6 (4) (g).

rendition of the services was material only which fee given for technical services rendered outside Ethiopia was taxable.[40] In effect, non-residents who received a technical fee for technical services they rendered in Ethiopia were not paying tax on it.[41] This is no more the case as the ITP discarded the 'location' requirement; whether a non-resident rendered the technical services to a resident here in Ethiopia or abroad, it is taxable. The important element is whether the fee-paying entities are those stipulated under Art 6 (4) (g).

For technical fee taxation, it is important to know 'what constitutes technical services'. The repealed income tax Proclamation defined not 'technical fee' but 'technical service' (as "any kind of expert advice or technological service").[42] It was clear that the tax targeted a consideration made in exchange for technical services. However, the ITP expands the notion by including considerations for 'professional', 'consultancy', and 'other personnel' services as a technical fee. At the same time, it fails to define 'technical'/'technical service' which makes it difficult to precisely tell the scope of the provision. As long as the taxable item is a 'technical fee', the inclusion should be limited to 'professional' or 'consultancy' services that are 'technical' in nature. The issue was contentious even under the previous income tax system where the law had a definition for 'technical services'. Some withholding agents tend to restrict the tax to cases involving some highly technical or technological service and have argued that non-technical services such as consultancy and management services are not the subject of

[40] Proclamation No. 286/2002, *supra* note 16, Art. 32 (1).

[41] Taddese raised cases where non-residents come to Ethiopia for a brief period of time to provide technical services such as to Ethiopian Telecommunications on the installation of fiber optics; to Ethiopian Electric and Power Corporation on installation of electrical wires and dams, etc. These persons were not subject to tax for the income they derived from these services. See Taddese, *supra* note 5, p. 452.

[42] Proclamation No. 286/2002, *supra* note 16, Art. 32.

this tax.[43] The ITP's inclusion of "professional and consultancy services" in the absence of a definition for 'technical service' can only intensify the disparity. The definition also includes a fee for 'services of other personnel', which refers to a fee paid for the hiring out of labor.[44] Yet, unlike the definition of 'management fee', the definition of 'technical fee' does not exclude 'employment income' which may add up the potential confusion between the two.

Thus, it is important to have at least a guideline that prescribes 'technical services' for the ITP. It may be difficult to have one, but we can start by taking lessons from practices elsewhere. When we resort to the commentaries in this regard, 'technical' is understood as an activity that involves the application of specialized knowledge, skill, or expertise in respect of science, profession, or occupation.[45] However, it is not confined to mechanical or machine-driven tasks but includes social sciences, commercial managerial activity, and professional services.[46] In this context, "technical service" can be inclusive of performing consultancy and professional services on behalf of a client.[47] While 'consultancy' as a 'technical service' involves the provision of

[43] See Taddese, *supra* note 5, pp. 447-449.

[44] For example, it covers a fee paid by a subsidiary to a parent company for the secondment of an employee of the parent company to the subsidiary. Drafter's Technical Note on ITP's Final Draft, *supra* note 23.

[45] Tatiana Falcão and Bob Michel, Scope and Interpretation of Article 12A: Assessing the Impact of the New Fees for Technical Services, Reprinted from *British Tax Review Issue 4,* (2018), p.428.

[46] UN Committee of Experts on International Cooperation in Tax Matters, Tax Consequences of the Digitalized Economy, Fifteenth Session, Agenda item 5(c)(ix, (2017), p. 4, available at https://www.un.org/esa/ffd/wp-content/uploads/2017/10/15STM_CRP22_-Digital-Economy.pdf last accessed on 12 February 2022.

[47] Andrés Báez Moreno, The Taxation of Technical Services under the United Nations Model Double Taxation Convention: A Rushed – Yet Appropriate – Proposal for (Developing) Countries', *World Tax Journal*, Vol. 7, No. 3, (2015), p. 2.

advice concerning a particular field, in 'professional services' the professional can do all the things a consultant or technician does, and as such with the particular knowledge and skills, professional service is broader than consultancy and technical service.[48] Another difficulty the Ethiopian revenue authorities need to be aware of and take action on is drawing a line between 'technical services' and the sale of 'know-how'. According to the OECD and UN model tax rules, know-how contracts involve the transfer of the use of, or the right to use, property or know-how; while in technical services, a person does not transmit know-how, but rather uses industrial, commercial, or scientific experience as a tool for advising his customer.[49] In contrast to the technical service provider, the vendor of know-how sells the tool as such and not the solution.[50] Hence, 'technical services' relates to the provision of services to the customer with the use of know-how and not to the transmission of know-how as such.[51]

The last tax base of Art 51 is 'insurance premium'. This is a newly introduced income tax base. It is not defined under the ITP, so, it will have its ordinary meaning. Black's Law Dictionary defines "insurance premium" as the

[48] UN Committee of Experts on International Cooperation in Tax Matters, Seventh Session, Taxation of Services, Item 3 (a) (vi) of the provisional agenda, (2016), p.26, available at https://www.un.org/esa/ffd/wp-content/uploads/2016/10/12STM_CRP1_Services.pdf last accessed on 12 February 2022.

[49] UN Model Double Taxation Convention between Developed and Developing Countries, (as updated in 2017) [here in after, UN Model Tax Convention]; OECD Articles of the Model Convention with Respect to Taxes on Income and on Capital, (as updated in 2017), Art. 12 [here in after, OECD Model Tax Convention].

[50] When an enterprise provides services to a customer, it does not typically transfer its property or know-how or experience to the customer; instead, the enterprise simply performs work for the customer. See UN, Tax Consequences of the Digitalized Economy, *supra* note 46.

[51] *Id.*

consideration paid by the insured to the insurer for insurance protection.[52] Thus, if a non-resident insurer received an Ethiopian source insurance premium, it must pay tax in Ethiopia. This will be the case if the premium is paid to a non-resident relating to the insurance of risk in Ethiopia.[53] What is material here is the place of the risk being insured, not whether the insured is a resident or non-resident of Ethiopia.

2.2. Taxation of recharged technical fees and royalties

Art 52 of the ITP is another provision exclusively targeting non-residents, and a newly introduced prescription. It is about the technical services or leased equipment provided by a non-resident person (other than through its permanent establishment in Ethiopia)[54] to an Ethiopian resident (other than to its permanent establishment abroad) or a non-resident having a permanent establishment in Ethiopia.[55] As these instances are already covered under Art. 51, we may then ask, what the need for Art. 52 is. It is because, unlike the cases of Art. 51, under Art. 52 the non-resident technical service or lease provider received its payment not from a resident recipient of the service or the lease, but from another non-resident that is a related person of the recipient.[56] Thus, the one who received the technical service or the lease and the one paying for it are different. Then, when the related person that paid for the service or the lease (which is non-resident) charged the recipient (who is a

[52] Black's *Law Dictionary*, 8th ed., *s. v.* "Insurance premium". Ethiopia's Vehicle Insurance against Third Party Risks Proclamation No. 559/2008, Art. 2 (15) also defines 'Premium' as "the amount paid for an insurance policy."

[53] Proclamation No. 979/2016, *supra* note 1, Art. 6 (4) (d).

[54] *Id.*, Art. 52 (1) (a).

[55] *Id.*, Art. 52 (1) (b). The provision calls them 'recipient'

[56] *Id.*, Art. 52 (1) (c). Regarding, what constitutes 'related person' for the purpose of tax, see the Federal Tax Administration Proclamation No. 983/2016, Federal *Negarit Gazeta*, (2016), Art. 4 [hereinafter, Tax Administration Proclamation No. 983/2016].

resident or permanent establishment in Ethiopia) for it,[57] Art 52 will come into the picture to tax the non-resident related person on the recharged amount it received from the service or lease recipient.[58]

From the above explanation, it is clear that Art 52 has no new tax base for non-residents; it taxes technical fees or royalties received by non-residents like Art 51. Thus, the provision is just an integrity measure intended to prevent avoidance of the non-resident tax through centralized payments systems within multinational enterprises.[59] In absence of Art 52, it may be argued that the recharged amount is a reimbursement of expenses and not a technical fee or royalty. So, the effect of Art 52 is that the tax treatment of the recharged amount is the same as if the recipient of the services or leased equipment paid the amount direct to the non-resident supplier or it will be assumed as if the related person [directly] supplied the technical services or leased the equipment to the recipient.[60]

2.3. Taxation of non-resident entertainers

Art. 53 of the ITP deals with the taxation of non-resident entertainers. This is another new prescription the ITP introduced as part of its move toward detailed regulation of non-resident taxation. The principal taxpayers under this provision are a non-resident entertainer or group of non-resident entertainers who have derived Ethiopian source income from participating in a

[57] *Id.*, Art. 52 (1) (d).
[58] *Id.*, Art. 52 (2).
[59] Drafter's Technical Note on ITP's Final Draft, *supra* note 23.
[60] Proclamation No. 979/2016, *supra* note 1, Art. 52 (2). It was not possible to tax a non-resident that actually provided the technical or lease service. As it paid by another non-resident, Ethiopia has no income tax jurisdiction. However, when a non-resident that paid for the service or lease charged the amount on Ethiopia resident or a non-resident having permanent establishment in Ethiopia, the recharged amount will become Ethiopian source income.

performance taking place in Ethiopia.[61] The income is an Ethiopian source if it is derived from a performance or sporting event taking place in Ethiopia.[62] Thus, what is important is the place of performance of the entertaining event, not the resident status (whether a resident or non-resident of Ethiopia) or the where about of the person who paid the entertainer.

The ITP defines 'entertainer' to include musician and sports person.[63] It is illustrative, so we can use the ordinary meaning of 'entertainer' (a person whose work is to entertain others) to include others such as singers, dancers, or comedians.[64] 'Group' is also defined to include a sporting team,[65] thus, using its ordinary meaning we can add others like a musical band. Similarly, 'performance' is defined to include a sporting event,[66] and we can think of other entertainment performances such as a music concert.

Art. 53(2) provides another taxpayer: "'another person' who derived income from a performance by an entertainer." This is a person other than the entertainer or group that has yet to derive income as a result of the non-resident entertainers' performance in Ethiopia. It is commonly the case that entertainers do not derive income from a performance directly but rather through a company that they control, and, therefore, the entertainer's fee is paid to the company.[67] And Art. 53 (2) is there to ensure that the tax imposed under Art. 53 (1) is not avoided in such cases. However, there is a potential problem related to the practicability of collecting taxes from payments made to a non-resident entertainer by another non-resident (not related to the

[61] *Id.*, Art. 53 (1).
[62] *Id.*, Art. 6 (4) (e).
[63] *Id.*, Art. 53 (3) (a).
[64] Drafter's Technical Note on ITP's Final Draft, *supra* note 23.
[65] Proclamation No. 979/2016, *supra* note 1, Art. 53 (3) (b).
[66] *Id.*, Art. 53 (3) (c).
[67] Drafter's Technical Note on ITP's Final Draft, *supra* note 23.

entertainer) for the performance performed in Ethiopia. A non-resident payer cannot be imposed with the withholding duty as it is a duty imposed on Ethiopian resident payers.[68]

Thus, entertainers may avoid tax liability simply by ensuring that they are paid by a non-resident person with no presence (commercial or otherwise) or assets in Ethiopia. Of course, just because the payer has no obligation to withhold does not mean the amount from an Ethiopian source should be left untaxed. The tax liability of the taxpayer and the withholding liability of the third party are distinct. Still, the practicability of the collection mechanism is the most important factor in determining the extraterritorial applicability of the tax law. Thus, the concerned organs (the Ministry of Revenues or the Ministry of Finance) should be aware of such potential practical problems and design way-outs ahead.

No doubt Art. 53 taxes income directly related to the performance, such as the prize money. But if Art. 53 is inclusive of the income a non-resident entertainer derives from other activities made in the course of performing a sporting event in Ethiopia, For example, a non-resident sportswoman may derive income from advertisements. The answer is affirmative; in the language of Art. 53 (1), what matters is if the income is derived from the entertainer's participation in a performance taking place in Ethiopia..[69]

[68] Income Tax Proclamation No. 979/2016, *supra* note 1, Arts. 64 (5) and 89.

[69] There is one well-known, "the Agassi case". The main issue was regarding a tennis player who was a non-resident of UK, but received payments from non-resident entities for advertising Nike during the game. The payer had no connection with the UK. But, the House subjected the payment to UK's income tax jurisdiction by considering advertisement as a business and income derived from a business activity performed in UK is subject to UK's income tax law. Rather than considering the payment as income from the sporting event, the House considered it as a separate event. In the Case, the payment was not made directly to the sportsman rather for the

Why is there a need to separately deal with the taxation of non-resident entertainers? Would not Art. 51 suffice? Entertainers derive diverse incomes for their performances other than those listed under Art 51, including advertising products in the course of performing, concerts, festivals, event entrance fees, awards, and prize money. Art. 53 should not be confused with Art. 54 (which taxes royalty) since the most common payment for some categories of entertainers, such as musicians, is royalty. Royalty comes into the picture when others use someone's work, for example, music, or when a musician allows others to use their work, while Art 53 is concerned with payments made when the entertainers themselves perform their work. Also, if a non-resident entertainer receives royalties, Art. 51 will be applicable.

3. New Income Tax Bases of Schedule 'D'

In this section, a discussion is made on the new income sources the ITP introduced to Schedule D. This is the area where the ITP contributed to widening the country's income tax base. The newness of some of the items is not to Ethiopia's income tax system but to Schedule 'D', so, in this section, 'new' refers to 'new to Schedule D. Moreover, the discussion in this section is in addition to the new taxable items that the ITP introduced in the context of exclusive taxation of Ethiopian non-residents (highlighted in Section 2). It has

foreign company which he owned. In short it is about payments made by a non-resident foreign company which has no any commercial presence in the UK, to another non-resident foreign company which has also no any commercial presence in the UK, yet controlled by the sportsman. The payment under contention was related to the activities performed by the sportsman in the course of performing his sporting event in the UK. See the House of Lords Appellate Committee, UK, Robinson (Appellant) vs. Agassi (Respondent), 17 May 2006, available at https://publications.parliament.uk/pa/ld200506/ldjudgmt/jd060517/agasro-1.htmm last accessed on 11 April 2019. Lessons can be taken from this case for issues raised under the above two paragraphs about the practical applicability and scope of Art 53 of the ITP.

been mentioned that management fees, insurance premiums, recharged technical fees and royalties, and income from performing entertainment are new to taxation under Schedule D.

3.1. Taxation of residual income categories

Some types of income categories may be identified or recognized after the enactment of tax laws, and it can also be daunting to list all potential income sources under the income tax laws. Having a provision to tax residual incomes can narrow the possibility of escaping tax for the mere reason that the income is not specifically named in income tax laws. Art. 63 (titled 'other income') of the ITP is there to such ends. The provision reads: "A person who derives any income that is not taxable under Schedule A, B, C, or the other provisions of this Schedule shall be liable for income tax at the rate of 15% on the gross amount of the income" (emphasis added). It gives a way for the taxation of a residual category of income or any income not otherwise taxable under the ITP. This is one of the major changes the ITP has introduced, not just to Schedule 'D, but to the country's income tax system as a whole, and it addresses one of the criticisms raised against the repealed income tax system: income sources that were not explicitly or implicitly mentioned in the individual income tax schedules were not taxed.[70] Art. 63 is comparable to Art. 21 of the OECD and UN model tax conventions, which attribute an exclusive taxing right to the state on items of income not covered by other distributive rules of the income tax law.[71] Accordingly, when there is

[70] Arguments were made to tax such incomes using the comprehensive definition of 'income' (under Art 2 (10) of the repealed income tax proclamation- a replica of which is Art. 2 (14) of the ITP) than introducing new specific tax laws when it is needed to expand the taxable income sources (a practice the government was accustomed to). See Taddese, *supra* note 5, p. 265.

[71] OECD Model Tax Convention, *supra* note 49, Art. 21; UN Model Tax Convention, *supra* note 49, Art. 21.

difficulty in characterizing an income for income taxation, this provision will be relevant.

The taxpayer of Art. 63 is a personwhether individual or body, Ethiopian resident or non-resident. Non-residents are taxable if they derive from an Ethiopian source 'other income' and this is if they are paid by an Ethiopian resident (other than as an expenditure of the resident's business conducted through a permanent establishment outside Ethiopia) or by a non-resident as an expenditure of the non-resident's business conducted through a permanent establishment in Ethiopia.[72]

The tax base is 'any income' not otherwise taxable under the ITP. Thus, the 'amount' must qualify as 'income'. To determine this, we need to resort to the comprehensive definition of 'income' provided under Art. 2 (14) of the ITP. It defines 'income' as "every form of economic benefit, including non-recurring gains, in cash or kind, from whatever source derived, in whatever form paid, credited, or received." Thus, any residual income category fitting the definitional elements of Art. 2 (14) is a tax base for Art.63.[73]

The phrase 'any income' under Art. 63 triggers the question of whether it includes income from "criminal and/or immoral" activities. As a matter of international practice and jurisprudence, there are divergent views about taxing income from criminal activities. While those in favor argue that a dollar of profit from criminal activity buys just as much as a dollar of profit from lawful activity (hence, we need to apply the same income tax principles for the two), those against worry that taxing such income will make

[72] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 6 (4) (g).
[73] For the details about the elements of this definition, see Belete, *supra* note 35, pp. 38-39.

governments a silent partner in crimes.[74] The consensus seems to be that as a matter of general principle, income from criminal activities would fall within the general inclusion provision under a global system or, in the case of a schedular system, one of the schedules.[75] If this is not the case, then it should be stipulated that income derived from criminal activities is still subject to tax.[76]

The absence of a specific prohibition of taxing "illegal income", coupled with the phrase "from whatever source derived" in the general definition of "income" under Art. 2 (14) of the ITP, may lead us to the conclusion that the ITP taxes income from criminal activities (the source of the gain is immaterial). However, the author believes that the issue needs scrutiny of the country's public policy beyond the doctrinal interpretation of tax law provisions. In addition, there is a need to consult criminal laws. If we for instance refer to the country's criminal code, customs, and corruption crimes proclamations, it is stipulated that property [income] acquired as a result of the commission of a crime, possessing unexplained property, or if illegal properties are seized, confiscation of the same will be ordered (in addition to a fine and/or imprisonment).[77] Then, we may ask, if the whole income or property is confiscated, what is left to tax? Also, we may ask, confiscation

[74] See Yosef Alemu, Taxing Crime: The Application of Ethiopian Income Tax Laws to Incomes from Illegal Activities, *Jimma University Journal of Law*, Vol. 4, No. 1, (2012), pp. 154-176. Writing based on the repealed income tax proclamation, the author (Yosef) argued for taxing income from criminal activities in Ethiopia, invoking the expression "from whatever source" under the proclamation's definition of "income".

[75] See Burns and Krever, *supra* note 3, p. 36.

[76] *Id.*

[77] See Criminal Code of the Federal Democratic Republic of Ethiopia Proclamation No. 414/2004, Federal *Negarit Gazzete*, (2004), Art. 98; Customs Proclamation No. 859/2014, Federal *Negarit Gazzeta*, (2014), Art. 147; and Corruption Crimes Proclamation No. 881/2015, Federal *Negarit Gazzeta*, (2015), Art. 21.

presupposes conviction, but do we need the same to impose tax? For taxation, identification of the income seems sufficient. In this regard, scholars also argued that, in part, the possibility of taxing illegal income provides a tool for the prosecution of crimes having nothing to do with taxation.[78] This is because criminals typically fail to declare their illegal income on tax returns; they can often be successfully prosecuted for tax evasion even when there is no specific proof as to how they got the money.[79] This seems not to be the case in Ethiopia, at least, as a matter of practice. Once again, the author believes that taxing criminal activities needs to be first addressed at the policy level, and addressing whether or not Ethiopia taxes crimes as a policy choice is decisive in settling the matter.

3.2. Taxation of windfall profit

Windfalls are considered unexpected accretions to wealth, and in many jurisdictions with the global definition of income, windfalls are not included in gross income, while in most jurisdictions with schedular definitions of income, windfalls simply fall between categories of income included in gross income.[80] Political considerations and practical difficulties in assessing the gains from windfalls serve as the common ground for their exclusion from the income tax base, although these may not constitute persuasive tax policy reasons.[81]

When it comes to Ethiopia, windfalls are included as one taxable category of income under Art. 60 of the ITP. The imposition of income tax on windfall profits is new to Schedule 'D' and a recent introduction to the country's

[78] Burns and Krever, *supra* note 3, p. 36.
[79] *Id.*
[80] *Id.*, p. 31.
[81] *Id.*

income tax system. It was in 2010 that the government enacted a special income tax proclamation to tax banks and other financial institutions, which derived huge windfall profits as a result of the devaluation of the Ethiopian currency (Birr) in the year 2010.[82] Then, the current ITP merges windfall profits into the income tax schedules.

Art. 60 (1) reads: "Windfall profit obtained from businesses prescribed in a directive to be issued by the Minister shall be liable to tax at a rate to be determined in such a directive." Thus, the taxpayers are business persons, individuals, or bodies. The tax base is 'windfall profit', which is defined as "any unearned, unexpected, or other non-recurring gains."[83] The definition is too general. For instance, when can we say a profit is 'unearned or unexpected'? The Proclamation left out the details, including the essential elements of this tax, to be determined by the Minister of Ministry of Finance (MoF).[84] It is the Minister who determines the amount of income to be considered as a windfall profit. Thus, the mere fact there is unearned, unexpected, or non-recurring gain does not amount to windfall profit unless the amount of profit meets the threshold to be set by the Minister. The Minister is also empowered to identify the types of businesses subject to this tax. This means, obtaining 'wind fall profit' will not automatically attract income tax unless the business is the one identified as a subject matter of windfall tax by the Minister. In the process of determining such issues, the Minister may take into account the nature of the business, thus, she/he can follow a case-by-case determination.[85]

[82] See Proclamation to Amend the Income Tax Proclamation No. 693/2010, Federal *Negarit Gazetta*, (2010). It was enacted, three months after the government devaluated Birr by more than 20% at once.
[83] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 60 (4).
[84] *Id.*, Art. 60 (2).
[85] *Id.*, Art. 60 (3).

The power to determine the specific tax payers, tax base, tax rate, and amount of income to be considered 'windfall profit' is granted to the Minister of MoF. Giving such extensive power to the executive organ (Ministry) itself was highly criticized;[86] now, the ITP has made it more worrisome by empowering a single individual (a Minister) to determine almost all core elements of the tax. This may open room for abuse, taking into consideration the relationship between political representation and taxation and; the non-delegation of core tax issues to the executive. It is not appropriate to delegate all essential powers of taxation to a single ministry, let alone a minister. The better thing would have been had the ITP, as primary legislation, outlined the core elements of the tax and then delegated the determination of more technical matters to the MoF, not the Minister.

3.3. Taxation of undistributed profit

Art. 61 of the ITP provides for the imposition of tax on the undistributed profits of a body. It prescribes that "tax shall be paid at the rate of 10% on the *net undistributed profit* of *a body* in a tax year to the extent that it is *not reinvested*, in accordance with the directive to be issued by the Minister" (emphasis added).[87] The taxable unit is a 'body' (which is defined to include a company and partnership),[88] which did not distribute profits to its members. But, since we are talking about 'profit' the taxable 'bodies' are those engaging in business undertakings and are expected to distribute the profits thereof to their members. Essentially, this refers to companies and partnerships.

[86] See Taddese Lencho, The Ethiopian Tax System: Excesses and Gaps, *Michigan State International Law Review*, Vol. 20, No. 2, (2012), p. 339. The 2010 Proclamation granted to the then Ministry of Finance and Economic Development to define windfall profits from time to time.

[87] Like windfall profits, here also the power to issue a directive is given to the Minister, not the Ministry, which may trigger the same concern raised above.

[88] Tax Administration Proclamation No. 983/2016, *supra* note 56, Art. 2 (5).

The tax base is the 'net undistributed profit'. Thus, first, there is a need to identify what constitutes 'net profit' and 'undistributed profit'. The answer is found under Directive No. 7/2019 on undistributed profit, issued by the Minister of MoF. As per this directive, 'net-profit' constitutes an amount that remains after the annual gross business income of the body is reduced by the amount of paid business income tax, deductible expenditures, depreciation allowance, and the reserve fund.[89] And the amount considered as 'undistributed profit' is; profit not distributed to members (as a dividend) or profit not repatriated to a non-resident body conducting business in Ethiopia through a permanent establishment or profit not re-invested to increase the capital of the body within 12 months of the body's accounting period.[90] The body can only avoid paying tax on this amount (taxation under Art 61) if it is proved to the satisfaction of the revenue authority that the body has made a distribution of dividend and/or increased its capital to the extent of its net-profit within 12 months of its accounting period.[91] If only part of the net-profit is distributed/re-invested, the tax will be imposed on the remaining net-profit.

The explicit taxation of 'undistributed profit' not only widens the income tax base but also avoids the preexisted confusion. Previously, since the repealed income tax laws had no definition for 'dividends', it was mandatory to refer to the Commercial Code, which contingent the distribution of dividend to the approval of a general shareholders meeting.[92] This has caused a divided interpretation of dividend tax; whether the actual distribution of dividends is a prerequisite to it or can it be imposed on undistributed profits too.[93]

[89] Ministry of Finance, A Directive on Taxation of Undistributed Profit, Directive No. 7/2019, Art. 3 (2) [here in after, MoF Directive on Taxation of Undistributed Profit].
[90] *Id.*, Art. 3 (1).
[91] See *id.*, Arts. 5-10.
[92] Commercial Code of Ethiopia Proclamation No. 1243/2021, Federal *Negarit Gazzete* Extra Ordinary Issue, (2021), Art. 438 [here in after, the Commercial Code].
[93] Taddese, *supra* note 5, pp. 463-468.

Companies, especially PLCs used to refrain from declaring dividends until they make sure that they can avoid the withholding obligations on dividend tax.[94] As a result, MoFED (now, MoF) was obliged to issue a circular that prescribed the imposition of dividend tax on 'undistributed profits'; opined it fits the general definition of 'income' as it is held for the benefit of shareholders.[95] The ITP (under Art 61) settled this once and for all. If a company distributed dividends, its members will pay dividend tax, and if it did not distribute the company will pay the tax on the undistributed profit. Thus, a company has little chance and motive to avoid tax by not distributing dividends.

3.4. Taxation of repatriated profit

Art. 62 of the ITP provides for a tax on the repatriated profits of an Ethiopian permanent establishment owned by a non-resident. The concept of permanent establishment determines whether an enterprise has sufficient activity in another territory to create a taxable presence there and thus justify that country's taxation of the business profits.[96] These are grey areas of business establishments that do not meet the tests of 'resident' (and lack personality); hence, the principle of residence cannot be invoked to assume tax jurisdiction over their income. On the other hand, applying the principle of source is not administratively feasible, as it requires tracing all income sources of the non-resident body that owns these establishments, and then identifying the income attributable to the establishments. The organization of modern business is highly complex to apply since there are a considerable number of companies,

[94] *Id.*, pp. 464-466.

[95] Ministry of Finance and Economic Development, Legal Opinion Letter Written to Ethiopian Revenues and Customs Authority, 27/11/2004 E.C.

[96] Annet Wanyana and Sebo Tladi, The "Permanent Establishment" Concept Analyzed from a South African Perspective, Journal of International Commercial Law and Technology, Vo. 4, Issue 3, (2009), pp. 213-215.

each of which is engaged in a wide diversity of activities and carries on on business extensively in many countries.[97] Thus, the application of the source rule (as it is) will make the tax administration complex and inefficient and entail less compliance.[98] However, it is unsound to let the establishments go untaxed, as they have become an enduring part of the country's. That is why we do have the rules of a permanent establishment, which is, a modification of the source principle to assume income tax jurisdiction on business conducted through certain recognized business establishments. The basic approach to determining the profits attributable to the permanent establishment is to require the determination of the profits under the fiction that the establishment is a separate enterprise and that such an enterprise is independent of the rest of the enterprise of which it is a part as well as from any other person.[99]

The ITP under Art. 4 recognizes the rules of permanent establishment as one ground to assume income tax jurisdiction. The provision defines a permanent establishment as "(…) a fixed place of business through which the business of a person is wholly or partly conducted."[100] Three basic elements are depicted in this definition: one, it is a place of business; hence, a facility such as premises, machinery, or equipment is available for this purpose; two, it is fixed; thus, it must be established at a distinct place with a certain degree of permanence; and finally, the purpose of the place is to carry out business, either wholly or partly. After this inclusive definition, the ITP goes on to list examples of establishments that are and are not to be considered permanent

[97] See OECD Commentaries on OECD Articles of the Model Tax Convention, (as updated in 2017), p. 225, available at https://www.oecd.org/berlin/publikationen/43324465.pdf last accessed on 12 February 2022.
[98] *Id.*
[99] *Id.*, p. 134.
[100] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 4 (1).

establishments.[101] The effect of being recognized as a permanent establishment is that the establishment must pay income tax on net income attributable to it (not on the worldwide income of a non-resident that owns the establishment). Therefore, taxation under Art 62 and other provisions of the ITP that depend on the permanent establishment to tax non-residents must follow the rules of the permanent establishment outlined under Art 4.[102]

Art. 62 (1) reads: "*A non-resident body* conducting business in Ethiopia *through a permanent establishment* shall be liable for tax at the rate of 10% *on the repatriated profit* of the permanent establishment" (emphasis added). The tax base is 'the repatriated profit'. To determine this, Income Tax Regulation No. 410/2017 provides a formula, including what to add and what to deduct in calculating 'repatriated profit'.[103] It should be underlined that the business income derived by the permanent establishment is taxable under Schedule 'C',[104] not the concern of Art. 62. The latter deals with a profit repatriated by the permanent establishment to the non-resident body (which owns the establishment) after paying the business income tax expected from it.

Thus, a taxpayer under Art 62 is a non-resident body that received the repatriated profit, while a taxable unit of the business income tax is the permanent establishment itself. As the recipient is not in Ethiopia, the permanent establishment has a withholding duty on the profit it repatriated.[105] And if the permanent establishment does not repatriate the profit to its non-resident owner, the un-repatriated amount will be considered 'undistributed

[101] *Id.*, Art. 4 (2) - (5).
[102] See for instance, *id.*, Arts. 54 (2), 55 (2) and 56 (2).
[103] Federal Income Tax Regulation No. 410/2017, Federal *Negarit Gazeta*, (2017), Art. 51 [here in after, Income Tax Regulation No. 410/2017].
[104] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 51 (3).
[105] *Id.*, Art. 89 (1).

profit' and the permanent establishment itself will be required to pay tax on it as per Art 61 of the ITP.[106]

A right to repatriate profit is one of the investment guarantees Ethiopia's investment laws provide for foreign investors (as one means of attracting foreign direct investment).[107] It may be questioned if taxing 'repatriated profit' goes against this objective. In addition, the taxation may also be considered double taxation: the permanent establishment paid business income tax on the profit, and it will be taxed again when repatriated. However, here it should be clear that if the commercial presence of the foreign investor is through establishing a "proper" enterprise like a company or subsidiary, it will be considered an Ethiopian resident and will pay no income tax when it repatriates its profit (after paying its business income tax under Schedule 'C'). Thus, the adverse impact of taxing a repatriated profit under Art. 62 on foreign direct investment is negligible.

4. Major Changes Introduced on Pre-existing Tax Bases of Schedule 'D'

Schedule 'D' has not only introduced a detailed regulation of non-resident taxation and new tax bases but has also brought a lot of changes to income categories that have been taxed under Schedule 'D' long before the ITP. The changes in this regard are especially noticeable when it comes to defining taxable items. This section is dedicated to discussing this and other major changes the ITP has introduced to the income categories in Schedule 'D' (which are not covered in the preceding two sections).

[106] MoF Directive on Taxation of Undistributed Profit, *supra* note 89, Art. 3 (1).

[107] See Investment Proclamation No. 1180/2020, Federal *Negarit Gazeta*, (2020), Art. 20. The same guarantees also provided under several bilateral investment treaties Ethiopia concluded.

4.1. Taxation of royalties

Art. 54 of the ITP provides for the taxation of royalties. It provides two categories of taxpayers. The first is an Ethiopian resident, an individual or a body, who derives royalty.[108] The other is a non-resident having a permanent establishment in Ethiopia who derives Ethiopian source royalty attributable to the permanent establishment.[109]

The tax base is 'royalty'. Defining 'royalty' for taxation is complicated. Though the general conception treats 'royalty' as a payment for the use of a person's intellectual property, it encompasses many fundamentally different types of payments and has diverse meanings across jurisdictions.[110] For that matter, not all countries classify royalties as a category of income in their own right. Some countries classify certain kinds of royalties as rental income and royalties received by individuals for intellectual property created by personal exertion as income from independent labor; while other countries classify royalties as investment income subject to the same basic rules as interest income.[111]

When it comes to Ethiopia, the ITP under Art. 2 (20) defines the term 'royalty' broadly, and essentially, consistent with the definition commonly found in international tax treaties.[112] It captures a wide range of rights and assets whose exploitation results in the payment of royalties. According to Art

[108] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 54 (1).
[109] *Id*., Art. 54 (2). Income from royalty will be considered as Ethiopian source income if it meets one of the two alternative tests provided under id, Art. 6 (4) (g).
[110] Burns and Krever, *supra* note 9, p. 18.
[111] *Id.*
[112] Compare it for instance with OECD Model Tax Convention, *supra* note 49, Art. 12 (2).

2 (20), the following six categories of amounts, whether paid periodically or as a lump sum, are treated as royalties:

First, a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematography films and films and tapes for radio, television, or internet broadcasting.[113] For example, payments made to authors for printing and publishing books; to musicians, songwriters, singers, and directors for producing and distributing music.

Second, a consideration for the receipt of, or right to receive, visual images or sounds, or both, transmitted by satellite, cable, optic fiber, or similar technology in connection with television, radio, or internet broadcasting.[114] By including this, the ITP expands the scope of 'royalty', as this category of royalties (the subject matters of which are used widely owing to the advancement of technology) was not included under the repealed income tax proclamation.[115]

Third, a consideration for the use of or the right to use any patent, invention, trademark, design or model, plan, secret formula or process, or other like property or right.[116] For example, payments made to inventors for using their patented products.

[113] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 2 (20) (a).
[114] *Id.*, Art. 2 (20) (b).
[115] See Income Tax Proclamation No. 286/2002, *supra* note 16, Art. 31 (5). The Amharic version of Art 31 of this proclamation was also titled 'የ ፈ ጠራ መብትን በ ማከ ራየ ት የ ሚገ ኝ ገ ቢ', which is expressive of only 'royalties' received as consideration for the use of, or the right to use of intellectual property rights (not reflective of the scope of royalty taxation). This is fixed in the Amharic version of Art 54 of the ITP; it employs the term 'ሮ ያ ሊ ቲ ' as a title
[116] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 2 (20) (c).

The fourth is a consideration for the use of, or the right to use, any industrial, commercial, or scientific equipment.[117] This one, for instance, includes equipment lease rentals.[118] Based on this, we can tell that 'royalty' in the context of ITP is inclusive of rental income received for a lease of certain kinds of equipment.

The fifth one is a consideration for the use of, or the right to use any information concerning industrial, commercial, or scientific experience.[119] This definition of 'royalty' includes any consideration for the supply of knowhow, but not the supply of services.[120] While discussing the taxation of technical fees, it has been pointed out that 'technical services' are not inclusive of know-how, thus there is a need to distinguish the two.[121]

Sixth, an amount as consideration for the supply of assistance that is ancillary and subsidiary to and is furnished as a means of enabling the application or enjoyment of property or a right referred to in the above five categories.[122] This is the only circumstance in which a service fee is treated as royalty.[123] This conception of 'royalty' was unknown to the repealed income tax laws, and its inclusion under the ITP helps to avoid the characterization conflict between 'royalty' and 'technical fee', which was tense previously.[124] Since the tax rates of royalty were lower than the technical fee, taxpayers with this

[117] *Id.*, Art. 2 (20) (d).
[118] Drafter's Technical Note on ITP's Final Draft, *supra* note 23.
[119] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 2 (20) (e).
[120] Drafter's Technical Note on ITP's Final Draft, *supra* note 23.
[121] Making a distinction between the two can be difficult, but, in this context and broad terms, knowhow is pre-existing knowledge and information that is secret that a person is given a right to use; while the provision of services involves using one's customary skills to bring knowledge and information into existence. See *id.*
[122] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 2 (20) (f).
[123] Drafter's Technical Note on ITP's Final Draft, *supra* note 23.
[124] See Taddese, *supra* note 5, p. 438.

know-how could very easily characterize payments as royalty, even though the substance of the contract shows that the payments are made for the provision of technical assistances.[125] Now, clarity is established in that if such assistance is supplied as ancillary and/or subsidiary to the property or rights listed under Art. 2 (20), the amount received in exchange is 'royalty'. In effect, the considerations received in exchange for the supply of services other than these are 'technical fees' not 'royalty'.

Countries also define 'royalty' to include considerations for the sale of intellectual property and the exploitation of natural resources connected with land, commonly mineral resources, petroleum, and forests.[126] Does Art. 2 (20) of the ITP include these? The provision defines 'royalty' as consideration for 'the use or right to use' and 'the receipt or right to receive' of the assets, rights, or services it list. These terms do not signify transactions entailing the transfer of ownership, such as, the sale of intellectual property rights. In effect, the taxation under Art. 54 is not inclusive of amounts derived from the sale of intellectual property or rights. If the intellectual property constitutes a business asset (held or used in the conduct of a business wholly or partly), the gain from its disposal is business income and taxable under Schedule 'C'.[127] Still, a gain from the disposal of non-business assets such as intellectual property, a consideration an author of a book received for selling her copyrights, is not covered. It cannot be taxed under Art. 59 of the ITP as capital gains either, as its scope is not inclusive of the disposal of intellectual property rights. This could have been avoided had the definition of 'royalty' been structured to

[125] *Id.* Previously, royalty was taxable at 5% while it was 10% for technical service fee. The rate difference is increased under the ITP; royalty charged with 5% while technical fee is taxed at 15%.
[126] Burns and Krever, *supra* note 9, p. 19.
[127] Income Tax Proclamation No. 979/2016, *supra* note 1, Arts 2 (3) and 21 (1) (b).

include amounts received as consideration for 'disposal of' rights or property listed under Art. 2 (20).

Art. 2 (20) is also not inclusive of royalties paid as considerations for the exploitation of natural resources connected with land. These are payments to the owner of the land (in Ethiopia, the government) from which the minerals are extracted or the forests are exploited.[128] However, though not under the ITP, the taxation of such royalties is part of Ethiopia's income tax system. The Constitution grants regional governments the power to collect royalties from mining operations and for the use of forest resources, while royalties from large-scale mining and all petroleum and gas operations fall under the concurrent power of taxation.[129]

Finally, the characterization of royalties may also get confused with other sources of income. For instance, its overlap with employment income was a source of inconsistent characterization, which seems to continue; this is when payments are made by the employer as a consideration for the use of intellectual property that belongs to an employee.[130] There are also possible confusions with business income; for instance, when a publishing company derives income from granting the right to use its copyright to other persons or if a film production company derived income both directly for the showing of

[128] Under the OECD Model Tax Convention such royalties are treated as income from immovable property than royalty. See OECD Model Tax Convention, *supra* note 49, Art. 6. Neither is this the case under the ITP.

[129] Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, Federal *Negarit Gazeta*, (1995), Arts 97 (8), (10), and 98 (3) [here in after, FDRE Constitution].

[130] See Taddese, *supra* note 5, pp. 297-311. The employment contract can be used as a base line to decide on the matter. The way the work was financed (whether the works of the employee are produced by the employer) is also important. For details see Belete, *supra* note 35, p. 53.

its films and from giving others the right to distribute and show those films.[131] We may say the income is business income since the activities are the businesses of the company or we may incline to consider it as royalties since the payments are made for the use of intellectual property.[132] However, if the core business of the entity is to derive royalties, there is no confusion that the royalty will be included in the business income of the entity and taxable under Schedule 'C', not 'D'. This would apply, for example, when the taxpayer's business is the development and licensing of industrial or intellectual property rights, know-how, or the leasing of equipment.[133]

4.2. Taxation of dividends

Art. 55 of the ITP provides for income taxation of 'dividends'. Art. 2(6) of the ITP defines 'dividend' as "a distribution of profits by *a body to a member* …" Thus, the terms 'body' and 'member' are key to precisely characterizing the taxable units of Art. 55. Both terms are defined under the Tax Administration Proclamation. It defines 'body' as "a company, partnership, public enterprise , public financial agency, or other body of persons, whether formed in Ethiopia or elsewhere"[134] while 'member' is defined as "a person with *membership interest* in the body including a shareholder in a company or a partner in a partnership" (emphasis added).[135] 'Membership interest' refers to "an

[131] Taddese, *supra* note 5, p. 437.
[132] See Belete Addis, Characterization of Taxable Units and Tax Bases under Schedule 'C' of the Federal Income Tax Proclamation of Ethiopia: A Commentary, *Bahir Dar University Journal of Law*, Vol. 10, No.1, (2019), p. 117.
[133] Drafter's Technical Note on ITP's Final Draft, *supra* note 23.
[134] Tax Administration Proclamation No. 983/2016, *supra* note 56, Art. 2 (5).
[135] *Id.*, Art. 2 (20).

ownership interest in the body, including a share in a company or an interest in a partnership."[136] Thus, 'membership interest' means 'ownership interest'.

Is 'ownership interest' limited to being a shareholder in a company or a partner in a partnership? For instance, like the ITP, the OECD Model Tax Convention also 'dividends' concerned with distributions of profits, the title to which is constituted by shares that are holdings in a company limited by shares.[137] This assimilates to shares and all securities issued by companies that carry 'a right to participate in the companies' profits'.[138] Hence, 'a right to participate in the companies' profits' is used as a qualifying factor. However, debtclaims participating in profits and interest on convertible debentures are not considered dividends; while interest on loans is considered a dividend in so far as the lender effectively shares the risks run by the company, i.e., when repayment depends largely on the success or otherwise of the enterprise's business.[139] We may use this take to understand 'ownership interest' in the ITP's context too (as there is a resemblance in their definition of 'dividend').

Therefore, the taxpayer of Art. 55 is a person that is considered a 'member' of a body (by qualifying the above descriptions). In this context, the provision provides two categories of taxpayers. The first is an Ethiopian resident, an individual or a body (who derives a dividend),[140] while the other is a non-

[136] *Id.*, Art. 2 (21).
[137] OECD Model Tax Convention, *supra* note 49, Art. 10.
[138] See OECD Commentary, *supra* note 97, p. 191.
[139] *Id.*
[140] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 55 (1).

resident who derives Ethiopian source dividends from its permanent establishment in Ethiopia.[141]

Previously, the taxable units of dividend taxation were limited to shareholders of companies, as 'dividend' was defined restrictively to include profit distributions made by a share company (SC) and a private limited company (PLC) to their shareholders.[142] This is no longer the case; the Tax Administration Proclamation defined 'body' to include not only companies but also partnerships, public enterprises, and other bodies. Accordingly, a partner who received a profit from the partnership is a taxable unit for dividend tax. This will take us to the argument of whether partnerships should be considered as incorporated entities or mere associations of persons. If they were treated as the latter, the profit distributed to partners would be business income, not a dividend.[143] Cooperative Societies are also required to withhold tax on dividends distributed to their members,[144] thus, members of such societies are also taxable units under Art. 55. Public enterprises are also mentioned as 'body'. After meeting their business income tax liability [among other things], these enterprises are required to transfer their profit to the government in the form of dividends (they are fully government-owned).[145] If it is the government that received the dividend (from its profit-making entity), there will be no tax under Art. 55.

It should be clear that the tax under Art. 55 concerns a 'body' that distributes 'profits' to its members (the mere fact that a body engages in profit-making

[141] *Id*., Art. 55 (2). Income from dividend will be considered as Ethiopian source income if the dividend is paid to the non-resident by a resident of body. See id, Art. 6 (4) (a).
[142] Income Tax Proclamation No. 286/2002, *supra* note 16, Art. 34 (1).
[143] For details see Belete, *supra* note 133, pp. 89-96.
[144] See Cooperative Societies Proclamation No. 985/2016, Federal *Negarit Gazeta*, (2016), Art. 43 (1) (b).
[145] Public Enterprises Proclamation No. 25/1992, Art. 31.

activities is not sufficient). For instance, civil society organizations do have members and are allowed to engage in profit-making activities.[146] But, they are prohibited from distributing the profit derived from such activities to their members;[147] hence, members of such entities are also not subject to dividend taxation. In addition, if the core business of a person is to derive dividends, the dividend is included in its business income and is taxable under Schedule 'C', not under Art 55. This would apply, for example, to financial institutions as their business involves keeping a pool of liquid assets such as shares that earn dividend income.[148]

By now, it is clear that the tax base of Art. 55 is 'dividend'. The ITP has brought significant improvements to its predecessor when it comes to the characterization of 'dividend'. The latter had no definition for 'dividend', as a result, it was mandatory to cross-refer to the Commercial Code, which limited dividends to distributions of profits decided by annual general meetings of shareholders.[149] There was also a serious clarity problem about whether other benefits in money or money's worth, such as the provision of loans, the distribution of property, or gifts of various kinds to shareholders, were not considered to be the distribution of dividends. Companies, especially, privately held PLCs, were using these loopholes to avoid paying dividend taxes by channeling their distributions to their members through numerous

[146] Civil Societies Proclamation No. 1113/2019, Federal *Negarit Gazzeta*, (2019), Art. 63 (1) (b).
[147] *Id.*
[148] Drafter's Technical Note on ITP's Final Draft, *supra* note 23.
[149] Though the Commercial Code remains relevant in understanding how dividends are distributed among shareholders, it cannot complete the intention of tax laws, which is to reach all sorts of distributions. See Taddese, *supra* note 5, p. 460.

backdoor deals.[150] As the discussion in the following paragraphs indicates, the ITP ha fixed these loopholes.

The ITP under Art 2(6) defines 'dividend' as 'a distribution of profits' by a body to a member. What constitutes 'profit distribution'? Distributions can take various forms, the most common of which are amounts paid by companies as dividends and amounts paid to repurchase company shares or purchase the shares of a subsidiary of the company.[151] In addition to assuming various forms, distributions can have different economic origins, basically three: they can be paid out of profits that have been taxed at the company level, out of profits that have not been taxed at the company level, or out of no profits at all (meaning, they constitute a return of capital).[152] The tax consequences of a distribution arising from one of these three different origins will vary significantly depending on the type of tax system in place. One constant among income tax systems, however, is that shareholders do not include income distributions that constitute a return of capital.[153] After broadly defining dividends as the distribution of profits, Art. 2(6) of the ITP provides the following three broad illustrative categories of amounts considered dividends:

First, an amount returned by a body to a member in respect of a membership interest on a partial reduction in the capital of the body if the returned amount exceeds the nominal value of the membership interest.[154] For instance, a company may decide to reduce its capital and in doing so it will return a

[150] Id, p. 463.
[151] Graeme Cooper and Richard Gordon, Taxation of Legal Persons and their Owners, *in* Victor Thuronyi (ed.), *Tax Law Design and Drafting*, International Monetary Fund, Vol. 2, (1998), pp. 71.
[152] *Id.*
[153] *Id.*
[154] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 2 (6) (a).

certain amount of the capital to its shareholders.[155] In such instances, if the returned amount exceeds the par value of a share, or what members have paid to acquire their membership interest, the exceeding amount (the difference) will be taxed as a dividend. If there is no excess, the returned amount will be considered a reimbursement of capitalor returnand not as a distribution of profitsordividends.

Second, an amount returned by a body to a member on redemption or cancellation of a membership interest, including on the liquidation of a company or termination of a partnership.[156] Membership interest may be canceled, for instance, upon the liquidation of a company. This time, after the creditors of the company are paid, the surplus asset will be distributed to its members, and if the returned amount exceeds the nominal value of their membership interest, the exceeding amount will be considered a dividend. Membership interest can also be redeemed (acquired by the company itself), for instance, when a shareholder withdraws from a company.[157] Upon withdrawal, a shareholder will receive the price of his share in return, and if this return exceeds the nominal value of the membership interest, the excess amount will be considered a dividend.

The third category of dividend is provided under Art. 2(6)(c) of the ITP, and it deals with 'fictitious dividends' or amounts that constitute disguised dividends. It provides four transactions: a loan a body extends to a member or its related person; a payment a body makes for an asset or services provided or rendered by a member or its related person; the value of any asset or service provided by a body to a member or its related person; and finally, any

[155] See Commercial Code, *supra* note 92, Arts. 462-472. Most probably, there will be return of capital to shareholders if the reduction of capital is not motivated by loss.
[156] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 2 (6) (b).
[157] Commercial Code, *supra* note 92, Art. 294.

debt waiver by a body to a member or its related person. These transactions will be considered a distribution of dividends only to the extent they 'in substance' are 'a distribution of profits' a body made to a member or a 'related person' of a member.[158] However, the ITP (or other tax laws) has no tests to determine whether the transaction 'in substance' is a distribution of profit. In this regard, the drafter mentioned 'fair market value' as an important factor. Accordingly, the loan a body extends to a member should be assessed against whether a fair market rate of interest is payable or, if payable, whether the interest is expected to be paid, and whether the loan is expected to be repaid.[159] The same goes for assets and services; whether payments made by a body are in excess of the fair market value of the asset or services it received from a member.[160] Using these as a stepping stone, the MoF should come up with a guideline. Otherwise, it will be difficult to enforce the provision, or it may result in inconsistent treatments.

One of the long-held concerns against dividend taxation in Ethiopia is its cascading effects on some dividend distributions or the concern of double taxation. The issue of double taxation in the context of dividend taxation can arise in two ways. The first is when dividends are paid by one corporation to another, which refers to inter-corporate dividends. Many income tax systems provide relief for inter-corporate dividends from tax to avoid the cascading effect of the tax upon dividends distributed to corporate shareholders.[161] Otherwise, it will result in double taxation when the dividends are distributed to corporate shareholders, who will again distribute the same dividends as

[158] For 'related persons' see Tax Administration Proclamation No. 983/2016, *supra* note 56, Art. 4.
[159] Drafter's Technical Note on ITP's Final Draft, *supra* note 23.
[160] *Id.*
[161] Ault Hugh and Brian Arnold, *Comparative Income Taxation: A Structural Analysis*, 3rd ed., Aspen Publishers, (2010), pp. 358-362.

dividends to their shareholders. The ITP does not exempt companies from withholding obligations when they distribute dividends to corporate shareholders. There is one exception: As part of the government's preferential treatment for cooperative societies, a directive issued by the MoF exempted non-individual members of cooperative societies from dividend taxation.[162] In the context of cooperative societies, 'non-individual members' are other cooperative societies.[163]

The second instance of double taxation is when dividends are paid by a company to an individual. This stands on the argument that once the company paid a business income tax on the profit, taxing the distribution of this same profit at the member level is double taxation. For instance, under the ITP, dividends are non-deductible expenses,[164] thus, the profit to be distributed to the shareholders is already taxed at the corporate level. Then, when the dividend is paid to the shareholders, they will be taxed again, which serves some to argue that this is double taxation. However, it is also possible to argue otherwise. As the company has independent status separate from its shareholders, the income of the two is different; hence, they should be taxed on their own. This is the position of the ITP. This time there is no exception for individual members of cooperative societies. Though not addressing the double taxation concerns raised here, members of a body will not pay dividend taxation if, for instance, a company makes a distribution of profits to its shareholders after it got taxed under Art. 61 for 'undistributed profit'.[165] This is because the company has already paid the tax on the 'dividend' before it gets distributed to members.

[162] See MoF Directive on Taxation of Undistributed Profit, *supra* note 89, Art. 10 (1).
[163] See Cooperative Societies Proclamation No. 985/2016, *supra* note 144, Art. 2 (10).
[164] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 27 (1) (d).
[165] See MoF Directive on Taxation of Undistributed Profit, *supra* note 89, Art. 8.

4.3. Taxation of interest

Art. 56 of the ITP deals with the taxation of income derived from 'interest'. It has two categories of taxpayers: an Ethiopian resident, an individual or a body, who derives interest;[166] and a non-resident who drives interest from an Ethiopian source attributable to its permanent establishment in Ethiopia.[167] Unlike dividends, interest does not suffer economic double taxation; that is, it is not taxed both in the hands of the debtor and in the hands of the creditor. It is generally agreed that, unless it is provided to the contrary by the contract, payment of the tax charged on interest falls on the recipient.[168]

The tax base is 'interest', which is defined under Art. 2 (16) of the ITP as "a periodic or lump sum amount, however described as consideration for the use of money or being given time to pay, and includes a discount, premium, or other functionally equivalent amount." From this definition, we can grasp the following main points:

First, interest is paid for two alternative causes:for the use of money or being given time to pay. The first instance (for the use of money) is the ordinary notion of interest, where interest is seen as the compensation earned by a creditor for the use of its money during the period of the loan.[169] Fundamental to this notionis that there is a debt obligation, hence, in this case, interest may be defined by reference to a debt obligation with a separate definition of debt obligation in the law that includes accounts payable and obligations arising

[166] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 56 (1).
[167] *Id.*, Art. 56 (2). Income from interest will be considered as Ethiopian source income if the interest is paid to the non-resident by a resident of Ethiopia. See *Id.*, Art. 6 (4) (g).
[168] If it happens that the debtor undertakes to bear any tax chargeable at the source, this is as though he had agreed to pay his creditor additional interest corresponding to such tax. See OECD Commentary, *supra* note 97, p. 212.
[169] Burns and Krever, *supra* note 9, p. 18.

under promissory notes, bills of exchange, debentures, and bonds.[170] This may include, for instance, interest paid for a loan granted, interest paid by banks to depositors, interest paid by the government to subscribers of government bonds, or interest paid by a company for subscribers of its debentures. The second category of interest (payment for being given time to pay) is a payment made for having an extension of the time for paying back a debt. Therefore, as long as the payment is made for either of these two purposes, it will be considered 'interest', irrespective of how it is described in the underlining contracts (the definition says 'however described'), and the form of payment is immaterial (it can be a periodic or lump sum). The definition is broad and includes interest paid on any loan, no matter who the lender is. The focus is on the character of the return derived from a transaction as interest and not on the character of the recipient.[171]

Second, the definition provides an illustrative list of payments that are considered 'interest' such as a discount and a premium. Modern commercial law contracts make it possible to convert interest on debt or quasi-debt obligations into a variety of other forms, including discounts and premiums in respect of loan principal.[172] Thus, interest is often defined for tax purposes to include commonly used interest substitutes such as discounts and premiums.[173] However, even terms such as these have a recognized legal

[170] *Id.*

[171] Drafter's Technical Note on ITP's Final Draft, *supra* note 23.

[172] Burns and Krever, *supra* note 9, p. 18. An example of a discount is when a bill of exchange is issued at a discount on its face value with the full amount of the face value payable on maturity of the bill. A 90-day bill with a face value of 100 birr may be issued for 90 birr. This means that the issuer of the bill receives 90 birr on issue and pays 100 birr on maturity. The difference of 10 birr is referred to as discount, but is economically the equivalent of interest. A premium is really additional interest and may be payable by a borrower with a low credit rating.

[173] An example of a discount is when a bill of exchange is issued at a discount on its face value with the full amount of the face value payable on maturity of the bill. A 90-day

meaning, and, like the notion of interest itself, characterization as a discount or premium may be avoided.[174] Consequently, it is suggested that the definition of interest include a general formula to more effectively cope with the flexibility available to taxpayers in the way they structure their financial transactions.[175] For example, 'interest' could be defined to include "any other amount that is functionally equivalent to interest." This is what the ITP did; Art. 2 (16) explicitly includes premiums and discounts, and then adds the expression 'other functionally equivalent amount'. The drafter noted that this can include an amount payable for the time value of money under a derivative financial instrument or a payment of defaulted interest by a guarantor.[176] Can we also include penalty charges for late payments in this general expression? For instance, under the OECD Model Tax Convention, penalty charges for late payment are not regarded as interest.[177] The Tax Administration Proclamation includes penalty and late payment interest (a taxpayer who fails to pay tax on or before the due date is liable for late payment interest) as types of 'tax'.[178] The Federal Income Tax Regulation No. 410/2017 (ITR) also adds a description for 'interest'; except it mentions savings and credit associations, it depicts the same notion of interest stipulated under the ITP.[179]

bill with a face value of 100 Birr may be issued for 90 Birr. This means that the issuer of the bill receives 90 Birr on issue and pays 100 Birr on maturity. The difference of 10 Birr is referred to as discount, but is economically the equivalent of interest. A premium is really additional interest and may be payable by a borrower with a low credit rating. Drafter's Technical Note on ITP's Final Draft, *supra* note 23.

[174] Burns and Krever, *supra* note 9, p. 18.

[175] *Id.*

[176] Drafter's Technical Note on ITP's Final Draft, *supra* note 23.

[177] See OECD Model Tax Convention, *supra* note 49, Art. 11 (3).

[178] See Tax Administration Proclamation No. 983/2016, *supra* note 56, Arts. 2 (31) (d) and 37.

[179] Federal Income Tax Regulation No. 410/2017, Federal *Negarit Gazeta*, (2017), Art. 3 [hereinafter, Income Tax Regulation No. 410/2017].

The ITP has made important developments by defining 'interest', which was not the case under the repealed income tax proclamation. Most importantly, it defined 'interest' broadly to reflect the fact that there is enormous flexibility in international monetary markets as to how financial instruments may be structured. This is particularly important for the imposition of non-resident tax on interest under Art 51. In addition, the ITP broadens the scope of interest taxation under Schedule 'D'. The repealed income tax proclamation had targeted only income from interest on deposits.[180] Thus, interest income derived from various forms of lending activities, which is comparabe huge to interest income from saving deposits, was not subject to the withholding scheme. The use of withholding taxation on interest can be justified by the desire of the government to use withholding as a scheme for capturing hard-to-tax income and obtaining a reliable cash flow as income is earned.[181] The ITP fixed this problem by defining 'interest' broadly, thus, enabling it to easily capture all types of interest. However, the principle of 'giving priority to other schedules' should not be forgotten when we deal with taxation under Schedule 'D'. This is relevant basically when the interest is business income of the taxpayer. Accordingly, if the core business of the person is to derive interest, the interest is a business income taxable under Schedule 'C'. This typically refers to financial institutions (like banks) or others carrying on business as moneylenders (for example, businesses that derive a significant portion of their income in the form of interest by leasing equipment under hire-purchase, finance lease, or operational lease agreements).

Art. 56 imposed a lower rate on interest from a savings deposit with an Ethiopian resident financial institution (taxed at 5%), while the remaining types of interest and interest from a savings deposit with a non-resident

[180] Income Tax Proclamation No. 286/2002, *supra* note 16, Art. 36.
[181] Taddese, *supra* note 5, p. 498.

financial institution are taxable at 10%.[182] Besides, previously, interest paid for non-financial institutions was non-deductible; hence, the rules heavily favored taxpayers who were able to strike a deal with financial institutions and adversely affected those unable to raise loans from financial institutions.[183] The imbalance is fixed now; the deduction for interest expenses is not conditional on raising money only from a financial institution.[184]

4.4. Taxation of income from games of chance

The ITP, under Art. 57, provides for the imposition of tax on a person who derives income from games of chance held in Ethiopia. The taxpayers are both Ethiopian residents and non-residents, whether individuals or a bodies. Non-residents are taxable only on their Ethiopian source winnings, which is income derived from a game of chance held in Ethiopia.[185] Ethiopian residents are taxable for the income they derive from games of chance held outside Ethiopia too, as residents are taxable for their worldwide income. However, Art. 57 is not designed to tax this amount; it imposes tax only on income derived from games of chance 'held in Ethiopia'. The remaining option is to tax this amount is the residual provision, Art. 63. The resort to the latter could have been avoided had Art. 57 qualified the expression 'held in Ethiopia' for non-residents.

The tax base is 'income from winning at games of chance', but no tax is payable when the winnings are less than 1,000 Birr.[186] Unlike its predecessor,

[182] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 56.
[183] See Income Tax Regulation No. 78/2002, Federal *Negarit Gazeta*, (2002), Art. 10 [here in after, Regulation No. 78/2002].
[184] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 23.
[185] *Id.*, Art. 6 (4) (f).
[186] *Id.*, Art. 57 (3).

the ITP attempts to define 'games of chance'; Art 57 (1) defines it as "a game whose *outcome depends primarily on chance* rather or the skill of the participant, including a lottery or tombola" (emphasis added). No tests or factors are indicated to determine whether the outcome of the game is 'primarily' the result of chance than the skill of the participant. Illustrative examples (lottery and tombola) are provided, which can be used as indicative examples to include similar activities. For instance, the National Lottery Administration Establishment Regulation defined 'lottery' as any game or activity in which the prize winner is determined by chance, drawing of lots, or any other means.[187]

The taxation of games of chance should capture income from these games , which have become so widespread with the advent of the internet and mobile technology.[188] This should of course be preceded by the recognition of a certain activity as 'games of chance' by the relevant government organ, which is the Ministry of Revenues.[189] Once the activity is recognized as such, the income derived from it will be taxable under Art. 57. For instance, at this time alone, raffle, lotto, toto, instant lottery, number lottery, multiple prize lottery, promotional lottery, conventional bingo, modern bingo, and sports betting are explicitly recognized as types of games or activities determined by chance.[190] In addition, one of the duties of the Director General of the National Lottery Administration is to submit studies on the introduction of new lottery games

[187] National Lottery Administration Re-Establishment Regulation No. 160/2009, Federal *Negarit Gazzeta*, (2009), Art. 2 (1) [here in after, National Lottery Administration Regulation No. 160/2009].
[188] Taddese, *supra* note 5, pp. 452-458.
[189] Definition of Powers and Duties of the Executive Organs Proclamation No.1263/2021, Federal *Negarit Gazzeta*, (2021), Art 27 (1) (i-k).
[190] National Lottery Administration Regulation No. 160/2009, *supra* note 187, Arts. 2 (1).

for the approval of the Ministry of Revenues.[191] When this happens, the tax administration should step up itself to capture such activities into the tax net.

Any game of chance undertaken by any means without the approval of the National Lottery Administration is prohibited and coined as 'illegal lottery'.[192] Should the taxation under Art. 57 capture only income derived from 'legal games of chance' (games licensed by the Administration)? Or should it not matter even if it is 'illegal' like gambling, as Art. 57 makes no such distinction and 'income' is defined as 'a gain from whatever source derived'? This will take us back to the arguments discussed aboveunder section 3.1.

4.5. Taxation of income from casual rental of assets

The ITP, under Art. 58, imposed a tax on a person who derives income from the casual rental of an asset in Ethiopia (including any land, building, or movable asset). The taxpayers are both Ethiopian residents and non-residents, whether individuals or a bodies. Non-residents are taxable only on their Ethiopian source income, which is the case if the income is derived from the rental of an asset 'located in Ethiopia'.[193] Ethiopian residents are also taxable for the income they derived from a lease of an asset located outside Ethiopia, as residents are taxable for their worldwide income. However, Art. 58 is not designed to tax this amount; it imposes tax only on income derived from the rental of an asset 'located in Ethiopia'. The remaining option is to tax this amount under the residual provision, Art. 63. The resort to the latter could

[191] *Id.*, Art 8 (2) (h).
[192] Ethiopian Revenues and Customs Authority [now, Ministry of Revenues], a Directive to Control Illegal Lottery Activities, Directive No 84/2012, Art. 2 (6).
[193] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 6 (4) (b).

have been avoided had Art. 58 qualified the expression 'located in Ethiopia' for non-residents.

The tax base of Art. 58 is 'income from casual rental of an asset'. 'Rent', 'asset', and 'casual' are the key terms to identify the scope of this provision. 'Rent' is not defined, but under ordinary principles, rent is understood as an amount received as consideration for the use or occupation of, or right to use or occupy, immovable or tangible movable property.[194] Though no direct definition is provided for 'asset', the provision provides illustrative lists of assets, including land, buildings, and movable assets. The list includes both movable and immovable assets, and we can add more using the ordinary meaning 'asset' which is anything that may be turned into a financial account. Then, the rental income from the 'casual' rental of assets is taxable under Art. 58; thus, regular rental activities are within its scope.

Because three schedules (Schedules 'B', 'C', and 'D') compete over the taxation of income from the rental of assets, the overlap is noticeable.[195] Due to this, the taxation under Art. 58 requires two preconditions. First, there are exclusions to make: assets, the rental of which is subject to other schedules and other provisions of Schedule 'D' are not taxable under Art. 58. These are; one, if the rent arising from the rental of a movable asset is to be characterized as both 'rental income' taxable under Art 58 and 'royalty', the priority is given to the latter, and it will be taxable under Art. 51 or 54 (as the case may be).[196] Two, the rental of buildings to the extent they are subject to Schedule 'B' is also excluded from Art. 58.[197] This refers to income from the 'regular'

[194] Burns and Krever, *supra* note 9, p. 20.
[195] For details see Belete, *supra* note 35, pp. 56-57 and 62; and Belete, *supra* note 133, p. 116.
[196] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 58 (2).
[197] *Id.*, Art. 13 (3).

rental of buildings. Three, income from the rental of business or business assets is 'business income', hence, taxable under Schedule 'C'.[198] This time, the exclusion is irrespective of the length orfrequency of the rental activities.

The second precondition for taxation under Art. 58 is that the income must be from 'casual' rent. For what amounts to 'casual', the ITR under Art. 50 attempts to explain it as "… gross income derived by a person who is not engaged in the regular business of renting a movable or immovable asset." Previously, since there was no such description, the characterization overlap was tense, and there were divergent interpretations of the tax on income from casual rental of an asset even by tax officials.[199] While some understood it as a tax applicable to Schedule 'C' taxpayers who occasionally lease property outside their regular line of business (like when a construction company leases construction equipment to others in lean times), others maintained its applicability to any person involved in a casual rental of property (regardless of whether it is a business person or not).[200] Now, even if it may be difficult to say it came up with clear tests for what amounts to 'causal', the description under Art. 50 of the ITR at least sends a message that, if the rental activities are undertaken in a business setting or if the rental activities are construed as 'regular', the resulting income is taxable under Schedule 'B' or 'C' (as the case may be), not under Art. 58.

4.6. Taxation of gains on disposal of certain investment assets

Art. 59 of the ITP provides for the imposition of tax on a person who has made a gain on the disposal of immovable property, shares, or bonds (referred

[198] Income Tax Regulation No. 410/2017, *supra* note 179, Art. 22.
[199] See Taddese, *supra* note 5, p. 488.
[200] *Id.*

to as a "taxable asset').[201] The taxpayers are both Ethiopian residents and non-residents, whether individuals or bodies. Non-residents are taxable only on their Ethiopian-source income. This will be the case if the non-resident derived a gain from the disposal of any of the following four: An immovable asset located in Ethiopia; shares and bonds issued by a resident company; a membership interest in a body (wherever resident), if more than 50% of the value of the interest is derived, directly or indirectly through one or more interposed bodies, from immovable property in Ethiopia; or an interest in a share or a bond issued by a resident company. [202] While the location of the asset disposed of and the residential status of a company that issued the shares or bonds are important to taxing non-residents, Ethiopian residents are taxable under Art. 59 irrespective of these. This gives a good lesson for Arts. 57 and 58, which provide the location requirement without qualification of the residential status of the taxpayers (they should remove the location requirement to tax residents).

Art. 59 deals with the taxation of capital gains. The taxation of capital gains has a diversified approach across jurisdictions; while some countries have a separate tax levied upon capital gains, in many jurisdictions capital gains are taxed as part of the income tax.[203] The Ethiopian tax system coincides with the latter approach since capital gains are taxed as part of the income tax (under Schedule 'D'). Through scholars have noted that it is strictly incorrect to speak of a capital gains tax for jurisdictions in the latter category, commonly used literature uses the term "capital gains taxation" to cover both

[201] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 59 (1).
[202] *Id*., Art. 6 (4) (c) and Income Tax Regulation No. 410/2017, *supra* note 179, Art. 6 (2).
[203] Chris Evans and Richard Krever, Taxing Capital Gains: A Comparative Analysis and Lessons for New Zealand, *New Zealand Journal of Taxation Law and Policy*, Vol. 23, (2017), pp. 486-488.

situations.[204] The distinction between capital gains and other gains is also common across jurisdictions. In many countries, capital gains (or certain categories of gains) are treated preferentially for tax purposes (which may include lower rates, partial or complete exemptions, and inflation adjustments that are not available for other gains).[205] The same is discernible under Art. 59 of the ITP,where the tax is imposed on selective assets, the gains are taxable at a fixed rate (not progressively), and there are preferential treatments, including quarantining of losses.

As noted above, a person is taxable under Art. 59 when it derives 'a gain on the disposal of a taxable asset'. Thus, understanding the terms 'disposal', 'taxable asset', and 'gain' is important to determining the scope of capital gains tax in Ethiopia. These are examined below, one by one.

a. Disposal of an asset

Art. 67 (1) of the ITP reads, "A person disposes of an asset when the person has *sold, exchanged, or otherwise transferred legal title to the asset*, and *includes* when the asset is cancelled, redeemed, relinquished, destroyed, lost, expired, or surrendered" (emphasis added). This provision provides various forms of disposal, with an illustrative list. The determining factor of whether the transaction is a disposal or not is the transfer of the legal title (ownership) of the asset from one person to another. It includes the disposal of a part of an asset[206] but is not inclusive of the vesting of an asset in a person by a liquidator, trustee-in-bankruptcy, or receiver.[207] According to, the Capital Gains Tax Directive No. 7/2019 enacted by the MoF, in the context of

[204] *Id.*
[205] Burns and Krever, *supra* note 9, p. 64.
[206] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 67 (4).
[207] *Id.*, Art 67 (5).

'share', disposal refers to a shareholder of a SC or PLC or a partner in a partnership transferring her share in the organization to another person through a sale or donation.[208]

Thus, for instance, if the asset is disposed of through a sale, the sellerwill be a taxpayer under Art. 59. If the asset is disposed of through donation, it will be the receipent of the donation.[209] Related to this, as much as there are arguments for the taxation of gifts or bequests, as a matter of rule, they are not taxed as income in many jurisdictions.[210] If the definition of income is inclusive of gifts, there may be a need for an explicit exclusion of gifts. However, it is recommended that the exclusion be limited, especially since it should not apply to the income from property that is transferred as a gift (unless the income is attributed to the transferor), to an amount transferred by or for an employer to or for the benefit of an employee (which should not qualify as a gift but employment income), and for gifts made in a business context other than to an employee (should be treated as business income to the recipient).[211] When we bring this to the context of the ITP, it is obvious that the definition of "income" is inclusive of gifts.[212] Then, it goes on to provide the kinds of gifts excluded/exempted from capital gains taxation; a cash amount or the value of the asset acquired by gift, other than a gift that is

[208] Ministry of Finance, A Directive to Implement Income Taxation of Gains from the Disposal of Capital Asset, Directive No 8/2019, Art. 3 (6) [here in after, MoF Directive on Capital Gains Tax].
[209] See *Id.*, Art. 13; Income Tax Regulation No. 410/2017, *supra* note 179, Art. 53 (2).
[210] Burns and Krever, *supra* note 3, p. 32.
[211] *Id.*
[212] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 2 (14), in defining "Income", uses the expression 'every form of economic benefit'.

employment, rental, or business income.[213] In a way, it goes along with the above recommendation.

If an asset is disposed of through succession or under a will, it is the deceased who will be treated as the one who disposed of the asset.[214] Since it is the heirs who derived the gain, it is they who have to pay the tax. However, under the ITP, gains derived from the transfer of assets through succession, or a cash amount or value of the asset acquired by inheritance, are explicitly exempt from income tax.[215] Thus, there is no income tax on inheritance.

b. Taxable asset

The next question will be the disposition of which asset is subject to Art. 59. The latter charges for the disposal of a 'taxable asset'. The answer is an immovable asset, a share or bond, or any interest in shares or bonds, such as, in the case of shares, a right or option to acquire shares.[216] In the context of limited administrative capacity and difficulties of enforcement in developing countries, there are persuasive arguments for excluding many types of capital gains and losses derived by individuals from the tax base.[217] This is because capital gains and losses may accrue over many years and are generally recognized on a realization basis, and taxpayers may not have maintained adequate records for calculating the amount of the gain or loss.[218] Ethiopia's imposition of capital gains tax on selective assets goes in line with this suggestion; it excludes from the tax base most capital gains realized and

[213] *Id.*, Art. 65 (1) (j).
[214] *Id.*, Art. 67 (3).
[215] *Id.*, Art. 65 (1) (j).
[216] *Id.*, Art. Art. 59 (1); Income Tax Regulation No. 410/2017, *supra* note 179, Art. 6 (1).
[217] See Burns and Krever, *supra* note 9, p. 64.
[218] *Id.*

losses suffered by individuals, other than gains and losses attributable to immovable property, shares, and bonds.

For tax purposes, the ITP categorizes these into two classes: class 'A, which constitutes an immovable asset, and class 'B, which constitutes shares and bonds (and any interest in these two).[219] Art. 59 referred to these as 'taxable assets', not 'capital assets'. And more, the title of the provision employs 'investment asset'. But it should be noted that one of the natures of investment assets is that they are capital assets (they are not current goods). For that matter, the Amharic versions of Art. 59, Art. 53 of the ITR (both versions), and the Capital Gains Taxation Directive, both in the title and content, use the expression 'የካፒታል (which means 'capital assets'). Thus, the tax under Art. 59 is about capital assets.The current income tax system widens the scope of assets for capital gains taxation. Previously, buildings (held for business, factories, and offices) and shares of companies were taxable assets,[220] the current one adds bonds and any interest in shares or bonds. However, the disposal of a share in cooperative societies is excluded from capital gains taxation.[221] This can be seen as part of the preferential treatment the government provides for the latter. Moreover, while the repealed income tax proclamation used the term 'building',[222] the ITP used 'immovable asset'. The ITP provides that an "immovable asset" includes a mining or petroleum right, or mining or petroleum information, as defined in Art. 36.[223] The definition is inclusive, so we can add others using its ordinary meaning stipulated under the Civil Code. The latter provides land and buildings and any intrinsic elements of these (such as crops and trees before being separated

[219] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 59 (2), (7) (b) and (c).
[220] Income Tax Proclamation No. 286/2002, *supra* note 16, Art. 37 (1).
[221] MoF Directive on Capital Gains Tax, *supra* note 208, Art. 11.
[222] Income Tax Proclamation No. 286/2002, *supra* note 16, Art. 37 (1).
[223] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 2 (13).

from the land and third party rights such as the rights of lessees and tenants) or accessories to land and buildings as immovable property, and also transactions concerning rights over immovable (such as usufruct) are considered transactions on immovable property.[224] So these too will be considered as Class 'A' taxable assets (i.e., immovable assets), the disposable of which attracts income taxation under Art. 59.

However, land should be excluded; in Ethiopia, land cannot be subject to capital gain tax as the ownership title belongs to the tate, and is not subject to disposal (through sale or exchange).[225] The other exclusion is the disposal of private residential buildings. Previously, a gain obtained from the transfer of a building held for residential use was completely exempt, without any qualification.[226] The ITP qualified this in that only buildings held and wholly used as private residences for 2 years before disposal are excluded.[227] Thus, a person is exempt from tax under Art. 59 on the disposal of his private residence provided the 2-year holding period is satisfied and the residence was wholly used as a private residence during this period (not partly as a business premise, for instance).

Why is disposal of a building held for private residence exempt from capital gains tax? There are desirable tax policy reasons for excluding capital gains

[224] See Civil Code Proclamation, *Negarit Gazzeta*, (1960), Arts. 1131-1139. According to the OECD Model Tax Convention the term "immovable property" shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources. See OECD Model Tax Convention, *supra* note 49, Art. 6 (2). Reading the relevant provisions of the Civil Code, the same can be said in Ethiopia.

[225] FDRE Constitution, *supra* note 129, Art. 40 (3).

[226] Income Tax Proclamation No. 286/2002, *supra* note 16, Art. 37 (2).

[227] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 59 (7) (a).

and losses on personal-use assets from the tax base of capital gains taxation, as taxpayers are not able to recognize capital gains and losses on what is essentially personal consumption derived by individuals.[228] In this context, a private residential building does not qualify to be an 'investment asset' or 'capital asset'. If so, why is a 2-year holding period provided? This is to fight tax avoidance arrangements. In the absence of this, at the time of disposal, a person may convert a building that has been used as a capital asset (for instance, as a business premise, office, or factory) to a residential building just to avoid taxation under Art. 59. Clarifying more on this point, the Directive on Capital Gains Tax prescribed that even if the plan [title deed] of the building was issued as residential," if a business license has been issued with the house number of the building and the building has been used for business activities, the exemption will not be applicable.[229] The disposal of an unfinished building, whether it is being built for a private residence or not, is also taxable.[230]

However, if the above assets (immovable property, shares, or bonds) are qualified as 'business assets', the gain from their disposal is a business income and taxable under Schedule 'C', not under Art. 59.[231] The latter is concerned with non-business capital assets (referred to as 'taxable assets'). For instance, a building held for business (like business premises) is a business asset; thus, a gain from its disposal is taxable under Schedule 'C'. Similarly, the gain companies derive from selling a share beyond its par value is business income (taxable under Schedule 'C');[232] while a gain from the disposal of a share by a

[228] See Burns and Krever, *supra* note 9, p. 64.
[229] MoF Directive on Capital Gains Tax, *supra* note 208, Art. 10 (2).
[230] The same goes for buildings used for residential purposes for less than 2 years prior to disposal. See *Id.*, Art. 10 (2).
[231] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 21 (1) (b).
[232] MoF Directive on Capital Gains Tax, *supra* note 208, Art. 11.

shareholder is a capital gain taxable under Art. In case the asset happens to be both a business asset and a taxable asset, the taxation of the gain from its disposal will be divided into Schedules 'C' and 'D', using the calculation of Art. 21 (4) of the ITP.[233] This split of gains as 'business income and 'capital gain' may make the characterization difficult,[234] yet, taxing the gains under the schedule they fit into is the right approach.[235]

Finally, it should be clear that, though certain assets are excluded from taxation under Art. 59 [for convincing reasons], that does not mean the gain from their disposal will go untaxed. There are many non-business capital assets other than immovable assets, shares, and bonds, the disposal of which is not covered under Art. 59 (assets like vehicles, machinery, and furniture that are not held by businesses as business assets but are capital assets). The same goes for a gain from the disposal of buildings held for private residence for 2 or more years prior to their disposal. Though no provision explicitly names and taxes such gains, they should be taxable under Art. 63 as 'other income'. Therefore, the exemption under Art. 59 is not the exemption from

[233] The provision, however, has no application business assets that are not depreciable assets. Drafter's Technical Note on ITP's Final Draft, *supra* note 23.

[234] See Belete, *supra* note 133, pp. 115-116.

[235] For instance, previously, even a gain from the transfer of a building held for business (as a business asset) was subject to capital gain tax under Schedule 'D'(Income Tax Proclamation No. 286/2002, *supra* note 16, Arts. 24 and 37). In effect, a building treated as a Schedule 'C' matter for depreciation purposes was transformed into a capital gains and loss matter when it transferred by a business. This special transformation of a building from a capital expenditure (for depreciation purposes) under Schedule 'C' into a capital gains or loss matter under Schedule 'D' lead to some arbitrage of the rules under these two Schedules, resulted in tax benefits for some taxpayers (Taddese, *supra* note 5, pp. 501-502). The ITP address this concern; one, by taxing the disposal of a building according to its nature (whether it is a business asset and taxable asset) and two, it provides a detailed prescriptions regarding how loss and depreciation deductions work for disposal of capital assets (Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 59 (4) and (5)).

income tax so long as the exemption is not again included in the exemption list of Schedule 'E' (which is authoritative in deciding the total income tax exemption of a certain income).

c. **Capital gains**

The tax base of Art. 59 is a 'gain' derived from the disposal of the taxable assets discussed above. To say there is 'gain', the consideration for the disposal of the asset must exceed the cost of the asset at the time of disposal.[236] Art. 70 of the ITP provides amounts considered consideration for the disposal of an asset', while Art. 68 lists expenditures considered cost of an asset'. The difference between the two is 'capital gain', and it is precisely this 'gain that is taxable under Art. 59. However, if the disposal is made through donation, the 'gain' is the difference between the original cost of the asset and the cost of the asset at the time of donation.[237] And, when the asset happens to be both a business and a taxable asset, what is taxable under Art. 59 is 'any gain above cost' (the amount, if any, by which the cost of the asset exceeds the net book value of the asset is taxable under Schedule 'C').[238]

In Ethiopia, the main problem in the determination of 'capital gain' is valuation.[239] The current income tax system has introduced many positive changes in this regard. For instance, there was a lack of clarity as to the extent

[236] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 59 (3).
[237] Income Tax Regulation No. 410/2017, *supra* note 179, Art. 53 (1).
[238] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 21 (4) (b). A detailed prescription in this regard is provided under MoF Directive on Capital Gains Tax, *supra* note 208, Art. 6.
[239] See for instance, Serkalem Eshetie, Constitutional and Administrative Issues in Relation to Capital Gains Tax Ethiopia: the Case of Bahir Dar City Administration, LL.M Thesis, Bahir Dar University, (2016). This work navigated administrative difficulties entangled with capital gains taxation in Ethiopia along with the question, which government has the power to tax it (the federal or regionals).

of the power of the tax authority to set aside the price fixed in a contract and reevaluate the asset.[240] As a result, parties may agree to transfer the property at its book value so that the capital gains tax can be zero or close to zero. Authorities also used to incline toward their own valuations when the agreement was for a donation of the property.[241] Now, better clarity is established. First, the detailed prescriptions under Arts 66-72 ITP have significantly narrowed the pre-existing gasps as to the determination of 'disposal' of an asset and 'consideration', 'cost', 'net-book value', and 'loss' for the disposal of an asset. Second, the power of the revenue authority is explicitly stated. The authority is empowered to disregard the price quoted in a contract and resort to the fair market value of the asset: If a taxpayer is unable to provide documentary evidence of the consideration for the disposal of an asset; if the asset is disposed of by way of gift; or if the price quoted in a contract (sale or otherwise) is not proportional to the fair market price of the asset.[242] Guidance for the determination of the "fair market value" of an asset is also provided.[243] In this regard, establishing a 'fair market price' for shares may continue to be a challenge, mostly due to the absence of a stock market in Ethiopia (though there have been recent developments to have one). In addition, a taxpayer under Art. 59 is required to keep a record of the acquisition date of the taxable asset, the cost of acquisition, any costs of improvement in relation to the asset, and the consideration received on

[240] Taddese, *supra* note 5, pp. 502-507.
[241] *Id.*
[242] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 70 (2) and (6); MoF Directive on Capital Gains Tax, *supra* note 208, Art. 8 (5).
[243] See Tax Administration Proclamation No. 983/2016, *supra* note 56, Art 3. It also empowered the Ministry of Revenues to issue a Directive for the purposes of determining the fair market value of any goods, asset, service, or benefit.

disposal of the asset.[244] To assist the valuation, the parties are also required to produce relevant authenticated documents associated with the transaction.[245]

All the above arrangements are made to facilitate evidence-based valuation and the potential abuses thereof, like providing a devalued price for assets in a contract. Now, the question is whether these positive changes in the laws are also practically reflected in the tax administration. The country's tax administration is still strangled by administrative incapacity, poor tax information collection and data recording, and manual-based operations (which make it more prone to corruption).[246] For instance, the revenue authority's incapacity to value fringe benefits and estimate the average daily revenue of category 'C' taxpayers is proven.[247] Thus, unless the administrative capacity of the revenue authorities is enhanced, including by staffing them with the required experts in valuation, the problems regarding the valuation of capital gains will persist. In addition, the concerned institutions, like the revenues authority and the document registration and authentication agency, should be aware that the capital gains provisions are vulnerable to abuse and require serious cross-checking and close cooperation.

Concluding Remarks

This article has attempted to provide an overview and examine the income tax schedule 'D' of the federal income tax proclamation through the tax bases and taxpayers of the taxing provisions of the schedule. The schedule's basic

[244] Income Tax Proclamation No. 979/2016, *supra* note 1, Art. 82 (5).
[245] MoF Directive on Capital Gains Tax, *supra* note 208, Arts. 7 and 8. Art 17 of the same also stipulates the effect of the invalidation of the contracts on the capital gains tax paid based on the cancelled contract.
[246] See Belete Addis *et al*., The 2016-Income Tax Reforms of Ethiopia: Drivers, Major Legislative Changes, and Constraints, *Bahir Dar University Journal of Law*, (upcoming).
[247] *Id.*

features are: one, it is a 'miscellaneous' schedule designed to tax sources not taxable under Schedules 'A', 'B', or C. It lacks unifying features in terms of the tax base, taxpayers, tax brackets, tax rates, and methods of tax assessment and collection. And it imposes a final tax on the income concerned.

Compared to its predecessor, the current Schedule 'D' has emerged with several remarkable developments. The main ones in this regard can be summed up into three. First, it came up with far clearer and expanded prescriptions about the taxation of non-residents. Non-residents deriving 'Ethiopian source income' being the mandatory pre-condition, the ITP imposed a tax on non-residents in three ways: in an exclusive setting where certain provisions are exclusively dedicated to taxing non-residents; in the context of permanent establishments, whereby non-residents are imposed with tax if they derive income from their permanent establishment in Ethiopia; and under the same provisions designed for Ethiopian residents as long as they derive Ethiopian source income.

The second is the introduction of new income tax bases: insurance premiums, management fees, repatriated profit, recharged technical fees and royalties, undistributed profit, windfall profit, and residual income. Especially, the taxation of residual income categories is a big introduction in this regard, as it explicitly closed the door for tax avoidance for the mere reason the amount is not named and made taxable under any of the income tax schedules.

The third one is the changes introduced under the preexisting income sources of Schedule D. For instance, it came up with informative definitional provisions for a management fee, a technical fee, interest, a dividend, and a royalty. These not only ease the characterization of the taxpayers and tax bases but also widen the scope of the respective taxation of these sources. They established clarity on many of the previous confusions and gaps related

to the taxation of these sources. The changes introduced in capital gains taxation are also significant in many ways, including widening the assets subject to capital gains tax and providing relatively detailed provisions for the valuation of capital gains. All these changes will be meaningful if the tax administration on the ground is also reformed to reflect the positive changes introduced under the tax laws.

The Editorial Board extends its gratitude to manuscript contributors and reviewers.