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The Editorial Board extends its gratitude to manuscript contributors, reviewers, and others who participated in different capacities. The Editorial Board appeals to all members of the legal profession, both in academia and practitioners, to contribute scholarly manuscripts.

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Unraveling Treatment of Currency Translation, Foreign Exchange Gains and Losses under Ethiopian Income Tax Law

Eyader Teshome Alemayehu*

Abstract

The issue of currency conversion in taxation and tax treatment of foreign exchange gain or loss is one of the nascent, yet complex and controversial area requiring due consideration from policy makers and legislative bodies. The legal requirement of assessment and final payment of tax liability in domestic currency has brought to the forefront the rule of currency translation when transaction is made in foreign currencies. This in turn has the potential for impending gains or losses in foreign exchange that emanate either from fluctuation in the rate of exchange among currencies or government measures of devaluation and revaluation of currency. A tax treatment of such gain and loss necessitates an effective legal framework to neutralize the negative effects of exchange fluctuation. As a result, tax laws of different countries govern and regulate comprehensively tax implications of transactions denominated in foreign currency. A concern might arise as to whether the Ethiopian income tax law ensures neutrality, clarity and certainty in relation to those issues. This research explores tax implication of foreign exchange gains and losses under Ethiopian income tax laws. The research is a doctrinal legal research type carried out through a comparative method.

The evidence from the investigation shows that a number of uncertainties and anomalies surround the existing Ethiopian income tax law regarding method as well as time of exchange rate in currency translation rule, the time of recognition of foreign exchange gains and losses, and as to how and when to determine realization. Moreover, there is an apparent discrepancy and even

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contradiction between Income Tax Proclamation No.979/2016 and Regulation No.410/2017 (amended by Regulation No.485/2021). Discrepancies can also be read between the Amharic and English versions of the laws. Taking cognizance of those glitches, either the law must be revised or the tax authorities at federal and regional levels have to come up with explanations through directives or advance rulings.

Keywords*: Currency Translation; Foreign exchange; Currency Transaction Tax; Ethiopia*

Introduction

Before the introduction of a monetary system (and even after), taxpayers across societies used to pay their tax liability in kind or in other ways such as service or labor.[1] In the course of socio-economic changes in human history, money/currency[2] came into being and persists as one of the main units of account through which various private and public debts including tax related amounts are calculated and paid.[3] In this same course of history, societies from different states came to make multifaceted economic interactions, giving birth to modern global economy. Despite such rich interactions involving the use of monetary medium, no universal currency is readily available for many who carry out international transactions around the world. This, among

[1] For instance, taxes used to be paid by a percentage of crops raised. See Richard Henry Carlson, A Brief History of Property Tax, IAAO Conference on Assessment Administration in Boston, Fair & Equitable, (2004), p.3.

[2] As to various definition of money See Charles Proctor, *Mann on the Legal Aspect of Money*, 7th ed., Oxford University Press, (2012), p.1.04-108. F.A. Mann, *The Legal Aspect of Money*,5th ed., Oxford University Press, (1992) p.3-10.

[3] *Money serves four basic functions in an economic system. It acts as (1) a medium of exchange, (2) a unit of measure, (3) a store of value, and (4) a standard of deferred payment*. Larry Allen, *The Encyclopedia of Money*, 2nd ed., ABC-CLIO, LLC pub, (2009), p. xiii-xvi.

others, leaves taxpayers with a perennial predicament in the processes of paying their tax related liabilities involving interstate business activities.

This difficulty brings us to the subject of determining applicable currency in tax assessment and final payment. In principle, many countries legally require application of their domestic currency in calculating the tax related payments and introduce currency translation rule in case any such amount is denominated in foreign currency.[4] Moreover, most citizens with tax duties use (or legally required to use) domestic currency in their day-to-day activities of generating income and spending expenses. For instance, Ethiopia sets a currency prescription requirement in which all monetary domestic transactions in the country must be expressed in *Birr*[5], and if not, it is legally presumed to be expressed in birr.[6]

For tax purposes, the requirement of applying domestic currency in tax calculation as well as currency prescription has the effect of requiring taxpayers to present or report their accounts in that particular currency with attendant net effect of requiring taxpayers to convert any transactions made in foreign currency[7] into domestic currency. This, in turn, brings the currency translation-rule or currency conversion rule into a tax system with potential consequences of adding serious complication to the entire system. First, determination and calculation of income tax, for that matter all tax, is an

[4] For instance, see the United Republic of Tanzania Income Tax Act, (2008) Chapter 332 of 2008, Section 57(1) Article 28 declare that a person's tax payable, income and amounts to be included and deducted in calculating income shall be quantified in Tanzania shillings. See also Australian *Income Tax Assessment Act 1997*960-C and 960-D*;* Section 985 of IRC, Section 5 of UK *Corporation Tax Act 2010;* Income Tax Act of Uganda, Act 11/1997, Chapter 340 1 July, 1997.

[5] Birr is the monetary unit and official legal tender of Ethiopia. National Bank of Ethiopia Establishment (as Amended) Proclamation, Proclamation No. 591/2008, *Federal Negarit Gazetta*, (2008), Article 17 (1).

[6] Id., Article 17 (3) & (4).

[7] The term foreign currency means any currency other than domestic currency.

intricate routine due to its entanglement with various deductions and exemptions.[8] Second, due to fluctuations in the values of major currencies such as US dollar and government devaluation/revaluation measures, currency translation might upshot in another gain or loss, independently from the underlying transactions.

This scenario inevitably gives rise to additional challenges and further complications to tax assessment and administration. To alleviate this, a country's tax law has to clearly and effectively deal with those foreign currency implications of taxation. In more practical terms, the rules of currency translation, recognition of foreign exchange gains and losses in the tax law must conform to basic principles of taxation such as equity, certainty, simplicity, and convenience. To such effect, the principle of certainty as well as simplicity of taxation requires determination of the basic component of taxes to be predictable, known in advance and plainly stated in the tax law.[9]

Despite all these intricacies of the subject, the Ethiopian currency translation and tax implication of deriving foreign currency gain or incurring foreign currency loss barely attracts the attention of academics, policy makers and practitioners, leaving dearth of insights in the literature in Ethiopia. Hence, this paper is primarily motivated to fill this gap in the literature, while looking into legal and practical problems with the view to recommend solutions. In the moves to attain these ends, it explores Ethiopian income tax law treatment of currency translation as well as foreign exchange gain and loss. In the course of the inquiry, the paper employs qualitative doctrinal legal research

[8] Jeanine Montocchio, The Tax Effects on South African Taxpayers involved in Foreign Exchange Transactions, M.A Thesis, School of Accounting at University of Kwazulu-Natal Studies, (2010), p.1.

[9] OECD, Fundamental Principles of taxation, In OECD, (Ed.), *Addressing the Tax Challenges of the Digital Economy*, OECD Publishing Paris, (2014), pp. 29-50. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (1937), p.850.

tools through which both primary source of authorities (laws), secondary data and practices of foreign countries are generated and analyzed as a way to gain an in-depth understanding of the phenomenon underlying the subject.[10]

The contents of the paper from the inquiry are organized in five sections. Section one introduces the relationship between taxation and foreign exchange or currency translation in general and specifically under the Ethiopian legal framework. Section two deals with operational currency and currency translation issues. The third and fourth sections investigate matters on tax treatment of foreign exchange gain or loss and feasibility of introducing currency transaction taxation practices in Ethiopia respectively. Finally, the paper wind up by making concluding remark and recommendations.

1. The Link between Taxation, Currency and Foreign Exchange

The relationship between taxation, currency and foreign exchange can be seen from varying perspectives. Accordingly, the tax aspects of currency and foreign exchange constitutes four intertwined issues: (1) determination of tax quantification currency, (2) the rule of currency translation, (3) income tax treatment (taxability or deductibility) of foreign exchange gain or loss (FEGL) and (4) currency transaction tax (CTT). The first issue is concerned with determination of applicable currency in tax assessment and final tax payment. The second and third interconnected issues are associated with the rule of currency translation[11] for tax purposes and income tax treatment [taxability or deductibility] of foreign exchange gain or loss respectively. The final issue

[10] Ian Dobinson and Francis Johns, Qualitative Legal Research, in Mike McConville and Wing Hong Chui (eds.), *Research Methods for Law*, Edinburgh University Press, (2007), p.21.

[11] Translation refers to the conversion of an amount in foreign currency to a business' functional currency. Inland Revenue Authority of Singapore, *Income Tax Treatment of Foreign Exchange Gains or Losses for Businesses*, IRAS e-Tax Guide, (2012), p.5.

gives a perspective to look into taxing foreign exchange transaction itself as an independent tax base usually referred to as currency transaction tax (CTT).

In Ethiopia, the Federal Income Tax Proclamation No. 979/2016 (hereinafter FITP),[12] and Federal Income Tax Regulation No.410/2017 (hereinafter FITR) [13] and Income Tax Regulation (Amendment) No.485/2021[14] are the primary legal framework governing the interface between income tax and foreign exchange in Ethiopia at the Federal level. [15] Though the contents of Article 77 of FITP No. 979/2016 is not only restricted to currency conversion rule, its heading is narrowly and erroneously labeled as "currency translation".[16]

Sub-article 1 and 2 of Article 77 establish the fundamental principles by designating the Ethiopian **Birr** as applicable currency for income tax determination and the rule of currency translation in cases where tax relevant amounts are denominated in foreign currency. On the other hand, sub-article 3

[12] Federal Income Tax Proclamation, Proclamation No.979/2016, *Federal Negarit Gazeta, Extra Ordinary Issue*, (2016), [herein after FITP No.979/2016].

[13] Council of Ministers Federal Income Tax Regulation, Regulation No.410/2017, *Federal Negarit Gazeta*, (2017), Article 44 [Herein after FITR No.410/2017].

[14] Council of Ministers Federal Income Tax Regulation, Regulation (Amendment) No.485/2021, *Federal Negarit Gazeta*, (2021), Article 44 [Herein after FITR (Amendment) No.485/2021].

[15]Before enactment of FITP No. 979/2016, the repealed Income Tax Proclamation only recognized the taxability or deductibility of foreign exchange gain and loss. The repealed law not only failed to state the relevant currency for tax determination and currency translation rule, it did not also provide us with detail rules for determining the taxability and deductibility of foreign exchange gain or loss. In contrast, the current FITP No. 979/2016 in addition to recognizing foreign exchange gains and losses in income tax, it also adds some provisions to the previous law and introduces the operational currency through which income tax is determined in Ethiopia and currency translation rules where taxpayers obtain income or incur liability in foreign currency. See Income Tax Proclamation No.286/2002, *Federal Negarit Gazeta*, (2002), Article 9, *Cf.* FITP No.979/2016, Article 77.

[16] In this regard the title of the previous ITP No.286/2002 seems relevant, Article 9 starts with "Foreign Exchange Transactions".

recognizes income tax treatment of foreign exchange gain or loss and finally sub-article 4 stipulates the power of the tax Authority to issue detail directive on this matter. Moreover, the Federal Income Tax Regulation No.410/2017 comes up with some detail implementing provisions regarding income tax treatment of foreign exchange gains and losses.[17] However, the above law, while it sets out the three issues, does not clearly and explicitly indicate the fourth issues of currency transaction tax (CTT).[18]

Before investigating the details of the above provisions, it is necessary to understand its scope of application. Closely looking into the placing of Article 77, one would notices it is insertion under Part seven of the FITP No.979/2016 that deals with common provisions and rules.[19] The inclusion of this umbrella provision (Article 77) under common rules tempts one to conclude that all sub-articles of the provision on applicability of birr, currency translation rules and recognition of foreign exchange gain or loss are applicable to all schedules of income tax alike. Yet, though the applicability of the first two rules (i.e., the rule of birr as operational currency in tax determination and currency translation rules) for all types of tax as well as taxpayers might hold true, the applicability of the rule of recognition of foreign exchange gain or loss to all schedules of income tax is questionable. Particularly, given the fact that deduction is not allowed for employment income tax, [20] it is difficult to imagine how foreign exchange loss is recognized under schedule A employment income tax. Second, unlike schedule A and Schedule D whose tax calendar is on monthly[21] and event

[17] FITR No.410/2017, Article 44.
[18] Currently it is possible to argue that income from currency transaction can be taxed under Schedule C Business income tax or at least under Schedule D Residual Income tax of Article 63, FITP No.979/2016. See *Infra,* p.26.
[19] FITP No.979/2016, Part seven, Chapter 2.
[20] Id., Article 10(3).
[21] Id., Article 10(1).

basis[22], the applicability of Article 77(3) of FITP is limited to Schedule B and Schedule C taxpayers with tax year. Moreover, the Federal Income Tax Regulation makes explicit that treatment of foreign exchange gain or loss is only applicable to business income tax.[23] The subsequent discussion will probe into treatment of those four issues under the Federal Income Tax Proclamation No.979/2016 and Income Tax Regulation No.410/2017 (Amended by Regulation No.485/2021).

2. Determination of Applicable Currency and Translation Rule

2.1 Operational Currency in Tax Calculation

The issue of deciding which currency is applicable in tax calculation is central in maintaining certainty, uniformity and equality of taxpayers in national economy. In Ethiopia, though Birr[24] has been practically used in determination of tax related amounts, the FITP No.979/2016 legally recognizes Birr as the currency to be used in tax calculation.[25] It explicitly requires "an amount taken into account under this Proclamation [income tax] to be expressed in **Birr**"[26] (emphasis added). Here, it is important to note that the law does not explicitly require the final tax liability to be paid in birr; rather its determination (expression) is to be set in birr. One can discern this legislative intent in the phrase that reads,"…shall be **expressed** in birr."[27]

[22] Id., Article 51-64.
[23] FITR No.410/2017 Article 44(1).
[24] In this regard see Article 1749(1) of the Civil Code: *A debt consisting in a sum of money shall be paid in local currency.*
[25] FITP No.979/2016, Article 77(1).
[26] Id.
[27] For instance, if a resident of Ethiopia receives 500 US dollar as a monthly salary, such employment income must be indicated in birr in order to determine its taxability, rate and final liability.

In general, for tax purposes, the Ethiopian Birr is considered as "Presentation currency*"* i.e., the currency by which financial statements are computed and presented for taxation. Other provisions of the same Proclamation also take the Birr as a unit of account in the determination of category of taxpayers through annual turnover,[28] in the determination of employment income[29], taxable rental income[30] and taxable business income.[31]

The applicability of birr in tax calculation is not only limited to income and deduction, rather it applies to all "*amounts taken into account under income tax*."[32] What are those amounts? Generally, amounts taken into account for income tax purposes are so numerous,[33] and variedly designated for different Schedules of income tax.[34] This means the rule applies to amounts generally, and is intended to be interpreted broadly.[35] Hence, "a taxpayer's income (gross income, taxable income), deductions (expenses and losses),

[28] Id., Article 3(1(a (2), (b) & (c).
[29]Id., Article 11.
[30]Id., Article 14(2).
[31]Id., Article 19(2).
[32] FITP No.979/2016, Article 77(1).
[33] Examples of an 'amount taken into account' for income tax purpose include but not limited to an amount of ordinary income, expense, an amount of an obligation, an amount of a liability, an amount of a receipt, an amount of a payment, an amount of consideration; and a value. See The Parliament of the Commonwealth of Australia House of Representatives, *New Business Tax System (Taxation of Financial Arrangements) Bill (No. 1)*, Explanatory Memorandum (Circulated by authority of the Treasurer, the Hon Peter Costello, MP), *(*2002-2003), p.105 [Hereinafter PCWAHR, New Business Tax System (Taxation of Financial Arrangements) Bill (No. 1)].
[34] In case of Schedule A employment income tax, salary, bonus, allowance, commission, value of fringe benefit, severance payment, compensation etc. are considered for income tax purposes. See FITP No.979/2016, Art 12(1), FITR No.410/2017, Article 8-19. On the other hand, Schedule B and Schedule C are associated with various amounts of gross income, deductions and losses. See FITP No.979/2016, Art. 15-16, Art.21-27, FITR No.410/2017, Art. 20-40.
[35] PCWAHR, New Business Tax System (Taxation of Financial Arrangements) Bill (No. 1), supra note 33, p.105.

exemptions and offsets must be measured in the [Ethiopian] national currency."[36]

The rationales behind declaration of domestic currency as tax quantification currency is, among others, linked to a need to provide common or uniform measurement of value[37], thereby to attain equality and certainty among taxpayers, ensure monetary independence of Central Bank rules and to enforce the legal tender character of own currency in settlement of public as well as private debts.[38]

The applicability of this provision does not entail any difficulty if all taxpayers in Ethiopia derive income or incur expenses only in Ethiopian currency. Nonetheless, this scenario does not always persist unless a country adopts closed economy, which is unlikely at least in contemporary global business realities. It has been submitted that with the greater integration of the world's economies, it is increasingly likely that a taxpayer will derive income or incur expenses in a foreign currency.[39] Second, the Income tax jurisdiction of Ethiopia adopts both residence and source principles.[40] This means resident of Ethiopia pays income tax on its worldwide sources while non-resident pays income tax on income derived from sources in Ethiopia.[41] Hence, it is more probable that resident taxpayers may gain income or incur liability in currency other than Ethiopian birr. Moreover, Directive of National Bank of Ethiopia

[36] Lee Burns and Richard Krever, Taxation of Income from Business and Investment, in Victor Thuronyi, (ed.), *Tax Law Design and Drafting*, Chapter 16, International Monetary Fund, (1998), Vol.3, p.25.

[37] PCWAHR, New Business Tax System (Taxation of Financial Arrangements) Bill (No. 1), supra note 33, p.101.

[38] Eyader Teshome, Legal and Regulatory Issues of Ethiopian Foreign Exchange Regime and Transactions, LL.M Thesis, School of Law, Bahir Dar University, (2017), [Unpublished available at BDU Library], p.83-85.

[39] Burns & Krever, *supra* note 36, p.25.

[40] FITP No.979/2016, Article 7

[41] Id., Article 7(1)

sets a currency prescription on export of goods by requiring payment of export to be made in acceptable foreign currency.[42] It is, therefore, inescapable to use foreign currencies, directly or indirectly, as a medium of pay or exchange in Ethiopian tax system.

Here, one might wonder as to how one could express or pay income tax in Birr if he/she derives income or incur expenses in foreign currency. This is because, on the one hand, payments of most transaction undertaken between residents of two different countries involve use of foreign currency as medium of exchange, on the other, an assessment of taxpayer's income, deductible expenses and final tax liability is usually determined and must be measured by home currency; in our case Birr.[43] To reconcile such situations many countries explicitly adopt what is frequently referred to as ***Currency Translation Rule*** under their income tax law.[44] Now let us look into treatment of currency translation rule under Ethiopian income tax law.

2.2. Currency Translation Rule in Taxation

Currency translation is the process of expressing amounts denominated in one currency into amounts measured in another currency by using exchange rate between the two currencies.[45] Though the term currency translation and currency conversion are used interchangeably, there are some differences between the two. ***Currency Translation*** is the process of declaring amounts denominated or measured in one currency into another currency using the

[42] Directive to Transfer NBE's Foreign Exchange Functions to Commercial Banks, National Bank of Ethiopia, Directive NO.FXD/07/1998 and its amendment Directive No.FXD 35/2008, Article 6.2.

[43] Burns & Krever, *supra* note 36, p.25.

[44] See 960-C and 960-D of the Australian *Income Tax Assessment Act 1997.* Section 985 of IRC, Section 5 of UK *Corporation Tax Act 2010.* Article 28 of The United Republic of Tanzania Income Tax Act Chapter 332 of 2008; Section 5-10 0f UK *Corporation Tax Act 2010.*

[45] Glossary of Foreign Currency Translation, adopted from GAAP (SFAS) No.52, (1981).

exchange rate between two currencies without physical exchange between those currencies.[46] Thus, currency translation is a repeated presentation of financial information or a change in monetary units in the balance sheets from one currency to another.[47] No physical exchanges between currencies occur. ***Currency Conversion***, on the other hand, is a physical exchange of one currency to another currency by using the exchange rate between two currencies.[48] For the sake of consistency, this paper will use the term Currency Translation. In Ethiopia, the FITP No.979/2016 legally introduced currency translation rules under its income tax regime. As per these rules, transactions denominated in foreign currency must be converted into an equivalent amount of Ethiopian birr for the purposes of determining taxpayer's income tax liability.[49] As a result, if any income or expense is expressed in foreign currency, the taxpayer is required to translate any such foreign currency earning, profit, costs or expenses into domestic currency for determination of gross income, allowable deduction, taxable income and final tax liability. Finally, it is also important to note that actual or physical conversion of currency might not be necessary for tax purpose as long as it is possible to calculate the amount in domestic currency.

Though it seems easy at first glance, the rule of currency translation is an intricate matter that warrants particular legal consideration. The rule of currency translation in general determined to answer essential questions of what is to be converted, when it should be converted and at what exchange rate to be converted whenever tax relevant amounts are denominated in foreign currency. It is important to note that actual determination of when, how and at what exchange rate such foreign currency should be translated

[46] Id.
[47] Id.
[48] Id.
[49] FITP No.979/2016, Article 77(2).

into local currency has significant implication on taxation as it could considerably influence the actual value of gross, deductible and taxable income. Furthermore, the rule of currency translation must be able to reflect the actual income and expenses of the taxpayers as well as the underlying economic realities of foreign operations. The general principle is that since translation is a mere re-statement of amounts denominated in foreign currency into domestic currency, as much as possible, currency translation must not alter the actual position of the taxpayer's income or cost.[50]

Nonetheless, in view of the fact that the exchange rate of major currencies such as U.S. dollar are allowed to float (through flexible exchange regime), the value of domestic currency, in terms of foreign currency, may actually fluctuate or get varied between the date of transaction and payment or even between date of realization and actual settlement. It has been submitted "the problem arises due to the difference in the rate of exchange between the times when first, the contract is negotiated; secondly, the money changed from one currency to another, thirdly, when the money is exchanged or remitted as payment and finally when the money is received."[51] This fluctuation of exchange rate (i.e., price of one currency in terms of other currency) definitely results in foreign exchange gain or loss distinct from the underlying transaction.[52]

It follows that as long as currency translation rule is required for tax purposes, the tax law needs to have clarity with respect to methods, time and rate of currency exchange to ensure the cardinal principle of simplicity, certainty and neutrality of taxation. The subsequent sections discuss the notions of methods,

[50] Burns & Krever, *supra* note 36, p.25-26.

[51] Attiya Waris, An Analysis of Section 4A of the Kenyan Income Tax Act, Hedging and Foreign Exchange Losses and Gains, *East African Law Journal*, Vol.2, (2005), p.92.

[52] Thabo Legwaila, The Suitability of the South African Corporate Tax Regime for the Use of South African Resident Intermediary Holding Companies, PHD. Dissertation, Faculty of Law, University of Pretoria, (2010), p.74.

time and rate of currency exchange as well as its treatment under Ethiopian tax law.

A. Rate of Exchange

Asif H. Qureshi notes that the external value of a state's currency is the value of its relationship with the currency of other nations which is generally known as the *Exchange Rate*.[53] Hence, Exchange Rate is the price of one currency in terms of another currency. In particular, foreign exchange rate is a rate or price at which one currency is exchanged for another currency. It is the value of one country's currency in terms of another country's (foreign) currency.[54] In general, the "exchange rate" is defined as: (1) The number of units of one currency required to purchase a unit of another currency; or 2) the market price of one currency denominated in another currency.[55] Normally, in determining the value of its currency in terms of a foreign currency, a country adopts its own exchange rate regime. As such exchange rate regime is defined as the 'way' the value of a domestic currency is determined in terms of foreign currencies or the way a country manages its currency in respect to foreign currencies and foreign exchange market.[56] Considering more institutional intricacies of the issue, others defined it as a system through which a country adopts to determine the value of its currency in terms of another currency that might include arrangements of fixing[57] or pegging the

[53] Asif H. Qureshi, *International Economic Law*, Sweet & Maxwell Ltd, (1999), p.126.
[54] Id.
[55] Yuriy Kozak, and Temur Shengelia (eds.), *An Introduction to International Economic Relations*, Tbilisi: Publishing House, (2014), p.106.
[56] National Bank of Ethiopia, *Monetary Policy Framework of Ethiopia*, Economic Research and Monetary Policy Process, NBE, (2009), p.15.
[57] *Fixed exchange rate* regime is a monetary peg that involves the fixing of the value of one currency in terms of another currency or gold. In this regime a country's currency is fixed against the value of another single currency (such as the U.S. dollar or euro), or to a group (or "basket") of currencies or to another measure of value, like gold. Rebecca, M. Nelson, *Current Debates over Exchange Rates: Overview and Issues for Congress*, p.3.

value of one currency to a certain currency, or floating[58] according to market forces and managing[59] both the fixation as well as floating.[60] As to the application of exchange rate concerning income tax in Ethiopia, sub-article 2 of Article 77 of FITP states:

If an amount is in a currency other than Birr, the amount shall be translated to Birr at the ***National Bank of Ethiopia prevailing exchange rate*** *applying between the foreign currency and Birr on the* ***date the amount is taken into account for the purpose of this Proclamation****.*[61] [emphasis added]

The above provision begs several questions over the subject at hand. First, one may ask whether this provision is a default provision or it applies uniformly to all tax-relevant amounts as well as to all income taxpayers. It seems that this provision applies uniformly to all taxpayers without exception because the law does not recognize special circumstances. Other countries allow application of different exchange rate depending on the nature of transaction and identity of taxpayers if the tax authority permits up on the fulfillment of certain conditions.[62] Similarly, Ethiopian income tax law needs

[58] *Flexible or freely floating exchange regime* is a type of exchange rate arrangement in which the value of a nation's currency is allowed to fluctuate based on the demand and supply of the foreign exchange market. This means a country allow the price of their currency to fluctuate depending on supply and demand for currencies in foreign exchange markets. It follows that market forces determine currency price or exchange rate without any intervention by the government. Therefore, there is a probability of getting different prices for one currency in terms of the other currency within some specific time interval, following fluctuations in the demand and supply of foreign currency. Id.

[59] *Managed floating exchange rate regime* is a system that combines both fixed and floating exchange rates. See Eyader Teshome, Legal and Regulatory Issues of Ethiopian Foreign Exchange Regime and Transactions, LL.M Thesis, supra note 38, p.25-27.

[60] Asif H. Qureshi, supra note 53, p.130.

[61] The Amharic version of this provision states *"የገንዘብ መጠን ከብር ውጪ በሆነ ገንዘብ የተያዘ ከሆነ፣ ለዚህ አዋጅ አፈፃፀም ሲባል የገንዘቡ መጠን በሂሣብ መዝገብ በሚመዘገብበት ጊዜ በወቅቱ የኢትዮጵያ ብሔራዊ ባንክ ባወጣው የምንዛሬ ተመን መሠረት ተሰልቶ ገንዘቡ ወደ ብር ይለወጣል።"*

[62] See The United Republic of Tanzania Income Tax Act; South African Income Tax Act No 58, Section 25D(1), Article 28(4).

to adopt such approach by recognizing special circumstances of each taxpayer. For instance, adoption of uniform exchange rate between taxpayers accounting on accrual basis and those on cash basis might cause unequal treatment between taxpayers as they follow different timing of income and expenditure recognition.[63] Another decisive matter is that the above provision needs critical explanation as to the method and time of exchange rate legally adopted in Ethiopia to translate tax relevant amounts denominated in foreign currency into birr. While such clarity is lacking in this provision of the FITP, the Custom Proclamation has intelligibility regarding exchange rate issues by stipulating "the customs value of imported or exported goods shall be calculated on the basis of the *official exchange rate* declared by the National Bank of Ethiopia *on the day the goods declaration has been registered*."[64] The clarity of the Custom Proclamation is distinguished by plainly mentioning the official exchange rate and the date of exchange rate as date of registration of declaration. Similarly, the Ethiopian Investment law has more certainty in relation to exchange rate of remittance of earnings and salary of foreign investors and expatriates whereby "any foreign investor shall the have right, in respect of investment to remit the payments and earnings out of Ethiopia in convertible foreign currency at the prevailing exchange rate *on the date of transfer"*[65] Here the date of exchange rate is specific and known in advance. Thus, the income tax law should have also use definite date to warrant principle of certainty of taxation.

[63] FITP NO 979/2016, Article 2(5).
[64] Customs Proclamation, Proclamation No.859/2014, *Federal Negarit Gazetta*, (2014), Article 101.
[65] Investment Proclamation, Proclamation No.1180/2020, *Federal Negarit Gazetta*, (2020), Article 20 (1& 3).

B. **Method of Translation**

As far as method of exchange rate is concerned, the pertinent provision cited earlier requires the applicable exchange rate to be the one determined by the National Bank of Ethiopia [NBE] as the prevailing exchange rate applying between the foreign currency and Birr. In other words, the Income tax law has to make a reference to other law or NBE in determining the applicable exchange rate as it is not the mandate of the tax law to determine exchange rate. Yet, an issue may arise as to which exchange rate is applied by NBE. To answer this question, one has to investigate the Ethiopian exchange rate regime. The exchange rate regime in Ethiopia can be classified as formal (official) and informal (black market) regime.[66] The formal regime, which Ethiopia officially follows (or at least claims to follow) is a managed floating exchange rate regime[67] where currency exchange rate is determined both by inter-bank foreign exchange market and by NBE. Nevertheless, the Ethiopian exchange rate regime is de facto characterized as Crawling-like arrangement by International Monetary Fund (IMF) where the later (NBE) plays much role in determination of exchange rate.[68] This is a kind of fixed exchange rates whereby the major determination of external value of one currency in terms other currency is made by government body such as NBE.[69]

[66] Though out of the scope of this paper, there is a widespread informal black market exchange regime in Ethiopia whereby the market (at higher rate) than the National Bank determines the exchange rate between birr and foreign currency.

[67] National Bank of Ethiopia, *Monetary policy Framework of Ethiopia*, NBE's Monetary Policy Framework, Economic Research and Monetary Policy Process, NBE, (2009), p.15-16. *During final review of this paper, Ethiopia is on the verge of introducing new Monetary Policy Framework.*

[68] IMF, *Ethiopia: Staff Report for the 2016 Article IV Consultation-Informational Annex*, Prepared by the African Department, International Monetary Fund, Washington, D.C., (2016), p.4.

[69] Id.

As far as types or methods of foreign exchange rate are concerned, the Directive of NBE only recognizes spot exchange rate[70] or current exchange rate with immediate delivery of currency at the retail market.[71] Accordingly, it is conceivable to argue that other methods of exchange rate such as historical[72], forward[73] or average[74] rates are not applicable.

The ascertainment of the NBE prevailing exchange rate is determined through the Directive that requires NBE to post the Daily buying and selling rate either through media or in a publicly visible place usually referred to as "Foreign Exchange Daily Indicative Rate".[75] The directive of NBE determines the spot exchange rate of buying or selling foreign currency with immediate delivery or settled at latest within two days.[76] Hence, one may conclude that spot exchange rate of NBE is the applicable currency conversion rate in currency translation rule indicated under sub-article 2 of Article 77 of FITP. Thus, the current exchange rate at the time of translation is applied over historical exchange rate at the time of transactions.

[70] Spot foreign exchange is a transaction where two parties agree to an exchange of currency with immediate delivery and execute the deal immediately or at latest within four days. An exchange rate governing such "on-the-spot" trading is called spot exchange rates, and the deal is called a spot transaction. Paul R. Krugman et.al, *International Economics: Theory & Policy*, 9th edition, Pearson Education Inc, (2012), p.326.

[71] National Bank of Ethiopia Directive No.FXD 01/1996, Article 26; NBE Directives No.FXD/03/1996, Article 10(2) and Directives No.FXD/09/1998 on "Operation of Foreign Exchange Bureaux, Article 13.

[72] Historical rate is the rate in effect at the date a specific transaction or event occurred (or the exchange value of foreign currency that is used when an asset or liability denominated in foreign currency is bought or going. Glossary of foreign currency translation, adopted from GAAP (SFAS) No.52, (1981).

[73] Forward exchange rate is an exchange rate agreed and quoted today but for delivery and payment on a specific future date. Id.

[74] Average rate is a simple or weighted average of either current or historical exchange rates.

[75] National Bank of Ethiopia Directive No.FXD/44/2014 on Fixation of Daily Exchange Cash Notes and Transaction Rate, NBE, February 26, 2014. Article 2(3) defines "Foreign Exchange Daily Indicative rate" as the daily indicative rates issued by NBE in a daily basis.

[76] Id.

However, the provision is silent as to whether the appropriate rate is the buying rate of exchange or selling rate of exchange or the average of the two. Given that usually the rate of buying and selling is different, the same money can be exchanged for different value as a result of merely using either selling or buying exchange rate. It is submitted that on a strictly technical approach, amounts which are received or which accrue in a foreign currency should be translated to domestic currency at the appropriate buying rate of exchange while expenditure or losses incurred should be translated at the appropriate selling rate of exchange.[77] On the other hand, Lee Burns and Richard Krever contend that when a buying and selling rate is specified for the relevant day (as is usually the case), it could be provided that the exchange rate midway between the two for that day is to apply.[78] In any case, the appropriate choice must be consistent use of the exchange rate that most accurately reflects the taxpayer's income or expenses.[79] Otherwise, to balance the two extremes, it seems better to apply the average or mid exchange rate between the buying and selling rate of exchange as practices and legislations of some countries show.[80]

C. **Modes of Translation and Functional Currency**

In relation to income tax, currency translation rule can come into picture at various scenarios whenever payment or receipt is made by currency other than Ethiopian birr, particularly it applies in foreign business income or loss, foreign rental income or loss, foreign employment income, foreign tax credit,

[77] www.saica.co.,Translation of Foreign Currency, April 2012-Issue 151 http://www.saica.co.za/integritax/2012/2055.Translntion_of_foreign_currency.htm [Last Accessed December 2023]

[78] Burns & Krever, *supra* note 36, p.25.

[79] Id.

[80] Income Tax Act of Uganda, Act 11/1997, Chapter 340 1 July, (1997), Section 57(2).

foreign-provided technical service and so forth.[81] To this effect, it has been asserted that "the basic rule should provide for currency translation on a transaction-by-transaction basis." [82] Under such a rule, each receipt of income denominated in a foreign currency should be translated into the national currency at the time the income is derived.[83] Similarly, each deductible expenditure denominated in a foreign currency should be translated into the national currency at the time the expenditure is incurred.[84]

However, such currency translation on a transaction-by-transaction basis is criticized for being too burdensome particularly for those taxpayers who enter into multiple transactions in a foreign currency.[85] By considering these realities, different countries permit an exception to this general principle by adopting a concept of *Functional Currency rules*.[86] According to the International Accounting Standard, "functional currency means the currency of the primary economic environment in which the entity operates; and refers to the currency in which the taxpayer conducts most of its activities."[87] Under the 'functional currency' rule, the net income or loss of an entity (or specified

[81] FITP No.979/2016, Article,45-46, Article 54-55, FITR No.410/2017, Article 20 & Article 25.

[82] Burns & Krever, *supra* note 36, p.25.

[83] Id.

[84] Id.

[85] Id., p.26

[86] For instance, see The Revenue Code Amendment Act No.50 B.E 2562 (2019) and Notification on Income Tax No.373 issued by the Director-General of the Revenue Department of Thailand, 5 May, 2020. A company or legal partnership may adopt a currency other than Thai currency as its functional currency for corporate income tax purposes.www.mazars.co.th/insights/doing-business-in-thailand/tax/use-of-foreign-currencies-for-cit-purposes [last accessed April 2024]. Moreover, countries such as USA, Canada and Australia recognize the use of functional currency. IRC Section 985 allows functional currency for US tax purposes to be determined in accordance with financial accounting of the taxpayer.

[87] International Financial Reporting Standard 21 (IAS 21) available at www.iasplus.com/en/standards/ias21.

part of an entity) that functions predominantly in foreign currency can be determined in that currency, with the net amount being converted into domestic applicable currency.[88] These rules permit taxpayers to make a functional currency choice. The consequence of making such a choice is that the taxpayer (or, if applicable, a part of that taxpayer, such as its foreign branch) is permitted to calculate its taxable income or tax loss in a currency other than domestic applicable currency. [89] The functional currency chosen must be the "sole or predominant" foreign currency in which that taxpayer (or part of that taxpayer) keeps its financial accounts. [90] Accordingly, access to a functional currency for tax purposes is limited to those entities or parts of entities which are expected to have substantial international operations.[91]It follows that, though the rule of functional currency permits application of foreign currency in calculating taxpayer's income or expenses, still the final liability must be translated into domestic applicable currency. Hence, the functional currency rule is geared towards lowering compliance costs associated with the general translation rule.[92] Use of a non-domestic functional currency may facilitate significant compliance cost savings, whilst not producing any undue distortion to the entity's ultimate domestic currency income tax liability.[93]

To reduce the burden of transaction-by-transaction currency translation as well as lowering compliance costs associated with it, the rule of functional currency ought to be adopted in Ethiopia for some taxpayers that predominately perform in foreign currency. Moreover, introduction of

[88] Abdol Mostafavi and Craig Marston, *Taxation of foreign exchange gains and losses for corporates*, New South Wales Division Tax Institute, (2013), p.30.
[89] Id.
[90] Id.
[91] PCWAHR, New Business Tax System (Taxation of Financial Arrangements) Bill (No. 1), supra note 33, p.112.
[92] Id.
[93] Id.

Functional Currency in Ethiopia can be justified on ground of no significant difference occurs on the amount of the liability as the final tax liability must be translated into domestic currency.

D. **Time of Translation**

Nonetheless, the difficult, yet most important task is the determination of the date of conversion called timing recognition. This is because after the official collapse of the *Bretton Woods System in* 1978 most countries moved to adopt floating-exchange rate regime that resulted in fluctuation of exchange rates of major currencies.[94] Unless a country stick to hard peg or fixed exchange rate regime the value of its currency in terms of other currencies may vary between the time of transaction and actual settlement. Given the volatile nature of exchange rate and time value of money, the law must be explicit as to times of exchange rate. As a result, one has to choose whether to apply exchange rate at the time of transaction, settlement, at time of translation or even left to parties' agreement since each have diverse domino effect on the actual value of the income received or expense incurred.

Turning to the Ethiopian law, one could see that the existing Income Tax Law does not seem to be clear on issue of time of exchange rate in currency translation. Article 77(2) of FITP No.979/2016 states the applicable date of conversion as the "***date [when] the amount is taken into account for the purpose of income tax*"** (emphasis added).

This phrasing, while it tries to indicate the time of exchange rate, lacks precision.[95] Apart from such problems, there is an apparent discrepancy between the Amharic and English versions of this provision. The Amharic

[94] Asif H. Qureshi, *supra* note 53, p.129. see also Joseph Gold, Exchange Rates: International Law and Organization, *American Bar Association*, (1988), p.8.
[95] See supra note 64 & 65.

version is too specific on time of translation as it uses the exchange rate at the date when the income or expenses are recorded in *books of account.*[96] On the other hand, the English version adopts a more general approach by using exchange rate at the date of recognition of amount for income tax purpose which may or may not be the date of record in the books of account. The question that may cross our mind is as to which of the two versions is more appropriate to apply. A critical analysis and merits evaluation might reveal that the date of translation adopted under the Amharic version has suffered from various problems. First, the date of record on books of account method appears to work only for rental income and business income taxpayers and among which it is limited to those who are obliged to keep books of account most notably Category A and B Taxpayers.[97] The application of exchange rate at time of books of account is difficult for Category C taxpayers as well as in case of Schedule A and Schedule D income taxpayers who are not legally required to keep books of account.[98] Further, as clearly noted above, the rule of currency translation applies to all Schedules of income taxpayers.[99] It is hard to imagine how income from employment and Schedule D that is denominated in foreign currency can be recognized or converted into birr at exchange rate on the date of the balance sheet while the employee or Schedule D taxpayers keep none. Second, given that currently only spot exchange rate at the time of actual translation is recognized under Ethiopian foreign exchange law, exchange rate disparities might happen between the date the amount is entered into books of account and the actual date of settlement i.e., when the amount is actually received or paid. All these

[96] The Amharic version states the applicable date of conversion as the "date the amount is recorded in books of account or Balance sheet statement *(የገንዘቡ መጠን በሂሣብ መዝገብ በሚመዘገብበት ጊዜ).*

[97] FITP No.979/2016, Article 3 cum Article 82 (1), (2) & (3).

[98] Id.

[99] See its inclusion under Common provisions part of FITP No.979/2016, Part seven, Chapter 2.

features of exchange rate at the date of the record in books of account appear to corroborate the argument that the English version is more tenable than its Amharic counterparts.

Still the English version does not satisfactorily answer the issue of exchange rate timing during currency translation. The critical issue lingering here is the point when such amount is taken into account for the purpose of income tax. The current Ethiopian income tax law lacks clarity over the exact time when tax relevant amounts are recognized or taken into account for tax purposes. As a result, one has to refer to tax accounting methods or principles adopted under income tax law to answer this question. An accounting method is a set of rules used to determine the timing of reporting income and expenses on a tax return.[100] Generally, the permissible accounting methods include, among other things, the cash method, and the accrual method.[101] While, the previous Income Tax Proclamation recognized two methods of tax accounting (i.e. *the cash-basis accounting method and the accrual basis of accounting),*[102] the current FITP No.979/2016 adds consideration of *the accrual basis of accounting* in case of long-term contract based on principle of percentage of completion of contract.[103] Yet, the repealed Income Tax Proclamation is far clearer than the current FITP No.979/2016 in defining these accounting methods.[104] Under the cash-basis system, income is derived when it is actually received by or made available to, or applied to the benefit of the taxpayer, and expenses are incurred when they are paid.[105] To this effect, the

[100] When is the Cash Method of Accounting Acceptable for Tax Purposes? January 19, 2016, https://www.njcpa.org/.
[101] Burns & Krever, *supra* note 36, p.23.
[102] Income Tax Proclamation No.286/2002, Article 58(2).
[103] FITP No.979/2016, Article 32.
[104] Income Tax Proclamation No.286/2002, Article 58(2). *Cf* FITP No.979/2016, Article 2(3), Article 29, Article 33.
[105] Burns & Krever, *supra* note 36, p.23.

cash method requires the taxpayers to recognize income when they receive cash or its equivalent and allows taxpayers to deduct expenses when payment is made.[106] In other words, under this method while all items of income whether money or the fair market value of property or services actually or constructively received during the tax year are included in gross income, expenses are deducted in the tax year in which they are actually paid.[107] On the other hand, under the accrual-basis system, income is derived when the right to receive the income arises, and expenses are incurred as a course of discharging the obligation to pay.[108] Accordingly, the accrual method recognizes inclusion of income prior to its receipt and deduction of expenses before actual payment on condition that taxpayer's right or duty to it is fixed and its amount can be determined with reasonable accuracy.[109]

Though the FITP No.979/2016 does not settle the matter clearly, a cumulative reading of some provisions of the proclamation appears to give us some guidance. The law proclaims that for a business and rental income taxpayer who adopts the accrual method, income is derived (and by extension expense is incurred) when the right to receive or obligation to pay arises.[110] On the other hand, for business and rental income taxpayers accounting for tax on a cash basis and other income taxpayers (Schedule A and D taxpayers) the amount is taken into account for tax purposes when income is actually received or payment is made.[111] Hence, the reasonable conclusion that can be drawn from those provisions of the FITP No.979/2016 is that under Ethiopian income tax law the time when tax relevant amount is taken into account

[106] Organization for Economic Co-operation and Development, *Glossary of Tax Terms-OECD, available at www.oecd.org/ctp/glossaryoftaxterms.htm*
[107] Id.
[108] Burns & Krever, *supra* note 36, p.23.
[109] Zolman Cavitch, *Tax Accounting: Basic Principles, Business Organization with Tax Planning*, Mattew Bender & Company, Inc., (2017), p.1-11.
[110] FITP No.979/2016, Article 2 (5(a (1)).
[111] Id., Article 2 (5(a (2) &(b)).

depends on the accounting method of each taxpayer that might vary according to Schedules of Income tax and categories of taxpayers.[112] This means the exchange rate that is applicable for taxpayers on accrual basis is the exchange rate at the time when the right to receive or obligation to pay arises though no actual income is received or payment is made. For other taxpayers, the applicable exchange rate is at the time when income is actually received or payment is made.

One issue that deserves particular consideration is whether the applicable time of exchange rate under Income Tax Proclamation is in line with the current Ethiopian exchange rate regime which only recognize spot exchange rate with immediate delivery of currency at the retail market and prohibit historical rate, forward, future, and option currency contract with future delivery.[113] This is because while Article 77(2) of FITP No.979/2016 only consider the time when tax relevant amount is taken into account and shows possibility of applying historical exchange rate at the time of balance sheet for taxpayers on accrual basis, only spot exchange rate at the time of settlement is allowed under Ethiopian foreign exchange regime. Hence, timing of applicable exchange rate for currency translation rule in taxation must not only consider time of recognition of income/expenses for tax purposes, but needs to take cognizance of prohibition of historical and forward exchange rate under the current Ethiopian Foreign exchange regime.

Since our income tax proclamation adopts different accounting method for different categories of taxpayers where each income or expenses are treated separately, it is apparent that different sources are recognized differently and

[112] Id., Article 2 (5(a) &(b)) cum Article 33.

[113] National Bank of Ethiopia Directive No.FXD 01/1996, Article 26, NBE Directives No.FXD/03/1996, Article 10(2) and Directives No.FXD/09/1998 on "Operation of Foreign Exchange Bureaux, Article 13.

hence taken into account differently for the purpose of income tax. In that case; different exchange rate might be applicable due to variation of exchange rate between the time when income or expense is recognized for tax purpose and time of actual settlement of the transaction. Moreover, given that the Ethiopian foreign exchange rate only recognizes spot exchange rate for currency translation and due to fluctuation of exchange rate between time of transaction and actual settlement or at time of conversion, foreign exchange gain or loss may result from such movement. This means local currency amount of a foreign currency claim or debt may increase or fall between the time it is recognized for income tax purposes as incurred and deductible, derived and assessable, or acquired, and the time it is paid, received or realized.[114] Therefore, a taxpayer may make a foreign exchange gain or loss on a disposal of foreign currency or a right to foreign currency, or on ceasing to have a right or obligation to receive or pay foreign currency.[115] Hence, it is essential to inquire as to how Ethiopian income tax law treats gain or loss arises from foreign exchange movement.

3. Tax Treatment of Foreign Exchange Gain or Loss (FEGL)

A gain or loss in a business transaction not only derives from the changes in the value of underlying goods, services or labor, it may also result from fluctuations in the value of exchange rates between different currencies. Business is often transacted in foreign currencies with potential gains or losses that emanate from such transactions due to the fluctuation in the rates of exchange. Such foreign currency gain or incurring a foreign currency loss sometimes referred to as a foreign exchange difference is a realized gain or

[114] Ga Barton, The Recognition of Foreign Currency Gains and Losses in Australian Income Tax Law, *University of Western Australia Law Review*, Vol. 34, (2008), p.2.
[115] Id.

loss solely attributable to a change in the value of domestic currency in terms of the foreign currency than the underlying transactions.[116]

Foreign exchange gain and loss [herein after FEGL] and its resultant consequences posed numerous complications to the computation of taxable income and as to how the income tax law should respond to such gain or loss.[117] Various countries adopt different approaches towards tax treatment of foreign exchange gain and loss.[118] Countries like Cyprus adopts tax neutral approach wherein foreign exchange gain is not an amount included in assessable income and foreign exchange loss is not tax deductible regardless of their nature (i.e. as revenue or capital).[119] Conversely, countries such as South Africa, New Zealand, Ireland and United Kingdom recognizes foreign exchange gain as taxable income and loss as allowable deduction regardless of their nature as revenue or capital.[120] Yet others recognize foreign exchange differences by making a distinction between revenue and capital account by which the former is treated only for income tax purposes.[121] Further, a

[116] These gains and losses arise "in connection with assets and liabilities denominated in a currency other than the currency in which a person's accounts are maintained, and are caused by fluctuations in the value of the two currencies relative to each other that occur between the time the obligation arose and the time the obligation is discharged. See *IBFD International Tax Glossary* definition of "foreign exchange gains and loss".

[117] Attiya Waris, supra note 51, p.95.

[118] Thabo Legwaila, supra note 52, p.75.

[119] In fact, companies specifically trading in foreign exchange are exception from this neutral treatment of FEGL. Amended Income Tax Law of Cyprus 2002(as Amended) https://www.taxathand.com [Last accessed April 2024].

[120] See Income Tax Act of Republic of South Africa Act S241 available at https://www.saica.co.za/integritax/1992/31_foreign_gains_and_losses.htm. The United Kingdom, New Zealand, Ireland and Canada are examples of countries that foreign exchange gains and allow deductions for losses. Allen and Overy "Where are we now on foreign exchange gains and losses". See Haccius *Ireland in International Tax Planning* (1995) 546; CCH New Zealand Limited New Zealand Master Tax Guide (2007) 6:213. FBC "Foreign Exchange Losses are Deductible". See The Parliament of the Commonwealth of Australia House of Representatives, p.26.

[121] Thabo Legwaila, *supra* note 52, p.75.

distinction may be drawn between realized and unrealized gain or loss as well as FEGL arising from translation and those arising from transaction.[122]

By and large, two major taxation issues are commonly encountered in tax treatment of foreign exchange gains and losses: (1) deciding whether the gains or losses are on income or capital account; and (2) determine the time of realization for income tax purposes.[123] Regarding the first issue, it seems that at least from the perspective of FITR (Amendment) No.485/2021, one can hold that FEGL on both revenue and capital account is recognized as deductible under Ethiopian Law.[124]

In Ethiopia, tax implications of deriving a foreign currency gain or incurring a foreign currency loss are primarily determined by FITP No.979/2016 which dedicates only a single sub-article to deal with the matter [125] and then by implementing Regulation No.410/2017[126] and Income Tax Amendment Regulation No.485/2022.[127] Moreover, sub-article 4 of Article 77 of FITP No.979/2016 makes a reference to the issuance of a tax directive that provides for, among others, the method of calculation of loss or gain arising in connection with foreign exchange transactions and conversion of amounts in a foreign currency to Birr.

[122] For example, the Swiss Supreme Court decided that only FEGL arise from Foreign exchange transactions are treats for tax purposes while those arise from mere translation are neither taxable nor deductible. See Swiss Supreme Court Decision 2C_897/2008 = BGE 136 II 88 at Tax Advisor and Associates AG, *Tax Bulletin No. 02/11 on Swiss Tax Law*, August 2011, Available at www.taxadvisors.ch.

[123] Foreign Exchange Losses are Deductible, (Feb. 01, 2005), available at https://www.fbc.ca/knowledge-centre/foreign-exchange-losses-are-deductibl.

[124] Council of Ministers Federal Income Tax Regulation (Amendment) No. 485/2021, Article 2(4).

[125] FITP No.979/2016, Article 77.

[126] FITR No.410/2017, Article 44.

[127] Council of Ministers Federal Income Tax Regulation (Amendment) No. 485/2021, Article 2(4).

Article 77(3) of FITP that address the issues of addition and deductible losses states: "All gains and losses arising from transactions in foreign exchanges shall be brought to account for tax purposes *as additions to taxable income or deductible losses in the tax year in which they are* ***realized.***" Here the law dictates that foreign exchange gains are included as addition to taxable income in the tax year in which they are realized. Similarly, foreign exchange losses are recognized as deductible losses and hence deducted from gross income.[128] To be recognized as such, the foreign exchange gain or loss must arise from transaction in foreign exchange. The provision makes no explicit distinction as to whether the gain or loss is on capital or revenue account. Though it does not clearly make a distinction between revenue and capital nature of FEGL, the phrasing of this provision seems to limit its application to FEGL that has revenue nature because it makes explicit reference to those FEGL arising from transactions in foreign exchanges; not from transfer of capital property. Noticeably, this position of the Income Tax Proclamation is recently revised under Article 2(4) of Income Tax Amendment Regulation No.485/2022 where foreign exchange loss on both capital and revenue account is recognized as deductible but with different treatment (by which FE Loss on Capital goods are deducted through depreciation whereas FE loss on revenue account are treated as deductible cost.)[129]

Although, the above provision of FITP sets forth income tax treatment of foreign exchange differences in Ethiopia, it suffers from various problems. First, the scope of application of this particular sub-article to other schedules of income tax other than Schedule C is uncertain. Particularly, the delegated FITR No.410/2017 under Article 44(1) & Article 44(6)(d) makes only reference to Schedule C Business income tax leaving us to assume that the

[128] Such deduction can be made on the basis of Article 26 of FITP No.979/2016.

[129] Article 2(4) (a)(1) & (2) of Income Tax Amendment Regulation No.485/2022 entirely repealed sub-article 2 of Article 44 of FITR No.410/2017.

remaining schedules of income tax are excluded from the rules of FEGL. Second, it merely states in general terms about tax recognition of FEGL where foreign exchange gains are included in and foreign exchange losses are deductible from a taxpayer's assessable income for the income year in which the foreign exchange realization event or events happened. Still, the provision of the Proclamation fails to provide detailed rules on how, when and on what criteria foreign exchange differences are treated under Ethiopian income tax law. Furthermore, it does not define important concepts such as foreign exchange gains/losses, transactions in foreign exchange, and realization timing.

In attempt to fill those gaps, the Federal Income Tax Regulation No.410/2017 and its Amendment No. 485/2021 somehow managed to come up with some detailed rules. The delegation of those matters to subsidiary laws might be appreciated from technicality perspective. To begin with, it is worth noting that the Regulation seems to limit the scope of application of income tax treatment of foreign exchange gain and loss only to *business income tax*.[130] Yet it is not clear whether this approach of restricting the scope of application for foreign exchange gain and loss recognition only to Schedule C business income tax is made intentionally and can be justified at all. Besides, restricting the application of FEGL rule only to Schedule C business income tax does not seem to be within the legislative mandate of the regulation.

Second, the Regulation clarifies definition of some terminologies. For instance, it defines foreign currency exchange gain or loss as "a gain or loss attributable to currency exchange rate fluctuations derived or incurred in respect of a foreign currency transaction."[131] For a gain or loss to be considered as foreign exchange gain/loss it must fulfill, at least, three

[130] Id., Article 44(1) states "A foreign currency exchange gain derived by a taxpayer shall be included in business income." See also Article 44(6(d)).
[131] Id., Article 44(6) (a) & (b).

conditions cumulatively. First, such gain or loss must directly originate as a result of changes or variation in the rate of currency exchange. If for any other factors such as alteration in price of the goods and services or better or underperformance, a gain is derived or loss is incurred, it is not taken as foreign exchange gain/loss. If the gain or loss occurred as a result of a combination of various factors, it is only to the extent to which it is attributable to currency exchange rate fluctuations that a given gain or loss is treated as currency exchange gain/loss".[132] Second, such gain or loss must be derived or incurred in respect of a foreign currency transaction. In this regard, the FITR No.410/2017 defines "foreign currency transaction" as a dealing in a foreign currency or the issuing of, or obtaining a debt obligation, denominated in foreign currency; or any other dealing in which foreign currency is denominated where such transaction is entered into in the conduct of a business to derive business income."[133] Here it is essential to note that such foreign currency transaction must be undertaken incidentally and solely for the purpose of conducting other primary taxable business. This means FEGL will, obviously, be taxable or deductible only where it arises from a transaction entered into by the taxpayer in the course of carrying out of a taxable business.[134] Otherwise if the gain is derived or loss is incurred as a result of independent foreign currency transaction business, such as arbitrage, it is not treated as foreign currency exchange gain or loss. Ethiopian law is not explicit as to income tax treatment of FEGL gained or incurred through trading in foreign exchange market.

[132] Australian *Income Tax Assessment Act 1936* Division 3B of Part III, Subsection 82V (1) *Cited in* Abdol Mostafavi and Craig Marston, *Taxation of foreign exchange gains and losses for corporate*, supra note 88, p.11.

[133] FITR, Article 44(6) (d).

[134] Income Tax Act of Republic of South Africa Act S241 available at https://www.saica.co.za/integritax/1992/31_foreign_gains_and_losses.htm.

Third in determining whether a taxpayer has derived a foreign currency exchange gain or incurred a loss in respect of a foreign currency transaction, account must be taken of the taxpayer's position under a hedging contract entered into by the taxpayer or by a related person in relation to the transaction.[135] The regulation defines "Hedging contract" as a contract entered into by a person for the purpose of eliminating or reducing the risk of adverse financial consequences that might result from a person under another contract from currency exchange rate fluctuations.[136]

The other issue worth considering under this theme is how Ethiopian tax law treats foreign exchange gain or loss. With regard to income tax treatment of foreign exchange gain or loss, as it arises incidentally in course of carrying out other taxable business, they are not separately taxed, or treated as taxable income. Rather such gain or loss in currency exchange is merely added to taxable income or deductible loss. However, it is not clear whether such addition and deduction is applied to the gross income or taxable income. If we treat foreign exchange gain or loss as mere addition or deduction, it will certainly be added to or deducted from gross income. Conversely, if we treat FEGL as a gain or loss it does have direct relation with profits and thus applied to taxable income.

The position of Ethiopian law is confusing because there is an apparent discrepancy between the contents of the Proclamation and that of the Regulation.[137] The Proclamation under Article 77(3) states "foreign exchange *gains and losses are brought to account for tax purposes as additions to taxable income or deductible losses."* On the other hand, FITR No.410/2017 adopts different rules for both foreign exchange differences. In tax handling of FEGL, the Regulation follows a substantially different approach from the

[135] FITR No.410/2017, Article 44(5).
[136] FITR No.410/2017, Article 44(6) (e).
[137] FITP No.979/2016 Article 77(3) *Cf.* FITR No.410/2017, Article 44(1).

Proclamation. First, from income tax perspective, it treats foreign exchange gains and losses differently. Second, in cases of foreign exchange loss a different approach is adopted for financial institutions and other taxpayers under the Regulation. In case of foreign exchange gain derived by a taxpayer, it must be included [added] in business income.[138] Though it is not still clear as to whether foreign exchange gain derived is added to gross business income or taxable business income, it is possible to assume that the reference is made to addition to gross business income. On the other hand, the Proclamation (at least under the English version) made addition of Foreign exchange gain to taxable income.[139]

With regard to foreign exchange loss, FITR No.410/2017 and its Amendment FITR No.485/2021 follow entirely a different approach. In fact, the provision on foreign exchange loss (i.e. Article 44(2)) is repealed by Article 2(4) of FITR Amendment No.485/2021. FITR No.410/2017 under Article 44(2) does not clearly provide deduction of loss from income except for loss incurred by financial institutions. Rather, if a taxpayer incurs a foreign currency exchange loss during a tax year, he/she is only allowed to offset against a foreign currency exchange gain derived by the taxpayer during the year, conditional on taxpayer verification of amount of the loss to the satisfaction of the Authority.[140] Moreover, other than financial institution other taxpayers (presumably business income taxpayers) are entitled to carry forward ***indefinitely*** unused amount of loss to offset against foreign currency exchange gains until fully compensated.[141]

[138] FITR No.410/2017, Article 44(1).
[139] The Amharic version of FITP No.979/2016, Article 77(3) adopts neutral approach as it does not make any specific reference to either the gross income or taxable income.
[140] Id., Article 44(2) (a).
[141] Id., Article 44(2) (b).

From the underlying legislative intents, one can infer that the regulation only allows offsetting against foreign exchange gain and not deduction from income even in situation where no foreign exchange gain is derived. Moreover, the Regulation allows offsetting of foreign exchange loss against foreign exchange gain without limit by carrying the loss forward *ad infinitum* in subsequent tax years until the two counterbalanced. As it is not only prone to abuse, but also might potentially become a subject of dispute between taxpayer and tax authority, the law needs to reconsider and thus limit this unlimited carrying forward of foreign exchange loss.

On the other hand, foreign currency exchange loss incurred by a financial institution is allowed as a deductible expenditure provided the financial institution has substantiated the amount of the loss to the satisfaction of the tax Authority.[142] Such distinct treatment is attributable to the fact that financial institutions are actually engage in foreign exchange dealings as part their normal business activity.

A question may arise as to whether the Regulation is in line with the proclamation in treatment of foreign exchange loss and if not whether it can deviate from its parent law. It is apparent that the Proclamation and the Regulation treat foreign exchange loss incurred by non-financial institution taxpayers differently. While the former allows deduction of the loss from taxable income, the latter allow offsetting of foreign exchange loss only against foreign exchange gains derived and if there is no such gain to carry forward it indefinitely. So, if one considers the hierarchy of law and principle of delegation of law, the Regulation should have been issued in line with its parent Proclamation and in case there is discrepancy the later (i.e., the Proclamation) must prevail.

[142] Id., Article 44(3).

As a result, the new FITR Amendment No.485/2021 comes up with some solution that deviates from the above provision regarding treatment of Foreign exchange loss. First the provision treats Foreign exchange loss on the capital side and on the current expenditure side differently. FE Loss on Capital goods is deducted through depreciation whereas FE loss on the revenue account is treated as ordinary deductible cost or expense of the year.[143] Hence, recently foreign exchange losses are not off-set only against foreign exchange gain but also considered as deductible expenditure of either capital or ordinary expenses that can be used as deduction from gross income. Though the change introduced by FITR Amendment No.485/2021 is appreciable, it still failed to provide a criterion to distinguish foreign exchange loss on capital side from that of current expenditure.

Turning to timing recognition of foreign exchange gain or loss, the Ethiopian law adopts realization-based system over accrual-basis taxation. As such, the Ethiopian income tax recognizes foreign exchange gain or loss in the tax year in which they are *realized*.[144] As things stands now, the only reasonable assertion drawn from the law appears that unrealized foreign exchange gain or losses are not recognized under Ethiopian income tax. In other words, unrealized foreign exchange gains are not considered as taxable income, and at the same time, unrealized losses are not deductible. Thus, foreign exchange gains or loss has income tax implication only when they are realized. Yet our law does not define what *realization-based* system means nor set any criterion that helps to identify when a foreign exchange gain or loss is realized. In the face of this legal silence, reference is made to definition provided by others in attempt to understand realization-based system. A gain or loss is realized when the gain or loss arises from a transaction that has taken place and the

[143] Income Tax Amendment Regulation No.485/2021, Article 2(4) (a)(1) & (2).
[144] FITP No.979/2016, Article 77(3) and FITR No.410/2017, Article 44(4).

gain or loss is therefore fixed and unalterable.[145] Hence, a realized (or settled) transaction creates a real gain or loss that should be reflected immediately in income. However, practical application of this realization-based treatment of foreign exchange gain and loss to taxpayers accounting for Accrual-basis system is very difficult while income and expenses are recorded for tax purposes without actual realization. In any case, the forthcoming income tax directive ought to set out detail rules that clarify as to what realization of FEGL means or at least needs to set criterion that helps to identify when a foreign exchange gains or loss is realized.

4. Currency Transaction Tax (CTT)

It has been mentioned that Ethiopian income tax law is silent on tax treatment of FEGL gained or incurred through independent trading in foreign exchange market. Usually such a gain and loss attributed to trading in foreign exchange is treated under independent tax base as in Currency Transaction Tax (CTT). The viability of taxing foreign exchange transaction itself as an independent tax base usually refers to currency transaction tax (CTT) or widely known as Tobin Tax. Although some trace its origin to the theories of John Maynard Keynes, it was first proposed by James Tobin in 1972 who advocated for a small tax to be applied to spot transactions on the foreign exchange market.[146] The feasibility of CTT is later advocated and more developed by Paul Bernd Spahn.[147] Apart from treating foreign exchange gains obtained by banks through devaluation measures of 2010 as windfall profits and taxed it as

[145] Attiya Waris, *supra* note 51, p.99.

[146] Tobin proposed a currency transaction tax first at the Janeway Lectures delivered at Princeton in 1972 and again at the presidential address to the Eastern Economic Association in 1977.Tobin J, A Proposal for International Monetary Reform, *Eastern Economic Journal*, *Vol.*4/3-4, (1978), p.*153*. Machiko Nissanke, Revenue Potential of the Currency Transaction Tax for Development Finance, *UNU-WIDER Discussion Paper No. 2003/81*, (2003), p.1.

[147] Paul Bernd Spahn, *On the Feasibility of a Tax on Foreign Exchange Transactions*, Report to the Federal Ministry for Economic Cooperation and Development, Bonn Goethe-Universität, Frankfurt, (February 2002) pspahn@wiwi.uni-frankfurt.de

such,[148] Ethiopia does not have independent currency transaction tax (CTT) as separate income tax base. On the other hand, it is conceivable to argue that income from currency transaction is taxed under Schedule C business income tax by considering the business aspects of the activity, the broad definition of income under Article 2(14), and broad inclusion of the term business for Schedule C income tax purposes under Article 2(2) of FITP No.979/2016. It is still possible to argue that income from currency transaction cannot escape taxation as it can be taxed under Residual income tax of Schedule D as per Article 63 of FITP No.979/2016. Yet, if the government of Ethiopia is really finding it necessary to broaden the scope of its tax base and thereby bring income that are so far not subject to tax into tax nets,[149] it needs to consider the feasibility of introducing currency transaction tax (CTT) and taxing the business of foreign exchange as independent tax base.

Concluding Remarks

Tax is often levied and collected through a medium of uniform currency with the attendant requirement of translation whenever tax relevant amount is derived or incurred in foreign currency. Such conversion of domestic currency into foreign currency and transaction in foreign exchange lead to other gains and losses. Although both the current Ethiopian FITP No.979/2016 and FITR No.410/2017 (FITR (Amendment) No.485/2021) have made various reforms on currency translation rules of taxation and tax treatment of foreign exchange gain and loss, still critical issues remain in many areas such as introducing functional currency rules, determination of

[148] Income Tax (Amendment) Proclamation No.693/2010, *Federal Negarit Gazeta*, (2010). Directive to Determine Tax on Windfall Profits obtained by Banks No.29/2003 E.C., Ministry of Finance and Economic Development, FDRE, in Amharic, unpublished. See Taddese Lencho, The Ethiopian Tax System: Excesses and Gaps, *Michigan State International Law Review*, Vol. 20, No.2, (2012), pp.327 -380.

[149] See preamble of the FITP No.979/2016, Paragraph two.

exact exchange rate method and time, recognition and realization of FEGL. Once currency translation is adopted in Ethiopia, the law should be explicit regarding method, time and rate of currency exchange to ensure the cardinal principle of simplicity, certainty and neutrality of taxation. There is also an apparent discrepancy between Proclamation No. 979/2016 and Income Tax Regulation No.410/2017 with regard to income tax treatment of foreign exchange loss. Under the latter, the loss associated with foreign exchange one is neutralized by the results from the opposite foreign exchange gains derived in the same tax year and where there is no foreign exchange gain or such a gain is not enough, the taxpayer is allowed to carry forward the loss in subsequent tax year. On the other hand, the Proclamation treats foreign exchange loss as deductible from gross income. Although this incongruity is somehow fixed by FITR (Amendment) No.485/2021, still certain problems persist. Taking cognizance of those hitches and anomalies in the law, either existing Ethiopian income tax law needs reforms or at least the tax authority, as legally authorized, through directive or advance ruling needs to come up with detailed and comprehensive treatment of the subject matter.

Statutory Protection of Creditors of a Subsidiary Company under Ethiopian Law: A Case for Parent Company's Liability for the Debts of Its Subsidiaries

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Abstract

A corporate group consists of a parent company and subsidiary companies with separate legal personality. A corporate group can have a dominant influence and may drain the assets of member companies toward the parent company, threatening the interests of minority shareholders, and creditors. To safeguard these interests, statutory provisions or self-help mechanisms should provide protection. This article examined the legal frameworks provided by Ethiopian laws for safeguarding the creditors of subsidiary companies in corporate groups. Specifically, it emphasized the question of whether the parent company is liable to a subsidiary company's creditors. The Ethiopian Revised Commercial Code (RCC), the primary legislation governing corporations in Ethiopia, establishes general regulations on the protection of creditors of businesses. This article explores the liability of a parent company towards the creditors of its subsidiary under the RCC and other relevant Ethiopian legislations. It uses German Law and the UK Company Act for comparative discussions. Italian law is also consulted. The study reveals that the RCC has provisions which prohibit parent companies from abusing control over subsidiaries. The provisions are related to wrongful trading, abuse of group's interests to the detriment of its subsidiaries, and cross-holdings of shares above the legal thresholds. These provisions provide statutory protections to creditors of a controlled company in a corporate group. Violations of these prohibitions by a parent company

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can lead to different degrees of liability towards creditors of a subsidiary company.

Keywords*: Contractual Creditor; Corporate Group; Parent Company; Subsidiary Company; Liability; Ethiopia.*

1. Introduction

Companies can form groups, resulting in complex corporate groups operating in large, medium, and smaller enterprises. Countries have attempted to address these developments through legislation, either through general company law, specific laws for affiliate companies, or judicial practice.[1] Corporate law posits that corporations have separate legal personalities and limited liability for shareholders, forming the corporate shield[2]. This shield applies to all corporate groups, meaning a parent company is typically not liable for the unpaid debts of its subsidiaries.[3] Traditionally, company law aimed to provide statutory protections to third-party creditors, but corporate groups have unique organizational structures and management, making the concern of creditor protection more serious.[4] This concern was justified by the

[1] Mehamed Aliye Waritu, Affiliate Companies in Ethiopia: Analysis of Organization, Legal Framework, and Current Practice, LLM Thesis, AAU (2010), P. 28.Availablr at; http://etd.aau.edu.et/handle/123456789/14933 (Accessed Aug. 3, 2023.) Despite the variation in the modes and objectives of regulations, the corporate laws of virtually all countries do regulate companies. One of the notable rationales for regulating single companies as well as corporate groupings by corporate laws is the issue of the protection of creditors.

[2] Hesty Deyah Lestari ,Creditor Protection Within Corporate Group Insolvency, *Mimbar Hukum* ,Volume 25, Nomor 1, Februari 2013, p-1, Available at; https://jurnal.ugm.ac.id/jmh/article/view/16104; Accessed on June 11-2023

[3] Frankel, Tamar, Book Review, Company Systems and Affiliations , American Journal of Comparative Law, 1988, Vol.36, No.1 p.163, available at https://www.jstor.org/stable/i234830, Accessed on March-14, 2023

[4] Mads Andenas and Frank Wooldridge, European Comparative Company Law, 2009, p-448, Available at, https://www.cambridge.org/core/books/european-comparative-company-law/6696387D0A03A2E8E6A1C41112557D75; Accessed on June 03-2023

trend of establishing affiliate companies for the limited liability of parent companies in risky activities.[5]

Previous studies on the topic of the protection of creditors in companies under Ethiopian laws reveal that the statutory mechanisms adopted, especially under the Old Commercial Code[6] were inadequate in effectively protecting corporate creditors when seen through the lenses of modern corporate governance and company law principles.[7] One may wonder to that extent that situation has changed following the legislative moves including the enactment of RCC, which has introduced new provisions on business organizations, . One key change introduced by the RCC is the recognition and regulation of corporate groups, which was not legally recognized and regulated until the RCC of 2021.[8] The RCC aims to protect corporate creditors, but Title Ten, Chapter One of the RCC[9] (Arts. 550–564) contains lesser provisions pertaining to creditors' protection in the context of corporate groups when compared to provisions that aim to protect creditors of companies not in corporate groups. Thus, it is imperative to refer to the legal provisions concerning creditors' protection placed under other sections of the RCC.

The article analyzes the statutory protections of a subsidiary company's creditors in Ethiopia's corporate group laws focusing mainly on vertical groupings. To this end, it analyzes the RCC and other domestic laws, with

[5] Mehamed, *supra note* no-1, p-28

[6] Commercial Code of the Empire of Ethiopia, 1966, Negarit Gazzetta, Extraordinary Issue, Proc. No. 166, 19th year, No. 3

[7] Tigist Dessie, The Protection of Corporate Creditors under Ethiopian Share Company Law in Light of International Recommendations, LLM Thesis, Unpublished, Bahirdar University, 2020, Available at: https://ir.bdu.edu.et/bitstream/handle/123456789/11927/TG%20final%20paper.pdf?sequence=1&isAllowed=y, Accessed on June 3, 2023.

[8] Title Ten ; Chapter One (art-550-564) of the RCC.

[9] The Commercial Code Proclamation No. 1243/2021 *Federal Negarit Gazette* Extra Ordinary Issue (2021) (the Revised Commercial Code' /RCC here in after).

some foreign jurisdictions consulted for comparative insight. Ethiopia follows the German model and incorporates elements from the UK Company Act.[10] Italian law, as one of the national jurisdictions with developed corporate group laws, is also consulted. The primary source is the law, while secondary sources include books, journal articles, and web pages.[11]

The article is organized as follows: Next to this introductory section, Section 2 highlights corporate creditor protection and corporate groups in general. Section 3 appraises a parent company's potential liability towards creditors of its subsidiaries. Finally, the article provides a brief conclusion and recommendation.

2. General Overview of Corporate Group: Definition, Nature, and Parent Company's Control Right

A corporate group that involves the management of two or more businesses as a unified economic entity, each with its own limited liability and legal identity, has now become a global phenomenon.[12] Such a group can be referred to as parent-subsidiary companies, holding-subsidiary companies, or affiliated companies. The organization of companies into groups offers numerous benefits, such as reduced tax obligations, accounting concerns, and increased flexibility in debt financing.[13] They also promote organizational

[10] Mesfin Beyene, Regulation of Groups of Companies in Ethiopia: A Comparative Overview, Mizan Law Review, Volume 17, No. 1, (2023), P. 210.

[11] The main basis of analysis will be the relevant laws pertaining to the issue of corporate groups in Ethiopia, including the RCC, Commercial Registration and Licensing Proclamation No. 980/2016, Capital Market Proclamation No. 1248/2021, and other relevant items of legislation. Foreign and domestic literature on the issue was also consulted as secondary data.

[12] Thomas Hadden, *The Control of Corporate Groups*, London Institute of Advanced Legal Studies, University of London, 1983, p. 343–369. Also see Paul L. Davies, *Introduction to Company Law*, Oxford University Press, 2002, *P.* 103.

[13] Eílis Ferran, *Company Law and Corporate Finance*, Oxford University Press (1999), *P. 533*

flexibility and minimize liability by shielding certain firm assets from legal action.[14]

In Ethiopia, the Ethiopian Commercial Code of 1960 lacks a specific regime for corporate groups, and previous studies have criticized the lack of special laws governing them in Ethiopia compared to many foreign jurisdictions.[15] Recently, issues related to corporate groups have come under regulation from a range of laws like the RCC, financial market regulations, and bankruptcy laws. Hence, to address legal issues pertaining to corporate groups, it is essential to skim through these scattered provisions. The RCC defines corporate groups as sets of companies including the parent company and all its subsidiaries.[16] A subsidiary company is a company subject to the control of the parent company, either directly or indirectly through another company.[17] The parent-subsidiary relationship between companies is created when there is direct or indirect control over one company by another.[18] The Capital Market Proclamation[19] also defines a subsidiary company as any company owned or controlled by another company.[20] However, the proclamation only talks about a subsidiary company of a share company, focusing on the relationship of parent-subsidiary established when one share company is

[14]Eike T. Bicker, Creditor Protection in the Corporate Group, (July 2006), p. 1, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=920472, (Accessed March 6, 2024).

[15] The research reviewed for the purpose of this study addressed the problem of the lack of regulation of corporate groups under the old Commercial Code. And there were pertinent recommendations to accommodate the issues of corporate groups in the RCC.

[16] RCC, art. 550 (1).

[17] Id., art-550 (2).

[18] Id., art-550 (3).

[19] Capital Market Proclamation No. 1248/2021, *Federal Negarit Gazette*, 27th Year No. 33 Addis Ababa, 23rd (July, 2021).

[20] Id., Art. 2/74.

owned or controlled directly or indirectly by another share company.[21] The RCC focuses on the control aspect, while the proclamation emphasizes management by the holder. These two provisions differ in their focus on ownership and control aspects. Another point of divergence between the two legislations is that the proclamation, instead of using the RCC's expression of *'subjected to the control of another company'*, provides more qualification by stating '*owned or controlled directly or indirectly by another share company.'* Thus, the proclamation emphasizes the relationship of parent-subsidiary that would be established when one share company is owned or controlled directly or indirectly by another share company. The ownership aspect does not vividly stand in the definition of the RCC as such. Instead, it has preferred to address the control aspect.[22]

The Commercial Registration and Business Licensing Proclamation[23] also defines a 'holding company' as '*a company incorporating two or more limited liability companies and issued with a special registration certificate and managed by the holder.*'[24] Let us compare of this definition with the definition for parent-subsidiary relations contained in the RCC: the former emphasizes management by the holding company while the RCC states that "comprising a controlling power" is an essential element for a parent-subsidiary relationship to exist.[25] This is where these two provisions clearly

[21] Id, Art. 2/13 defines the term 'company' as 'a share company as defined in the RCC'. This partly arises from the scope of application of the proclamation since the issuance of shares to the public is not allowed for other forms of companies except for share companies.

[22] Of course, it is to be noted that one of the tools by which one company potentially controls the other is through the ownership of the majority of shares.

[23] The Federal Democratic Republic of Ethiopia, Commercial Registration and Licensing Proclamation No. 980/2016, *Federal Negarit Gazette* No. 101 (5 August 2016).

[24] Id, art-2/40, And, pursuant to Art. 9 of the RCC, a holding company is a parent company that does not itself conduct operations to produce goods or render services by engaging in activities specified under Article 5 of the Code but holds shares in other companies that do so.

[25] Mesfin, *supra* note no.10, P. 202.

differ.[26] On the other hand, the RCC defines 'control' as a parent company's ability to govern the financial and operating policies of a subsidiary, either alone or with other shareholders.[27] Under the RCC, control exists when a company owns shares with voting rights representing more than half of the capital in the subsidiary.[28] However, ownership of more than half of voting rights in a company by another does not necessarily establish a parent-subsidiary relationship. In exceptional circumstances, the legal effects of 'control' may not apply.[29] A parent-subsidiary relationship can exist even when one company owns less than half of voting rights, especially when shareholders other than the shareholder company are not in a position to exercise control over their company. The RCC's Art. 553/1 mandates that a parent company's voting rights in a subsidiary's controlled company must include subscription and purchase rights for exercisable or convertible voting rights. A subsidiary company that has no other shareholders than a parent company is considered '*a wholly owned company*'.[30] The RCC outlines that, in Ethiopia, the most common method for forming affiliation is acquiring a company's share, either as a share company or an investment in an existing company's share capital. This can be a one-sided or a joint holding.[31] Other methods include control agreements, management contracts, and business leases.[32] Affiliation can also be established through voting agreements or

[26] Id.
[27] RCC, art. 552(1).
[28] Id., Art. 552(2).
[29] Id.
[30] Id, Art-551.
[31] In most national jurisdictions, where one company acquires 10 percent or more of another company's share that other company is prohibited from owning or holding shares in the first company. Also see; Mehamed, *supra note* no-2, P. 20.
[32] Immenga Ulrich, *Company System and Affiliations*, International Encyclopedia of Comparative Law, Martinus Nijhoff Publishers, The Hague, Vol.XIII (1985) P. 5.

shares with multiple or no voting rights.[33] In cases of no controlling interest, various techniques can be employed to obtain sufficient voting power.[34]

A parent company can exercise control by giving instructions to its subsidiary, potentially affecting its interests and liabilities towards shareholders and creditors, as per Art. 556/1 of the RCC. A parent company is entitled to give instruction to the organs of management of its subsidiaries while acting as a shareholder in the general meeting of shareholders or through its board of directors or senior management.[35] However, the extent and mode of the instructions is unclear. The law simply stipulates that instructions from a parent company may be given "to the organs of management of a subsidiary company".[36] Since a subsidiary company must have all of the necessary management organs in accordance with the RCC, it is unclear in this case whether orders from a parent should be provided to all of the organs or, instead, just one of the organs. In a similar vein, the law says nothing concerning the way instructions are to be given (written or spoken). A parent company may request access to information from a subsidiary under the RCC in order to provide effective instructions.[37] Undoubtedly, this entitlement can be seen as an extension of shareholders' access to information as specified under the general provisions of the RCC. The board of directors or other management body of the parent company may request any information from the subsidiary in accordance with Article 557 of the RCC, with the exception of communications that infringe upon the rights of third parties or foreign laws.[38] Once again, the law is ambiguous regarding which

[33] Id.
[34] Id.
[35] RCC, art-556/1.
[36] Id.
[37] Id, Art-557.
[38] The right to request information from the subsidiary company, in the words of the RCC, is available to the board of directors or 'a management body with equivalent status' of a parent company. "A management body with equivalent status" may refer to a parent company that

organs of the subsidiary company must give requested information and what happens if they are unable or refuse to comply.

3. The Concept of Corporate Creditors' Protection in Company Law: An Overview of Rationales and Mechanisms of Protection

Creditors lend money to a company at will, making it a debtor to them. However, companies often disappear without returning money, leading to significant losses for creditors. Traditionally, there were no laws to provide remedies for creditors involved in a company's failure.[39] In the modern times, governments have enacted laws to curb such practices and protect creditors' interests.[40] The laws also aim at striking a balance between the interests of shareholders and creditors.[41] Particularly, company laws regulate Corporate Groupings (CGs), most importantly, to protect minority shareholders and creditors of member companies, as dominant groups can hamper creditors' interests. The latter two are arguably more susceptible to the opportunism or negligence of the dominant shareholders in the framework of a corporate group than they would be in the context of a single company.[42] CGs have a chain of control, where each company has its own legal personality and is not liable for another's debt.[43] This can lead to a loss of corporate economic

is a private limited company or a one-member private limited company that is exempt from the requirement of having a board of directors as its organ of management.

[39] Richard A. Posner, the Rights of Creditors of Affiliated Corporations,University of Chicago Law Review, V-43, 1975, p-502, Available at; https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2856&context=journal_articles, Accessed on Aug-5-2023

[40] Id.

[41] Mads Andenas and Frank Wooldridge, *European Comparative Company Law*, Cambridge University Press. (2009), P. 448

[42] Hertig, Gerard, and Kanda, Hideki, "Creditor Protection," in R. Kraakman et al. (eds.), *The Anatomy of Corporate Law*, Oxford University Press (2002), P. 74.

[43] Mehamed, *supra* note no. 1, P. 26.

independence in companies affiliated with other companies, posing risks to creditors.[44]

The stronger concerns in corporate groups for the protection of creditors emanate from their nature.[45] Corporate groups are, on the one hand, collections of independent companies; on the other hand, one could be dependent on the other, and the other could control the dependent.[46] This nature of CGs may hinder creditors from getting performance from controlling companies due to the legal entity doctrine or principle of limited liability.[47] The application of separate entity and limited liability principles makes the liability of the parent company for the debts of its subsidiary limited to the amount of its shareholding in the subsidiary, even though in commercial reality, corporate groups are designed for the interests of the group as a whole.[48] In corporate groups, each company has its own legal personality, and legally speaking, one company is not liable for the debt of another company.[49] In addition, economically, corporate groups often do not operate independently of each other because of the chain of control among them. Due to this chain of control, there is a wider possibility that a controlled company may be used to pursue the economic interests of the group rather than its own interests.[50] Hence, in that case, creditors of the controlled company may not get the performance of their obligation from the company not pursuing its own interest, and because of the legal entity doctrine, they could not easily go against the other member company in whose interest the debtor company was working.[51] So, the risk to creditors is either in the

[44] Id.
[45] Id, P. 26.
[46] Id.
[47] Id.
[48]Lestari, *supra* note no-2, P.1.
[49] Tamar, *supra* note no-3, P.163.
[50] Mehamed, *supra* note no. 1, P 28.
[51] Id.

principle of limited liability or in the loss of corporate economic independence in companies affiliated with other companies, the creditors of the controlled company.[52]

Ethiopian affiliate companies are becoming more prevalent in both financial and non-financial sectors. These companies often involve private limited companies, family relations, common management, common shareholders, and cross-shareholding.[53] However, previous studies show that the statutory mechanisms used, particularly under the old Commercial Code, are inadequate for protecting corporate creditors.[54] The recent enactment of the RCC of 2021 has introduced new provisions for business organizations, including the recognition and regulation of corporate groups. Owing to its newness, there is an inadequacy of studies and judicial practices on the issues of corporate groups in Ethiopia, let alone separately on the creditors' protection aspect. Hence, this work, instead of addressing all the potential concerns in corporate groups in general, has critically analyzed the provisions of the relevant Ethiopian company laws on the protection of creditors of subsidiary companies subject to the direction and supervision of another company, i.e., a parent company, in vertical groupings of companies. It has also analyzed the relevance of the rules on creditors' protection, speculating mostly for the protection of creditors in single companies to safeguard corporate creditors' interests in corporate groups.

Corporate creditors can use various protection mechanisms to ensure their claims are met by debtor companies.[55] These mechanisms can be statutory legal provisions in company, insolvency, and other laws, or through a self-

[52] Id.
[53] Id.
[54] Tigist, *supra* note 7.
[55] Id., p. 35.

help mechanism.[56] However, there are no uniform approaches across jurisdictions. In Anglo-American traditions, creditors are protected through contracts, while in civil law countries like Europe, they are protected through statutory provisions.[57] This is partly attributable to the major objective of company laws in these traditions, which is the maximization of shareholder value, justifying maximum flexibility for private regulation through contracts.[58] Contrastingly, in civil law countries such as Europe, creditors are usually protected through statutory provisions, as the company law in these traditions also seeks to protect creditors as well.[59] Generally, there are two categories of mechanisms recognized in many jurisdictions: statutory mechanisms and contractual mechanisms.[60] Statutory protection is incorporated in company law, insolvency law, and common law rules on lifting the corporate veil.[61] It is efficient for bargaining between companies and creditors, as it is less costly.[62] Legal rules that provide incentives and remedies include fraudulent conveyance law, lender liability, legal capital rules, and fiduciary duties to creditors.[63] Detailed discussions on each

[56] Elis Tarell, Basel II, and the Protection of Creditors in Company Law: The Role of Banks as Financial Intermediaries in the Protection of Third Creditors of Debtor Companies, Ph.D. Dissertation, Hamburg University, (2015), p. 47 https://d-nb.info/1127225545/34 (Accessed June 23, 2023).

[57] Id.

[58] Id.

[59] Id.

[60] Id.

[61] Mandatory rules are essential for protecting corporate creditors, as self-help mechanisms are not available to all types of creditors, especially those with less bargaining power. Statutory provisions for bargaining between companies and creditors are efficient and less costly. Mechanisms include mandatory disclosure, capital-related requirements, shareholder claims subordination, rules governing opportunism, and reducing opportunism by company controllers. Legal rules provide incentives and remedies, including fraudulent conveyance law, lender liability, legal capital rules, and fiduciary duties to creditors. For more, see; Pau L. Davies, Introduction to Company Law, 2nd edition, Oxford University Press, USA, 2010, P.71.

[62] Tarell, *supra note* no. 56.

[63] Id.

mechanism are provided in some prior publications and won't be repeated here.[64]

The second major category of mechanism for protecting company creditors is a contractual or self-help mechanism. This mechanism views the firm as a nexus of contracts, with creditors entering numerous contracts voluntarily to maximize their benefits.[65]Corporate creditors seek protection through the terms of the contract with the debtor, making it a primary matter of contract rather than company law.[66] Creditor self-help as an alternative to creditor protection by mandatory rules is not available per se to "pure" tort creditors but only to contractual creditors.[67]Self-help mechanisms include third-party credit insurance, debt covenants, collateral, personal guarantees, and interest rates.[68]

4. A Case for Parent Company's Potential Liability for the Debts of Its Subsidiaries under Ethiopian Corporate Group Laws

[64] Tigist, *supra note* no. 7.

[65] Accordingly, corporate creditors, as a third party who contracts voluntarily, seek to gain adequate protection through the terms of the contract with the debtor. As a result, the issue of corporate creditor protection is considered a primary matter of contract rather than company law. The creditor self-help mechanism, as it can be understood from its name, isn't available for involuntary creditors as they have no prior contractual relationship with the company before they become a creditor. Creditor self-help as an alternative to creditor protection by mandatory rules is not available per se to "pure" tort creditors but only to contractual creditors.

[66] Tarell, *supra note* no. 53, p. 47–48.

[67] Peter O. Mülbert, A Synthetic View of Different Concepts of Creditor Protection—Or: A High-Level Framework for Corporate Creditor Protection, Law Working Paper No. 60/2006 (February 2006), P. 20: available at https://www.ecgi.global/sites/default/files/working_papers/documents/SSRN-id883625.pdf (accessed July 3, 2023).

[68]Id, Covenant is contracts between a corporate creditor and debtor determining loan terms and conditions. Obtaining collateral is the most effective self-help mechanism, as it avoids ex-post opportunism and grants a property right. Collateral also self-enforces, allowing the creditor to enforce security upon debtor defaults.

This section presents a critical analysis of the RCC's provisions, other relevant Ethiopian laws, and pertinent national laws of other countries in order to make the case for a parent company's potential liability for the debts of its subsidiaries in the context of the subsidiary company's creditors' protection.

4.1. A Parent Company's Control Right, the Manner of Its Exercise and Its Implication on Subsidiary Company's Creditors' Protection

A parent company has 'instruction rights' over a subsidiary company, which is obliged to obey the instructions issued by the parent. Art. 556/2 of the RCC states that the organs of management of a subsidiary must comply with the instructions issued by the parent, subject to certain conditions and exceptions. However, the provision does not specify the nature of the instructions or the standard of care expected of the person furnishing the instructions on behalf of a controlling parent company. This raises the question of whether a controlled company has the right to scrutinize if the instructions advance the interests of the parent company, a subsidiary company, or the group in general. In Germany, a controlling undertaking holding shares in a dependent company has an enhanced duty of good faith in all its relationships with the subsidiary company and its shareholders.[69] If the controlling company violates its duties, every minority shareholder in the dependent company has an action for discontinuance against both the controlling and dependent companies.[70]

The RCC's position on instructions and the standard of care expected from a parent company's legal representatives is unclear. However, many foreign jurisdictions have clear standards for parent company behavior when giving instructions to a subsidiary. For example, in Germany, legal representatives

[69] Andenas and Wooldrigde, *supra note* no. 41, p. 482.
[70] Id.

must be careful and conscientious when giving instructions, and if they breach these duties, they are jointly and severally liable for damages.[71] The law also mandates parent company management to not give instructions detrimental to the interests of a subsidiary company, and vice versa.[72] Violation of this rule results in liability for damages and creditors of a subsidiary company who fail to satisfy their claims from the subsidiary enterprise's assets.[73] It is desirable to have clear legal provisions on this aspect under our RCC as well

The controlling company's instructions must be honored by the management organs of the controlled company, as per Art. 556/3 of the RCC. Nonetheless, not every management body of a subsidiary is bound by instructions from the parent company. Art. 556/3 states that directors and managers not appointed by the parent company but due to provisions in the memorandum of association, shareholders' agreement, or any law or regulation are not bound by the parent company's instructions. The law also states that a subsidiary company's board of directors or management acting against its interests is not considered a breach of fiduciary duties.[74] However, Art. 563/2 allows the board of directors or management body of a wholly owned subsidiary not to breach its fiduciary duty even if they make decisions contrary to the subsidiary's interests or conduct detrimental to it without an assumption of expected gains.

The RCC permits subsidiary company management to refuse patent company instructions if they do not advance the group's interests, do not assume

[71] Paragraph 309 of German Stock Corporations Act 1965.
[72] Id.
[73] Italian law recognizes joint liability for damages suffered by wrongful acts on a subsidiary, as per the Civil Code. Those who profit from such acts are also liable. However, members and creditors can only take action against the parent company if they cannot obtain satisfaction from the subsidiary. See Article 2497(2) of the Italian Civil Code.
[74] RCC, art. 563/1.

damages will be balanced by expected gains, and could potentially jeopardize the subsidiary's existence.[75] If they do, they will be jointly liable with the parent company towards creditors of the subsidiary, who cannot meet their claims solely with the subsidiary's assets. The RCC does not provide remedies for interested parties, including creditors affected by subsidiary companies acting on a parent company's prejudicial instructions. Although the RCC grants a parent company significant power to manage and interfere in subsidiary affairs, it is unclear if the parent is liable to subsidiary creditors.[76] However, a parent company may be liable for damages to subsidiary companies and their creditors who fail to meet their claims with the subsidiary's assets. The RCC does not prescribe a standard of conduct for parent companies, potentially allowing them to abuse control rights and negatively impact subsidiary shareholders and creditors.

It also important to mention that, a parent company can potentially abuse control over its subsidiary through majority shareholding and acting as a director. Under the RCC, an organization or institution can be appointed a director and appoint a permanent representative for its term.[77] The representative is subject to the same obligations, including civil and criminal liability, as a director in their own name, without prejudice to the joint liability of the legal entity they represent. Under the RCC, directors shall be responsible for exercising duties imposed on them by law, memorandum of association, and resolutions of general meetings of shareholders.[78] Thus, where a parent company acts as a director of a subsidiary company, it will be subject to duties expected of a director, such as a duty of loyalty[79] , a duty to

[75] Id.
[76] Mesfin, *supra* note no. 10, p. 210.
[77] RCC, Art. 296/4/5.
[78] Id, art-315.
[79] Id, art-316.

exercise independent judgment[80] , a duty of care and diligence[81], a duty of strict good faith[82] , and a duty to avoid conflict of interest.[83] As a director of the company, the parent company has a duty and liability prescribed for directors in general. Based on that, the veil of limited liability of the parent company can be pierced, and the creditor of the subsidiary company can proceed against the parent company, which acts as the director of their debtor, if a parent fails to preserve the assets of the subsidiary company.

The RCC states that directors shall be liable for damage caused to creditors where the company continues its business after the time when the directors knew or ought to have concluded that there was no reasonable prospect of the company being able to pay its creditors.[84] Directors who fail to preserve intact the company's assets shall be liable to the company's creditors to the extent of the reduction in the company's assets they caused where the company's assets are not sufficient to pay creditors.[85] Even the company`s decision not to institute proceedings against the directors shall not affect the creditor`s rights to sue such directors.[86] In addition to a parent company acting as a director of a subsidiary, it can also potentially abuse its control over a subsidiary while acting as a majority shareholder of a subsidiary company. Therefore, a parent company that engages in an abuse of its control over the subsidiary company, either as the latter's director or a majority shareholder, will be potentially liable to creditors of the subsidiary company if they fail to meet their claims only with the assets of the debtor subsidiary company.

[80] Id, art-317.
[81] Id, art-318.
[82] The Civil Code, Art. 2209.
[83] RCC, Art. 320.
[84] Id., Art-329/1.
[85] Id., Art-329/2.
[86] Id., Art-329/3.

Another important aspect in the discourse of control and/or instruction by a parent is the issue of the requirement of publicity of control to third parties. The RCC requires a non-wholly-owned subsidiary to indicate in the Commercial Register if its management is directed by the parent company.[87] A wholly-owned subsidiary is presumed to be subject to the parent company's instructions and does not need to disclose its ownership.[88] The question is whether the subsidiary needs to disclose being controlled by another company in transactions and correspondences, and if this disclosure affects the parent company's potential liability towards the subsidiary's creditors. This aspect of publicity is recognized in some national jurisdictions. For instance, Article 2497 of the Italian Civil Code mandates a subsidiary company to indicate its subjection to another company's direction and coordination in transactions and correspondence.[89] This subjection must also be indicated in a special section of the Register of Enterprises, with the parent company exercising control also appearing in this section.[90] Directors who fail to comply or maintain a record indicating the subjection still exists may be responsible for damage caused to members or third parties.[91] However, under the RCC, there is no requirement for a subsidiary company to disclose control to the management of a subsidiary company, and failure to do so does not result in misrepresentation.[92] Creditors of a subsidiary company who fail to meet their claims can proceed to a controlling parent company if they can prove abuse and mismanagement of the debtor subsidiary by the parent company.

[87] Id., Art-556/4.
[88] Id., Art. 556/5.
[89] Art. 2497 of the Italian Civil Code, *Codice Civile*, Approved by Royal Decree no 262/1942 and amended from time to time.
[90] Id.
[91] Id.
[92] RCC, Art. 554, The provision mandates parent company management to notify subsidiary management of control changes, and unless foreign, the subsidiary must inform parent company of its shares and voting rights, unless recognized by the relevant country's law.

4.2. A Parent Company Exploiting Corporate Group Entrepreneurial Opportunities

Exploitation is the unfair use of another person's vulnerability for one's own benefit, which can be transactional or structural.[93] It can be a discrete transaction, such as a sweatshop or pharmaceutical research firm, or a structural property of institutions where the rules unfairly benefit one group to the detriment of another.[94] One of the key rules incorporated under the section of the RCC governing corporate groups is the rule that prohibits a parent company from exploiting corporate opportunities within a group.[95] Yet, it is unclear what constitutes a corporate opportunity. In principle, a parent company is prohibited from exploiting corporate opportunities within a group, whether directly or indirectly through another subsidiary. Yet, the RCC provides exceptional grounds and preconditions under which a parent company is allowed to exploit a group opportunity. The first situation is where a parent company has secured the approval of directors of the subsidiary that have not been appointed by it. However, where all directors of a subsidiary are appointees of a parent company, it does not need to secure their approval. Instead, a parent company has to secure the approval of the non-controlling shareholders of the subsidiary. Although the provisions require the approval of the non-controlling shareholders of the subsidiary,

[93] Stanford Encyclopedia of Philosophy, Exploitation (December 20, 2001; Substantive Revision, Monday, October 3, 202) https://plato.stanford.edu/entries/exploitation/ (Accessed March-22-2024).

[94] Id.

[95] RCC, Art. 560, states that "A parent company, whether registered in Ethiopia or abroad, must not itself or through another subsidiary exploit a corporate opportunity of a subsidiary *unless it has received the approval of directors of the subsidiary that have not been appointed by it, and if there are none, of the non-controlling shareholders of the subsidiary*. The prohibition imposed on a parent company under Sub-Article (1) of this Article shall not apply to a wholly owned subsidiary" (Emphasis Added).

which presumably has the objective of protecting minority shareholders in a subsidiary company, the law does not prescribe the level of capital holding expected of these 'non-controlling shareholders of the subsidiary' and potentially creates ambiguity on the implementation of this rule.

The RCC follows a different approach where a subsidiary happens to be 'a wholly owned' one, in which a parent company is allowed to exploit a corporate opportunity of a group without preconditions.[96] From the above analysis of provisions of the RCC, we can argue that there are instances where a parent company exploits corporate opportunities within a group in violation of or without following the preconditions set out under Art. 560 and thereby poses damages to a subsidiary company. The damage sustained by a subsidiary company because of unlawful exploitation of group opportunities may reduce the chances for creditors of the latter to collect their claims from the subsidiary. Thus, a parent company that has rendered a subsidiary unable to meet the claims of its creditors due to the exploitation of opportunities within a group will potentially be pursued by the creditors of the subsidiary company.

4.3. Wrongful Trading, Subsidiary Insolvency and Creditors' Protection

Sometimes a subsidiary company's business viability may be significantly weakened, and it may find itself on the verge of dissolution or bankruptcy. The protection of creditors during the time the debtor company is still in operation but is on the verge of going bankrupt is the fundamental idea behind wrongful trade.[97] During this time, divergent incentives can be observed. In

[96] Id., art-560 (2) (3).

[97] Zoltán Fabók, Wrongful Trading in England and Hungary: A Comparative Study, *A Comparative Study' in Dr Jennifer L. L. Gant (ed), Harmonisation of European Insolvency*

the best interests of the business, the director could wish to negotiate the company's way out of the sticky situation, but in order to do so, he will probably need more time, more credit, and new obligations.[98] The unsecured creditors can be worried that the debtor's assets, which are the only security that can pay for their claims, are disappearing and that this will put them in a worse situation than if official bankruptcy procedures had been initiated sooner.[99] In principle, a director has an obligation to act in the company's and its shareholders' best interests. Nonetheless, a director's primary responsibility in the event of insolvency is to safeguard the interests of the company's creditors. Insolvency shifts a director's responsibility from promoting a company's success to acting in the best interests of creditors.[100] Directors may consider ceasing trading, but this may not always be in the best interest of creditors.

A key principle of corporate law holds that, as a company is an independent legal entity, it bears exclusive responsibility for its debts. This notion is not absolute, nonetheless, as company laws and court rulings have proven that the company's independent legal personality may be bypassed for the purpose of holding directors or shareholders liable for the debts the company incurs.[101] Wrongful trading is one of the grounds whereby directors might be held accountable for the company's debts. On this issue, the corporate group laws in Europe make two proposals concerning the liability of the parent company in the event that its subsidiary is unable to escape winding up by means of its

Law (2017), p. 85, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2896290 (Accessed March 3, 2024).

[98] Id.

[99] Id.

[100] Since Green, What is Wrongful Trading? (08/08/2023); https://www.crowe.com/uk/insights/what-is-wrongful-trading (Accessed April-14-2024).

[101] Nzafashwanayo, Dieudonne, Wrongful Trading: The Liability of Directors for the Obligations of the Company Under Rwandan Law (September 2, 2016), PP. 3–4. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2833820 (Accessed April-14-2024)

own resources.[102] The first proposal observed under the laws of English, French, and Belgium provides that the parent company would be obliged to carry out a fundamental restructuring or initiate the winding up procedure.[103] A failure of this rule by the parent company renders it liable to the subsidiary company in liquidation for the losses caused to all creditors by the said acts.[104] This consequence is based on the presumed knowledge of the parent about the subsidiary company's arrival at a crisis point.[105]

In Ethiopia, in the context of a corporate group, the RCC obliges a parent company to take necessary measures to save the subsidiary company on the verge of bankruptcy from failure. It states;

1. Whenever a subsidiary company, which has been managed according to instructions issued by its parent even in the interest of the group, has no reasonable prospect, by means of its own resources, of avoiding dissolution or winding-up, the parent company *shall without delay effect a fundamental restructuring of the subsidiary or initiate its winding-up procedure*.
2. If the parent company acts in contravention of Sub- Article (1) of this Article, it shall be held *liable for any unpaid debts of the subsidiary incurred after the said crisis point.*
3. If the parent company has managed the subsidiary to the detriment of the subsidiary and in violation of the interest of the group, it *shall be held liable for any unpaid debts of the subsidiary which are the consequences of the harmful instructions.*

[102] Andenas and Wooldrigde, *supra note* no. 41, p. 484.
[103] Ibid.
[104] Id.
[105] Id.., Also, according to Article 2497(2) of the Italian Civil Code, persons who have taken part in wrongful acts that have damaged the subsidiary incur joint liability with the parent company for damages suffered by it. Persons who consciously benefit from such acts are also liable within the limits of the advantages obtained by them.

4. The right to claim compensation provided for in Sub- Articles (2) and (3) of this Article can be invoked *only by the liquidator or trustee of the subsidiary. The liquidator or trustee, as the case may be, is obliged to exercise such claim if creditors holding not less than 10 % of the debts of the subsidiary request that.*[106] (Emphasis Added)

Pursuant to Art-564/1 of the RCC, a parent company that exercises control over another subsidiary company has an obligation to prevent a subsidiary company from going to dissolution by effecting *a fundamental restructuring* or, if the chance of restructuring is not feasible, to initiate a timely winding-up procedure. The failure by a parent company to do so makes it liable for any 'unpaid debts of the subsidiary, which are the consequences of the harmful instructions' under Art-564/2. The liability of a parent company is restricted to the debts incurred by a subsidiary company after the crisis point. Parent company acting quickly means no liability, even if its intervention has affected the subsidiary's creditors. The fact that instructions issued by its parent had the potential to advance the interests of the group does not seem to make a parent free from the obligations imposed, so long as a subsidiary has no reasonable prospect, by means of its own resources, of avoiding dissolution or winding-up.[107]

Art. 564/3 of the RCC provides two cumulative requirements to hold a parent company liable for the debts of its subsidiary: managing the subsidiary to the detriment of the subsidiary and in violation of the interests of the group. Concerning the extent of the parent company's liability, the provision states that it shall be held liable for any unpaid debts of the subsidiary, which are the consequences of the harmful instructions. Concerning the nature of a parent company's liability, Art. 564/4 provides that it is in the form of compensation

[106]RCC, Art. 564.
[107] Id., art-564/2.

that, in principle, can only be invoked by the liquidator or trustee of a subsidiary company at their option. Nonetheless, the liquidator or trustee of a subsidiary company has a legal obligation to claim compensation from a parent when creditors hold not less than 10% of the debt.

A few observations are in order concerning the liability of a parent company under Art. 546 of the RCC. Firstly, it is important to note that the RCC does not impose a mandatory rescue obligation on the parent, which could affect creditors and minority shareholders.[108] Secondly, the liability of a parent company does not depend on whether the assets of a subsidiary company are sufficient or otherwise to meet the claims of its creditors. Thirdly, creditors are not authorized to file a direct claim against the responsible parent company. Finally, a parent company's liability is in the form of compensation, and its amount is not unlimited.

Art. 564 provides two modes of compensation subjected to different requirements, both of which require proof of the fact that a subsidiary company failed to pay its debts as expected of it as a result of harmful instructions by a parent company. The compensation scheme under Art-564/2 seems to be the responsibility of a parent company to make a subsidiary incur additional debts. The key differences between Art-564/2 and Art-546/3 are that the amount of compensation for the former is equivalent to 'any unpaid debts of a subsidiary company that are the consequences of the parent company's harmful instructions *incurred after the said crisis point* '; whereas the latter does not make reference to the time when the debts are incurred by the subsidiary. Instead, Art. 564/3 makes a parent company liable for being a reason for the subsidiary's inability to pay debts, rendering the amount of compensation presumably unlimited.

[108] Id., Arts-560, and 564.

In effect, art. 564/3 of the RCC amounts to piercing a corporate veil.[109] Yet the Code fails to clarify whether instructions by a parent company and obedience by its subsidiary to the instructions can raise a ground for treatment as 'alter ego' and thereby result in piercing of a corporate veil or 'single business entity' or 'agency' reason that renders a parent company liable for the debts of the subsidiary company.[110] The clarification of this approach helps courts of law enforce the mandatory shareholders and/or directors in single companies to be applied in corporate groups.[111] In general, there is no explicit legal provision in Ethiopia governing how to handle a subsidiary's insolvency. This approach might make the subsidiary even more insolvent, which would encourage risk-averse people to create fictitious companies as a way to protect themselves from unsecured creditors. Article 295 can, however, be invoked to help close these legal gaps, particularly in cases where a parent shareholder commits crimes that jeopardize the interests of the subsidiary or make it difficult to distinguish between the subsidiary and itself.[112] One may also argue for the possible application of RCC Art. 850/1, which establishes the liability of shareholders (in this case, a parent company acting as a shareholder of a subsidiary company) to creditors of a subsidiary in the event that a parent commits fraud or issues instructions that cause a subsidiary to stop making payments to its creditors.[113] These two suggestions can assist Ethiopia in harmonizing with other nations concerning the piercing of a corporate veil.

[109] Mesfin, *supra* note no. 10, p. 226.
[110] Id.
[111] Id.
[112] Id.
[113] This rule seems to endorse the general company law notion that limits shareholders' liability and extends their liability to third parties only in exceptional cases. It is placed under the section of the RCC that governs bankruptcy.

4.4. Violation of the Prohibition of Share Cross Holdings and Its Implication on Creditors' Protection

It is to be noted that maintaining a company's capital helps a company properly exploit its capital for its legitimate purpose. When implemented effectively, it restrains the improper return of capital to shareholders through capital reduction, capital raising, company distribution, and share cross-holding.[114] Share cross-holding between two or more companies occurs when one company subscribes shares in another company and, in return, that other company also acquires shares of its member company.[115] Share cross-holding, either between two companies or more than two companies, has a high negative impact on capital maintenance.[116] In the context of group companies, the RCC states that 'a subsidiary may not hold any shares directly or indirectly in the parent company.[117] This provision puts a complete ban on share cross-holdings between a parent company and its subsidiary.[118] Yet, Art. 555 of the RCC does not address cross-holding among more than two companies, which potentially amounts to allowing multiple parent subsidiaries to cross-hold each other's capital without any limit.[119] The aim of the law in prohibiting a share cross holding between a parent company and its

[114] Yomilata Mando, Capital Maintenance in Ethiopian Non-financial Share Companies: The Law and the Reality on the Ground, LLM Thesis, AAU (June 2020), p. 51 http://213.55.95.56/handle/123456789/22280 (accessed July 21, 2023).

[115] Corporate Finance Institute, Cross Holding (2015), Available at; https://corporatefinanceinstitute.com/resources/management/cross-holding/#:~:text=What%20is%20Cross%20Holding%3F,holding%20of%20the%20first%20company . (Accessed September 11, 2023).

[116] Id.

[117] RCC, art. 555/1

[118] Of course, the law makes a distinction between companies having a parent-subsidiary relationship and those that do not. The RCC does not provide a complete ban on cross-shareholdings for companies not constituting a group; instead, it sets conditions and a limitation threshold. In this case, where a second company holds 5% or more of the capital of the first company, the first company may not hold shares in the second company.

[119] Yomilata, *supra* note 114, p-34.

subsidiaries is to maintain the capital of both companies and thereby protect the interests of their creditors. So, a parent company through its control right compels a cross shareholdings with its controlled company in violation of the provisions of the RCC; one can argue for the liability of a parent company towards creditors of its subsidiary.

Concluding Remarks

Large firms today are often organized as corporate groups with numerous subsidiaries, each having a separate legal personality. However, this separation of legal existence is not matched by the economic independence of the units, as one company may dominate another through majority ownership, centralized or common management, and an enterprise agreement. This dominating influence can lead to the group company serving the interests of the controlling company, impairing the assets of member companies, providing inadequate consideration, and extending credit at a lower rate. This situation threatens the interests of the units, their minority shareholders, and their creditors. Special regulation of affiliate companies is necessary to protect these interests. Creditor protection is usually provided through statutory legal provisions, insolvency laws, or self-help mechanisms. In the Ethiopian legal system, affiliate companies are emerging as an organizational form in both the financial and non-financial sectors.

The study critically analyzed the legal frameworks on the protection of a subsidiary company's creditors within corporate groups under Ethiopian laws, focusing on the questions of whether a creditor of a subsidiary company should pursue the assets of a corporate parent to satisfy its claim, how parent companies should be treated when a subsidiary lacks sufficient assets to satisfy its creditors, and the mechanisms adopted under the RCC for the protection of creditors.

The findings of the work reveal that; in Ethiopia, the parent company has the right to instruct a subsidiary, shift assets, and exploit its corporate opportunity, which can affect the subsidiary and even expose it to insolvency. Liability arising from these activities is in principle, limited to the assets of the individual subsidiary. The Code does not impose a mandatory rescue obligation on the parent, which could affect creditors and minority shareholders. The principle of the corporate veil is not applicable unless the subsidiary company is managed according to instructions issued by its parent. However, if the parent company acts without delay in the subsidiary's restructuring or liquidation, it is not liable to creditors.

Concerning the potential legal consequences of parent firms misusing their authority to assume the role of director or majority shareholder of a subsidiary, one must examine the RCC rules not specifically designed for corporate group setup. The section of the RCC governing corporate groups lacks adequate legal provisions and cross-references to other Code provisions, potentially exposing them to speculation and incorrect legal provisions.

Also, the RCC's approach to instructions and the standard of care expected from a parent company's legal representative are unclear. Many foreign jurisdictions have specific standards for parent company representatives when giving instructions to a subsidiary. For example, in Germany, legal representatives must be careful and conscientious, and if they breach their duties, they are jointly and severally liable for damages. In Italy, individuals involved in wrongful acts that damage a subsidiary incur joint liability with the parent company. However, members and creditors can only take action against the parent company if they cannot obtain satisfaction from the subsidiary. The RCC does not address the issue of publicity of control by a subsidiary company that is under the supervision of another company. However, some jurisdictions recognize this aspect, such as the Italian Civil Code, which requires a subsidiary corporation to declare its control in

transactions and correspondences. Directors of controlled companies are liable for any harm caused to shareholders or third parties.

Based on the above findings, the writers forward the following recommendations:.

1. The section of our RCC that governs corporate groups in general fails either to incorporate adequate legal provisions or make cross-references to other general provisions of the Code. This is not a good legislative drafting style, as it exposes us to speculations and/or incorrect legal provisions.

2. The approach reflected in the RCC concerning the nature of the instructions and what degree or standard of care is expected of the person furnishing the instructions on behalf of a parent company is unclear. Having clear legal provisions on the aspects addressed here is desirable under the RCC as well. In order to help creditors of a subsidiary company take calculated risks while doing business with a firm that is supervised by another company, such an approach needs to be recognized under our RCC.

Taxing Advocates' Income in Ethiopia: An In-depth Examination of the Presumptive Tax Assessment Regime

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Abstract

This article investigates the presumptive income tax regime for advocates in Ethiopia, focusing on the characterization of advocates' income as business income, their categorization into Categories A, B, or C taxpayers, and the presumptive income tax assessment of Category C advocates. The study employs a mixed-methods approach, combining doctrinal analysis of legal frameworks with a qualitative examination of tax administration practices.

The article finds that Ethiopia's treatment of advocates under the business income tax schedule is consistent with international norms, simplifying tax administration. However, issues arise with categorization and presumptive tax determination. Despite the principal income tax laws base advocates' categorization and presumptive tax assessment on annual turnover, the laws lack clear and objective mechanisms for determining this turnover. Administratively, tax authorities have attempted various turnover estimation methods with limited success due to inappropriate approaches and flawed applications. Non-compliance among advocates further exacerbates these challenges. As a result, categorization and presumptive tax assessments are often subjective, uncertain, and prone to evasion.

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To address these shortcomings, the article proposes modernizing the presumptive tax regime by introducing effective turnover verification methods, requiring Category C advocates to maintain basic records of receipts with an optional standard deduction for expenses, utilizing robust third-party information frameworks for reliable data exchange, and enhancing tax authorities' capabilities to implement these reforms. These measures aim to create a more equitable and efficient income tax system for advocates in Ethiopia.

Key words: Presumptive Taxation; *Advocates' Income*; *Turnover Tax*; *Tax Compliance*; *Ethiopia.*

Introduction

Over the past several decades, the taxation of advocates' income has remained a peripheral concern within the Ethiopian tax system. A form of presumptive taxation known as standard assessment has served as the primary method for assessing the taxes of most advocates. Advocates, based on the type of their advocacy licenses, have been subjected to fixed lump sum taxes collected by tax authorities. Due to its simplicity and predictability, advocates did not voice complaints about this assessment method. Conversely, tax authorities expressed concerns that the fixed taxes were inadequately low, infrequently updated, leading to advocates paying taxes that did not accurately reflect their income status.[1]

Following the enactment of the current income tax laws in 2016/17, specifically the income tax regulation, there has been a shift in the income tax assessment method for advocates, transitioning from an indicator-based to a

[1] *የመደበኛ ቁርጥ ታክስ አወሳሰን* (Standard Assessment) *ሥራ ላይ ለማዋል የቀረበ ሀሳብ፣ ፊስካል ፖሊሲ መምሪያ፣ገንዘብና ኢኮኖሚ ልማት ሚኒስቴር፣ አዲስ አበባ፣1994 ዓ.ም፣ ገጽ 24, 28።*

turnover-based standard assessment.[2] It was during and after this change that various problems surfaced, particularly from the advocates' community. Tax authorities maintained their concerns that advocates were not meeting their tax obligations, accusing them of evading taxes. Despite being significant income earners, advocates reportedly declared only a minimal portion of their taxable income, resulting in negligible or minimal income tax payments, according to tax officials.[3] Consequently, tax authorities in regions like Amhara significantly raised tax amounts for advocates, sparking discontent within the advocates' community. In response to these measures, advocates organized seminars, aimed at raising awareness of the tax challenges they faced due to the authorities' measures, and submitted complaints to both federal and regional government officials, exemplified by letters from the Ethiopian Federal Advocates and Amhara Region Bar Associations to the Ministry of Finance and the Amhara National Regional State Finance Bureau, respectively.[4] Despite these efforts, the disputes persist, and temporary measures seem insufficient to address the root causes of the problems.

Advocates have raised various complaints regarding the law and practice of income tax assessment. The primary issues include advocates' contention that, as professional service providers, they should not be classified as businesses under Schedule C of the Income Tax Proclamation. They argue that advocacy

[2] Council of Ministers Income Tax Regulations, No. 78/2002, *Federal Negarit Gazetta, (2002),* Schedules 2; Council of Ministers Federal Income Tax Regulation, No.410/2017, *Federal Negarit Gazetta,* (2017), Schedule One, Business sector No. 75. While this article primarily addresses the tax matters of regional states, the laws of the federal government are referenced herein for the sake of convenience and simplicity. The income tax laws of the regional states mirror those of the federal government verbatim. Rather than citing multiple identical laws, the approach adopted here is to cite one law that is analogous to the others.

[3] Interview with Getachew Mesfin, Senior Tax officer, Amhara National Regional State Revenue Bureau, (11/02/2015 E.C, i.e Ethiopian Calendar).

[4] *የኢትዮጵያ ፌዴራል ጠበቆች ማህበር፣ ደብዳቤ ቁጥር ኢ/ፌ/ጠ/ማ00087፣ ቀን 17/11/2015 ዓ.ም፤ የአማራ ክልል ጠበቆች ማህበር፣ ደብዳቤ ቁጥር ጠ/ማ- 142/15፣ ቀን 09/12/12015 ዓ.ም።*

services, governed by distinct laws, differ from commercial activities.[5] Additionally, advocates claim that many personal expenses, deemed nondeductible by tax authorities, serve the dual purpose of deriving income from advocacy services. For example, using private cars for transportation from offices to courts is among the nondeductible expenses by the tax authorities. Due to these unique features, advocates argue that Schedule C and the maintenance of books of accounts are unsuitable for them, leading most advocates to eschew bookkeeping and be taxed presumptively.[6]

[5] It is noteworthy that the claim asserting "advocates are not businesses" appears to be a prevalent viewpoint among advocates. This argument has been consistently raised by advocates, extending beyond issues related to income tax. For instance, in his 2014 doctoral dissertation, Taddese Lencho articulated the advocates' resistance to the Ministry of Trade's decision to incorporate consultancy services into the category of trades necessitating business licensing and registration. This resistance was grounded in the argument that advocacy does not qualify as a business and, therefore, should not be classified among activities treated as trade under the prevailing commercial code at that time. Taddese Lencho, The Ethiopian Income Tax System: Policy, Design and Practice, A Dissertation Submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, University of Alabama, (2014), p. 377. To the dismay of the advocates, the recently enacted commercial code, which supersedes its predecessor and was promulgated in 2021, categorizes professional services as a form of trade. This categorization implies that advocates are regarded as traders within the framework of the Code, as stipulated in Article 5(31) of the Commercial Code of Ethiopia Proclamation No. 1243/2021. In a scholarly article authored in Amharic language in 2018, Mohamed Dawud reported that advocates have consistently opposed the imposition of indirect taxes, such as value-added and turnover taxes (VAT and ToT). They have advocated for legislative bodies to reconsider applicable tax laws and to grant exemptions for advocacy services from VAT and ToT. These assertions and requests are underpinned by arguments highlighting the purported unconstitutionality of imposing indirect taxes on advocacy services and emphasizing the distinctive professional nature of advocacy, which sets it apart from conventional business activities. *ሙሐመድ ዳውድ አልቃድር፣ በኢትዮጵያ ከሕግ አገልግሎት የሚሰበሰብ የተጨማሪ እሴት ታክስና የተርን አሸር ታክስ፤ አዙሪት ጥያቄዎችና ውሰብስቦች፣ Bahir Dar University Journal of Law*, Vol.8, No.2 (June 2018).

6 *በፌደራል የጥብቅና ስራ የግብር አስተዳደር ስርዐት የህግና አተገባበር ጉድለቶችና መፍትሄዎች፣ የኢትዮጵያ ፌዴራል ጠበቆች ማህበር፣ ታህሳስ 2015 ዓ.ም፣ ገጽ 5,15-16,19,37-38።*

Secondly, advocates criticize the lack of uniformity and predictability in presumptive income tax assessment across different regional states and even within the same region. Advocates across different tax centers are subject to varying assessment methods, with some centers mandating bookkeeping and taxation based on records, while others insist on fixed lump sum taxes. The advocates' opposition to fixed taxes stems from their belief that such amounts lack a clear basis or study. [7] The persistent nature of the presumptive tax problem surrounding the taxation of advocates' income indicates that the concerns between tax authorities and advocates are ongoing.

This article aims to address the limited academic work on the topical issue of income tax assessment for advocates in Ethiopia. It investigates the historical origin, developments, and features of the presumptive income tax regime for advocates, analyzing policy, legal, and administrative issues. The goal is to provide new insights to the academic community and propose measures for resolving the problems faced by both tax administrations and advocates. As regards its scope, the article focuses on individual advocates, not law firms. Individual advocates fall under the taxation power of regional states, while law firms, considered as bodies, fall under the concurrent taxation power of both the federal government and regional states. [8] The article emphasizes the law and practice of presumptive income taxation for advocates, primarily in the Amhara National Regional State, with some coverage in the Addis Ababa City Administration and the Oromiya National Regional State.

The authors employ a mixed-methods approach, combining doctrinal and qualitative methods. The doctrinal method involves a review of legal frameworks governing professional and income tax affairs, while the qualitative method investigates practical matters related to the administration

[7] *የአማራ ክልል ጠበቆች ማህበር ደብዳቤ*, Supra note 4.

[8] The Constitution of Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, *Federal Negarit Gazetta*, (1995), Articles 97(4), 98(2).

of income tax laws for advocates. The article draws on data from primary sources such as tax proclamations, regulations, directives, and letters. Additionally, interviews with tax officers and advocates in the study areas contribute to exploring relevant administrative and practical issues. Secondary sources, including tax books, journal articles, and newspapers, further enrich the analysis.

The article is structured as follows: The first section offers insights on income tax approaches that apply to advocates, from theoretical perspectives and international practices. It helps evaluate the appropriateness of the current design of Ethiopia's presumptive tax regime for self-employed professionals like advocates. The second section conducts legal and practical analyses of income tax laws applying to advocates in Ethiopia, examining issues such as the characterization of advocates' income, their status as Category A, B, or C taxpayers, and the flaws in the design and application of presumptive tax assessment methods. The final section presents the main conclusions and recommendations.

1. General Overview on Income Taxation of Advocates

In tax literature and systems, individual advocates are typically classified as self-employed professionals or part of the liberal profession. Compared to other ordinary small taxpayers, professionals are perceived as relatively high-income earners capable of maintaining accounting records. This perception has led tax scholars, such as Richard Musgrave and Michael Engelschalk[9], to

[9] Musgrave, R. Income Taxation of the Hard-to-Tax Groups. Cited in Daisy Ogembo, Are Presumptive Taxes A Good Option For Taxing Self-Employed Professionals In Low & Middle-Income Countries?, *Journal of Tax Administration*, Vol 5:2, (2019), p. 32; Richard M. Bird and Sally Wallace, Is it Really so Hard to Tax the Hard-to-Tax? The Context and Role of Presumptive Taxes, in J. Alm et al. (Editors), *Taxing the Hard-to-Tax*, Elsevier B.V. Publishing, (2004), pp. 129-130; Michael Engelschalk, *Designing a Tax System for Micro*

favor the taxation of advocates through an account-based self-assessment. Despite arguments about tax evasion threats posed by professionals, the consensus is that they pose no unique threat compared to other taxpayers, and the tax evasion risk can be mitigated through increased enforcement of account-based income taxation. Since an account-based self-assessment system relies on information supplied and calculations undertaken by taxpayers, there is a risk of tax evasion. To ensure the system functions effectively, several measures must be implemented. For instance, it is crucial to establish a strong tax audit team to identify groups of taxpayers with a high probability of tax evasion and to review their tax returns. This requires well-organized, computerized data storage and processing systems for taxpayers' information. [10] Other supplementary measures to minimize tax evasion risks in a self-assessment system include withholding and third-party reporting schemes. These methods are considered efficient instruments to curb tax evasion and ensure tax compliance. [11]

International experiences reveal that many countries, both developed and developing, do not apply the presumptive assessment method to advocates within the self-employed professional community. [12] Countries like the USA, Australia, Mexico, Kenya, Rwanda, Ghana, Nigeria, and Uganda tax advocates according to conventional self-assessment methods for business income tax rules. In these countries, advocates are required to maintain proper books of accounts related to their income and expenses. The tax base for

and Small Businesses: Guide for Practitioners, International Finance Corporation, (2007), p. 76.

[10] Tapan K. Sarker, Improving Tax Compliance in Developing Countries via Self-Assessment Systems - What Could Bangladesh Learn from Japan?, *AISA-Pacific Tax Bulletin*, Vol. 9, No. 6 International Bureau of Fiscal Documentation, (June 2003), pp.8-9.

[11] Andrew Okello, Managing Income Tax Compliance through Self-Assessment, IMF Working Paper, WP/14/41, (2014), pp 11-12; Konstantin Pashev, Presumptive Taxation: Lessons from Bulgaria, Post-Communist Economies, *Taylor & Francis Journals*, vol. 18(4), (2006), p. 400, 417.

[12] Daisy Ogembo, Supra note 9, p. 35.

advocates is their net income, calculated as gross income less deductible expenses. Advocates in these countries must keep records such as receipts and invoices as evidence for deductible expenses. Developed countries' tax administrations are known for providing specific explanatory notes or guidelines regarding taxable incomes and deductible expenses for advocates. For example, the Australian Taxation Office outlines deductible expenses for advocates, including car expenses for work-related travel, travel expenses, costs related to occupation-specific clothing, fees for training or seminars, advocacy license renewal fees, professional indemnity insurance, Supreme Court Library fees, parking fees, tolls, Bar association membership fees, and fees for professional publications. [13]

Within the framework of the Kenyan income tax system, presumptive taxation is applicable to resident individuals engaged in business activities, provided their annual income does not exceed KSh 5 million (equivalent to 43,271.31 US dollars). Notably, self-employed professionals are expressly excluded from the presumptive regime, even if their annual income meets the stipulated eligibility criteria or threshold. Instead, these professionals are subject to taxation on their net income in accordance with the conventional business income tax rules. The withholding scheme also applies to self-employed professionals whose monthly professional fees are KSh 24,000 or more. The tax rate ranges from 3% to 5% of the gross fee, depending on whether the fee is contractual or non-contractual. [14]

Countries such as those in the Nordic region have introduced third-party reporting information schemes or pre-populated tax returns in their personal

[13] Lawyer expenses A–F | Australian Taxation Office (ato.gov.au), (November 15, 2023).
[14] Daisy Ogembo, Taxation of Self-Employed Professionals in Africa: Three Lessons from a Kenyan Case Study, African Tax Administration Paper 17, (2020), pp. 8-9.

income tax systems to supplement the self-assessment method.[15] These schemes apply to individual taxpayers, including self-employed professionals. Third parties, such as financial institutions, report payment information to the tax administrations, which process and match this information with the submitted tax returns to detect inaccurate declarations. In practice, third-party reporting information methods have proven to be "highly effective in detecting unreported income and have resulted in substantial additional tax revenue". [16] This method requires the collection of extensive taxpayer information from various institutions, matching this data with tax returns, and checking for discrepancies. Consequently, the method necessitates a legislative framework, effective use of information technology, and a well-coordinated and organized tax administration.

Some countries apply a presumptive tax assessment approach to certain categories of self-employed professionals in an optional and limited manner. Self-employed professionals below a certain income threshold are allowed to keep simplified accounts or records of their gross incomes. Their expenses are estimated through presumptive methods, such as a standard deduction where a certain percentage of their gross income is regarded as deductible expenses. This approach is optional because taxpayers can choose to have their incomes and expenses assessed through the account-based self-assessment approach. India is an example of a country using a presumptive tax assessment method for advocates. Under India's 2016 income tax rule, advocates with a gross annual income not exceeding 5 million Indian Rupees (59,850.00 US dollars) can opt for the presumptive tax regime under the "self-employed

[15] Using Third Party Information Reports to Assist Taxpayers Meet their Return Filing Obligations— Country Experiences With the Use of Pre-populated Personal Tax Returns, Forum on Tax Administration Taxpayer Services Sub-group, Organization For Economic Co-Operation and Development, (March 2006), pp. 5-6.

[16] Id.

professionals" category. [17] The eligibility for this regime is based on the records of gross receipts maintained by the advocate. Under the presumptive tax regime, 50% of the advocate's annual gross income is presumed to be taxable income, while the remaining 50% is deemed a deduction for all expenses. The determination of gross income is based on documents such as bills of costs issued to clients, retainer agreements, and other relevant records. Similarly, under the Indonesian income tax system, legal professionals such as advocates with an annual gross income below Rp 4.8 billion (close to 292,560.00 US dollars) are eligible to use a presumptive tax assessment method called the Income Tax Calculation Norm. [18] Instead of detailed bookkeeping of income and expenses, these professionals maintain records of their gross income and calculate their taxable income by taking 50% of their gross income, simplifying the expense accounting process. This 50% is treated as taxable income, which is then subject to progressive tax rates. The Income Tax Calculation Norm is supplemented with a withholding scheme, where clients of legal professionals, both legal entities and individuals, withhold income tax from payments made to the professionals. Eligibility for the presumptive tax regime in Indonesia is determined based on the records of total gross receipts or turnover from professional services provided during the financial year.

2. Income Taxation of Advocates in Ethiopia: Law and Practice

2.1. Characterization of Advocates' Income

[17] Commission, and brokerage (insurance agents) are also not eligible for the presumptive tax method. Presumptive Taxation of Certain Eligible Businesses or professions under income Tax Act 1961, p. 1, available at https://www.incometaxindia.gov.in/Booklets%20%20Pamphlets/15-presumptive-taxation.pdf, (accessed on March 10, 2022).

[18] Tan, D., & Sudirman, L. , Final Income Tax: A Classic Contemporary Concept to Increase Voluntary Tax Compliance among Legal Profession in Indonesia, *Journal of Indonesian Legal Studies, Vol. 5* Issue 1, (2020), pp 129-133.

Ethiopia has organized its income tax system as a schedular income system, currently comprising four tax-charging schedules and a fifth schedule for exempt incomes.[19] Before examining specific tax assessment issues for taxpayers, it is crucial to initially determine the schedule applicable to them. This principle is equally relevant for advocates. As outlined in the introductory section of this article, there are complaints among advocates asserting that they should not be defined as businesses and categorized under Schedule C. Therefore, to comprehensively address this issue, it is imperative to examine how advocates are subject to Schedule C of the Income Tax Proclamation and analyze why doing so is justifiable.

For the purpose of delimiting the scope of application of Schedule C, the Income Tax Proclamation defines "business" to include professional activity conducted for profit. In the government's technical notes explaining the Proclamation, professional activity is defined as intellectual work involving the application of knowledge and skill acquired through higher or specialized educational systems, with advocacy given as one example.[20] What distinguishes professional activity from other business activities is that the personal knowledge and skill of the taxpayer are the most important components, obtained through higher education or specialized training. Additionally, by its nature, professional activity falls under the category of rendition of services rather than the supply of goods.

The first explicit mention of a profession as part of income falling under Schedule C was made by the Income Tax Decree of 1956. The Decree stated that incomes derived from businesses, professional, and vocational

[19] The schedules are listed as follow. Schedule 'A', Income from Employment; Schedule 'B', Income from Rental of Buildings; Schedule 'C', Income from Business; Schedule 'D', Other Income; Schedule 'E', Exempt Income. Federal Income Tax Proclamation No. 979/2016, *Federal Negarit Gazetta*, (2016), Article 8.

[20] Id, Article 2(2); Federal Income Tax Proclamation No. 979/2016 Technical Notes, Ministry of Finance and Economic Cooperation, (2018), p. 3.

occupations are taxed under Schedule C.[21] Another notable change was observed when the Income Tax Proclamations of 2002 and 2016 provided an alternative title to Schedule C as "Business Income Tax" and "Income from Business," respectively. It seems that pre-2002 income tax laws treated the profession as an additional type of activity, other than business, that is a source of income taxable under Schedule C. The 2002 and subsequent Income Tax Proclamations considered the profession as one type of business activity for Schedule C purposes. In the 2016 Income Tax Proclamation, there is an explicit definitional provision defining business broadly to include professional and vocational activities.

The distinction between the profession and business emerged from the older civil law tradition of separately regulating commercial traders and liberal professionals, such as advocates and medical doctors.[22] Traders were considered to conduct their business for profit, while professionals rendered their services with the primary motive of serving the public. The payment received by professionals was labeled as an honorary fee, not a profit. However, apart from France and Germany, the income tax systems of most countries did not follow this old civil law tradition.[23] Income tax systems globally consider self-employed professionals to be engaged in business and their income as business income. Professionals calculate their taxable incomes and deductible expenses in the same way as businesses, using account-based self-assessment. The Ethiopian income tax system follows the conventional approach of defining the profession as a business and subjecting it to business income tax rules. Hence, the advocates' argument that they should not be treated as businesses lacks a valid basis in tax law discourse.

[21] The Income Tax Decree of 1956, Article 4(C).
[22] Lee Burns and Richard Krever, Individual Income Tax, in Victor Thuronyi (ed.), *Tax Law Design and Drafting*, volume 2, International Monetary Fund, (1998), p. 501.
[23] Id.

The structure of income tax systems in general and the categorization of taxable incomes in particular are predominantly guided by fundamental tax principles, such as equity and efficiency. In light of these principles, different categories of income can be brought together and taxed under the same tax rules or vice versa. Self-employed professionals such as advocates share commonality with ordinary businesses regarding the nature of their transactions, income, and expenses. Both provide services to and receive incomes from numerous clients, engaging in multiple transactions and contracting parties on an independent contract basis. They exercise control over matters such as determining the place, time, and means of performance of their activities, aiming to generate income exceeding their expenses. Taxing this income, or what can be called profit, is the goal of income tax law. The notion of an "honorary fee" does not have relevance in this regard. To render their services, they incur different types of capital and ordinary expenses. To make the income tax system efficient by simplifying its structure and the task of tax administration, it is advisable to bring businesses and professional activities under a single set of rules, such as a schedule. Hence, proposing a separate tax schedule for professionals could make the income tax system too complex by allowing different schedules for remaining professionals, like medical practitioners, chartered accountants, and engineers, based on non-tax factors. According to Lee Burns and Richard Krever:

There are no persuasive tax policy reasons for the distinction [between business and profession]. From a tax administration perspective, it is much simpler to have a single set of rules dealing with all business and professional activities. If necessary, targeted rules such as tax accounting rules for work in progress can be applied to professions without the need for a completely separate regime for professional income.[24]

[24] Id.

Another argument raised by advocates in support of their opposition to being treated as businesses is that the keeping of books of accounts is suitable for businesses, but not for professionals like them. This argument lacks validity as it does not conform to the conventional purpose of books of accounts in tax laws. Under tax laws, taxpayers subject to self-assessment are required to present books of accounts to the tax administration as evidence of the correctness of their information, forming the basis for tax assessment. The accounts enable the tax administration to check the accuracy of the reported income and expenses of the taxpayers and help prevent potential tax evasion. As much as possible, taxpayers are required or encouraged to back up their self-assessment report with records or accounts. Within the actual tax systems, exceptions to the requirement to keep books of accounts are made on certain grounds. Certain categories of taxpayers, such as those defined as small businesses, may be considered incapable of maintaining books of accounts. Requiring these businesses to do so could incur high compliance and administrative costs for both the businesses and tax administrations. Hence, small businesses identified as incapable of keeping books may be exempted from this obligation. The high likelihood of submitting falsified books of accounts in certain business activities or sectors can also lead tax systems to devise alternative tax assessment approaches, rather than relying on books of accounts-based self-assessment. Apart from these and related reasons, the exemption of taxpayers based on the assumption that they engage in professional activities does not hold sway. In general, the distinction between profession and business has neither origin nor basis in tax laws.

The argument that advocates' expenses, by their nature, have a dual purpose of generating income from advocacy services and personal benefits does not justify separate tax treatment of advocates from businesses. The dual purpose of some expenses is a tax issue, not only related to advocates but also to other taxpayers or businesses. That is the reason why income tax laws incorporate

allocation rules of expenses between business (deductible) and personal (non-deductible) uses. The Income Tax Proclamation acknowledges that certain expenditures may serve multiple purposes, such as the generation of different classes of income. Expenses associated with both business (taxable) and personal (non-taxable) benefits can be allocated through a process of apportionment, making the business-related portion eligible for deduction while respecting the non-deductible personal aspect.[25] But still, if there are unique circumstances that call for it, it can be possible to prepare special rules or guidelines for either businesses or professionals without fundamentally affecting the efficiency goal of the tax system. It is important to remind that designing an income tax structure requires compromises among different tax principles, needs, and enforcement capacity of tax administrations. To conclude, the evolution of income tax laws globally corresponds with treating self-employed professionals as engaged in business. While advocates argue against being classified as businesses under Schedule C of the income tax system, the Ethiopian framework conforms to international practices.

2.2. Categorization of Taxpayers under Schedule C and its Applicability on Advocates

The primary goal of categorizing taxpayers under Schedule C is to identify those subjected to bookkeeping and presumptive assessments, placing them into "Category A," "Category B," or "Category C." Taxpayers falling into the first two categories bear the legal obligation of maintaining books of accounts, with their income tax liabilities determined based on these records.[26] This

[25] Federal Income Tax Proclamation, Supra note 19, Article 76.

[26] Category A taxpayers encompass entities such as companies and partnerships, regardless of their annual turnover, as well as individuals, specifically sole proprietors, whose annual turnover (gross income) is Birr 1,000,000 or more. In contrast, Category B taxpayers consist of individuals whose annual turnover (gross income) falls between Birr 500,000 and less than 1,000,000. Finally, Category C taxpayers are individuals with an annual turnover (gross

account-based assessment entails assessing gross income, deductible expenses, taxable income, and tax liability, applying conventional deduction rules like depreciation, bad debt, and loss carry forward. Furthermore, Category A taxpayers must keep records of business assets and liabilities. On the other hand, Category C taxpayers are subject to the presumptive tax assessment method unless they voluntarily choose book-account taxation, adhering to the tax authority's accounting standards. (Detailed discussion on the presumptive tax assessment method will follow).

The tax authorities categorize taxpayers as A, B, or C based on the legal form of the business (either a body or sole proprietorship) or the taxpayer's annual turnover. [27] Initial categorization often occurs when issuing the Taxpayer Identification Number (TIN). This categorization may be based on the legal nature of the business or on assumptions about future activity and income generation as estimated by tax assessment officers. The taxpayer provides details such as the business form, initial capital, and expected turnover for the year. Tax authorities use this information to categorize taxpayers and inform them of their associated tax obligations. Changes in turnover may prompt re-categorization as businesses evolve, relying on taxpayers' annual tax declarations and other available information. Methods such as estimating daily sales through on-site observations[28] and collecting third-party information[29] assist in updating categories.

income) of less than Birr 500,000. Federal Income Tax Proclamation, Supra note 19, Articles 3, 18, 49, 82.

[27] Id, Articles 3 (2).

[28] To ascertain daily sales, tax officers visit business premises and estimate daily sales or gross income. These officers employ guidelines provided by tax authorities to compute the daily sales. Directives pertaining to the "estimation of daily sales" have been issued by tax authorities. The estimated daily turnover is subsequently converted into an annual turnover by multiplying the daily turnover with the designated number of working days per year for the specific business sector in which the taxpayer operates. The tax authorities have

The categorization of taxpayers into A, B, and C, along with its associated tax assessment implications, extends to advocates. Law firms, being established as bodies, are consistently treated as Category A taxpayers. Individual advocates with annual turnovers exceeding the Category C threshold can be categorized as either Category A or B taxpayers, depending on their turnover. Both law firms and Category A and B individual advocates are legally obligated to maintain books of accounts for tax assessments. In determining taxable income, advocates follow fundamental rules, deducting expenses incurred for income generation. However, expenses unrelated to taxable activities are non-deductible. Apportionment becomes crucial for expenses serving both taxable and non-taxable purposes. [30]

Despite the theoretical conformity, legal and practical challenges persist in categorizing individual advocates under the Ethiopian income tax system. Firstly, there is limited opportunity for advocates to be categorized when they commence practice. They are less likely to approach the tax authorities, apply for a Taxpayer Identification Number (TIN), declare their presumed income, and be classified as Category A, B, or C taxpayers at the start of their practice. Unlike the procedure for obtaining business licenses,[31] advocates seeking an advocacy license are not initially required to obtain a TIN. Advocates only need to get tax clearance from the tax authorities and submit it to the

predefined the average number of days for various business sectors. The ultimate result is an annual turnover, serving as the foundational basis for the categorization of taxpayers and the assessment of tax liabilities.

[29] Directive issued to amend the 2009 Category, A, B and C taxpayers Tax Assessment Directive of the Amhara National Regional State, Article 5.

[30] Federal Income Tax Proclamation, Supra note 19, Articles 22(1)(a), 27(1)(l), 76(1)(b).

[31] To obtain a business license, one must visit the tax authorities, obtain a TIN, and submit the TIN certificate to the business license issuing government bodies. This creates an opportunity for the tax authorities to gather information and categorize businesses into Category A, B, or C. Commercial Registration and Licensing Council of Ministers Regulation, No. 392/2016, *Federal Negarit Gazetta*, (2016), Articles 9(1)(e), 10(10), 11(11), 12(7).

advocacy license issuing authority for license renewal or return. [32] This initial lack of a TIN requirement implies that, at the beginning of their practice, the tax authorities have limited opportunities to meet with the advocates to initiate the process of initial categorization and inform them of categorization-related tax information and obligations. At the end of the tax year, advocates are supposed to go to the tax office and obtain a tax clearance certificate to renew their license. It is during this time that advocates declare their income and tax officers could make categorization.

Secondly, the Income Tax Proclamation does not regulate from what sources and how to calculate the annual turnover of taxpayers for initial categorization purposes. It specifies individual taxpayers with certain annual thresholds as Category A, B, and C taxpayers but does not detail the procedures to calculate turnover or the necessity of keeping records for calculation purposes. Records of gross income or turnovers are not required to be kept in advance to identify taxpayers subject to account-based self-assessment and presumptive tax regimes. The tax declaration and associated bookkeeping requirements come into existence only after taxpayers are classified into Category A, B, or C. [33] After initial categorization, the Proclamation instructs authorities to rely on "tax declarations filed by a taxpayer or any other information available to the Authority" to check and decide whether taxpayers shall be re-categorized.

In practice, tax authorities use presumptive tax assessment methods to make the initial categorization of individual taxpayers, including advocates. These presumptive methods typically used for tax assessment purposes also apply to the initial categorization of taxpayers. The main presumptive methods used for categorization involve estimating daily sales (estimated assessment) and

[32] Federal Advocacy Service Licensing and Administration Proclamation No.1249/2021, *Federal Negarit Gazetta*, (2021), Article 20(1), 21(2).
[33] Federal Income Tax Proclamation, Supra note 19, Articles 82, 83.

official assessment methods.[34] As will be further discussed in the next section, these methods have numerous limitations in assessing a reasonable and fair amount of annual turnover of the taxpayers. They are subjective and exposed to manipulations, hence they cannot be proper ways to determine the annual turnover of advocates. There are widespread opportunities for subjective and non-representative estimates of turnovers. For example, according to the official assessment method, advocates make tax declarations without submitting records of their activities and income unless they choose to do so voluntarily.[35]

For taxpayers initially classified as either Category A or B, the determination of their future annual turnover and their next possible re-categorization can be based on books of accounts since they are under book-keeping obligations. However, the determination of future annual turnover and re-categorization of Category C taxpayers continue to rely on presumptive methods due to the absence of an obligation to keep records of turnovers altogether. For Category C taxpayers, the tax authorities rely on the same assessment methods used for initial categorization for determining presumptive income tax liabilities and possible re-categorization. Since the assessment methods are exposed to subjectivity and abuse, they do not prevent Category C advocates from hiding or under-declaring their turnover, allowing advocates to remain in the same category indefinitely.

[34] Interview with Tsegaye Waqweya, Tax officer at Sheno Town Revenue Office, Oromiya National Regional State;
Interview with Demis Degefu, Tax officer at Moja ena wodera Woreda Administration Revenue Office, Amhara National Regional State, (Date 04/02/2015 E.C).

[35] While it is difficult to corroborate with actual evidence, the authors came across information hinting that in the past there was a misconception and practice within the tax authorities that the categorization requirement of the Income Tax Proclamation did not apply to advocates. As a result, the idea of Category A, B, or C advocates had remained almost non-existent within the tax administrations, and the advocates were paying income taxes using the indicator-based standard assessment.

Category A or B advocates are seemingly scarce in Ethiopia. A study by the Federal Advocates Association revealed that in Oromiya Regional State, advocates generally fall under Category C, with regional tax authorities having limited information on Category A and B taxpayers. Another study in 2011 E.C (2018) found no advocates reporting an annual turnover of over 1 million Birr, becoming a Category A taxpayer, and registering for VAT in Amhara Regional State.[36] The rarity of Category A and B taxpayer status is attributed to the inappropriateness or weaknesses of the presumptive methods used for categorization purposes, coupled with the tendency among advocates to under-declare their correct income.

Recently, the Ministry of Finance has mandated that Category A and B advocate-taxpayers keep proper books of accounts and pay income tax based on their accounts starting from the 2023/24 tax year. [37] However, before enforcing bookkeeping duties for Category A and B advocate-taxpayers, it is crucial to identify who Category A, B, and C advocates are. As a result of the absence of effective turnover verification methods, coupled with the taxpayers' failure to declare the correct amount of their income, it has become customary for individual advocates to remain Category C taxpayers, making an upward categorization from Category C to Category B or A a rare practice.

2.3. Presumptive Income Tax Assessment of Category C Advocates

Since the inception of Ethiopia's current income tax system during the reign of Emperor Hailesilasse, individual advocates have been subject to two primary presumptive assessment methods: indicator-based standard

[36] *በፌደራል የጥብቅና ስራ የማብር አስተዳደር ስርዐት የህግና አተገባበር ጉድለቶችና መፍትሄዎች*, Supra note 6, pp. 37-38; *ሙሐመድ ዳውድ አልቃድር*, Supra note 5, p. 259.

[37] *የገንዘብ ሚኒስቴር ደብዳቤዎች፣ ቁጥር ማኢ30/7/10795፣ ቀን 05/12/2015 ዓ.ም፤ ቁጥር ታ/ክ/ቀ/47፣ ቀን 30/12/2015 ዓ.ም።*

assessment and turnover-based standard assessment. [38] The following sub-sections explore the details.

[38] For the sake of clarity, it is important to explain the concept of standard assessment and delineate the distinguishing features between indicator-based standard assessment and turnover-based standard assessment. A presumptive tax assessment system can be configured either as a standard or estimated assessment, contingent upon whether presumptive taxes are to be levied at the business-sector or individual-taxpayer levels. Commonly referred to as an occupational lump-sum tax, standard assessment prescribes fixed taxes corresponding to various business activities or occupations. The determination of presumptive tax liability is correlated with the specific type and/or size of business sectors. Consequently, taxpayers engaged in identical business activities or falling within the same group are obligated to pay an identical tax amount. In the context of standard assessment, which entails occupation-based fixed taxes, various proxies may be employed, including but not limited to the type of business, size of floor space, number of employees, location, value of inventory, capacity of machinery, and years of operation. Turnover-based standard assessment calculates tax liability for business sectors based on the turnover of businesses or occupations. For instance, it may stipulate that advocates generating turnovers ranging between 450,001 and 475,000 or between 475,001 and 500,000 Birr per annum are subject to presumptive income taxes of 24,165 and 26,040 Birr, respectively. Indicator-based standard assessment relies on indicators such as the type of business, size of floor space, number of employees, location, and years of operation. An illustrative instance of indicator-based standard assessment is the imposition of taxes on advocates based on criteria such as the type of their advocacy license or the duration of their work experience. Both standard assessment approaches do not specify the exact tax amounts imposed on individual taxpayers, such as Mr. X or Y. To implement standard assessments on actual taxpayers, it is imperative to categorize them appropriately in the standard assessment table or schedule. This categorization may involve determining factors such as the turnover generated by advocates or their specific type and experience, as illustrated in the aforementioned example. The indicator-based and turnover-based standard assessments differ in their equity and efficiency implications. Indicator-based standard assessment is administratively straightforward but may be inequitable and does not prepare taxpayers for maintaining books of accounts in the future. On the other hand, turnover-based standard assessment, while theoretically capable of determining taxpayers' taxable income, if poorly designed and implemented, will result in subjectivity and susceptibility to tax evasion. To address this, taxpayers should be required to maintain basic records of receipts, using methods like cash accounting, to verify the turnover amount. Estimated assessment entails the establishment of a presumptive tax for each taxpayer based on the proxies integrated into the presumptive tax system. This results in the assignment of specific presumptive taxes to individual taxpayers, leading to potential variations in tax burdens among taxpayers within the same business sector. Gunther Taube and Helaway Tadesse, Presumptive Taxation in Sub-Saharan Africa: Experience and Prospects, International Monetary Fund, Working Paper, WP/96/5, (1996), pp. 12-16; Jean-François Wen, How to Design a Presumptive Income Tax for Micro and

2.3.1. Indicator-Based Standard Assessment: Historically, the initial application of indicator-based presumptive taxes on advocates emerged not from income tax laws but from legislation enacted in the 1940s to regulate the advocacy profession. [39] This pioneering law marked a significant historical development by introducing four fixed lump-sum taxes for advocates based on the nature or type of their advocacy licenses. Advocates registered to practice at all levels of courts were obliged to pay an annual income tax of 200 Maria Theresa Thaler (the Ethiopian currency at that time). Those restricted to Provincial, Regional, and Communal courts paid 100 Thaler; Regional and Communal courts paid 50 Thaler; and Communal courts paid 30 Thaler. [40] A subsequent amendment law reduced the number of fixed taxes to two and reset the tax amounts as follows:

- Advocates registered to practice at all levels of courts were obliged to pay an annual income tax of 300 Birr.
- Advocates practicing in lower-level courts paid 150 Birr. [41]

These taxes, acting as both advance and final payments for the upcoming tax year, were paid to the then Ministry of Justice, in Amharic, *ፍርድ ሚኒስቴር*, a governmental judicial body empowered to register and authorize advocates.

Small Enterprises, NOTE/2023/002, International Monetary Fund, (2023), p. 4; Zerihun Asegid, Standard Assessment of Small Businesses in Addis Ababa City; Legal and Practical Problems in Focus, Business Law Series, Vol. 6, Addis Ababa University, (2014), p. 125.

[39] The Courts (Advocates) Rules of 1944, Legal Notice No. 49 of 1944. It is important to acknowledge the different terminologies used in the law regarding payments made by advocates. The English version of the law uses the term "annual fee" to refer to various payments imposed on advocates. However, the Amharic version uses the terms *"ግብር"* and *"የተቆረጠ ግብር*," which in English ordinarily imply income (standard) taxes. The tax laws enacted in the 1940s used the Amharic term *"ግብር"* to refer to taxes paid by taxpayers.

[40] Id, Article 6.

[41] Courts (Registration of Advocates) Rules, Legal Notice No. 166/ 1952, Article 10.

The law granted the Ministry the authority to revoke advocates' names from the registry and invalidate their advocacy certificates if taxes were not paid—a unique tax enforcement measure.[42] The law made no provision for record-keeping or the assessment of advocates' income, expenses, and taxes based on such records. The reason behind opting for standard assessment as the income tax assessment modality for advocates remains unclear, but one plausible explanation is its prevalence in the traditional and early modern income tax systems of Ethiopia. The concept of levying income taxes based on the nature or type of occupation could have influenced the drafters to incorporate standard assessment for advocates.

Even though the main income tax laws existed in the 1940s, it appears that the first modern income taxation of advocates was introduced by the aforementioned laws. Subsequently, the indicator-based standard assessment from these laws was integrated into the main income tax legislation. From the 1960s to 2017, Ethiopia's income tax laws incorporated indicator-based standard assessments for the following sectors: transport, flour mills, and advocacy, based on indicators such as the number of seats, carrying capacity, energy type, operational years, and advocacy license type.[43]

In 2002, Ethiopia underwent a presumptive income tax reform introducing two standard assessment schedules, one for turnover-based fixed taxes and the other for indicator-based fixed taxes. Advocacy, along with transport and flour mills, fell under the indicator-based schedule. [44] A significant outcome of this reform was an increase in fixed taxes for advocates, responding to concerns that advocates were paying disproportionately low amounts in

[42] Id.

[43] The absence of pertinent historical data within the archives and library of the Ministry of Finance makes it difficult to discuss in detail the transition and subsequent regulation of early presumptive taxes on advocates in the conventional income tax laws, specifically in the presumptive schedules of the 1960s issued by the Ministry of Finance at that time.

[44] See Council of Ministers Income Tax Regulations No. 78/2002, Schedules 1 and 2.

income taxes. For decades prior to 2002, first and second-grade advocates had been paying 340 and 178 Birr in taxes, respectively. These amounts were comparable to the annual employment taxes paid by employees with monthly salaries of 400 and 200 Birr, respectively. The tax rates for advocates remained unchanged for several decades. To address equity issues and boost tax revenues, the Income Tax Regulation of 2002 increased the taxes for first and second-grade attorneys from 340 and 178 Birr to 614 and 327 Birr, respectively. The revised taxes were set to be equivalent to the employment income taxes paid by employees with monthly salaries of 620 and 327 Birr, respectively.[45]

Table 1: Presumptive Tax Payable; Source: Council of Ministers Income Tax Regulations No. 78/2002, Schedule 2

Attorney Services	Presumptive Tax Payable		
	Annual Sales	Net Profit	Tax
First Grade Attorney	11488	6893	614
Second Grade Attorney	7453	4472	327

The federal-level advocacy law, issued two years before the formulation of the Income Tax Regulation of 2002, classified advocacy licenses into three types: federal first instance court advocacy license, federal courts advocacy license, and federal court special advocacy license. In contrast, the regional-level laws retained the decades-old classification of advocacy licenses into two categories, termed: first-class advocacy license and second-class advocacy license.[46] The Income Tax Regulation included first-grade and

[45] *የመደበኛ ቁርጥ ታክስ አወሳሰን*, Supra note 1, p. 26, 28.

[46] Federal Courts Advocates' Licensing and Registration Proclamation, No. 199/2000, *Federal Negarit Gazetta, (2000)*, Article 7; The Proclamation to Provide for the Licensing, Registration, and Controlling of Code of Conduct of Advocates Practicing before the Amhara National Regional State Courts, No. 75/2002, *Zikre Hig Gazetta, (2002)*, Article 7.

second-grade advocacy classifications, matching those stipulated in the regional advocacy profession regulation laws.

The primary strength of indicator-based standard assessment lies in its administrative simplicity and its effectiveness in combating tax evasion. Indicators such as professional licenses are readily observable and difficult for taxpayers to conceal, thereby significantly reducing opportunities for tax evasion.[47] However, within the context of prevailing tax theories and practices, Ethiopia's design and administration of indicator-based standard assessment for well-educated advocates resemble a simpler and less sophisticated form of presumptive taxation akin to the patent system, typically recommended for micro-businesses. Micro-businesses, characterized by primarily cash-based informal transactions, include mobile/street traders, service providers, and small retail outlets. Patent-type presumptive method is recommended for illiterate or semi-literate micro-businesses that cannot practice cash-basis bookkeeping and have net incomes near the poverty threshold. These micro-businesses pay a fixed tax amount without the obligation to maintain books of accounts.[48] Moreover, imposing equal taxes on advocates with the same advocacy license but different incomes could be considered less equitable, failing to consider advocate-specific conditions. Some advocates argue that it is unfair for all advocates to pay the same amount of taxes, especially considering the disparity in earnings, where some earn millions while others earn only a few thousand Birr per year. They propose that taxes should be assessed based on the income earned within the tax year to address this fairness issue. [49]

[47] Victor Thuronyi, Presumptive Taxation of the Hard-to-Tax, in J. Alm et al. (Editors), *Taxing the Hard-to-Tax*, Elsevier B.V. Publishing, (2004), p. 103.

[48] Jacqueline Coolidge and Fatih Yilmaz, Small Business Tax Regimes, World Bank, Note No. 349, (2016),pp.4-5

[49] Interview with Kuma Beyene, Advocate at all levels of Oromiya and Federal courts, (12/03/2016 E.C).

The indicator-based standard assessment of advocates continued until the replacement of the Income Tax Regulations of 2002 by the new Income Tax Regulations of 2017. Following the 2016 income tax reform in Ethiopia, the federal government introduced Council of Ministers Federal Income Tax Regulation No. 410/2017. Notably, this regulation distinguishes itself from its predecessor by relocating the advocacy profession from Schedule Two to Schedule One of the Presumptive tax tables. This shift signifies a departure from fixed taxes based on the "first and second-grade licenses" and signals an era of turnover-based assessment for advocates.

2.3.2. Turnover-Based Standard Assessment: Under the Income Tax Regulation of 2017, Schedule One of the standard assessments categorizes each business sector, including advocacy, into 19 sub-groups, each associated with specific turnover thresholds. These thresholds, ranging from "Up to 50,000" to "475,001-500,000 Birr", form the basis for setting 19 tax liabilities. The table encompasses three key numerical elements: annual turnover thresholds divided into 19 bands, profit rates, and fixed taxes corresponding to each turnover band. The profit rate signifies the portion of turnover considered as the taxpayer's net income, indirectly reflecting the amount of turnover deemed as an expense (standard deduction). For advocacy, the 25% profit rate implies that 25% of annual turnover is presumed as net income, while the remaining 75% is considered an expense incurred to generate turnover.

Table 2: Turnover-Based Presumptive Business Tax Per Year: Source: Council of Ministers Federal Income Tax Regulation No.410/2017.

Business Sectors	Average Annual Profit Rate	Turnover-Based Presumptive Business Tax Per Year																	
		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19
		Up to 50,000	50,001-75,000	75,001-100,000	100,001-125,000	125,001-150,000	150,001-175,000	175,001-200,000	200,001-225,000	225,001-250,000	250,001-275,000	275,001-300,000	300,001-325,000	325,001-350,000	350,001-375,000	375,001-400,000	400,001-425,000	425,001-450,000	450,001-475,000	475,001-500,000
Attorney services	25%	530	1155	2040	2978	3915	5120	6370	7620	8870	10408	11970	13533	15095	16665	18540	20415	22290	24165	26040

To levy fixed taxes under Schedule One, tax authorities must ascertain the annual turnover of each advocate and place them within the appropriate turnover band. Once categorized, the tax payable can be derived directly from the table or calculated using the Schedule C tax rates for individual taxpayers. Unfortunately, the Income Tax Regulation fails to specify how to determine taxpayers' turnover for enforcing Schedule One. In designing the turnover-based standard assessment of Schedule One, the federal government, specifically the Ministry of Finance, neglected to incorporate a straightforward yet objective turnover determination method. Historically, federal tax laws are initially issued by the federal government, after which regional states adopt the same law with a modified title. This practice has inadvertently led to legal gaps in regional tax laws mirroring those in federal tax laws. Regional states have integrated the federal income tax regulation

into their own laws, reproducing the turnover-based standard assessment for advocates verbatim but omitting the turnover-reporting mechanism. [50]

One distinctive feature of the presumptive income tax system for Category C taxpayers is the absence of any obligation to maintain books of accounts. The reliance on turnover-based standard assessment occurs in the absence of legally mandated and practically submitted records of taxpayers. In turnover-based presumptive tax systems, the contemporary understanding is the absence of "standard" books of accounts, not the absence of books of accounts altogether. Small taxpayers within the turnover-based presumptive tax regime should be required to maintain basic books or records, without onerous accounting requirements. For example, they could keep simple records of receipts and purchases using cash accounting.[51] According to Alan Carter,

All but the very smallest (micro-level) operators in all [developed and developing] countries should more or less know what their basic cash receipts are. A cash receipts journal is sufficient as a foundation for a simple presumptive regime suitable for most small businesses.[52]

What makes the Ethiopian presumptive income tax system for Category C taxpayers very unique is that it does not require self-employed professionals, such as advocates, to maintain simplified books of accounts. This departs from theoretical perspectives and international practices, as discussed previously.

[50] See for example, Council of Regional Government Regulation Issued for the Execution of the Income Tax Proclamation in the Amhara National Regional State, No. 162/2018, *Zikre Hig Gazette*, (2018).

[51] Jean-François Wen, How to Design a Presumptive Income Tax for Micro and Small Enterprises, NOTE/2023/002, International Monetary Fund, (2023), p. 4.

[52] Alan Carter, *International Tax Dialogue: Key issues and debates in VAT, SME Taxation and the Tax Treatment of the Financial Sector*, International Tax Dialogue, (2013), p. 74.

The absence of a turnover-reporting mechanism in Schedule One compels tax authorities to resort to the notorious and outdated method of estimating daily sales for Category C taxpayers under Schedule One. Despite occasional intentions to apply this method to advocates,[53] it is rarely employed due to its incompatibility with the nature of advocacy. Estimating daily sales is more suited to businesses with tangible goods and fixed locations, unlike advocacy, which involves the provision of intellectual services rather than physical goods. The unpredictable nature of rendering legal services, both in terms of place and time, poses a significant challenge for tax administrations attempting to observe and estimate advocates' daily and annual turnovers. Consequently, tax authorities have explored the following methods, each with varying degrees of application and impact, to enforce the turnover-based standard assessment system.

i. Official Assessment: When inquired about the method used to ascertain the annual turnover or income of advocates, many tax officers simplistically respond with *"ጠበቆቹ ባሳወቁት"* (based on advocates' declaration).[54] Advocates interviewed also corroborate this method. During the annual tax payment period (from July 01 to 30 each year), tax assessment officers instruct advocates to complete a tax declaration form, disclosing the annual turnover derived in the tax year, accompanied by their signature as an affirmation of the accuracy of their declaration. [55] The officers are responsible for calculating tax liabilities based on the information received from the

[53] Directive Issued to determine Tax Assessment of Amhara National Regional State Category A, B and C taxpayers, Amhara National Regional State Finance Bureau, (2009 E.C), Article 3(10).

[54] Interview with Esayas Teshale, Head of Bole Sub-City Woreda 13 Revenue Office, Addis Ababa City Administration, (27/07/2014 E.C); Interview with Demis Degefu, Supra note 34.

[55] While Category C taxpayers are not required to maintain books of accounts, they must make a tax declaration within 30 days of each July in the Ethiopian fiscal year. In the context of Category C taxpayers, a tax declaration entails reporting turnover or income using a form provided by tax authorities, without the necessity of supporting records or accounts. Federal Income Tax Proclamation, Supra note 19, Article 83(6).

advocates. The tax assessment procedures involve some steps: first, the annual income or turnover declared by the advocates is adjusted to taxable income, using the 25% profit rate designated for advocacy. Subsequently, the tax rates specified in schedule C are applied to the taxable income to determine the amount of taxes payable by the advocates.

The problem with this official assessment method lies in advocates making declarations without the support of accounts or records, which raises concerns about the accuracy of the declared amount. Tax officers lack effective verification means to ascertain its accuracy, which becomes a source of worry for tax authorities and a potential cause of disputes between authorities and advocates. There is a prevailing perception among tax authorities that such declarations rarely reflect the true income of advocates, with a high likelihood of under-declaration. One interviewed tax officer vividly described a concerning scenario: *"ጠበቃው በፊት ዳኛ ወይም አቃቤ ህግ እያለ በየወሩ ከደሞዙ ላይ 35% ግብር ይከፍል የነበረ አሁን ጠበቃ ሲሆን መኪናውን እየነዳ መጥቶ ምንም አልሰራሁም ብሎ አንድ ሺህ ወይም ሁለት ሺህ ብር አመታዊ ግብር ከፍሎ ይሄዳል::"* [56] Translated, "The advocate used to pay 35% tax on his salary every month while he was a judge or prosecutor. Now he is an advocate. He drives his car to the revenue office and pays a thousand or two thousand Birr as annual tax, saying that he did nothing."

From a revenue mobilization perspective, the officer contends that the previous indicator-based standard assessment is far superior to the currently applied official assessment of the turnover-based standard assessment. In its letter sent to its branches, the Amhara National Regional State Revenue Bureau expressed the problems associated with the official assessment as

[56] Interview with Getachew Mesfin, Supra note 3.

follows: *"አሁን ባለው ሁኔታ በክልላችን የጠበቆች ግብር እና ታክስ አወሰሰንና አከፋፈል ሁኔታ ወጥነት የጎደለውና ሰፊ የፍትሃዊነት መዛባት የሚስተዋልበት ከመሆኑ ባሻገር ከዘርፉ ትክክለኛውን የመንግስት ገቢ እየተሰበሰበ አለመሆኑን ራሳቸው ጠበቆች በተለያዩ ግዜያት በነበሩ የጋራ የምክክር መድረኮች ያረጋገጡት ሀቅ ነው።"* [57] Translated, "In the current situation, the tax assessment and payment conditions of advocates lack uniformity, and [it] is exposed to unfairness. [In addition], the advocates themselves confirm that the proper amount of tax is not being collected from advocacy service."

Under the existing defective official assessment method, the officers have limited evidence and opportunity to verify the accuracy of the declared turnover.[58] Ultimately, they are left with the decision to either accept or reject the declared amount. If accepted, 25% of it is considered a taxable income, with the remaining 75% deemed deductible expense. This approach may result in advocates paying lower taxes, leading to revenue loss and unfairness due to the high likelihood of under-declaration of correct income. If assessment officers reject the declared amount and provide their own estimate, a dispute arises without a clear benchmark and reliable evidence to judge each side's position. The estimated amount may or may not accurately reflect the advocates' actual income, raising fairness concerns from their perspective. Dissatisfied advocates can formally lodge complaints with tax dispute settlement forums, such as the grievance review department and tax appeal commission. [59] However, as previously mentioned, the lack of a clear benchmark and reliable evidence complicates the resolution process. Recent

[57] *የአማራ ብሄራዊ ክልላዊ መንግስት ገቢዎች ቢሮ ደብዳቤ፣ ቁጥር ገቢዎች 4.1/1569/14፣ ቀን 08/11/2014 ዓ.ም።*

[58] Interview with Esayas Teshale, Supra note 54; Interview with an anonymous advocate in Addis Ababa City Administration and Amhara National Regional State, (April 18, 2022).

[59] The examination of the challenges encountered by judges, taxpayers, and tax authorities arising from presumptive tax assessment methods within dispute settlement forums and procedures is beyond the purview of this paper.

tax issues concerning advocates, including subjective and uncertain assessment procedures and outcomes, have been attributed to this flawed assessment method.

In addition to the subjectivity and fairness issues discussed, presumptive income taxation of advocates faces legal uncertainties. Assessment methods are prone to unpredictable and frequent changes through subsidiary legislations and circular letters. Discrepancies between the law and administrative practices of tax authorities are common. The legal uncertainty and inconsistency in presumptive tax assessments of advocates are evident in cases observed in the Amhara and Oromiya Regional States. Until the enactment of the current income tax proclamations and regulations in 2016/17, advocates were taxed based on the indicator-based standard assessment method. Following a new regulation in 2017 that replaced indicator-based assessment with turnover-based assessment, the Amhara Regional Finance Bureau issued a directive in 2017 instructing the regional revenue bureau to assess income taxes of advocates based on either the estimation of daily sales or third-party reporting methods.[60] However, the estimation of daily sales method is administratively inappropriate for professional activities like advocacy, which involve intellectual work rather than the acquisition and disposal of physical goods. The use of third-party information is not well-developed due to the absence of effective legal and institutional frameworks that establish relationships between third-party institutions and the Revenue Bureau. As a result of these limitations, the Amhara Region Revenue Bureau has been left with the difficult option of using the defective official assessment method, which has created several problems mentioned above. In 2023, a new directive was issued instructing the Regional Revenue Bureau to collect taxes from advocates based on

[60] Supra note 53.

indicator-based standard assessment, implying the repeal of the official assessment method.[61] Accordingly, advocates were classified into two categories and required to pay the following annual fixed taxes: First-grade advocates: 32,400 Birr, Second-grade advocates: 21,615 Birr. When the regional Revenue Bureau began to collect the fixed taxes based on this directive, it faced fierce opposition from regional advocates who submitted official complaints to the regional Finance Bureau. They argued that the levies were excessively high and succeeded in having the newly increased fixed standard levies repealed. In August 2023, after one month of the issuance of the above directive, the regional Finance Bureau wrote a letter to the regional Revenue Bureau instructing the latter not to apply the indicator-based standard assessments for the 2022/23 (2015 E.C) tax year. For this tax year, the Finance Bureau urged the Revenue Bureau to determine advocates' income tax liability based on the combined use of official assessment and third-party reporting information. Furthermore, the Finance Bureau instructed the regional Revenue Bureau to conduct a study and prepare a new income tax assessment directive for advocates for the 2023/24 (2016 E.C) tax year. [62] Until the completion of writing this paper, which occurred just before the end of the tax year, no official announcement had been made regarding the outcome of the study, particularly concerning the applicable tax assessment method. Consequently, the frequent changes and uncertainties in assessment modalities create frustrations among tax officers and the advocates' community.

In the Oromiya Region, the practice seems to persist with the decades-old indicator-based standard assessment, despite the introduction of turnover-

[61] Tax Assessment Directive for Category A, B and C Business and Rental Income Taxpayers Located in the Amhara Region, (Amharic), Amhara National Regional State Finance Bureau, No. 15/2015, Article 9(e).

[62] *የአማራ ብሄራዊ ክልላዊ መንግስት ፋይናንስ ቢሮ ደብዳቤ፣ ቁጥር አብክመ ገ/ቢ/ክቢ-01/14፣ ቀን 25/12/2015 ዓ.ም።*

based standard assessment. Advocates with "first and second level-advocacy licenses" were required to pay presumptive income taxes of 2800 and 2350 Birr, respectively, before 2017. Post-2017, many advocates were asked to pay a fixed presumptive tax of 5000 Birr, regardless of their advocacy license type or income. This amount increased to around 12,000 Birr for the 2015 E.C tax year.[63] The regional tax authorities' reliance on fixed taxes for administrative simplicity contradicts the potential implementation of turnover-based standard assessment, and it does not consider variations in income levels among advocates.

ii. Third-Party Reporting Information: According to the estimated assessment directives, third-party information refers to sale or purchase documents aiding in determining the taxpayer's tax obligations.[64] Third parties may include both suppliers and clients of taxpayers. Suppliers provide goods or services, referred to as inputs, enabling taxpayers to conduct business activities and generate taxable income. The information obtained from suppliers represents the purchase or expenses incurred by taxpayers. Conversely, clients contribute information about the sales made or turnover received by taxpayers. Tax authorities can obtain transaction details from either suppliers or clients.

Concerning advocates, third-party information typically refers to details about payments advocates receive from their clients, as inferred from advocacy

[63] President of Oromiya Region Bar Association, cited in *በፌደራል የጥብቅና ስራ የማብር አስተዳደር ስርዐት የህግና አተገባበር ጉድለቶችና መፍትሄዎች*, Supra note 6, p. 36; *የጠበቆች ማብር እና ታክስ አከፋፈል ላይ የሚታዩ ችግሮች አጭር ዳሰሳ፤ ከጠበቆች የተሰበሰቡ መረጃዎችን መሰረት ያደረገ፣ 2015 ዓ.ም፣ ገጽ 4*; Interview with Kuma Beyene, Supra note 49.

[64] Estimated Assessment Implementation Directive, no. 158/2013, Ethiopian Revenues and Customs Authority, Article 2(7). The tax authorities issue estimated assessment directives in accordance with the authority vested in them by the Tax Administration Proclamation. Federal Tax Administration Proclamation, No. 983/2016, *Federal Negarit Gazetta*, (2016), Article 26 (8)).

contracts. The understanding between tax authorities and advocates often overlooks the costs incurred by advocates for necessary inputs in rendering advocacy services, such as office rent, printing, and transportation expenses. While agency documents indicate the type and extent of legal representation, they do not provide information on the fees clients pay to advocates. Advocacy contracts are more informative, revealing the total fee to be paid to advocates and the mode of payment. Identifying third parties as potential sources of information for advocates' income involves government institutions that should deposit agency and advocacy contracts. These institutions include courts, the Federal Document Authentication and Registration Agency, and regional justice offices. These institutions deposit agency and advocacy contracts, providing potential sources for third-party information.

The general process assumes that information obtained from third parties, like courts, is transferred to tax administration. This data serves as the basis for calculating annual turnover, with turnover amounts or fees from documents like advocacy contracts summed up.[65] Applying a profit rate of 25% on the annual turnover helps determine the taxable income, which is subject to tax.

Third-party reporting information, if properly designed and implemented, has the potential to yield beneficial results. Courts and similar institutions can assist tax authorities by collecting agency and advocacy contracts from advocates and subsequently reporting relevant financial information. This information plays a crucial role in tax assessment by identifying the sources and amounts of payments received by advocates. Despite its potential benefits, the application of the third-party reporting information method for

[65] Directive Issued to revise the Amhara National Regional State Category C taxpayers Tax Assessment Directive No. ፖ-04/2000 E.C, Article 3.

assessing advocates' turnover and tax liability faces legal and administrative limitations.

Firstly, there are no mandatory and uniform rules obligating advocates to submit agency and advocacy contracts to third parties or directly to tax authorities through third-party instructions. Consequently, the collection of these documents by third parties is irregular and fragmented. Different regions exhibit varying practices, resulting in inconsistencies. For example, justice offices in Amhara and Oromiya National Regional States require advocacy contracts from advocates as a precondition for authenticating agency contracts, whereas in Addis Ababa City, the Federal Document Authentication and Registration Agency authenticates agency contracts without such requirements.[66] Conversely, courts in Addis Ababa City mandate advocates to submit advocacy contracts when they file their pleadings, while courts in Amhara and Oromiya National Regional States do not impose this requirement.[67] Secondly, a uniform legal framework governing the information-sharing mechanism between third parties and tax administrations is absent. There is no law binding third-party institutions to regularly share documents or information with tax authorities, resulting in an undeveloped practice of information reporting by these entities. Attempts in Amhara Regional State to collect advocacy contracts from justice offices rely on letters from regional finance and tax authorities, which may not be legally binding on the justice offices. [68] Thirdly, even when information is transferred, administrative challenges hinder its use for tax assessment purposes. Processing information from third parties requires specialized

[66] Interview with Animaw Demis, Advocate at Federal and Amhara Regional State' Courts, (20/03/1016 E.C); Interview with Kuma Beyene, Supra note 49.

[67] Id.

[68] See for example, *የአማራ ብሄራዊ ክልላዊ መንግስት ፋይናንስ ቢሮ ደብዳቤ*, Supra note 62; *የአማራ ብሄራዊ ክልላዊ መንግስት ገቢዎች ቢሮ ደብዳቤ*, Supra note 57.

information technology and skilled tax assessment officers, resources that are often lacking in Ethiopian tax authorities.[69] Moreover, the geographical distribution of justice offices and courts across Ethiopia complicates the collection and sharing of agency and advocacy contracts. Advocates, who operate in multiple locations, are assessed and taxed based on the tax center corresponding to their registered address, further burdening institutions involved in the third-party reporting system.

In practice, third-party reporting information seems more of a supplementary tool for the official assessment-based presumptive assessment method. Advocates, during tax declaration filing, report their income, and tax authorities may use third-party information to cross-check reported income correctness. For example, in a letter, the Amhara National Regional State Finance Bureau instructs tax officers as follow: *"በየደረጃው የሚገኝ የገቢ ተቋማት ከፍትህ ተቋማት የሚያገኙትን እና በራሳቸው ጥረት የሚያገኙትን የሶስተኛ ወገን መረጃ በማሰባሰብ ዳግም ውሳኔ በመወሰን ግብር ከፋዩ አሳውቆ ከከፈለው የሚበልጥ ገቢ ከተገኘ ማብርና ታክስ መሰብሰብ ይኖርባቸዋል"* [70] In English, "Revenue institutions at different levels must gather third-party information from the justice institutions and through their own efforts, make re-assessments, and collect taxes if the re-assessed income is greater than what the taxpayer declared and paid."

[69] Due to the prevailing manual tax administration, tax assessment officers need to review the print or hard copies of agency and advocacy contracts submitted by advocates. Additionally, they may encounter various technical challenges during tax assessments. For example, advocacy contracts may not cover all income scenarios, potentially resulting in under-declaration. Some advocates receive income without formal written contracts. Conversely, payments documented in advocacy contracts may span multiple tax years, complicating accurate assessment. Furthermore, the presence of payment provisions in advocacy contracts does not guarantee their actual receipt by advocates, as clients may fail to make final payment installments.

[70] *የአማራ ብሄራዊ ክልላዊ መንግስት ፋይናንስ ቢሮ ደብዳቤ*, Supra note 62.

Finally, it is necessary to note that the problems explored so far stem not only from administrative limitations or improper conduct by tax authorities and advocates. Poor design and formulation of presumptive tax methods, such as Schedule 1 of the presumptive tax regime, contribute to these problems by leaving tax authorities and taxpayers to rely on defective tax assessment rules. The existing income tax proclamations and regulations introduced turnover-based categorization and a presumptive tax regime, but without explicit turnover-verification methods. They neither require Category C advocates to keeping records of turnover nor incorporate other methods to determine turnover amounts.

It is under such a legal gap that the tax authorities attempted to apply various methods to assess the annual turnover of the advocates, including estimated assessment, official assessment, and third-party reporting information. However, due to their inappropriateness or flawed application, these methods did not result in effective assessment of advocates' turnover. As a result of both legal and administrative gaps, the practice of advocates' categorization and presumptive tax assessment becomes subjective, uncertain, and prone to potential tax evasion. Therefore, it is crucial to scrutinize the government bodies responsible for designing presumptive tax assessment methods for Category C taxpayers, particularly advocates, and to assess their contribution to the tax problems discussed here.

Unlike the repealed income tax proclamations, the current proclamations transfer the determination of the presumptive tax assessment method from the legislature to the executive body, specifically the Council Of Ministers at the federal level (or the Councils of Regional Governments).[71] These bodies

[71] Federal Income Tax Proclamation, Supra note 19, Article 49; See also, Amara National Regional State Income Tax Proclamation, No.240/2016, *Zikre Hig Gazette*, (2016) Article 48.

decide, through regulations, that Category C taxpayers shall be taxed using indicator or turnover-based standard assessment and prepare two different assessment schedules, with instructions for finance authorities to revise the schedules every three years.[72] As observed in our preceding discussions, the assessment of annual turnover is a crucial factor in establishing the presumptive income tax liability of Category C taxpayers under Schedule 1. However, the finance authorities responsible for overseeing and revising the legal frameworks governing the schedule have not provided tax authorities with an objective and effective means to determine taxpayers' annual turnover.

A significant problem arises in Ethiopia where finance authorities lack administrative readiness and capacity to monitor and reform the schedules. For example, the Amhara Finance Bureau lacks a dedicated section or officers for tax responsibilities, including revising standard assessment schedules.[73] The issuance of tax directives is often drafted by the Regional Revenue Bureau and distributed in the name of the Finance Bureau's head.[74] Similar issues persist in Addis Ababa City Administration, where the Fiscal Policy and Revenue Study Directorate reportedly does not conduct independent studies or revisions of the presumptive tax regime for Category C taxpayers. The Ministry of Finance is assumed to harmonize the country's tax systems, with the City Administration following the Ministry's direction.[75] This highlights a lack of proper performance by the finance authorities in

[72] Council of Ministers Federal Income Tax Regulation, No.410/2017, Supra note 2, Articles 49, 60; The Income Tax Proclamation Execution, Council of Regional Government Regulation, No. 162/2018, *Zikre Hig Gazette*, (2018), Articles 49, 60.

[73] Interview with Worku Gashaw, Director of Revenue Sharing Formula and Regions' Balanced Growth Study Directorate, Amhara National Regional State Finance Bureau, (10/02/2015 E.C).

74 Interview with Getachew Mesfin, *Supra* note 3.

75 Interview with Yirgalem Eshetu, Director of Fiscal Policy and Revenue Study Directorate, Addis Ababa City Administration, (21/03/2015 E.C)

designing, monitoring, and reforming presumptive tax regimes for advocates and other Category C taxpayers.

Concluding Remarks

This article examined the income taxation of advocates in Ethiopia, focusing on the application of Schedule C of the Income Tax Proclamation. Three critical issues were addressed: the characterization of advocates' income, the determination of their status as Category A, B, or C taxpayers, and the methods of presumptive income tax assessment.

Ethiopia's income tax system categorizes advocates under Schedule C, treating them as businesses. This classification conforms to international practices and simplifies tax administration by applying consistent rules to similar income sources, whether professional or business. Advocates' arguments against this classification lack a basis in tax law, as professional activities like advocacy are considered businesses that require bookkeeping for accurate tax assessment and the prevention of evasion. While some advocate expenses have a dual purpose, tax laws allow for apportionment to distinguish between deductible business expenses and non-deductible personal expenses.

The categorization of taxpayers into Categories A, B, and C under Schedule C faces significant challenges, particularly concerning advocates. First, obtaining an advocacy license does not require a TIN as a precondition. This initial lack of a TIN requirement implies that, at the beginning of their practice, the tax authorities have limited early opportunities to meet with advocates to initiate the process of categorization and inform them of tax obligations. Second, the Income Tax Proclamation lacks clear guidelines for calculating annual turnover for initial categorization, leading to reliance on advocates' self-declarations or other subjective presumptive methods. This

reliance results in advocates often remaining in Category C, as upward categorization is rare due to inaccurate turnover estimates.

Since the inception of Ethiopia's current income tax system during Emperor Haile Selassie's reign, advocates have been assessed using two primary presumptive methods: indicator-based and turnover-based standard assessments. The initial indicator-based assessment, introduced in the 1940s, imposed fixed taxes on advocates based on their license type. However, these fixed taxes, though simple to administer, did not account for income variations among advocates, leading to equity concerns. The 2016 income tax reform transitioned to a turnover-based assessment, aiming to align tax liabilities more closely with actual incomes. However, like the categorization problem, the turnover-based presumptive assessment system lacked clear mechanisms for determining annual turnover. The Income Tax Proclamations and Regulations have not provided an objective and effective means to determine advocates' annual turnover. Administratively, tax authorities attempted to apply several methods to assess the annual turnover of advocates, including estimated assessments, official assessments, and third-party reporting information. However, due to their inappropriateness or flawed application, these methods did not result in an effective assessment of advocates' turnover. These administrative limitations are exacerbated by non-compliance behaviors among advocates. As a result, the practice of presumptive tax assessment for advocates becomes subjective, uncertain, and prone to potential tax evasion.

Drawing from theoretical perspectives and international experiences, it is evident that Ethiopia's presumptive tax regime for Category C advocates lacks sophistication, treating well-educated professionals similarly to micro-businesses. This departure from recommended practices poses challenges to equity, efficiency, and revenue mobilization, contradicting international norms emphasizing the importance of maintaining records for accurate tax

assessment. These findings extend beyond the advocacy profession, urging a broader examination of other self-employed professionals under similar presumptive tax regimes, such as accountants, doctors, and engineers.

Consequently, the article recommends a series of reforms aimed at modernizing the income tax regime for advocates in Ethiopia. It is crucial to establish effective turnover verification methods to ensure accurate categorization of advocates as Category A, B, or C taxpayers. The reforms should also include implementing a presumptive tax approach, where Category C advocates maintain basic records of receipts with the option of a standard deduction for expenses. Effective utilization of third-party information is recommended, supported by a robust legal framework and collaboration between courts/justice organs and tax authorities. This collaboration will ensure reliable data exchange and enhance the accuracy of turnover assessments. Additionally, enhancing the administrative capacity of tax authorities through training programs and infrastructure improvements is essential. A well-trained and equipped tax administration is crucial for effectively implementing the recommended reforms, particularly in developing expertise in auditing and verifying financial records specific to the legal profession. Lastly, regular monitoring, evaluation, and reform of the presumptive tax regime by responsible government bodies are necessary to address emerging challenges and improve the regime's effectiveness and efficiency.

Forensic Science in the Ethiopian Federal Criminal Justice Process: Appraisal of its Utilization.

Shimelash Wondale Dagnew[3]

Abstract

This article explores the utilization and impact of forensic evidence within the federal criminal justice process of Ethiopia. It aims to investigate the current state of forensic science in the country's federal criminal justice process, examining its application, challenges, and potential for improvement. The research employed, as major research tools, comprehensive literature review, analysis of relevant legal frameworks, and interviews with key informants. Findings of the study revealed that there is an insufficient legal framework in place to govern the utilization of forensic evidence in criminal cases. In addition, inconsistencies were observed in the utilization of forensic evidence by law enforcement agencies, posing challenges to its effective utilization. Furthermore, variations were identified in how courts interpret and apply forensic evidence, highlighting the need for standardization and clearer guidelines. The findings also indicate the importance of adequate training and resources for forensic experts to ensure accurate analysis and presentation of evidence.

Keywords: Forensic Science; Forensic Evidence; Criminal Justice Process; Ethiopia.

Introduction

Crime has existed as long as humanity and it is changing its form from time to time based on the changing circumstances in human lives. Technological

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advancements have brought forth new forms of criminal activity, leading to an increasingly complex investigation that requires a higher level of expertise and the application of scientific knowledge. Further, the complex nature of the crimes committed often complicates criminal investigations.[1]

In response to such dynamics, the field of criminal investigation has undergone multiple stages of development over time, advancing new methods and techniques in criminal investigation practice. Particularly the integration of forensic science into criminal investigation has taken the advances to a significantly higher level.[2] The continuous advancement of technology has led to major improvements in forensic science, and presently, modern criminal investigation is closely intertwined with the application of forensic science.[3]

As its course of development shows, forensic science is largely a practical science, drawing theoretical and empirical insights across spheres of scientific disciplines for practical applications. As such it is composed of different professions and referred to as "mixed science" that seeks to utilize science to benefit the ends of legal systems.[4] In the modern criminal justice system, the application of forensic science assists courts in resolving criminal, civil, and administrative cases though it is predominantly applicable in criminal cases.[5]

[1] Segni Nemomsa et al, 'Forensic Science Trend, Current Challenges in Ethiopia: A Narrative Review Evidence from Recent Literature and Policies' *Journal of Forensic Research*, [2023] 14(3), pp. 2-3.
[2] Max H. Houck and Jay A. Siegel, Fundamentals of Forensic Science, Second Edition, Elsevier, (2010), p.3.
[3] Id.
[4] Barry A.J. Fisher et al, Introduction to Criminalistics: The Foundation of Forensic Science, First Edition, Elsevier, (2009), p.3.
[5] Id.

The application of forensic science with a particular focus in criminal matters is termed as "criminalistics."[6]

Practically speaking, the utilization of forensic science means the examination of physical evidence,[7] which includes murder weapon, hairs, fibers, fingerprints, DNA,[8] biological materials, and so on.[9] The history of the application of forensic evidence goes back thousands of years to ancient China.[10] The story goes as follows: A farmer was found murdered in a rice farm. The head of the village gathered the farmers who were working in the fields closest to the crime scene. As all of them denied the criminal act, he had them lay their sickles on the ground. After some time, while the interrogation was conducted, flies gathered around one of the sickles. Though it was cleaned and no visible blood on it, the flies were attracted by microscopic blood remains on the sickle, and ultimately the killer was identified.

The insight underlying the story is still used in modern forensic practice.[11] Forensic evidence, if utilized properly, may be used as the best available evidence.[12] Presently, advances in forensic science have progressed to the extent of reliably revealing some form of evidence a suspect inevitably leaves

[6] Richard Saferstein, Criminalistics: An Introduction to Forensic Science, Tenth Edition, Pearson Education Inc., (2022), p.6.

[7] Id.

[8] While DNA is not tangible, the physical evidence that contains DNA, such as bodily fluids, skin cells, and blood, can be physically collected and preserved. In a word, these materials are tangible and contain DNA. Hence, DNA is a physical evidence.

[9] Houck and Siegel, supra note 2, p.3.

[10] Deepak Rawtani and Chaudhery Mustansar Hussain, History of Forensic Science, First Edition, Wiley-Vch Gmbh Publisher, (2020, p. 7-8.

[11] Id.

[12] Ross M. Gardner, Practical Aspects of Criminal and Forensic Investigations, 2nd. Ed., Tailor & Francis Group, (2012), p.7.

behind due to his unavoidable contact with a crime scene during the perpetration of a crime. [13]

The utilization forensic science operates based on the principle that states where there is contact between two items, there will be an exchange of microscopic material—which is widely referred to as Locard's Exchange Principle.[14] Underlying the principle is that forensic science plays a vital role in the criminal justice process by providing scientific expertise and analysis such as DNA analysis, fingerprinting, ballistics, toxicology, and more. The expert evidences from such endeavor help to identify suspects, to establish timelines, and to reconstruct events surrounding a crime. By utilizing forensic science, investigators can link individuals to criminal activities, corroborate witness testimonies, and provide objective evidence in courts of law.[15] The application of forensic science ensures that the criminal justice system operates on a solid foundation of scientific principles, enhancing the accuracy, reliability, and fairness of criminal investigations and trials. It serves as a powerful tool in uncovering the truth, protecting the innocent, and bringing the guilty to justice, ultimately contributing to the safety and well-being of society as a whole.[16]

This article explores various types of forensic evidence commonly used in criminal investigation, prosecution, and adjudication processes in Ethiopia at

[13] Houck and Siegel, supra note 2, p.3.

[14] Locard's Exchange Principle states that a person who commits a crime will carry something to the crime scene and take something away from it. In other words, any criminal leaves behind a trace when committing a crime due to his contact with the crime scene and it is the investigator's duty to find this trace evidence and reconstruct the events of the crime.

[15] Tae Myung Choo and Young-Shik Choi, 'Defining and Explaining Serial Murders in the United States', *Korean Journal of Legal Medicine*, [2010] 44 (1), p. 6.

[16] Everett Baxter, *Complete Crime Scene Investigation Handbook* (First Edition, Taylor & Francis Group 2015), p. 126.

the federal level. The study particularly aims to explore whether forensic science is utilized in the Ethiopian federal criminal justice process. It specifically aims to identify the common and major kinds of forensic evidence to be used in criminal cases, the gaps in the practice, and to suggest ways to better utilize forensic science.

The study employed qualitative research method. Both primary and secondary data sources such as Ethiopian federal court records and insights from federal forensic experts (primary sources), as well as information from books, journals, and academic research (secondary sources) are utilized. The data in the investigation were generated through legal text analysis, document reviews, interviews with key informants, case analysis, and scholarly literature reviews.

Police officers, public prosecutors, judges, and public defenders were taken as sources of data to gain perspectives on the challenges and opportunities related to the use of forensic science in Ethiopia's criminal justice system. The study specifically examined the operations of the Federal Court at Lideta Bench, which is known for handling a significant number of cases, including those of a complex and high-profile nature.[17]

The research is organized in four sections. The first section, following this preliminary backdrop, highlights fundamental concepts in forensic science. The second section provides a brief account of Ethiopian forensic practice in criminal legal systems. In the third section, the article defines and extensively elaborates the technical operations of forensic tools instrumental in criminal investigation. Also, this section assesses the Ethiopian practice in terms of the use and the capacity of institutions in their use of these tools. As an extension

[17] Tadesse Biru Kassie and Mohammed Seid, The Challenges of the Judiciary System in Ethiopia: The Case of the Federal Supreme Court and the Federal High Court, *Journal of Law and Society*, Vol. 9, No. 2, (2018), p.54.

of such issues, the fourth section unravels the major constraining issues in using forensic science across Ethiopian criminal investigation practice. Finally, the article makes concluding remarks by reemphasizing the place of forensic science in the pursuit of attaining the ends of criminal justice, and by recapping on the institutional and individual capacities in using forensic tools in the Ethiopian legal systems. Based on the findings, the part suggests possible policy and legislative actions to fill the gap in the use of forensic tools in the country's criminal justice system.

1. Basic concepts associated with forensic evidence

1.1. Crime Scenes

A crime scene is a place where a crime is committed. It may be a street corner, a business place, or a residence. Crime scenes can also be categorized as indoor or outdoor.[18] The size and complexity of crime scenes vary depending on the type of crime committed.[19] Multiple crime scenes may occur. For instance, if a victim is killed in his home and his body is discovered dumped elsewhere, his home becomes the primary crime scene, and the dumping site becomes the secondary crime scene.[20] A crime scene provides the investigator with a starting point to gather information about the victim and the suspect. Besides, it helps to reconstruct the crime.[21]

[18] Gardner, *supra* note 12.
[19] Id.
[20] Peter White, Crime Scene To Court: Essentials of Forensic Science, Second Edition, RS.C,(2004), p. 21-23, [hereinafter Peter, Crime Scene To Court: Essentials of Forensic Science]; Interview with Tewodros Taye, Forensic Evidence Collection Unit Head and Forensic Expert in Arson and Explosion at the Federal Forensic Investigation Department (Addis Ababa, 24 May 2023).
[21] Id.

Crime scenes are processed by forensic experts and investigators to gather evidence, identify suspects, and build cases. This process involves taking photographs of the scene and collecting DNA samples and fingerprints. Forensic experts may also collect physical evidence such as clothing, weapons, and other objects. The proper processing of the scene determines the degree of success for the entire criminal investigation.[22]

Crime scene investigator needs to have the knowledge and skills to preserve the evidence related to the crime committed. He should, in other words, be capable of recognizing, identifying, preserving, and gathering physical evidences. He must also be equipped with knowledge of both the legal and the scientific standards for gathering such evidences.[23] One of the most important aspects of crime scene investigation is the establishment of a chain of custody, which refers to the process from evidence collection to delivery to a court of law. Chain of custody shall be maintained to ensure validity of the evidence.[24]

Crime scenes are also important in identifying trends and patterns in criminal behavior. By studying the commission of the crime and the evidence gathered from crime scenes, it is possible to develop profiles of offenders and determine any similarities in the way they commit crimes. This can help the police to narrow the suspects' list, to stop crimes in progress and prevent similar crimes in the future.[25]

1.2. Forensic Toxicology

[22] Jacqueline T. Fish and Jonathon Fish, Crime Scene Investigation Case Studies, First Edition, Elsevier, (2014), pp. 10-14.
[23] Id.
[24] Id.
[25] Terrence F. Kiely, Forensic Evidence: Science and the Criminal Law, First Edition, CRC Press LLC, (2001), p.262.

Toxicology is the scientific study of the impact of chemicals and toxins on living organisms. Toxicology frequently involves the examination of biological samples such as blood, urine, and hair to determine whether an individual has come into contact with dangerous substances.[26] It plays a crucial role, especially in cases involving drug-related offenses, poisoning, and homicide.[27] To this end, samples are analyzed in a laboratory to identify the presence and quantities of toxic substances.[28] Forensic toxicology can also be used to determine whether alcohol played a role in a crime. Analysis of a suspect's blood alcohol level at the time of their arrest can provide evidence in cases such as drunk driving accidents, assault, and homicide.[29] Further, toxicology can provide information about the victim's behavior and actions leading to a crime.[30]

1.3. Crime Laboratories

Crime laboratories are where forensic evidence is processed and analyzed.[31] They are run by experts from various fields, including, Physics, Geology, Botany, Biology, Photography, Computer Science, and more.[32] The ballistics department also examines and processes any firearms, bullets, or other firearm parts discovered on or near the crime scene or inside the victim's

[26] K.S. Narayan Reddy, The Essentials of Forensic Medicine and Toxicology, 33rd Ed., *The Health Sciences Publisher*, (2014), pp.498-499.
[27] Id.
[28] Fisher et al, supra note 4, p.80.
[29] Id.
[30] William G. Eckert, Introduction to Forensic Sciences, 2nd. Ed., CRC Press Inc. (1997), p. 2.
[31] Ayn Embar-Seddon and Allan D. Pass, Forensic Science, Salem Press, Inc., (2009), pp. 301- 303.
[32] Gardner, supra note 12.

body.[33] Moreover, a crime laboratory may contain crucial units like the toxicology unit, fingerprint unit, voiceprint analysis unit, and others.[34]

2. Forensic Evidence in Ethiopia – a Brief Account

Currently, forensic evidence holds immense significance as a tool in criminal investigation. In several countries, its advanced utilization has led to the successful resolution of numerous criminal cases that would have otherwise remained unsolved through conventional investigation methods. Scholarly literature on the utilization of forensic evidence in Ethiopia is insufficient. While there are varying reasons for this, it is largely attributed to the complexities and daunting circumstances surrounding Ethiopian criminal justice practice. These variables are presumed to have hindered scholars from adequately exploring the subject.[35]

Before the introduction of modern investigation techniques, criminal investigation in Ethiopia used to employ traditional methods that took various forms throughout different periods. Practices such as *Leba shay* and *Afersata/Awechachign*[36] were employed to identify perpetrators. However,

[33] Interview with Seada Abdela, Head of Physical Forensic Evidence Unit at the Federal Forensic Investigation Department (Addis Ababa, 24 May 2023).

[34] Saferstein, supra note 6.

[35] Assefa Mulugeta Asfaw, Development And Competence of Forensic Examination in the Protection of Rights of the Accused in the Criminal Justice of Ethiopia: Prospects and Challenges, the Case of Homicide in Addis Ababa, Ma Thesis, Addis Ababa University, (2016), p. 5.

[36] The phrase leba shay or leba sha is Amharic and literally means searching thief. It was a technique of thief-searching that was practiced in Ethiopia. An individual who was stolen (or allegedly stolen) reported to the person who was in charge of leba shay, known as leba shay at'ech'i- the one who administers the leba shay. An adolescent boy would be made to drink a drug. Reportedly, the drug he drank was a mixture of tobacco and an herb-the latter unidentified by the common people. After taking the drug, the boy became intoxicated and entered into a trance as if under hypnosis. Accompanied by a follower, leba shay teketay, the boy went to house looking for the thief. The owner of the house before which the boy fell down was considered to have stolen the property. The accused person would be taken to a judge

despite their long-standing use, these methods had numerous drawbacks. Lacking scientific basis, they often led to misleading outcomes and consequences. Consequently, these traditional investigation practices were entirely abolished.

The first step in establishing modern criminal investigation in Ethiopia began during the time of Emperor Haile Selassie I in 1946, and the first forensic science laboratory was established. Since its establishment, the Abadina Police College, currently renamed as the Ethiopian Police University College, has been providing a range of forensic-related courses, including fingerprint and document analysis, crime scene photography analysis, and more.[37] It is now more than half a century since the college started delivering forensic science services, and until recently, it was the only institution that provides training related to forensic science and forensic evidence at a national level.[38]

As far as legal framework is concerned, forensic science and evidence are not given due emphasis in the Ethiopian criminal justice system. There is no comprehensive legal regime governing evidence in general and forensic evidence in particular. Even the recent criminal justice policy--the 2011 FDRE criminal justice policy--hasn't incorporated forensic evidence as one of

known as the leba shay dannya (judge). See Alexander Naty, The Thief-Searching (Leba Shay) Institution in Aariland, Southwest Ethiopia, https://www.jstor.org/stable/pdf/3774010.pdf?refreqid=fastly. Affersata, also known as awuchachign, is communal inquiry into crime to discover a criminal's identity. The technique used was to summon all inhabitants of the neighborhood where the crime was committed, and to sequester them until they named the criminal. The gathering would be called by a local official such as the district governor, either upon request of the injured party, or, in cases of serious public disturbance, on government initiative. See Stanley Z. Fisher, Traditional Criminal Procedure in Ethiopia, 1971.

[37] Kibrom Desta, *Fingerprint Identification and Verification using Minutiae Extraction for Crime Investigation* (MSC Thesis, St. Mary's University 2018) 4.

[38] Id.

the major kinds of evidence to be utilized. There are some provisions implicitly related to digital forensics dealing with computer crimes,[39] but forensic evidence as a contemporary form of evidence is not properly set out in a separate section in the policy. Neither does the judicial practice provide guiding cases. The federal Supreme Court's cassation division has published 25 volumes of decisions, and in none of those cases was forensic evidence used to resolve a criminal matter.[40]

Moreover, there are some provisions in different legislations that allow the use of forensic evidence in criminal cases. For example, some provisions under the Anti-terrorism Proclamation No. 652/2009[41] allows interception of individual's phone, correspondence, and e-mails. Similarly, proclamation no. 434/2005[42] – revised anti-corruption special procedure and rules of evidence proclamation – permits the use of evidences produced by a computer, interception of correspondence & letters, and voice recordings.

Yet the problem here is that though there are provisions in other legislations allowing the use of forensic evidence in criminal and other cases, there is no detailed procedure that govern the use of such evidences. This most probably results in inconsistent utilization of forensic evidences in different benches within the same court as judges and prosecutors are not obliged to adhere to a defined criteria and procedure to use them. Generally speaking, in the context

[39] Federal Democratic Republic of Ethiopia, *Criminal Justice Policy* (Ministry of Justice 2011), pp. 44-45.
[40] Federal Supreme Court, Cassation Division Decisions, Volume 1-25.
[41] Federal Democratic Republic of Ethiopia, Anti-terrorism Proclamation No. 652/2009, Federal Negarit Gazetta, (2009), Article 2(8), Article 14 and article 29.
[42] Federal Democratic Republic of Ethiopia, Revised Anti- Corruption Special Procedure, Proclamation No. 434/2005, Federal Negarit Gazetta, (2005), Articles 45-47.

of Ethiopia's criminal justice process, forensic evidence rules has not been put in place in a way to meet the demands of the criminal justice system.[43]

3. Major Kinds of Forensic Evidence and Their Utilization in Ethiopian Federal Criminal Justice Process

3.1. Fingerprint

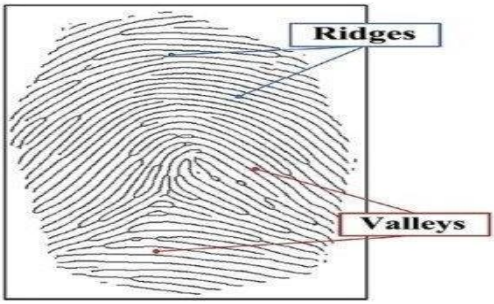
Fingerprints are one of the most crucial pieces of forensic evidence that play a significant role in identifying and convicting criminals. Human fingerprints are unique, and the pattern formed by the ridges (the raised lines that form unique patterns on the tips of human fingers and thumbs) and minutiae (the unique characteristics or features that are present in the ridge patterns of a fingerprint) is what makes fingerprints unique. Minutiae can include ridge endings, bifurcations, dots, and other unique details.[44] Fingerprints are different for every person. Even identical twins have different fingerprints though they have the same DNA.[45]

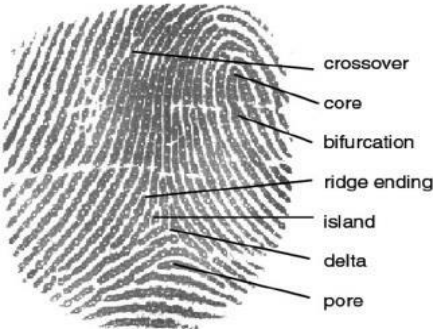
Fingerprints are common at crime scenes and can be gathered through various mechanisms such as ink, dust, or chemicals. Once secured, the print is photographed or scanned to produce a digital image.[46] These images are then scrutinized to match with the identity of a known suspect or to someone

[43] Nemomsa *et al*, supra note 1; Behaylu Girma, Forensic Science Evidence under Ethiopian Criminal Justice System; the Case of Homicide in Addis Ababa, LLM Thesis, Bahir Dar University, (2014), p.3.
[44] Gardner, supra note 12.
[45] Id.
[46] Baxter, supra note 16; Interview with Behailu Mengistu, Head of Prints and Criminal Records Unit at the Federal Forensic Investigation Department. (Addis Ababa, 24 May 2023).

else.[47] Fingerprints can be lifted from various materials such as plastic, metal, and glass, and can also be employed to recognize victims.[48]

Image 1. Ridges of fingerprints[49]





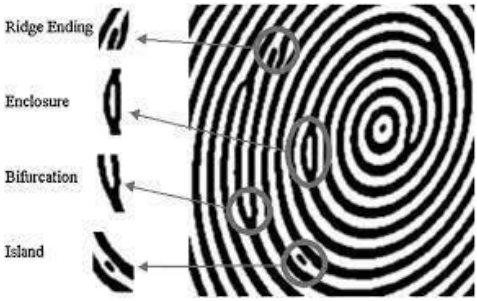


Image 2. Minutiae of Fingerprints[50]

[47] Id.
[48] Gardner, supra note 12, 28-30.
[49] Ridges Characteristics of fingerprints, available at <https://www.google.com/search?q=Images+of+ridges+characteristics+of+fingerprints> last accessed on 6 June 2023.

Fingerprints at a crime scene can appear in three primary forms. Latent prints are typically invisible and left behind by bodily secretions. Patent prints are visible to the naked eye and result from contaminants like blood or grease. Plastic prints are created when an impression is made on a malleable surfaces, such as wax.[51] Identifying the surfaces to examine for fingerprints at a crime scene is crucial in the effort to locate and recover them.[52] Perpetrators may deliberately obliterate fingerprints, making it challenging for investigators to discover any trace of them. This act of perpetrators is referred to as *a forensic countermeasure*.[53] In such instances, investigators may opt not to process the scene due to the possibility of negative outcomes.[54]

Fingerprint can help identify the gender of the offender. Accordingly, women have significantly higher ridge density than men. It is likely that the fingerprints have a male origin with a ridge density of 11 ridges/25 mm^2 or less. Similarly, a fingerprint having a ridge density of 12 ridges/25mm^2 or greater is likely to be of female origin.[55] Additionally, fingerprints can assist in estimating the age group of the culprit. The trend is that as individuals get older, the ridges of their fingerprints become more worn and scattered than before. The skin's pores also experience a reduction in lubrication, which affects the texture of the fingertips.[56]

[50] Minutiae of fingerprints, available at <https://www.google.com/search?q=Images+of+Minutiae+of+fingerprints> last accessed on 6 June, 2023.
[51] Baxter, supra note 16; Tewodros, supra note 20.
[52] Id.
[53] Baxter, supra note 16.
[54] Gardner, supra note 12, pp.28-30.
[55] P. Gnanasivam and R. Vijayarajan, Gender Classification from Fingerprint Ridge Count and Fingertip Size Using Optimal Score Assignment, Springer, (2019), pp. 344-346.
[56] Id.

Though there is no law that governs the application of fingerprint, it is being utilized in the Ethiopian criminal justice process. To this end, the federal forensic investigation department is employing its own manual to collect, preserve, and presents it as evidence in court of law.[57] According to the respondent, the manual is prepared as per the standards of best international practices.[58] Despite the use of such manual, practitioners still notice practical problems in securing crime scenes by first responders as there is a possibility of tampering with fingerprints.[59] According to one of the respondents to is the study, this problem may be due lack of knowledge of forensic evidence and sometimes because of negligence.[60]

In one illustrating criminal case,[61] a man was murdered in his residence and locked inside and the neighbors notified the police about the incident. Unfortunately, the police were negligent and mishandled the crime scene. They failed to collect any fingerprints from the doorknob and also neglected to collect fingerprints from a stone discovered at the scene promptly. As a result, the case failed despite the presence of circumstantial evidences suggesting the suspect's involvement in the crime.[62] On the flip side, there are cases where fingerprint analysis was made by the federal police forensics department and the court considered it admissible. In a case involving two defendants accused of aggravated theft, one of the defendants had a

[57] Seada, supra note 33.
[58] Id.
[59] Interview with Chief Inspector Bikila Tadesse, Head of Corruption Crimes against Government Institutions, Federal Police Criminal Investigation Department (Addis Ababa, 30 May 2023).
[60] Interview with Chief Sergeant Kebe Adinew, Detective at Addis Ababa Police Homicide Division (Addis Ababa, 30 June 2023).
[61] Interview with Adanech Gezahegn, Homicide Division Coordinator and Prosecutor at Ministry of Justice, Lideta Bench (Addis Ababa, 22 May 2023).
[62] Kebe, *supra* note 60.

fingerprint that matched the one found at the crime scene. The court relied on the forensic report and convicted the defendant.[63]

In another case[64], fingerprint evidence, though both possible and necessary to use, was not utilized. In the case of *Federal Prosecutor v. Hiwot Mekonin*, the defendant was charged with strangling and killing two children using a knife. Nevertheless, despite the identification of a murder weapon with a possible fingerprint on it, no forensic evidence was provided to conclusively prove that the defendant's fingerprint was present on the weapon. As a result, the defendant's conviction relied solely on her confession without the support of forensic evidence.[65]

Relying solely on the defendant's confession not only creates potential grounds for the defendant's acquittal but also hinders judges from reaching an informed decision. Even when a defendant confesses, it is crucial for the prosecution to collect and present forensic evidence like a fingerprint. By doing so, if the confession is deemed invalid for any reason, the integrity of the case would not be compromised. In addition,[66] witness testimony, in many similar cases, is relied on more frequently than fingerprint and other forensic evidence in securing a conviction. This also has the potential to compromise cases of the prosecution in present and future cases.

Fingerprints prove most valuable when they can be matched with previously recorded prints. However, without a database to facilitate matching a suspect's

[63] Simeneh Kiros and Cherinet Hordofa, When the Expert Turns into a Witch: Use of Expert opinion Evidence in the Ethiopian Justice System, *Journal of Ethiopian Law*, Vol. 27, No. 1, (2015), p.104-105.

[64] Interview with Mihiret Eshete, Coordinator and Prosecutor of Crimes against Women and Children Division, Lideta Bench (Addis Ababa, 24 May 2023).

[65] Federal Prosecutor v. Hiwot Mekonin, Federal High Court, Lideta Criminal Bench, File No. 298113, (5 December 2022).

[66] Mihiret, supra note 64.

fingerprint with existing records, certain investigations may fail even when a fingerprint is obtained from a crime scene or another relevant location within the investigation.[67] The police usually retains fingerprints of recidivists; however, this practice falls short as the number of records is severely limited.[68]

3.2. Document Analysis

Document analysis is employed to scrutinize various forms of paper-based evidence, including handwritten notes, typed or printed documents, and even digital images.[69] Document analysis is employed for similar purpose in the Ethiopian federal criminal justice process.[70]

Document analysis begins with a preliminary visual examination of the document in question to ascertain its origin, age, and authenticity. The analyst examines the paper used, watermarks, ink, strokes, and letter formation, to determine its source.[71] Handwriting analysis involves evaluating the handwriting's overall appearance, including features such as letter spacing, slant, slope, size, alignment, and pressure patterns to create a writer's profile. By comparing this profile to reference documents, the examiner can determine if the questioned writing was written by the same person.[72]

Another critical aspect of document analysis is typewritten and printed documents. In the case of typewriting, the typeface, typewriter, ribbon, and formatting elements are analyzed for similarities and differences compared

[67] Behailu, supra note 48.
[68] Interview with Deputy Inspector Binyam Berihun, Team Leader at Addis Ababa Police Homicide Division (Addis Ababa, 30 June 2023).
[69] Fisher et al, supra note 4, p.80.
[70] Id.; Interview with Zelalem Fikadu, Deputy Director General of Corruption Crimes at Ministry of Justice, Lideta Office (Addis Ababa, 20 June 2023).
[71] Saferstein, supra note 6, p.12.
[72] Id.

with any known reference documents. The same methods are used in the analysis of printed documents with particular attention given to identifying the type of printer used.[73]

As far as photocopied documents are concerned, in Ethiopia, document forensic analysis encounters a limitation wherein photocopied documents cannot be thoroughly examined by forensic experts. This problem arises due to the absence of advanced technology and trained experts in the field.[74] However, in other jurisdictions, particularly in developed countries, forensic analysis of photocopied documents is feasible.[75] Yet in Ethiopia, public prosecutors[76] and public defenders[77] face challenges as they are unable to utilize photocopied documents to substantiate charges or defend their clients. According to a respondent,[78] certain individuals are aware that photocopied documents are not susceptible to forensic scrutiny under existing criminal investigation techniques and resort to measures to eliminate original documents when apprehended in the act. For instance, they may opt to chew and swallow the original document, such as a cheque, in an attempt to destroy the incriminating evidence.

The application of documentary evidence as a form of forensic evidence is incorporated in pertinent laws. For example, Articles 45 and 46 of proclamation No. 434/2005, revised anti-corruption special procedure and rules of evidence proclamation, set out the application of documentary evidence in various forms such as one obtained from a computer and written

[73] Fisher et al, supra note 4.
[74] Seada, supra note 33.
[75] Anil Kumar, 'A Review on Analysis of Photocopied Documents', International Journal of Information and Computer Science, [2018] 5(7), p. 1.
[76] Adanech, supra note 61.
[77] Interview with Ayalew Masresha, Federal Public Defender (Addis Ababa, 14 June 2023).
[78] Zelalem, supra note 70.

letters. In white-collar crimes, documentary evidence is one of the most common forms of evidences presented by disputing arties in the Ethiopian federal criminal justice process.[79] The prevalence of forged, falsified, and other fraudulent documents in criminal cases are a primary factor contributing to the utilization of document analysis within the Ethiopian criminal justice process. These cases encompass various forms of deception, such as counterfeit currency, fake identity documents, fraudulent contracts, and forged documents from government institutions.[80]

3.3. Ballistics Evidence

A forensic investigation related to ballistics evidence is about an examination of the trajectory and behavior of projectiles, such as bullets, and ballistics as a way to establish connections between a specific weapon and a crime scene.[81] Ballistics experts gather and scrutinize evidence, including firearms, spent cartridges, bullets, casings, and other pertinent materials, and finally carry out tests to determine the type of weapon employed. The process mostly involves meticulous inspection of the bullet or casing's size, shape, and markings, assessment of any scratches or imperfections present on the surface, and measuring the distance it traveled.[82] Ballistics analysis can also help to identify the type of injury sustained by a victim,. Particularly, a bullet wound's size, shape, and trajectory can give investigators insight into the nature of the

[79] Seada, supra note 33; Zelalem, supra note 70.
[80] Id.
[81] Philip P. Massaro, Big Book of Ballistics, First Edition, Gun Digest, (2017), p.11-14; Seada, supra note 33.
[82] Brian J. Heard, Firearms and Ballistics, Second Edition, Wiley-Blackwell, (2008), pp. 43-48; Seada, supra note 33.

crime, and help determine if the shooter was stationary or moving and other related details.[83]

In certain instances, ballistics analysis may be employed to link a particular suspect to a weapon. When investigators seize a firearm, ballistics analysis may be used to ascertain whether it was used in a specific crime. If the bullet or casing's markings correspond to those on a suspect's weapon, it can provide convincing evidence that the suspect was implicated in the crime.[84] As one of the respondent pointed out in the interview over the subject,[85] ballistics evidence is used in crimes involving firearms such as terrorism, robbery in Ethiopia, and to this effect, firearms, bullet barrels, gunpowder, and others are analyzed to understand the commission of the crime.

While the practice on the ground widely involves such professional activities to day, there is no law that *per se* regulates the utilization of ballistics evidence.[86] According to respondents in the study, the federal forensic investigation department used its own manuals to collect, preserve, and utilizes ballistics evidence in court of law.[87] Yet it is important to note that despite the limited utilization of ballistics forensic investigation in relation to the current demand for criminal investigation, there are notable cases that show potential for the utilization of ballistics forensic evidence in the Ethiopian federal criminal justice process. One prominent case is the

[83] Gerald Burrard, The Identification of Firearms and Forensic Ballistics, First Edition, A.S. Barnes and Co., (1934), p.26-29.
[84] Fisher et al, supra note 4, pp. 31-33.
[85] Interview with Tadele Bereded, Coordinator of Terrorism, Conflicts, and Hate Speech Crimes at Ministry of Justice, Lideta Office (Addis Ababa, 5 June 2023); Interview with Abriham Getaneh, Federal Prosecutor and Coordinator of Organized and Transboundary Crimes at Ministry of Justice, Lideta Office (Addis Ababa, 14 June 2023).
[86] Id.
[87] Tewodros, supra note 20.

assassination of the late General Seare Mekonin, a former General of the Ethiopian Defense Force, and General Gezai Abera, another former military official.[88]

The ballistics investigation report examined multiple elements including bullets, bullet casings, and the firearms associated with the shooting incident. Through such analyses, it was determined that the bullets recovered from the victims' bodies and the bullet box discovered at the crime scene were linked to the firearm confiscated from the defendant, providing evidence of his involvement in the assassination.[89] By examining the markings on the bullets found at the crime scene and comparing them with those created by the firing mechanism of the gun, as well as matching the bullets with the markings on the bullet box, the ballistics investigation concluded that the firearm confiscated from the defendant was the weapon used to kill the two victims.[90]

Another respondent[91] shared experiences related to exhibit handling. He stated that some cases fail because prosecutors fail to see the actual existence and details of exhibits. In one case, a suspect was captured while possessing a firearm believed to be illegal, leading to charges filed by the prosecutor. However, the accused denied the allegations and requested the court to order an examination of the firearm seized from them. Subsequently, a ballistics report demonstrated that the supposed firearm was not an actual gun but rather an Olympic Fire gun.

[88] Federal Prosecutor v. Mesafint Tigabu, Lideta High Court Criminal Bench, File No. 248873, (28 June, 2021).
[89] Id.
[90] Id.
[91] Interview with Seid Kemal, Prosecutor of Terrorism Cases at Ministry of Justice, Lideta Bench (Addis Ababa, 3 July 2023).

In *Federal Prosecutor v. Michael Tadesse*,[92] a third case relevant to the subject, the accused faced charges of possessing an illegal firearm, and the police exhibited a gun allegedly connected to the crime. The prosecution relied on this gun as evidence to strengthen the grounds for conviction. However, the accused requested the court to order a ballistics examination to determine if the gun was functional or not. When the court issued the order, it was determined that the police no longer had the gun in their possession. As a result, the accused was exonerated. Thus, exhibit mishandling may seriously affect the validity of the evidence and the outcome of the case as it is part of the chain of custody.[93]

A significant issue within the Ballistics unit of the federal police forensic investigation department is the absence of stored data for future cases. This lack of data storage becomes problematic when, for instance, the same firearm is used in multiple crimes across different times and locations. As a result, investigations are prolonged as there is no database available to cross-reference a recovered gun with past records.[94]

3.4. Cyber Forensics

Cyber forensics, also referred to as *digital forensics*, is the process of examining digital evidence to discover, assess, safeguard, and present data for legal purposes. It is a crucial element in contemporary criminal investigation, particularly in cases where criminals utilize technology to perpetrate crimes like hacking, identity theft, and cyber stalking.[95] Investigators collect

[92] Federal Prosecutor v. Michael Tadesse, Federal High Court, Lideta Criminal Bench, File No. 227352, (3 May 2023).
[93] Interview with Tewodros, supra note 20.
[94] Seada, supra note 33
[95] EC-Council, Computer Forensics: Investigating Network Intrusions & Cyber Crime, EC-Council Press, (2010), p.1-3; Interview with Inspector Bedilu Yohhannis, Head

electronic evidence from sources such as computers, cell phones, and other digital devices. The evidence collected could be anything from deleted files to internet browsing history, social media communications, and even emails.[96] Cyber experts analyze the data collected in cybercrimes and provide reports to be used in court. With the rise in cybercrimes, it is important to collect all relevant digital evidence like logs of IP addresses, timestamps, and access records because digital evidence is often the most crucial evidence in establishing the motive and identifying the perpetrator.[97]

When it comes to the Ethiopian practice, though limited, there are some legal provisions that govern the utilization of cyber forensic evidence. For instance,[98] Anti-terrorism proclamation No. 652/2009 Article 2(8), Article 14, and Article 29 allow interception of individual's phone, and e-mail. Besides, Articles 45-47 of proclamation No. 434/2005, revised anti-corruption special procedure and rules of evidence proclamation, set out rules on evidences produced by a computer, and voice recordings.

Yet the major problem with the practice in the Ethiopian context is that the cybercrimes unit faces limitations in conducting independent cyber forensics investigation. This challenge particularly visible in cases involving serious and complex crimes, and the police have to rely on assistance from government institutions such as INSA (The Information Network Security Administration) and NISS (The National Intelligence and Security Service).[99] In practice, institutions like INSA may be unwilling to present certain evidence in its original form. For example, telephone recordings may be presented in a script form, and the original recordings may be withheld on the

of Cyber Crimes Division at Federal Police Criminal Investigation Unit (Addis Ababa, 2 June 2023).

[96] Embar-Seddon and Pass, supra note 31.

[97] EC-Council, supra note 95; Bedilu, supra note 95.

[98] Anti-terrorism Proclamation No. 652/2009, supra note 41.

[99] Bedilu, supra note 95.

grounds of national security concerns. As a result, courts may disregard such evidence due to its altered presentation and the refusal to provide the original recording.[100]

Nevertheless, in some cases courts accept the script forms of evidence, even in the face of objections from Public Defenders or the accused. According to the respondents,[101] it appears that courts occasionally show a bias towards the prosecution. Despite this, judges justify admissibility of such evidence and a respondent explained that such evidence is admissible as circumstantial evidence.[102] There is an example of cyber forensic investigation (currently ongoing court case). According to a respondent,[103] during a ceremony to distribute condominium apartments in Addis Ababa, suspicions arose that the selection system had been manipulated to favor a specific list of winners. As a result, a computer forensic investigation was conducted, which provided evidence of a cybercrime committed with the intention of benefiting certain individuals in the process. The individuals involved in the crime, many of whom are computer and ICT experts, are now facing prosecution. The respondent explained that[104] according to the findings of cyber forensics, the software application system was deliberately tampered with to introduce vulnerabilities that allowed remote manipulation of the input data and subsequent outcomes.

[100] Interview with Abriham Getaneh, Federal Prosecutor and Coordinator of Organized and Transboundary Crimes at Ministry of Justice, Lideta Office (Addis Ababa, 14 June 2023); Bedilu, supra note 95; Interview with Mignot Denekew, Federal Prosecutor of Financial Crimes at Ministry of Justice, Lideta Office (Addis Ababa, 14 June 2023).

[101] Interview with Abu Mamo and Tilanesh Asmare, Federal Public Defenders (Addis Ababa, 16 June 2023).

[102] Interview with Feyisa Bedada, Federal High Court Criminal Cases Judge, Lideta Bench (Addis Ababa, 15 May 2023).

[103] Bedilu, supra note 95.

[104] Interview with Idris Selman, Federal Prosecutor of Corruption Crimes at Ministry of Justice, Lideta Office (Addis Ababa, 20 June 2023).

The respondent[105] further explained that to prevent intrusion and remote manipulation, the system was intended to operate solely within a local area network, i.e., limited to specific computers and inaccessible online. However, it was deliberately designed to be connected to the internet network, enabling easy manipulation from any location. As a result, although the system appeared to function fairly and transparently during the ceremony, it was actually manipulated to generate predetermined names as winners of the opportunity

3.5. Forensic Pathology

Forensic pathology deals with the study of postmortem (after-death) examination of dead bodies to determine the cause and manner of death.[106] Forensic pathologists perform examinations of the body, which involve examining injuries, establishing the time of death, and collecting biological samples for further investigation. They employ various techniques to examine the body and obtain evidence, such as X-rays, CT scans, and microscopic analysis of tissue samples.[107] Sometimes, the dead person may be a Jane Doe (unknown corps of a female) or a John Doe (unknown corps of a male). In such instances, a forensic pathology may include DNA and fingerprint tests to identity the victim.[108]

In Ethiopia, there are a few medical institutions like Menelik II Referral Hospital where most forensic pathology examination is made.[109] According to respondents, though there is no law that governs the application of forensic pathology report as a forensic evidence, the federal forensic investigation

[105] Id.
[106] Eckert, supra note 30.
[107] Id.
[108] Pekka Saukko and Bernard Knight, Knight's Forensic Pathology, Third Edition, Arnold Publisher, (2004), p. 98-106.
[109] Simeneh and Cherinet, supra note 63.

department employs its own manual prepared based on best international practices.[110] Though it is not used in all cases,[111] there are promising experiences in federal courts. A couple of stories that illustrate the experiences were reported by respondents. In one of such cases, a man was admitted to a hospital after sustaining injury from an alleged human attack.[112] Unfortunately, the victim passed away while receiving treatment, leading to the accused being charged with homicide. However, the forensic pathology report revealed that the victim's death was not a result of the accused's actions but rather due to a viral infection contracted during his hospital stay. As a result, the accused was cleared of homicide.

A respondent,[113] in another instance, [114] reported that the accused hit the victim in the face, leading to the victim's admission to a hospital and eventual death. Nonetheless, a forensic pathology report revealed that that the cause of death was internal brain bleeding, which could potentially stem from natural causes rather than solely being attributed to the accused's punch. Despite this evidence, the defendant was still deemed guilty. However, the court's decision was reached by a majority vote. Even if the accused was ultimately convicted, the forensic pathology report resulted in a dissenting opinion. The problem here is that in the current practice, forensic pathology reports in the Ethiopian federal criminal justice process do not incorporate a toxicology examination in cases where the cause of death may be linked to toxic substances, rather

[110] Interview with Chief Inspector Wondimagegn Tsegaye, DNA Examination Expert and Head of Forensic Biology Unit (Addis Ababa, 24 May 2023).
[111] Kebe, supra note 60.
[112] Interview with Temesgen Zelalem, Nina Taye, and Abdulkerim Shehibo, Federal High Court Criminal Cases Judges, Lideta Bench (Addis Ababa, 12 May 2023).
[113] Kebe, supra note 60.
[114] Federal Prosecutor v. Solomon Kefene, Federal High Court, Lideta Criminal Bench, File No. 292825, (22 June 2023).

than solely relying on observable internal and external injuries of the victim. This omission has the potential to lead to unjust decisions.[115]

Still in another case with some similarity with first case in this category,[116] a woman stabbed a man, causing him to be hospitalized. Unfortunately, the man passed away leading to the accused being charged with homicide. However, the forensic pathology report determined that the victim's death resulted from an infection he acquired while in the hospital. Consequently, the accused was charged with the lesser offense of inflicting bodily injury on others.[117]

Two well-known cases that serve as most illustrative in the utilization of forensic pathology in Ethiopia's federal criminal justice process are the assassinations of two former high-ranking military officials, General Seare Mekonin and General Gezai Abera[118] and the singer Hachalu Hundessa.[119] The forensic pathology reports demonstrated that the recovered bullets from the crime scenes were the cause of death. The reports provide detailed explanations of how the bullets inflicted injuries and impacted the internal organs of the victims, ultimately leading to death.[120]

3.6. DNA (Deoxyribonucleic Acid)

DNA is unique to every individual, except those individuals who are identical twins or triplets. DNA is known as the "blueprint of life" as the genome

[115] Interview with Melkamu Debie, Federal Public Defender (Addis Ababa. 15 June 2023).
[116] Id.
[117] Federal Prosecutor v. Samrawit Tizazu, Federal High Court, Lideta Criminal Bench, File No. 279648, (12 March 2023).
[118] Federal Prosecutor v. Mesafint Tigabu, supra note 85.
[119] Federal Prosecutor v. Tilahun Yami & 4 others, Lideta High Court Criminal Bench, File No. 260483, (24 December 2021).
[120] Id.

(genetic information) of an individual is entirely contained within their DNA, making it the most unique and reliable form of identifying an individual.[121] DNA can be found in a wide range of sources, such as hair, skin cells, blood, semen, and saliva. By analyzing these samples, forensic specialists can establish a connection between an individual and a crime.[122]

The DNA analysis unit is a recent phenomenon in the Ethiopian criminal justice process. The unit was established on July 9, 2022, for the first time in the country.[123] Though there is no law that governs the application of DNA as a form of forensic evidence, the federal forensic investigation department carries out DNA test for various purposes one of which is its utilization in court of law to assist criminal cases. As such it is utilized as per the internal manual prepared by the department.[124]

Turning to the role of the outcomes, DNA analysis can almost always confirm or exclude a suspect's involvement in a crime. DNA evidence is incredibly enduring and samples can last for centuries or longer, making DNA a reliable form of evidence.[125] In the Ethiopian context, certain limitations can potentially impact the accuracy of DNA testing. One such limitation is the scarcity of chemicals required for the testing process. Additionally, the lack of financial resources to acquire expensive and state-of-the-art devices is another constraint that may affect the accuracy of results.[126]

However, despite its many advantages, application of DNA evidence has its limits in the Ethiopian federal criminal justice process. Forensic experts have

[121] William et al, An Introduction to Forensic Genetics. 2nd.ed., John Wiley & Sons, Ltd, (2007), p.7.
[122] FBI Handbook of Crime Scene Forensics, Skyhorse Publishing Inc., (2008), p.24.
[123] Wondimagegn, supra note 110.
[124] Id.
[125] William et al, supra note 121.
[126] Wondimagegn, supra note 110.

to take due care when collecting, analyzing, and interpreting DNA samples to keep their validity. In addition, DNA samples can be contaminated which can make it difficult to establish a reliable chain of custody.[127] There are instances where police officers have tampered with crucial sources of DNA evidence. In one case, a woman was raped and murdered in a motel, with semen present around her genitalia. However, first responders (police officers) compromised the evidence by cleaning the semen and disposing of it.[128] In the case of homicide, it is primarily investigated by the Addis Ababa Police, with a few exceptions involving federal officials and foreigners falling under the jurisdiction of the Ethiopian Federal Police.[129] According to respondents,[130] the utilization of forensic evidence by the prosecution is not adequate. However, other respondents acknowledged that there are instances where DNA is employed in criminal cases.[131]

In another illustrative case,[132] a woman faced charges of killing her baby, and the prosecution presented eyewitness testimonies and circumstantial evidence, such as the woman found with blood on her hands and clothes. However, the woman denied any involvement in the crime. During the court's evaluation of the prosecution's evidence, it was revealed that there was no conclusive evidence establishing that the baby belonged to her. Additionally, the prosecution lacked evidence to substantiate that the blood discovered on the defendant's hands and clothing is of the deceased baby. To ascertain whether the woman had indeed committed the crime or not, the court ordered a DNA examination. The results of the examination confirmed the blood was from

[127] Jacqueline and Jonathon, Crime Scene Investigation Case Studies, supra note 33.
[128] Interview with Aboma Legese, Coordinator and Prosecutor of Various Crimes Division, Lideta Bench (Addis Ababa, 26 May 2023).
[129] Binyam, supra note 68.
[130] Interview with Asahib Bizuneh and Aynalem Dereje, Criminal Cases Judges at Federal First Instance Court, Lideta Bench (Addis Ababa, 11 May 2023).
[131] Supra note 112.
[132] Id.

the baby and that the baby was indeed biologically connected to the defendant, leading to her conviction.[133]

Interview reports from respondents of the study also show that [134] the prosecution, in most cases, doesn't utilize forensic evidence and this results in detrimental effects on the desired outcome. The respondents specifically highlighted instances where the cases of prosecution become weak and unreliable due to non-utilization of forensic evidence effectively. In one case,[135] a person was charged with statutory rape, which resulted in her giving birth to a child. The prosecution had only the testimony of the victim. The defendant denied the rape allegations and also disputed the paternity of the child. Subsequently, the court directed the prosecution to present DNA results to establish whether the defendant was the biological father of the child. However, by the time the court issued the order, the child had already passed away, and performing a DNA test on the decomposed body was not feasible due to lack of technological tools and experts in the field.

Despite the aforementioned shortcomings, the defendant was convicted based on the victim's testimony and compelling circumstantial evidence. The respondent counter argued that the prosecution was not sufficiently diligent in gathering forensic evidence to support its case, highlighting the potential for the court to have exonerated the defendant. Additionally, he stated that if the prosecution had collected DNA evidence before the child's death, the defendant would have had less room to deny the charges, and the court could have reached a more certain decision.[136] The same respondent stated that[137]

[133] Id.
[134] Interview with Temesgen Shiferaw, Criminal Cases Judge at Federal First Instance court, Lideta Bench (Addis Ababa, 12 May 2023).
[135] Federal Prosecutor v. Girma Abebe, Federal First Instance Court, Lideta Criminal Bench, File No.302906, (24 May 2023).
[136] Id.

there are instances where the prosecution relies on forensic evidence to support its case.

There are, in fact, instances of reports where DNA analysis pay off in the practice. For example, in one particular case,[138] a man was accused of raping a woman with intellectual disabilities. By the time the defendant was charged, the fetus resulting from the rape had already been aborted. However, the prosecution presented compelling forensic DNA evidence, which demonstrated the similarity between the accused's DNA and that of the aborted fetus. As a result, the defendant was ultimately found guilty and sentenced, as he was unable to refute the incriminating evidence.

To add a more illustrative case, a woman was killed in a strangle, the crime scene yielded crucial evidence in the form of a string and a fingerprint. However, despite the potential to extract forensic evidence from the string and the victim's nails for DNA analysis, as well as the presence of a clear fingerprint on the wall, the police failed to conduct a timely forensic examination of the crime scene. Consequently, the opportunity to gather valuable evidence was lost, and the evidence dissipated leading to the suspect's acquittal without consequences.[139]

Respondents in the study also reflected on their experiences as prosecutors. A respondent[140] in this instance stated that the police focus on gathering evidence such as the suspect's blood and clothing from the crime scene. However, other potential forensic evidences such as hair and other remnants found at the scene are often overlooked. Nevertheless, there are instances where DNA testing is conducted to further analyze the evidence. In one

[137] Id.
[138] Federal Prosecutor v. Ketema Begashaw, Federal First Instance Court, Lideta Criminal Bench File No. 302775, (26 April 2023).
[139] Tariku Abate (Federal Police File No. 044/12).
[140] Mihiret, supra note 64.

case,[141] a woman was subjected to sexual assault and subsequently became pregnant. After some time, she filed accusation against the suspect. The pregnancy was terminated through an abortion. Meanwhile, seeking retribution for the accusation made against him, the suspect killed the woman and was subsequently apprehended. To establish a connection between the suspect and the crime, a DNA test was conducted, comparing the blood found at the crime scene, the victim's blood, and the blood discovered on the suspect's clothing at his residence. Furthermore, a DNA test was carried out to determine if there was a match between the DNA of the aborted fetus and that of the accused.. The result of these findings confirmed the match and revealed the rape act as a result of which the perpetrator was convicted.

The experience of Public Defenders also revealed that there are promising practices related to DNA. In one of such cases,[142] a woman was raped and subsequently gave birth to a child. Consequently, the accused faced charges of rape. DNA testing conclusively established that the accused is the biological father of the baby. With no viable defense, the accused was pronounced guilty of rape.[143]

Though DNA test is available in Ethiopia, it is not usually utilized by law enforcement institutions and individuals. Apart from a lack of awareness as to its significance, the cost is a pushing factor not to utilize it. According to a respondent,[144] the cost of conducting a DNA test for paternity is relatively lower compared to testing samples from a crime scene. Currently, the maximum subsidized cost of a paternity test is approximately 8,600 Ethiopian

[141] Federal Prosecutor v. Michael Shimelis, (Federal High Court, Lideta Bench, File No. 301860).
[142] Federal Prosecutor v. Kedir Shemelo, Federal First Instance Court Lideta Criminal Bench, File No.294490, (17 March 2023).
[143] Mihiret, supra note 64.
[144] Wondimagegn, supra note 110.

Birr. On the other hand, testing samples from a crime scene can be quite expensive. This is primarily due to the need for a series of tests and the use of various chemicals in the process. According to a respondent,[145] in a specific instance, the expense associated with a DNA test amounted to 45,000.00 (forty five thousand) Ethiopian Birr. Here it is possible to see that the cost of DNA tests particularly of evidence obtained from a crime scene is not easily affordable, which may be a pushing factor for its application in criminal cases.

An issue concerning the Biology unit of the federal forensic investigation department is the lack of a structured database to store DNA information from individuals who have undergone DNA testing during criminal investigation. Additionally, there are limitations in data sharing practices with federal and regional law enforcement agencies due to the absence of an established system for such exchanges.[146]

3.7. Voice Print

Voice print analysis is one aspect of forensic evidence. Recorded conversations are one of the admissible evidence in court during criminal proceedings. The recording may be intercepted or direct recording. The voice of each individual is different (based on frequency, wavelength, and other differences) and a voice related to a crime can be identified.[147]

Under Ethiopian context, there are limited laws that relate to utilization of voice print as a form of forensic evidence. For instance,[148] Anti-terrorism proclamation No. 652/2009 Article 2(8), Article 14, and Article 29 allow

[145] Kebe, supra note 60.
[146] Wondimagegn, supra note 110
[147] James M. Ulam, the Hearsay Rule: Are Telephone Calls Intercepted by Police Admissible to Prove the Truth of Matters Impliedly Asserted, *Mississippi College of Law Review*, Vol. 113, No.5 (1991), p.351.
[148] Proclamation No. 652/2009, Supra note 41; Proclamation No. 434/2005, supra note 42.

interception of individual's phone to extract voice evidence from the phone communication. Besides, Articles 45-47 of proclamation No. 434/2005, revised anti-corruption special procedure and rules of evidence proclamation, deal with evidences obtained from voice recordings as a form of voice forensic evidence.

In Ethiopia, however, it is a problem where the voice recording cannot be presented or the prosecution is not willing to present it in its original form, but in a script form. In such cases, the accused objects to other forms claiming his constitutional right to confront all the evidence presented against him.[149] Accordingly, the defendant claims the production of the original recording to contest or otherwise admit the contents. This is because the voice recording may not be credible due to various constraints in it such as noise, number of people, and others.[150] As a general principle, before accepting the voice recording as evidence, the court shall decide whether the evidence is relevant to the case at hand. Besides, if the court is convinced that the evidence is relevant, it has to decide in what form the evidence shall be admissible.[151]

Voice evidence that is not presented in its original form may also face potential dismissal by prosecutors. This is due to the concern that such evidence may not be deemed admissible in court. In a specific case involving defendants accused of conspiring to commit terrorism, one of the pieces of

[149] Feyisa, supra note 102; Interview with Mihretab Bayu, Federal High Court, Criminal Cases Judge, Addis Ababa, Lideta Bench, (17 May 2023).

[150] Clifford S. Fishman, Recordings, Transcripts, and Translations as Evidence, the Catholic University of America, (2006), p. 5; Feyisa, supra note 102; Mihretab, supra note 149.

[151] Peter Ashford, the Admissibility of Illegally Obtained Evidence, Chartered Institute of Arbitrators, (2019), p.377-381, [hereinafter Peter, the Admissibility of Illegally Obtained Evidence]; James W. Jennings, Preserving the Right to Confrontation: A New Approach to Hearsay Evidence in Criminal Trials, University of Pennsylvania Law Review, Vol. 113. No.5, (2002), p. 742.

evidence presented was a telephone conversation recorded by INSA (Information Network Security Agency). However, the evidence was provided to the police in written form and the Prosecutor chose to close the case due to insufficient evidence to continue with the criminal charges.[152]

There are similar examples in this regard.[153] In this context, it is essential for prosecutors not only to verify the authenticity of the evidence obtained from institutions such as INSA but also to obtain additional evidence that validates the identification of the suspects' voices. This includes verifying that the voice recordings were cross-checked and confirmed to be genuinely belonging to the suspects.

According to a respondent,[154] Similar to the Biology unit, the Prints and Criminal Records unit lacks a database for cross-referencing an individual's voice in ongoing criminal investigations with previously stored voice prints. Additionally, the department lacks the necessary technology and expertise to conduct voice recognition tests to support criminal investigations and court proceedings. Moreover, the unit does not collaborate with institutions such as INSA and NISS, which possess the essential resources for voice analysis, to enhance its capabilities. Instead, the unit heavily relies on these institutions to carry out investigations related to voice recognition.

3.8. Forensic Toxicology

As noted in section one, toxicology is the scientific study of the impact of chemicals and toxins on living organisms in which biological samples such as

[152] Bontu Fikadu and Urge Wakene, Lideta Office, Prosecution File No. 216/15 & Police File No.761/14.

[153] Gebre-Silassie and 6 others, Lideta Office, Prosecution File No. 585/15 & Police File No. 365/15; Mebru and 14 others, Lideta Office, Prosecution File No. 376/15; Tsehay and 7 others, Lideta Office, Prosecution File No. 757/15.

[154] Behailu, supra note 48.

blood, urine, and hair are examined to determine whether an individual has come in contact with dangerous substances.[155] Samples are analyzed in a laboratory to identify the presence and quantities of toxic substances.[156] Forensic toxicology can also be used to ascertain whether alcohol play a role in a crime. Analysis of a suspect's blood alcohol level at the time of their arrest can provide evidence in cases such as drunk driving accidents, assault, and homicide.[157] Further, toxicology can provide information about the victim's behavior and actions leading to a crime.[158]

In the Ethiopian federal criminal justice process, the practice of forensic toxicology is not applicable and there is not case that utilized toxicology report as an evidence. According to a representative from the forensic department of the federal police, this is primarily attributed to a lack of technology and trained professionals in the field.[159] As a result, many criminal cases remained unsolved. Another respondent reported an instance [160] where a woman tragically passed away while seeking medical assistance. It was difficult to determine the cause of her death. The family alleged professional fault and requested a criminal investigation. The police initiated a criminal investigation, but due to the unavailability of a toxicology examination and report, it was challenging to determine the cause of death. Consequently, the prosecution closed the case due to insufficient evidence to file a criminal charge.[161]

[155] Reddy, supra note 26.
[156] Fisher et al, supra note 4.
[157] Id.
[158] William, supra note 30.
[159] Wondimagegn, supra note 110.
[160] Adanech, supra note 61.
[161] Melaku Mekonin, Federal Police File No. 1411/11.

4. Arson and Criminal Profiling- issues of special significance in connection with forensic evidence

An essential topic concerning forensic evidence is the matter of arson. This form of crime necessitates the presentation of forensic evidence to support a criminal charge. Given that arson is among the most challenging crimes to investigate, it demands a distinct set of skills and expertise. Investigators need to have a deep understanding of the legal and regulatory requirements associated with arson investigation.[162] Further, arson investigation requires a deep understanding of fire dynamics, the behavior of different materials when exposed to fire, and the techniques used to start fires.[163] Experts utilize specialized software to scrutinize fire patterns and anticipate fire behavior. They also collaborate closely with other professionals, such as forensic chemists and electrical engineers to comprehend the source and beginning of the fire.[164]

Arsonists often use accelerants such as gasoline or kerosene to start fire, which can complicate the investigation process.[165] Detecting and identifying accelerants requires specialized training and equipment, and the analysis of evidence from the scene of the fire can be complex and time-consuming.[166] Another unique aspect of arson forensic investigation is the need to work closely with other professionals like firefighters, and law enforcement officials like the police. Firefighters are often the first responders to a fire, and they play a critical role in preserving evidence and documenting the scene of

[162] John E. Douglas et al, Crime Classification Manual, Second Edition, Jossey-Bass Publisher, (2006), p. 261.
[163] Id.
[164] Douglas H. Ubelaker, Forensic Science: Current Issues and Future Directions, Wiley-Blackwell (2012), p. 43-46.
[165] Douglas et al, supra note 162.
[166] Id.

the fire.[167] Forensic analysts will also examine the burn patterns at the scene of the fire. An intentionally set fire will typically have a pattern of burn marks that follow the path of the accelerant, while an accidental fire will produce a different pattern of burn marks.[168] The analysis of burn patterns and the behavior of the fire can provide critical information about how the fire started and can help reduce list of suspects and identify the offender.[169]

As far as Ethiopian context is concerned, arson is a crime punishable up to 15 years of rigorous imprisonment and it is defined as :

> *whosoever maliciously or with the intention of causing danger of collective injury to persons or property, sets fire to his own property or to that of another whether it be building or structures of any kind, crops or agricultural products, forests, timber or any other object.*[170]

However, there is no specific rule to enable the use of forensic evidence in crime of arson. The federal forensic investigation department uses its own manual how to collect, preserve, and present evidence in court of law.[171] In practical cases of arson, the crime is treated with provisions related to crimes against property as there is no specific law that governs cases related to arson.[172]

The forensics unit within the Ethiopian federal police department is in its early stages of development, particularly concerning the requirements for

[167] Mukesh Sharma and Ajay Sharma, Forensic Investigation in Fire & Arson Cases, Rajasthan (2020), p.2.
[168] Paul Bieber, Folklore and Forensics: The Challenges of Arson Investigation and Innocence Claims, West Virginia University, (2016), p.558.
[169] Id.
[170] Criminal Code of Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004, Federal Negarit Gazetta, (2005), Article 494.
[171] Tewodros, supra note 20.
[172] Mihretab, supra note 149.

forensic investigation of arson cases. In essence, the unit lacks proper organization to effectively integrate experts and technologies necessary for handling complex cases that require advanced technological applications. This limitation can be attributed to scarce resources in terms of manpower, technology, and budget.[173]

In terms of court proceedings in the Ethiopian federal criminal justice process, arson cases are typically supported by eyewitness testimonies and circumstantial evidence. However, there are instances where forensic evidence is utilized to establish the occurrence of arson as a criminal act. In one case,[174] a fire erupted in a government office, resulting in the destruction of materials housed within. Given that there were no signs of an accidental fire, suspicion fell on an employee who worked there. Through a forensic investigation, it was determined that the accused intentionally started the fire. The underlying narrative revealed that the accused had embezzled public funds stored in the office and set the fire in an attempt to make it appear as though the money had been lost in an accidental fire.

Another essential topic regarding forensic science and evidence is criminal profiling, a method used to identify forensic evidence linked to perpetrators. Criminal profiling is a technique that originates from the discipline of forensic psychology and it is considered a forensic tool in criminal investigation.[175] It is a unique method that enables investigators to construct a profile of an offender not solely based on witness accounts, but rather on behaviors exhibited during the commission of a crime. It can be described as the procedure of identifying an offender's personality traits, behavioral inclinations, geographic locations, and demographic or biological attributes

[173] Tewodros, supra note 20.
[174] Mihretab, supra note 149.
[175] Richard N. Kocsis, Criminal Profiling: Principles and Practice, First Edition, Humana Press Inc., (2006), p.20.

based on the characteristics of the crime.[176] In a nutshell, profiling is the application of psychology to find offenders. Data utilized to generate profiles may be taken from clues found at the crime scene, as well as from information about the victim, forensics reports, and witness statements.[177]

Criminal profiling is used in a proactive context during an ongoing criminal investigation.[178] It is also referred to as psychological profiling, offender profiling, criminal investigative analysis, and criminal personality profiling.[179] Profiling proves to be a valuable technique as it helps to comprehend the psychological state of the perpetrator, thereby narrowing down the list of potential suspects.[180] In this regard, it helps the investigator to decide the direction of the investigation and this minimizes the time to be taken to find the perpetrator and windup the investigation.[181]

There are arguments about whether criminal profiling is a science that accurately identifies the identity of the offender. On the other hand, some argue that though it seems to be scientific, it cannot correctly predict the identity of the offender. As a result, it is labelled as a *Pseudo-Science*.[182] There is also a widely accepted view that criminal profiling is more of an art than a science while others argue that criminal profiling is a science as it uses

[176] Joseph T. McCann, Criminal Personality Profiling in the Investigation of Violent Crime: Recent Advances and Future Directions, *Behavioral Science and the Law*, Vol.10, No.4, (1992), p.475.
[177] Grover M. Godwin, Criminal Psychology and Forensic Technology: A Collaborative Approach to Effective Profiling, CRC Press, (2001), p. 6.
[178] Id.
[179] Id.
[180] McCann, supra note 176.
[181] Colin Wilson, Criminal Profilers and Their Search for the World's Most Wanted Serial Killers, First Edition, Skyhorse Publishing, (2007), p.18, [hereinafter Colin, Criminal Profilers and Their Search for the World's Most Wanted Serial Killers].
[182] Godwin, supra note 177.

scientific facts for its effective findings.[183] Though criminal profiling plays a significant role in finding the perpetrator, it may in some cases turn out to be entirely wrong resulting in unfavorable outcomes.[184] Further, not all arson crime scenes are amenable to criminal profiling. Typically, crime scenes that are most conducive to criminal profiling are those where there are indications of psychopathology or mental disorder exhibited by the perpetrator. Examples of appropriate instances where criminal profiling is most effective include crime scenes revealing evidence of sadistic torture, ritualistic behavior, evisceration (body organs removal), posturing of the body (abnormal positioning of a body), and others.[185] Cases involving destruction of property, assault, or murder during the commission of a robbery are generally unsuitable for criminal profiling since the personality of the criminal is not generally revealed in such crime scenes. Similarly, drug-induced crimes are not well-suited for criminal profiling as the true personality of the perpetrator is often distorted or altered as a result.[186]

Presently, criminal profiling has gained widespread recognition as an essential method of crime investigation, and it continues to be employed in the United States, Europe, and various other countries to this day.[187] The concept of criminal profiling is unfamiliar within the Ethiopian federal criminal justice process. Detectives, forensic experts, prosecutors, judges, and defense attorneys are not acquainted with the term "profiling." Hence, there is no practice as far as criminal profiling is concerned. However, it is hoped that criminal profiling will eventually be utilized to assist Ethiopia's criminal justice system. This section incorporated the topic to provide readers an

[183] Kocsis, supra note 175.
[184] Godwin, 177.
[185] Embar-Seddon and Pass, supra note 31.
[186] McCann, supra note 176.
[187] Id.

insight into the term and how it is employed in other jurisdictions to assist their criminal justice systems.

5. Challenges in the utilization of Forensic Evidence in Ethiopian Federal Criminal Justice Process

Forensic science plays a critical role in resolving criminal cases and delivering justice. However, in Ethiopia, forensic science faces numerous challenges that hinder its effectiveness. These challenges range from inadequate funding and insufficient training of forensic practitioners to the lack of advanced forensic technology in the country.[188] Furthermore, the absence of consistent utilization of forensic evidence in courts and prosecutions poses a significant challenge. Additionally, there is a noticeable lack of awareness among police officers regarding the importance and practical application of forensic evidence.[189]

One of the primary challenges facing forensic science in the federal criminal justice process of Ethiopia is inadequate funding. The government allocates a meager budget to forensic science, which limits the sector's ability to invest in modern technology and advanced training.[190] This forces forensic experts to rely on outdated techniques and equipment, limiting their ability to analyze evidence accurately.[191] As the investigators lack the necessary resources to conduct forensic investigation to the desired standard,[192] they rely on eyewitness testimonies, which are not always reliable and are susceptible to

[188] Tewodros, supra note 20; Wondimagegn, supra note 110.
[189] Sisay Goa, Deputy Head of Various Crimes Division at Ministry of Justice, Lideta Bench (Addis Ababa, 26 May 2023); Aboma, supra note 128.
[190] Behailu, supra note 48; Seada, supra note 33; Tewodros, supra note 20; Wondimagegn, supra note 110.
[191] Id.

manipulation. This limitation may result in disparities in the gathered evidence, ultimately affecting the administration of justice.[193]

Another challenge is the lack of sufficient and continuous training opportunities for forensic experts and other law enforcement officials.[194] Regarding forensic experts, there is a scarcity of qualified forensic scientists in the country, and a majority of them have insufficient formal training. This scarcity is influenced by the limited availability of institutions offering courses in forensic science and evidence, such as Arba Minch University.[195]

The county's legal framework is also a source of challenge impeding the effectiveness of forensic science. No standardized protocols and procedures are guiding forensic evidence collection, processing, and its admissibility in court in this country.[196] Consequently, inconsistencies arise in the application of forensic evidence within the judicial system, as legal practitioners demonstrate variations in their comprehension and familiarity with forensic science. Likewise, prosecutors lack specific guidelines to determine which types of forensic evidence should be included in a legal charge.[197] This situation can result in discrepancies when incorporating forensic evidence into criminal charges, as there is no mandatory procedure in place to assess and determine the inclusion of specific types of forensic evidence.[198]

Another aspect of concern is the matter of financial resources. The forensic department of the Ethiopian federal police has been unable to hire sufficient number of forensic experts or provide sufficient funding for the procurement

[193] Tewodros, supra note 20; Wondimagegn, supra note 110.
[194] Id.
[195] Seada, supra note 33; Wondimagegn, supra note 110.
[196] Temesgen, supra note 134.
[197] Sisay Goa, Deputy Head of Various Crimes Division at Ministry of Justice, Lideta Bench (Addis Ababa, 26 May 2023); Mihiret, supra note 64.
[198] Wondimagegn, supra note 110.

of essential forensic equipment due to the scarcity of financial resources.[199] In addition, the lack of technical expertise and modern forensic equipment means that analyses are of a lower standard. This lack of capacity affects the outcome of many crimes.[200]

Limited access to essential equipment and tools can hinder forensic investigators in collecting sufficient evidence, potentially resulting in delays or incomplete investigations. [201] This limitation may compromise the accuracy of forensic results, as investigators might struggle to detect trace evidence without access to state-of-the-art laboratory equipment, leading to inconclusive findings. Consequently, the lack of equipment and tools can slow down forensic investigations, delaying justice and adversely affecting the individuals involved in a case. Moreover, inadequate resources increase the likelihood of errors, raising the risk of wrongful convictions and impeding the investigative process. Insufficient access to necessary equipment and tools can also impact the training of forensic experts, leaving them ill-prepared to fulfill their duties effectively. This, ultimately, means that many crimes may go unsolved, and the perpetrators go unpunished.

Concluding remarks

Forensic science can transform the way criminal cases are investigated, prosecuted, and adjudicated in Ethiopia. By employing various scientific techniques, investigators can uncover new information that can lead to successful criminal investigation, even in cases that would otherwise remain unsolved. The use of forensic science has helped to reduce the number of unsolved cases in the Ethiopian federal criminal justice process. However,

[199] Behailu, supra note 48; Seada, supra note 33; Tewodros, supra note 20; Wondimagegn, supra note 110.
[200] Id.
[201] Id.

there are still several issues that need to be addressed to make the application of forensic analysis more effective.

Forensic evidence, its application, and significance is not well-understood by a significant number of Police officers. This poses one of the challenges in effectively securing crime scenes to preserve crucial evidence that requires investigation and analysis by forensic experts. Yet, the utilization of forensic science within the federal criminal justice process of Ethiopia is still in its early stages, leading to inadequate utilization of forensic evidence. Furthermore, in the current federal criminal justice process of Ethiopia, forensic evidence is predominantly employed as circumstantial evidence rather than conclusive evidence.

The absence of sufficient documentation system poses difficulties in accessing closed cases for research purposes. Likewise, an inadequate database system hampers investigation and limits the availability of closed cases for research purposes. The lack of a comprehensive legal framework for the use of forensic evidence in the Ethiopian criminal justice process poses significant challenges. To address these issues, it is crucial for Ethiopia to develop a unified and comprehensive legislation specifically dedicated to forensic evidence. This framework should provide detailed guidelines, procedures, and standards for the collection, analysis, admissibility, and evaluation of forensic evidence. By doing so, Ethiopia can ensure fairness, accuracy, and effectiveness in its criminal justice system, promoting public trust and confidence in the administration of justice. Moreover, among the 25 volumes of cassation decisions from the Federal Supreme Court of Ethiopia, there is a notable absence of decisions related to forensic evidence in criminal cases. This may suggest that forensic evidence is poorly utilized or not used at all.

The following measures are specifically suggested to address the issues pertaining to the application of forensic science within the Ethiopian criminal justice system. First, given the importance of forensic evidence in criminal investigation, universities should consider providing courses related to forensic science such as law, medicine, biology, chemistry, and computer science. These courses can provide students with a solid foundation in the scientific principles and techniques used in forensic investigation.

Second, legal frameworks that will guarantee admissibility of forensic evidence in court proceedings should be developed. Legislation that will regulate the storage, handling, and presentation of forensic evidence in court should also be enacted.

Furthermore, there is a need for courts to develop appropriate internal guidelines that are in line with international best practices. These guidelines help to set detailed standards as to the admissibility of forensic evidence to ensure consistency in the assessment of forensic evidence. Similarly, it is essential for prosecutors to have clear institutional guidelines for the use of forensic evidence. Guidelines can help ensure that prosecutors use forensic evidence consistently and appropriately. Guidelines can also provide prosecutors a discretionary power to decide which evidence to use and how to present it in court.

At last, a comprehensive database system should be established to connect all entities within the federal criminal justice system, enabling the seamless interconnection of criminal records for suspects. Moreover, joint law enforcement database system should be developed to foster interconnection between regional and federal law enforcement agencies.

Some Remarks on Peculiar Facets of Regulatory Regime Governing Atrocity Crimes in Ethiopia.

Bereket Messele[∇]

Abstract

This piece briefly compares the FDRE Criminal Code provisions on atrocity crimes such as genocide, crimes against humanity, and war crimes with the rules and jurisprudence of International Criminal Law. Unlike the approach followed in the latter, the Criminal Code has expanded the category of protected groups from acts of genocide. It also provides an additional actus reus element. There is no specific atrocity offence called crimes against humanity under the Criminal Code. Ironically, the FDRE Constitution proscribes 'crimes against humanity' as a generic term that encompasses genocide, war crimes, and other serious offences, instead of being a separate offence. Whilst the Criminal Code lists acts that constitute war crimes, they are not explicitly defined as 'grave' breaches of the Geneva Conventions in contrast to the Statutes of the ICC, ICTY, and ICTR. Besides, the Criminal Code incorporates other acts as war crimes, the severity of which is questionable in light of the requirements under International Humanitarian Law (IHL). Moreover, unlike the ICC Rome Statute, a plan or policy as part of a large-scale commission of war crimes is not required under the Criminal Code.

Keywords: *Atrocity Crimes; FDRE Criminal Code; Genocide; Crimes; Against Humanity; War Crimes.*

1. Introduction

Atrocity crimes[1] have been (and are still being) committed in several parts of Ethiopia since a long time ago. Over the last five years, such incidents have

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[1] Atrocity crimes are related to the three legally defined International Crimes i.e. genocide, crimes against humanity and war crimes as enshrined in different international treaties and

frequently occurred due to the country's instability. In 1992, the country applied the prosecution mode of transitional justice by establishing ad-hoc "*red-terror trials*" for the former Dergue officials, where genocide and war crimes were the major issues at the trial.[2] The Ethiopian People's Revolutionary Democratic Front (EPRDF), which ruled Ethiopia for over 27 years, was also known for its prevalent violations of human rights and arbitrary killing of citizens despite the fast economic growth of the country.[3] The current regime (led by PM Abiy Ahmed since April 2018) received widespread popular support in the start due to immediate changes brought in the country, such as calling for reconciliation and reform, expressing interest in liberalising the political system, releasing hundreds of political detainees

national laws, namely, 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, annexe (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.

[2] 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).

[3] See, Amnesty International, Ethiopia: 25 Years of Human Rights Violations, Public Statement, AI INDEX: AFR 25/4178/2016 (2 June 2016). As the country was hit by a wave of protests, the EPRDF imposed a nationwide state of emergency several times from 2016 to 2018 in which state security forces injured, killed and detained thousands of protestors. See, 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.

and dropping terrorism charges against opposition party leaders in exile.[4] Despite such, the country has been still knocked by violence, armed conflict, and extensive practice of mob justice by non-state actors, and horrendous crimes have been frequently committed. Following the outbreaks of violence in different parts of the country, hundreds of people were killed and displaced. In October 2019 and June 2020, ethnically and religiously motivated conflicts took hundreds of innocent lives and destroyed properties in many parts of the country.[5] One of the major incidents that led to the occurrence of atrocity crimes was the outbreak of an armed conflict between the Federal Government and the Tigray Region on November 4, 2020. In this conflict, civilians suffered heinous and inhuman attacks committed by both parties to the conflict, most of which could fall under international crimes.[6] These days, there is an ongoing conflict between various non-state actors and the Ethiopian National Defence Force (ENDF) in Amhara, Oromia and a few other regions, which were often instigated by deep-rooted political divisions and disagreements. For instance, EHRC reported mass killings of civilians and arbitrary detention including an attack on medical professionals, patients, and healthcare facilities following deadly hostilities between ENDF and Fano

[4] See for instance, Mahlet Fasil, News: Ethiopia frees Andargachew Tsige, drops charges against Berhanu Nega, Jawar Mohammed and two media organs (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, 2023.

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

[6] 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, at 2.

armed group in the Amhara region.[7] It is evident that the prevalence of atrocity crimes in Ethiopia has been increasing dramatically.

On the other hand, atrocity crimes were legally criminalised in Ethiopia only after the 1957 Penal Code.[8] The country adopted its first codified criminal code in 1930.[9] Before that, any rule included a few criminal provisions codified under a single religious document called *Fetha Negest* (the law of the king).[10] The 1930 Penal Code neither comprehensively addressed several criminal matters nor had provisions on atrocity crimes. Following the 1960's extensive process of modernization of the law through codification, the 1930 Penal Code was replaced by the 1957 Penal Code.[11] The 1957 Penal Code was a relatively modern one and incorporated rules on *genocide* and *war crimes*.[12] After nearly half a century, it was again replaced by the 2004 FDRE Criminal Code (hereinafter, the Criminal Code). Despite the introduction of new crimes,[13] most of the rules governing atrocity crimes are simply

[7] EHRC, The human rights impact of the armed conflict on civilians in Amhara Regional State, public statement, August 14, 2023. See also, EHRC, የኢትዮጵያ ዓመታዊ የሰብአዊ መብቶች ሁኔታ ሪፖርት (ከሰኔ ወር 2015 ዓ.ም. እስከ ሰኔ ወር 2016 ዓ.ም.), last update, July 5, 2024.

[8] The 1957 Penal Code of Ethiopia, Proclamation No. 158 (1957)

[9] Penal Code of the Empire of Ethiopia 1930, entered into force September 1930, published by Emperor Haile Selassie printing house, (1930), Addis Ababa.

[10] The Fetha Negest, The Law of Kings, Translated from Ge'ez by Abba Paulos Tzadua, published by Faculty of Law of Haile Sellassie I University, Addis Abeba, Ethiopia, Chapter XLVII, XLVIII, XLIX, L (homicide, corporeal punishment, drunkenness, arson, usury, etc., (1968). See generally, Asefa Jembare, An Introduction to the Legal History of Ethiopia, Lit Verslag, (2000).

[11] The 1957 Penal Code, *supra note* 8.

[12] *Ibid*. Articles 181–295 of the Penal Code. Apart from the process of modernization, the major reason for the incorporation of these rules is aligned with the country's experience of the horrific attack following fascist Italian rule. For the details see Campbell, The Addis Ababa Massacre: Italy's National Shame (Oxford: Oxford University Press, 2017) 279-331.

[13] These are types of crimes created as a result of technological advancement and the creation of a complex society, such as the hijacking of aircraft, computer crimes, and money laundering, crimes against women and children, etc. See, Criminal Code of the Federal

reproduced from the 1957 Penal Code and incorporated into the Criminal Code without major alteration.[14] The way these crimes are regulated under the Criminal Code has some peculiar aspects compared to the approach followed under the rules and jurisprudence of International Criminal Law. This piece aims to uncover these peculiar aspects of the rules governing atrocity crimes in Ethiopia in light of International Criminal Law.

Atrocity crimes are global problems that in effect necessitate the evaluation of national laws in light of and in comparison, with the International Criminal Law. The way atrocity crimes are regulated under the Criminal Code can be examined in comparison with the rules and jurisprudence of International Criminal Law. Hence, the purpose of this article is to compare national law with international law as a benchmark. The comparative analysis as such enables us to grasp the rules of International Criminal Law and evaluate the Ethiopian counterpart. However, the legal analysis is restricted to offences definition or substantive elements (subjective and objective) of provisions on atrocity crimes under the Criminal Code and International Criminal Law. Other issues such as modes of criminal liability and punishment were not addressed by this article. Accordingly, the upcoming section does two things. First, it briefly describes the provisions governing core crimes under the Criminal Code. Then, the way these crimes are regulated under the Criminal Code[15] is assessed according to International Criminal Law rules, case law and jurisprudence.

Democratic Republic of Ethiopia (FDRE Criminal Code), Proclamation No. 414/2004 entered into force 9 May 2005, preamble.

[14] Generally, while the special Part of the Penal Code in Book II Title II Chapter 1 is entitled 'crimes against laws of nations' which encapsulated core crimes as 'fundamental offences', the caption of this specific part was changed to 'crimes in violation of international law under the 2004 FDRE Criminal Code. See Book III, Title II of the Criminal Code.

[15] FDRE Criminal Code, *supra note* 13. However, some changes introduced by the Criminal Code when it replaced the 1957 Penal Code are also occasionally raised in this chapter.

2. Atrocity Crimes and the Regulatory Regime in Ethiopia

2.1. Genocide

There is no specific provision defining the Crime of Genocide in the International Military Tribunal of the Nuremberg (IMT) Charter.[16] It was not even mentioned in the judgment of the tribunal since genocide was not known during that time and the horrendous acts committed by the Nazis against the Jews and other minority groups were addressed and punished with war crimes and crimes against humanity.[17] It was recognized for the first time as a crime under international law following the adoption of the UN General Assembly Resolution in 1946.[18] Based on this Resolution, the UN Economic and Social Council (ECOSOC) was authorized to prepare the draft Genocide Convention, which the General Assembly finally adopted on 9 December 1948 (hereinafter, the Genocide Convention)[19]

[16] Although genocide was mentioned in the text of the indictment, it did not form a separate charge during prosecution. Rather, it was seen as a conduct which satisfied the requirements of war crimes and crimes against humanity. See Commentary on the Law of the International Criminal Court, edited by Mark Klamberg, Torkel Opsahl Academic EPublisher Brussels, (2017), 19.

[17] Charter of the International Military Tribunal, August 1945, Article 6(c); Werle and Jessberger Principles of International Criminal Law, Oxford University Press, fourth edition (October, 2020) 294; William Schabas, Genocide in International Law: The Crime of Crimes (2nd ed., Cambridge: Cambridge University Press, 2009), at 44&46: Mark A. Drumbl, The Crime of Genocide, in Research Handbook of International Criminal Law-37 Brown publishing (2011). See also Robert Cryer, *et al*, An Introduction to International Criminal Law and Procedure, Cambridge University Press, 4th Revised edition, (August 2019) 207.

[18] UN General Assembly Resolution, the Crime of Genocide, 11 December 1946, A/RES/96, available on https://www.refworld.org/docid/3b00f09753.html, accessed on 20 March 2022

[19] Convention on the Prevention and Punishment of the Crime of Genocide, General Assembly resolution 260 A (III), Approved on 9 December 1948, entered into force 12 January 1951.

It has been almost 73 years since the Convention entered into force and is still applicable without changes.[20] The definition part of the Convention is explicitly transposed into the Statutes of ICC, ICTR, and ICTY[21] and numerous national laws. The first conviction for genocide was made following the judgment of ICTR in the *Akayesu and Kambanda* cases in 1988.[22] Today, the prohibition of the crime of genocide as stipulated under Article 2 of the Convention[23] has attained the status of *ius cogens* norm thereby posing *erga omnes* obligation.[24]

2.1.1. Offence Definition and *Mens Rea* Requirements

[20] Some scholars such as Bassiouni consider that 'genocide is addressed in a single specialized convention that has never been amended or supplemented, notwithstanding the pressing need to do so.' See M. Bassiouni, Introduction to International Criminal Law: Second revised edition, Martinus Nijhoff Publishers, (2013) 154.

[21] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Article 6: UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993, Article 4(2): UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994, Article 2(2).

[22] ICTR, *Prosecutor v. Akayesu*, Trial Judgement, (Judgement) ICTR-96-4-T, 2 September 1998; ICTR, *Prosecutor v. Jean Kambanda*, Appeals Chamber, (Judgement and Sentence), ICTR-97-23-S, 4 September 1998.

[23] Article 2 of the Convention reads: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

[24] UN Framework of Analysis for Atrocity Crimes, A tool for Prevention (2014) 26, available at https://www.refworld.org/docid/548afd5f4.html, accessed on February, 2020. See also, ICJ Advisory Opinion, Reservation to the Convention on the prevention and punishment of the crime of Genocide, ICJ (1951) Rep. 15, 23 ICJ, Case concerning Armed Activities on the Territory of the Congo (DRC v. Rwanda) Jurisdiction of the Court and Admissibility of the Application, Judgement, (3 February 2006), para. 64.

The vast majority of states criminalized genocide in their domestic law after the adoption of the Convention.[25] Ethiopia was a pioneer country in ratifying the Convention.[26] However, it took several years to implement the Convention through domestic legislation.[27] It was only after the promulgation of the 1957 Penal Code that the crime of genocide was made a punishable offence under Ethiopian law for the first time. Subsequently, when the 2004 Criminal Code substituted the 1957 Penal Code, it retained a substantial part of the provision on genocide[28] except for a few, yet important changes.[29]

The title of the Amharic text language of the Criminal Code describes the crime of genocide as '*ዘርን ማጥፋት*', which can be directly translated to English as 'destroying the race'.[30] The Amharic phrase does not include

[25] Antonio Cassese, Gaeta P., Baig L., Fan M., Gosnell C. and Whiting A., Cassese's International Criminal Law Oxford: Oxford University Press, (2013) 122.

[26] Tadesse has well explained the justifications for the then swift ratification of the 1948 Genocide Convention by Ethiopia. Of the major reasons, one is the atrocities committed by Italians following their occupation of the country in 1935. For details, see Tadesse, *supra note 2* at 179 & 180.

[27] Ethiopia has implemented the Convention under its domestic law six years after the coming into force of the Genocide Convention.

[28] Article 281 of the 1957 Penal Code, *supra note* 8.

[29] The most significant alterations as subsequently discussed include its replacement of the Penal Code's controversial *mens rea* requirement of 'plan to destroy' with the Convention's 'intent to destroy' and employed the term 'group' instead of the Penal Code's 'social unit of a multinational population unified in language and culture'.

[30] Article 269 of the FDRE 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:

(a) Killing, bodily harm, or serious injury to the physical or mental health of members of the group, in any way whatsoever or causing them to disappear; or

(b) measures to prevent the propagation or continued survival of its members or their progeny; or

(c) the compulsory movement or dispersion of peoples or children or their placing under living conditions calculated to result in their death or disappearance,

is punishable with rigorous imprisonment from five years to twenty-five years, or, in more serious cases, with life imprisonment or death.

protected groups other than 'race' for the title only meant to notify the destruction of a race as such.[31] Ironically, the operative part of the provision however includes a broader category of protected persons than the Convention as indicated below. Therefore, the above misleading phrase in the Amharic text does not impact the application of the provision to other categories of protected groups – religious, national and ethnical groups. Perhaps, one could argue that titles in legal texts convey an abstract of detail provisions and are not required to go beyond them.

One of the major changes introduced by the Criminal Code was the requisite mental element to commit genocide, which shifted from 'plan to destroy' in the 1957 Penal Code to 'intent to destroy'.[32] It's important to note that according to the Convention, the 'plan to destroy' is not a legal requirement. Additionally, there is a significant distinction between using the phrase 'plan' versus 'intent' as the requisite *mens rea* since the former can only serve to demonstrate the existence of the latter. The ICTR Appeals Chamber in the *Kayishema and Ruzindana* case ruled that the presence of a plan may become a relevant factor while proving the specific intent and facilitating the proof of the crime.[33] Accordingly, the current provision of the Criminal Code resolved the discrepancy concerning genocidal *mens rea*.[34]

[31] Tadesse, *supra note 2* at 182. See also Marshet, *supra note 2*.

[32] According to Tadesse, in practice during the prosecution of Derg officials, both the Federal High Court and Federal Supreme Court 'failed to clarify whether what is referred to as ዕቅድ in the genocide provision of the Penal Code of 1957 meant plan or intent, or both'. As a result, it was not clear whether the Penal Code supports the jurisprudence of international criminal law in which the intent rather than the plan is the required *mens rea* of genocide. See Tadesse, *supra note 2*, at 266. Later on, article 269 of the FDRE Criminal Code replaced the phrase ዕቅድ (plan/intent) under Article 281 of the Penal Code of 1957 with አሳብ (intention). 'በማቀድ' is substituted with በማሰብ'. See Tadesse, *supra note 2* at 195 & 204.

[33] ICTR, *Prosecutor v. Kayishema and Ruzindana*, Appeals Chamber, (Judgement), 1 June 2001, ICTR-95-1-A, para.172. See also Cassese, 'Is Genocidal Policy a Requirement for the

However, what is different under the Criminal Code is it added the word '*organises, orders or engages in*' in the same provision defining genocide. This is a bit strange given the fact that these matters need to be dealt with under modes of participation in Article 32 of the Criminal Code. For all these forms of liability, the general principle of law applies to all forms of crime within the Criminal Code. The writer failed to find any reason for incorporating these modes of participation in the offence definition other than its being repetition.

On the other hand, the Criminal Code failed to incorporate the phrase '*as such*, which is in the offence definition of genocide under the Convention, ICC, ICTR, and ICTY statutes. Since different meanings are attached to the phrase, it remains ambiguous.[35] It was included under the Convention and ICC statute to avoid the explicit reference to the word 'motive' as there was disagreement during the negotiation of the Convention.[36] Although the motive for which a crime is committed is irrelevant to establishing criminal responsibility, it is debated that the discriminatory nature of the attack in genocide necessitates such.[37] Ad-hoc tribunals also interpret the phrase as emphasising the intent to destroy the protected group. For instance, ICTR and ICTY indicated that the phrase '*as such'* signifies 'that the victim of a crime of genocide is not merely the person but the group itself'.[38] But then, there is

Crime of Genocide?' in P. Gaeta (ed.), The UN Genocide Convention: A Commentary (Oxford: Oxford University Press, 2009) 128-136, 135.

[34] Tadesse, *supra note 2*, at 204.

[35] Schabas, Genocide in International Criminal Law, *supra note 17*, at 298&299.

[36] *Ibid*, 294. See also, A Greenawalt, Rethinking Genocidal Intent: The Case for a Knowledge-based Interpretation, Columbia Law Review (1999) 2259.

[37] ICTR, *Prosecutor v. Musema*, Appellate Chamber, (Judgement), ICTR-96-13-A, 16 November 2001 para. 165.

[38] ICTR, *Niyitegeka v. Prosecutor*, Appeals Chamber, (Judgment), 9 July 2004, ICTR-96-14-A, para. 53; ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Judgment), 26 February 2007, ICJ Reports 20076, para. 187.

an argument that such protective purpose of the criminalization of genocide is already expressed by the specific intent-requirement - *dolus specialis* to destroy the group in whole or in part.[39] Tadesse rightly justified the absence of the phrase in the Criminal Code that because of its ambiguity, it would be difficult for the legislator to find the appropriate terminology in the Amharic language that could properly describe the phrase.[40]

2.1.2. Extra Category of Protected Group: Recognition of *Politicide*

The Criminal Code replaced the phrase 'social unit of a multinational population unified in language and culture' in the 1957 Penal Code with a single word 'group' and explicitly recognized the four protected groups - racial, ethnic, national, and religious groups as enshrined under the Convention. What is interesting is that the Criminal Code extended the list of protected groups and additionally recognized *political, nation, nationality, and colour groups*, which was described as 'covering *twice* the number of groups protected by the Convention'.[41] By doing so, it adds categories of protected groups not mentioned in the Convention's definition of genocide.[42]

[39] Laras Berster, 'Article II' in C.J. Tams et al., Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (München: C.H.Beck.Hart.Nomos, 2014), 152; Werle and Jessberger, Principles of International Criminal Law, *supra note 17,* at 156&315. ICTY, in *Tolimir* case, noted that 'the term "as such" emphasises the crime's prohibition of the destruction of the protected group itself'. See ICTY, *Prosecutor v. Tolimir,* Trial Chamber, (Judgement), 12 December 2012, IT-05-88, para. 741.

[40] In this regard, Tadesse tried to adduce the Federal High Courts' judgement in Mengistu *et al.* case where the court translated the Convention's definition of genocide to show the difference with the 1957 Penal Code in which it finally omitted the phrase '*as such*' in the translation. According to him, this suggests that 'either the terms were viewed as redundant additions by the Court or that their exact meaning was actually not obvious to the Court.' See Tadesse, *supra note 2* at 285.

[41] Tadesse, *supra note 2* at 204.

[42] Such addition of a broader category of protected group in the Criminal Code can be justified in light of the 1995 Constitutional approach which makes nations and nationalities as building blocks of the Constitution. It re-affirms that nations, nationalities and peoples are the holders of ultimate sovereign power and are entitled to every right including self-determination and secession. See article 8 and 39 of the Constitution.

This is indicated by some as a progressive move in light of International Criminal Law jurisprudence according to which there should be a closed one/exhaustive.[43] Except for the ICTR's decision which supports the non-exhaustive nature of the list of the protected group in the *Akayesu* case,[44] such a view is not held in the case-law of both the ICTY and ICC.[45] Since the introduction of the Convention, there have been critics for the limited focus on protected groups.[46] The various efforts to include even other groups namely, political and social were unsuccessful.[47] Only a few countries including Ethiopia, Bangladesh, Colombia, Costa Rica, Côte d'Ivoire, Ecuador, Poland, Slovenia, and Lithuania included '*political groups*' as one of the protected groups from genocidal acts.[48] Hence, the Ethiopian Criminal Code like the above countries appears to remedy the gap of the Convention.[49]

[43] Marshet, *supra note 2* at 76.

[44] ICTR, *Akayesu*, Trial Judgement, *supra note 22*, para. 511&516. Based on the *travaux préparatoires* of the Convention, the court determined that the drafters intended to protect any *stable and permanent group* rather than the groups specifically mentioned. See also Schabas, Genocide in International Criminal Law, *supra note 96*, at 153.

[45] ICTY, *Prosecutor* v. *Krstic*, Appellate Chamber, 19 April 2004, para 8; ICC, *AI Bashir Arrest Warrant*, Pre-Trial Chamber I, ICC-02/05-01/09-3, 4 March 2009 paras. 137.

[46] Cassese's International Criminal Law, *supra note 25, at* 122; Van Schaack, Beth, The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot, Yale Law Journal, Vol. 106, No. 2259, (1997) 2291; Cherif Bassiouni, Crimes Against Humanity in International Criminal Law, Second Revised Edition, American Journal of International Law, Volume 88 Issue 1, (1992); Cherif Bassiouni, International Criminal Law, Volume 1: Sources, Subjects and Contents Volume I, 3rd Edition, Published by Brill Nijhoff, (2008).

[47] David Nersessian, Genocide and Political Groups, Oxford University Press, (2010) 21; Report of the Preparatory Committee on the establishment of an international Criminal Court, Vol. I, Supp. No 22, A/51/22 (1996), para. 60.

[48] Marshet, *supra note 2* at 92. The same also applies in the Spanish *Pinochet* case. See, Van Schaack, Spanish Pinochet, American Journal of International Law, (1999) 693.

[49] Some suggest that 'political Group' comes under the scope of genocide protection by virtue of customary international law. See for instance, Beth Van Schaack, The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot, Yale Law Journal 106 (1997) 2259. However, Schabas criticize that it is ambitious to suggest that the practice of a few countries (which criminalized politicide under their domestic laws) defines some customary norm including political groups in the definition of genocide. See, William Schabas, An

In practice, the Ethiopian courts also passed decisions on the commission of genocide against a 'political group'.[50] In that respect, the Federal High Court in *Colonel Mengistu Hailemariam et al* case even stressed that 'the exclusion of political groups from the Convention's definition was in itself political, lacking any philosophical and legal justifications'.[51]

Against such, Tadesse discoursed that '…there could eventually be nothing that could prevent the treatment of all human groups as protected groups in the Ethiopian law of genocide'.[52] This seems a viable argument in light of what is enshrined under the Criminal Code. One could further submit that so long as the crime of genocide requires the specific '*intent to destroy'*, it does not seem problematic, though challenging, to extend the cart of a 'protected group'. Unlike crimes against humanity or war crimes, the gravity of genocide is mainly marked by the intent to destroy a protected group in whole or in part, which is principally in the mind of the perpetrator. The scope of interests protected by the crime of genocide is therefore narrower than that of crimes

Introduction to the International Criminal Court 3rd edn, Cambridge University Press, Cambridge, (2007) 162.

[50] The major one is the prosecution of Derg officials in the Red Terror Trials. The conviction for the crime of *politicide* is made based on the Penal Code 1957. In this trial about 3,583 Derg officials were convicted of heinous crimes and other ordinary crimes, of which about 1,100 were convicted for genocide against political groups and other crimes. See Marshet *supra note 2 at* 174. Some of the infamous cases include FHC, *SPO v. Colonel Mengistu Hailemariam et al.*, (Trial Judgment) 12 December 2006, File No. 401, 116.; FHC, *SPO v. Colonel Tesfaye Woldeselassie et al*., (Sentencing Judgment), 4 August 2003, File No. 03101, 26-32. After the Red Terror Trials, leaders of the Coalition for Democracy and Union (CDU) political party are also accused of politicide following the 2005 post-election violence during the EPDRF ruling. FHC, *Federal Prosecutor v. Hailu Shawulet al*., (Trial Ruling), 3 May 2007, File No. 43246/97. Marshet generally regarded it as the recognition of *politicide* as a form of genocide under Ethiopian law. See, Marshet, *supra note 2* at 93. Tadesse also indicates that the Ethiopian courts rejected the argument mentioned for the exclusion of political groups from protected groups on 'stable and permanent groups' long before it was raised in the international tribunal. See, Tadesse, *supra note 2* at 209.

[51] FHC, *SPO v. Colonel Mengistu Hailemariam et al*., (Ruling on Preliminary Objections), 10 October 1995, File No. 1/87, 104-105. See, Tadesse, *supra note 2* at 209.

[52] *Ibid* at 228.

against humanity, as it specifically pertains to attacks on civilian populations. Expanding the scope of genocide may complicate cases by creating overlap and broadening the situations to which it applies. Despite such limitations, one could argue that the Criminal Code has taken a step forward, such as including political groups. States are not barred from using broader definitions if they believe it offers better protection for the victim as long as it does not contradict the minimum requirement under the Convention.[53] The difficulty of invoking universal jurisdiction under customary international law for the part extended by the Criminal Code beyond the *erga omnes* definition of the crime of genocide could be a potential (procedural) limitation in this regard.

2.1.3. Prohibited Acts

Individual acts of the crime of genocide have one common aspect. They are all targeted toward the destruction of the physical, biological, or social existence of the members of the protected groups. While six behaviours amounting to *actus reus* of genocide are provided under the FDRE Criminal Code, the Convention and ICC Statute list five prohibited acts.[54] Peculiarly, the Criminal Code further recognized 'causing members of a group to disappear' as prohibited acts of genocide.[55] Another visible difference is, under the Criminal Code 'compulsory movement or dispersion of *peoples or children*'[56] constitutes an individual act of genocide, but when it comes to the Convention as well as the Statutes, the equivalent conduct is stated as 'forcibly transferring children of the group to another group'.[57] It is clear that

[53] See, Article 3 of the 1957 Convention, *supra note* 8.
[54] See Article 2 of the Genocide Convention, article 269 of the FDRE Criminal Code and Article 6 of the Rome ICC statute respectively.
[55] See above subparagraph (a) of article 69 of the FDRE Criminal Code. Except for this additional act, the Criminal Code reproduced the list of individual acts of genocide stipulated under the repealed Penal Code.
[56] See Article 269 (c) of the FDRE Criminal Code.
[57] See Article 2 (e) of the Genocide Convention.

the latter only requires 'forcible transfer of *children'*, *not people*. The Criminal Code added 'people' apart from not specifying that the compulsory movement must be from one group to another. One could argue that the Criminal Code's formulation seems to have forced displacement or similar acts in mind as a form of the *actus reus* of genocide. Marshet however considers that unless the purpose of compulsory transfer of people is also to exterminate them physically, it is not sufficient to be regarded as an underlying act of a crime of genocide.[58] This might also coincide with the conduct of 'ethnic cleansing' in which civilians belonging to a particular group are forcefully expelled from an area, a village, or a town. As the District Court of Jerusalem concluded in the *Eichmann* case, such conduct does not necessarily constitute genocide if its purpose is 'only' to remove a group of people from a territory.[59] Likewise, the ICTY in the Brđanin case held that the criminal strategy of cleansing Bosnian Krajina had been committed with the "sole purpose of driving people away" and there is no evidence that the conduct had been committed with the intent required for genocide.[60] It therefore appears that, while the forced transfer of people may not have any legal significance *per se*, it may serve as an indicator of a special intent of genocide.

The rest of the prohibited acts look similar except for the terminologies used. For instance, while both the Conventions and ICC Statute use the same terminology of 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part', the counterpart of the Criminal Code says 'placing under conditions calculated to

[58] The central point of his argument is that 'the compulsory transfer of people as such, more often than not, fails to fulfil the genocidal intent to eliminate the possible targets of genocide, which is the core element of the crime of genocide'. Rather, he considers such an approach 'a trivialization of the nature of the crime'. Marshet, *supra note 2* at 79.

[59] Eichmann v. Israel Attorney General, 36 ILR 5 (DC) (1968).

[60] ICTY, *Prosecutor v Brđanin*. Trial Chamber II, 1 September 2004, para 118.

result in their death or disappearance'.[61] Nevertheless, it is worth noting that 'placing' could potentially be interpreted as a lower threshold than 'deliberately inflicting', significantly extending the definition of *actus reus.* Likewise, the Criminal Code uses the broader term 'measures to prevent the propagation or continued survival of its members or their progeny' while both the Convention and ICC statute infer as 'imposing measures intended to prevent births within the group'.[62]

2.2. Crimes Against Humanity

Unlike genocide and war crimes, crimes against humanity are not regulated through a separate Treaty/Convention. It was first by the Nuremberg Charter[63] and later by the Tokyo Charter[64] that crimes against humanity were criminalised. A major advanced rule came after the promulgation of ICTY, ICTR, and ICC statutes.[65] However, the crime is not defined uniformly in these Statutes.[66] Nonetheless, the two major contexts in the commission of listed acts i.e., 'a widespread or systematic attack' and 'against a civilian population' form part of the constitutive elements of the definition of the crime as developed under customary law.[67] The terms 'widespread or systematic attack' are explicitly mentioned only in the ICC and ICTR

[61] See article 6(c) of the ICC statute and article 269 (c) of the FDRE Criminal Code.
[62] See article 2 (d) of the Genocide Convention, article 6 (d) of the ICC statute and article 269 (b) of the FDRE Criminal Code.
[63] Article 6(c) of IMT Charter.
[64] United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (London Agreement), (8 August 1945) article 6(c).
[65] The content of crimes has evolved since WWII through these statutes and the jurisprudence of their respective courts.
[66] See article 7(1) of the ICC Statute, article 5 of the ICTY and article 3 of ICTR.
[67] UN, Framework of Analysis for Atrocity Crimes: *supra note* 24.

Statutes.[68] It is generally because of these contexts of the commission of the crime that it is branded as an international crime, which could otherwise be regarded under ordinary crime such as murder and torture in the domestic jurisdiction.

2.2.1. The Neglected Regime under Ethiopian Criminal Law

There is no separate crime called 'crimes against humanity' under Ethiopian law, with its *mens rea* and *actus reus* elements. Hence, one cannot be specifically prosecuted for such a crime pursuant to the existing law. Instead, the term 'crimes against humanity' is merely mentioned both under the Constitution and the Criminal Code as encompassing different categories of international crimes. To begin with, Article 28(2) of the Constitution, which is captioned as 'Crimes against Humanity', reads:

Criminal liability of persons who commit crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearances or torture shall not be barred by statute of limitation. Such offences may not be commuted by amnesty or pardon of the legislature or any other state organ.[69]

[68] The ICTY does not mention such elements. The *chapeau* of the provision reads that '…shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population…'. Similarly, see article 6 of IMT, it does not mention such elements. Whereas, article 3 of the ICTR provides that '…when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds…' but without any link with an armed conflict and Article 7(1) of the ICC Statute reads '…when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack…'.

[69] Constitution of the Federal Democratic Republic of Ethiopia, 1995, Federal Negarit Gazzeta, Proc. No. 1, 1st Year, No.1, Article 28(2). The provision actually is meant to provide a rule on the statutes of limitation and amnesty or pardon for the crimes listed therein. However, one can envisage that it incidentally indicates the crimes against humanity as generic crime that encompasses genocide, summary execution, forcible disappearance or torture.

Accordingly, the Constitution treated genocide and other crimes as falling under the general category of crimes against humanity. Indeed, the *travaux* préparatoires of the Constitution also indicate its broader conception than being a separate offence.[70] Likewise, the legislator has used the term crimes against humanity to broadly denote international crimes in Article 44(1) of the Criminal Code and refer to genocide and war crimes specified under Articles 269-274. The provision is neither designed to define crimes against humanity nor elaborate it as such since it is rather meant to govern a statute of limitation.[71] The reference to the other provisions of the code dealing with genocide and war crimes generally shows the legislators' assumption that crimes against humanity broadly encompass these crimes. The issue becomes clearer when one looks into the specific acts criminalised as violations of International Law in those provisions of the Criminal Code i.e., articles 269-274. None of these provisions defines a specific act of crimes against humanity except acts of genocide and war crimes.[72] Here too, the *travaux* préparatoires of the Criminal Code precisely count genocide and crimes against humanity as similar acts and accordingly clarify the cause for abolishing the term 'Crimes against Humanity' in the text of the Criminal

[70] The Constitutional Assembly, Minutes of Constitutional Assembly; Discussions and Debates on the Making of the FDRE Constitution, Vol. 5, (Unpublished, Addis Ababa, Ethiopia, 1994)107.

[71] This provision is part of the rules regulating 'Participation in Crimes Relating to The Mass Media' under chapter IV of the Criminal Code and specifically it deals with special Criminal Liability of the Author, Originator, or Publisher who contributes to the commission of different serious crimes including crimes against humanity defined under Articles 269 – 274.

[72] That section of the FDRE Criminal Code is entitled 'Crime in violation of international law' under the chapter named 'fundamental crimes'. *Ibid*.

Code,[73] unlike article 281 of the 1957 repealed Penal Code which indicated them alternatively.[74]

The author opines such a broad stipulation of crimes against humanity under Ethiopia law coincides with the classical understanding which considers genocide as a subclass of crimes against humanity. For instance, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968) treats genocide as one category of crimes against humanity.[75] At one point, ICTR for instance explained that the crime of genocide is a type of crimes against humanity,[76] although later it also explained their difference.[77] There are times in history when 'Genocide' was regarded as a specifically odious and heinous form of crimes against humanity,[78] although later the definition of these crimes evolved in different paths. Likewise, some domestic laws characterise the crime of genocide as a species of crimes against humanity.[79] That way, the Ethiopian law seems to reflect the classic understanding that crimes against humanity encompass

[73]The *travaux* préparatoires document of the FDRE Criminal Code, (Unpublished, Addis Ababa, Ethiopia, 2003) 143&144.

[74] The naming of the offence under the title of article 281 of the Penal Code reads 'genocide; crimes against humanity'.

[75] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968), Article 1.

[76] ICTR, *Prosecutor v Kayishema and Ruzindana*, Trial Chamber (Judgement) 95-1-T, 21 May 1999, para.89. See also, K. Ambos, Treatise on International Criminal Law: Vol II, The Crimes and Sentencing, Oxford, Oxford University Press, (2014) at 2&5 and Werle and Jessberger, *supra note 17*, at 328.

[77] ICTR, *Kayishema and Ruzindana*, Trial Chamber (Judgement), *supra note 76*, para. 89.

[78] United Nations War Crime Commission, History of the United Nations War Crime Commission and the Development of the Laws of War, London, (1948). Furthermore, Alette and Fred noted that 'Genocide was for a long time considered a subset of crimes against humanity as genocide fulfilled the legal requirements for categorization as crimes against humanity.' See, Alette Smeulers and Fred Grünfeld, International Crimes and other Gross Human Rights Violations, A Multi- and Interdisciplinary Textbook, International and comparative criminal law series, v. 32, Martinus Nijhoff, publishers, (2011) at 90.

[79] See for instance, Article 211-1 of the French Penal Code of 1992, Article 611 of the Estonian Penal Code, and Article 313 of the Penal Code of Burkina Faso.

different crimes, of which genocide is one. This is generally striking given the fact that crimes against humanity have been criminalised as a separate offence in international and domestic laws for nearly a century. Hence, the question remains, is whether the absence of domestic laws necessarily precludes the prosecution of the crime before the courts of Ethiopia. Below, relevant suggestions are made in this respect.

2.2.2. Possible Way-out: Customary International Law aspects of Crimes against Humanity

Several countries incorporated the definition given for crimes against humanity as enshrined under the ICC Statute into their national laws.[80] Yet, Ethiopia is neither a signatory nor a party to the ICC Statute. Lack of regulation of the crime in Ethiopia becomes more challenging for there is no precedence of prosecution and punishment of such crimes by the domestic courts.[81] Consequently, Marshet indicated two alternatives as a solution. The first is recourse to ordinary crimes to investigate and prosecute perpetrators of crimes against humanity. He argues that this approach is followed in the prosecution of the Derg officials.[82] The idea is through the application of rules on ordinary crimes such as killing, torture, rape, etc., it is possible to least fight impunity and ensure the accountability of the perpetrator of crimes against humanity. Nevertheless, the problem with this approach is that it lacks the moral condemnation and labelling that should be attached to core crimes, notably crimes against humanity in this case. The author rather sees the possibility of prosecuting through war crime if it is connected with armed conflict and in so far as the individual acts committed coincide with the

[80] Darryl Robinson, The Draft Convention on Crimes against Humanity: What to do with the Definition?' in Morten Bergsmo and Song Tianying, *eds*, On the Proposed Crimes Against Humanity Convention (FICHL 2014) 103.
[81] Marshet Tadesse, *supra note 2*, at 106.
[82] *Ibid*.

requisite *mens rea* of war crimes under customary international law. This is because crimes against humanity are often committed in the period of an armed conflict or some sort of violence.[83] However, it is still challenging to envision this possibility in situations that may not be classified as an armed conflict. This is because crimes against humanity encompass a different contextual element i.e., the commission of underlying acts, such as killing and persecution of civilians, as part of a *widespread* or *systematic* attack.

The second is the application of international criminal law on crimes against humanity for domestic prosecution. It is usually the case that customary international law (upon passing through the test of *opinio juris* and *state practice*) becomes applicable in domestic situations in areas where international treaty norms are not incorporated into the legal framework of a given state.[84] The central point of Marshets' argument is that '... the criminalization of crimes against humanity has risen to the level of a *jus cogens* which imposes *erga omnes* obligation which means a non-derogable duty owed to all mankind'.[85] In fact, certain forms of crimes against humanity

[83] Alette Smeulers and Fred Grünfeld, *supra note 78*, 46&86.

[84] Cherif Bassiouni, International Crimes, Jus Cogens and Obligatio Erga Omnes, Law and Contemporary Problems Vol. 59, No. 4, (1996) 277; Hannes Vallikivi, Domestic Applicability of Customary International Law in Estonia, Juridica international, Vol.7, (2002), 28.

[85] See Marshet, *supra note 2*, at 106. His argument is supported by several scholars. See for instance,

Werle and Jessberger, *supra note 17*, at 330; Bassiouni *supra note 99*, at 158; Cassese A, Genocide. In: Cassese A, Gaeta P, Jones JRWD The Rome Statute of the International Criminal Court Vol I. Oxford University Press, New York, (2002), at 191; Schabas *supra note 96*, 143; Ambos, *supra note 76* at 40; De Hoogh A, Obligation Erga Omnes and International Law: A Theoretical Inquiry into the Implementation and Enforcement of International Responsibility of States, Kluwer Law International, The Hague, (1996), at 63; Tam CHJ, Enforcing Obligations Erga Omnes in International Law, Cambridge University, Press, Cambridge, (2010); Van Schaack B, The Definition of Crimes Against Humanity: Resolving the Incoherence, Colum. J. Transnat'l L. 37, (1999), at 850. See also, *Nulyarimma v Thompson*, Federal Court of Australia, Judgment of 1 September 1999, para. 18-21. Hence, the point is that such a justification confers the Ethiopian Courts jurisdiction over crimes against humanity.

have attained customary international law status. The case law of the ICTY and ICTR,[86] the UN Secretary-General,[87] and the Law Commission[88] established the fact that criminal liability for crimes against humanity represented an imperative standard of international law.[89] Unlike war crimes and genocide, which have been codified in a separate treaty, crimes against humanity is evolved through customary international law.[90] Furthermore, a state can even prosecute past perpetrators without violating the principle of legality and non-retroactivity of criminal law since core crimes including crimes against humanity have already attained the status of customary international law.[91] For instance, the trial panel of the former Court of Bosnia and Herzegovina held that although crimes against humanity were not included in the criminal code during the conflict between 1992 and 1995, in

[86] Court of Bosnia and Herzegovina, *Mitar Raševid et al*., Case No. X-KRZ- 06/275, 1st Instance Verdict, 28 Feb. 2008, p. 164; ICTR, Akayesu, Trial Judgement, *supra note 22*, at 577.

[87] UN Secretary-General Report pursuant to paragraph 2 of Security Council Resolution 808 (1993) 34&48.

[88] International Law Commission (ILC), Commentary on the Draft Code of Crimes against the Peace and Security of Mankind (1996), Article 18.

[89] *Ibid*, Article 26.

[90] Robert Cryer, *et al*., *supra note 17*, 231 & ff. Commentary on the Law of the International Criminal Court, *supra note 15 at* 121&122.

[91] Several international human rights law instruments and regional human rights courts affirm the retroactive prosecution of a person for the commission of core crimes as the exception to the principle of legality. See, the International Covenant on Civil and Political Rights (ICCPR), General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, article 15 (2); Universal Declaration of Human Rights (UDHR), (1948), article 11(2). Vienna Convention on the Law of Treaties, (1969), entered into force on 27 January 1980, article 57&64. ECtHR, *Vasiliauskas v. Lithuania* (App.no. 35343/05) (October 2015). In this case, the Court ruled that the conviction for political genocide under the new Criminal Code of Lithuania is a violation of the prohibition of retroactive application of law. Regarding crimes against humanity, a Court would still have to determine that a particular form of conduct amounted to customary international law at the time of commission and, in addition, that this was sufficiently known to the perpetrator. See the recent case of Kosovo Specialist Chambers, *Specialist Prosecutor vs Thaçi (Hashim) and others*, Decision on the application for interim release, Case No KSC-BC-2020-06, KSC-BC-2020-06/F00412, ICL 2102 (KSC 2021).

1992 crimes against humanity were accepted as part of customary international law and constituted a non-derogative provision of international law.[92] Therefore, it can argued that certain forms of 'crime against humanity' falls under *jus cogens* rules which imposes *erga omnes* obligation on states.

Accordingly, it seems vital to look into elements of the crimes against humanity as recognized under customary international law so that the Ethiopian courts can consider them during domestic prosecution. Therefore, the question is which elements of 'crimes against humanity' have attained the status of customary international law and how they are interpreted and applied. Except for some differences in the contextual elements, the Statutes of ICTR and ICC including the decisions of Courts generally reflect crimes against humanity as they existed under customary international law.[93] The essential elements that must be established before any particular act is regarded as a crime against humanity include: the accused commits a prohibited act in a "widespread or systematic" manner, which is "directed against any civilian population",[94] and there must be a nexus between the acts of the accused and the attack.[95]

Looking at the elements that are not required under customary international law, although the ICTY statute requires that the attack must be committed in the context of an armed conflict, the Court held that a connection with an

[92] *Mitar Raševid et al*., *supra note 86*, at 165.
[93] International Criminal Law Services (ICLS), International Criminal Law & Practice Training Materials, OSCE-ODIHR/ICTY/UNICRI Project on Supporting the Transfer of Knowledge and Materials of War Crimes Cases from the ICTY to National Jurisdictions, Module 7, Crime against Humanity, (2018) at 4, available on https://iici.global/0.5.1/wp-content/uploads/2018/03/icls-training-materials-sec-7-cah1.pdf, accessed on 20, February 2022.
[94] UN, Framework of Analysis for Atrocity Crimes, *supra note* 24, at 22.
[95] ICLS, *supra note* 93, at 4.

armed conflict is not required.[96] Similarly, the ICTR statute requires the attack to have a discriminatory element, but this is not required under customary international law.[97] The ICTR Appeals Chamber in this regard held that the discriminatory ground restriction in the Statute applies only to that Court and is not a requirement in customary international law.[98] Also, in the ICC the above two elements are not required.[99] Moreover, the ICTY held that as a matter of customary law, it is not required to show that the attack was carried out as part of a 'policy' or 'plan'.[100] This is rather required under the ICC statute that the attack must be committed under or in furtherance of a State or organisational policy.[101]

Material/individual acts of crimes against humanity listed under the three statutes seem quite comparable although the ICTY and ICTR have a list of around 8 acts whereas the ICC has more than 10 lists as an act broadly proscribed encompass several acts.[102] Additionally, the phrase 'other inhumane acts' is included in all of them whereas the ICC statute further reads

[96] ICTY, *Prosecutor v. Dusko Tadic a/k/a*, IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (October, 1995) para. 141; Extraordinary Chambers in the Court of Cambodia, *Prosecutor v. Kaing Guek Eav*, (Case No. 001/18-07- 2007/ECCC/TC), Trial Judgement, (July 2010), 218.

[97] However, it should be underlined that it is only the contextual element of the 'attack' that needs to be non-discriminatory since the individual acts of crime of persecution might *per se* requires the persecution be carried-out on discriminatory grounds. See ICLS, *supra note 93* at 7.

[98] ICTR, *prosecutor v Jean-Paul Akayesu*, Appeal Chamber (Judgement), ICTR-96-4-A, 1 June 2001, para. 469.

[99] *Ibid*.

[100] See, ICTY, *Prosecutor v. Kunarac et al*., Appeals Chamber, (Judgment), 12 July 2002, IT-96-23/1-A, 96&98. The trial panel ruled that there is no requirement that the acts of the accused were supported by any form of "policy" or "plan" at the ICTY or in customary international law. But, the court at the same time noted that it is relevant to establish the attack was necessarily widespread or systematic, or directed against a civilian population.

[101] The ICC Statute, article 7(2).

[102] See article 7(1) (a-k) of the ICC Statute, article 5 (a-i) of the ICTY and article 3(a-i) of ICTR.

'other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or mental or physical health'.[103] All of them apparently intended to include serious crimes that can result in grave suffering to civilians as individual acts of crimes against humanity. The practical application of these acts might not be similar according to the interpretation of different courts. Nevertheless, it is worth mentioning that there are also customary international law rules as regards particular conduct, such as the prohibition against torture and enslavement.

2.4. War Crimes

War crimes are serious breaches of international humanitarian law (IHL) or laws and customs of war during an armed conflict. The principal sources of war crime in international law include the 1907 Hague Regulation,[104] the 1949 Four Geneva Conventions,[105] the 1977 Two Additional Protocols,[106] International Criminal Law Statutes (ICTY, ICTR, and ICC),[107] and

[103] *Ibid*.

[104] The purpose of the Hague Conventions is to limit the means and method of warfare.

[105] The four Geneva Conventions primarily focus on protecting civilians and other categories of protected persons who no longer participate in hostilities. Thus are: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, entered into force 21 October

1950; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, entered into force 21 October 1950; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force 21 October 1950; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force 21 October 1950.

[106] The two Additional Protocols (APs) updated the level of protection given to the category of persons protected under the four Geneva Conventions and accordingly AP I deal with international armed conflict and non-international armed conflict. Because of AP I the traditional distinction of the 'Hague Law and Geneva Law' no longer becomes relevant as it combines rules from both Conventions.

[107] Article 2 and 3 of the ICTY, Article 4 of the ICTR and Article 8 of the ICC

customary law.[108] There are also several other treaties on the regulation of certain means of warfare notably biological and chemical weapons and anti-personnel mines, protection of cultural property, and the prohibition on the use of child soldiers.[109]

2.4.1. Gravity of Violation of IHL and the FDRE Criminal Code

War crime was introduced in Ethiopia by the 1957 repealed Penal Code.[110] Before that, it was not known as criminal conduct in any domestic legal text. The Criminal Code has replicated the list of acts of war crimes from the 1957 Penal Code. However, there are also additional lists of acts included as an *actus reus* element of war crime against a civilian population, wounded, sick, shipwrecked persons, or medical services following the 1977 Protocols Additional to the four Geneva Conventions. Generally, the Criminal Code included 13 provisions (Articles 270-283) regarding war crimes in the Special Part of the Code, entitled 'Chapter I Fundamental Crimes, Title II Crimes in

[108] Most of the provisions of the 1907 Hague Regulations and the 1949 Geneva Conventions have become recognized as customary law and hence apply to all states whether they are parties or not. See, Thedore Meron, Human Rights and Humanitarian Norms as Customary Law, Oxford Press, (1999) 62.

[109] Some of the Conventions includes Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction 10 April 1972; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effect, 1980; Convention on the Prohibition of the Use, Stockpiling, production and Transfer of Anti-personnel Mines and their destruction, 1977. See in general, Depositary Notification C.N.651.2010 Treaties-6, dated 29 November 2010, available at http://treaties.un.org accessed on March 20, 2022; Resolution on amendments to article 8 of the Rome Statute of the International Criminal Court, ICC-ASP/16/Res.4, adopted at the 12th plenary meeting on 14 December 2017, by consensus, ICC-ASP/16/20, available at https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16- Res4-ENG.pdf accessed on March 20, 2022.

[110] The rules on war crime from articles 282-295 were applicable irrespective of the nature of war either in the international or non-international armed conflict.

Violation of International Law'.[111] The Criminal Code does not follow the classification of grave breaches used in the Geneva Conventions of 12 August 1979,[112] which are replicated by the ICC, ICTR and ICTY Statutes.[113] The *chapeau* of Article 270 which prohibits war crimes against the civilian population reads:

Whoever, in time of war, armed conflict or occupation organises, orders or engages in, against the civilian population and in violation of the rules of public international law and of international humanitarian conventions[114]

Except for referring to Public International Law and IHL rules, this provision does not mention the seriousness/gravity of an act to designate it as a war crime. Nevertheless, this does not pose a problem in the application of war crime for a serious breach of Geneva Conventions since article 270 of the Criminal Code provides that a war crime against civilians is committed when it is in 'violation of the rules of public international law and international humanitarian conventions.' This means war crimes provisions of the Criminal Code should be interpreted in the light of international law and IHL treaties. Ethiopia is a party to the four Geneva Conventions including the two additional protocols. Four of the Geneva Conventions in turn have a specific

[111] This does not mean that there are no acts provided in other sections of the Criminal Code which may fall under the category of a war crime. For instance, article 315 (2) which prohibits improper use of enemy uniforms in times of war is situated in the military crimes section. See, Tadesse, *supra note* 2, 301.

[112] See article 8(2) (a) of the ICC Statute, and articles 3 and 4 of the ICTY and ICTR.

[113] Article 2 of the ICTY which says '...grave breaches of the Geneva Conventions…' Article 4 of ICTR reads 'serious violations of Article 3 common to the Geneva Conventions'. Whereas, article 8 (1) of the ICC statute, apart from providing the requirement (not as elements of the war crime) that 'committed as part of a plan or policy or as part of a large-scale commission' for the court to have jurisdiction over war crime, sub-article 2(a) of the same clearly defines war crime as 'Grave breaches of the Geneva Conventions'.

[114] Subsequent provisions also refer to such under the phrase 'in the circumstances defined above' see articles 271 and 272 or specifically mention phrases like 'international law and humanitarian conventions', and 'international conventions to which Ethiopia is a party' see articles 275 & 276.

list of grave breaches of the law of war notably, Article 50 GC I, Article 51 GC II, Article 130 GC III, and Article 147 GC IV. That is, a grave breach of an act is committed against protected persons (wounded, injured, sick, shipwrecked, prisoners of war, and civilians) and property. Therefore, although the seriousness of the breach is not mentioned as a defining element of war crime in Ethiopia, it is still a requirement for prosecution since the Criminal Code needs to be interpreted following the IHL rules of the 1949 Geneva Conventions. Moreover, in the Tadic case, the ICTY held that the omission of the seriousness test is not directly an issue as long as other requirements are met. [115]

But then again, the Criminal Code proscribes certain acts as war crimes that do not satisfy the required threshold of severity under the IHL. Like the ICC Statute and others, the *actus reus* element of war crimes under the Criminal Code constitutes the commission of individual acts within the context of an armed conflict. Some of these individual acts as indicated above include war crimes against protected persons and property and the use of prohibited means and methods of warfare. Indeed these acts constitute violations of IHL rules and satisfy the test of seriousness.[116] A war crime is committed when there is a serious violation of the rules of IHL by individuals participating in an armed conflict.[117] The ICTY Appeals Chamber ruled that a violation is serious when it constitutes a 'breach of a rule protecting important values' or 'involves grave consequences for the victim'.[118] Nevertheless, as indicated by Tadesse, the Criminal Code's Articles 274,[119] 277,[120] and 278[121] failed to encompass

[115] See, ICTY, *Prosecutor v. Tadić*, Appellate Chamber, (Judgement), IT-94-1-A, 15 July 1999.
[116] Tadesse, *supra note 2* at 306.
[117] This was also established by the ICTY Appeals Chamber in the infamous case of *Tadic.* See, ICTY*, Prosecutor v. Tadić,* supra note 115, para. 94.
[118] *Ibid*.
[119] Article 274 criminalises acts of 'provocation and preparation' to commit crimes such as war crimes against the civilian population, war crimes against wounded, sick or shipwrecked

conducts that could amount to a war crime for they do not met the required threshold of gravity under IHL.[122] Similarly, the mere act of insulting persons belonging to a humanitarian organisation and an enemy bearing a flag of truce/negotiator, which doesn't satisfy the threshold of seriousness under IHL respectively criminalised as a war crime under Articles 281(1) and 283[123] of the 2004 Criminal Code. [124]

The other important issue is related to the jurisdictional threshold of the ICC statute to handle war crimes. ICC exercises its jurisdiction over war crimes when it is '...committed as part of plan or policy or as part of a large-scale commission of such crimes.[125] Indeed this is not the element of a war crime under the statute. Rather, it indicates how the Court exercises its jurisdiction by focusing on the most serious situations rather than isolated incidents of war crimes. Nonetheless, it is worth mentioning that Article 8(1) of the ICC statute states 'in particular', which implies that war crimes committed without a plan/policy may not be *directly* excluded from the ICC's jurisdiction. When it

persons or medical services war crimes against prisoners and interned persons, war crimes against prisoners and interned persons

[120] Article 277 criminalises the violation of an armistice or a peace treaty duly concluded.

[121] Article 278 criminalises acts of a person who is not a member or an auxiliary of armed forces recognized by the officials of the Ethiopian government and who engages during wartime in hostile acts against the Ethiopian defence force, its services, lines, or means of communications or transport.

[122] Tadesse, *supra note 2, at* 302-304.

[123] Article 281(1): insulting a person belonging to or a representative of, an international humanitarian organisation as well as a person placed under the protection of such an organisation. Article 283: insulting an enemy bearing a flag of truce, an enemy negotiator, or any person accompanying him or her.

[124] Tadesse, *supra note 2* at 306.

[125] See article 8(1) of ICC statute. Unlike 'widespread or systematic attacks' in the case of crime against humanity, plan, policy and scale in the case of war crimes under the ICC statute do not constitute the elements of the crime. To fall under the jurisdiction of the Court, the act should constitute a war crime when it meets the required gravity of the threshold under Article 17(1) (d). According to this provision the court is empowered to determine the case inadmissible in cases where there is not sufficient gravity to justify further action by the court. See also, Robert Cryer, *et al, supra note 96,* at 277&278.

comes to the Criminal Code, this is not a requirement at all. Therefore, the Ethiopian Courts can prosecute war criminals regardless of the gravity of the situation, even in cases of single isolated acts constituting war crimes.

2.4.2. Absence of Classification of the Nature of the Conflict: Progressive Development

One of the interesting aspects of the Ethiopian Criminal Law is the absence of classification of war crimes based on the nature of an armed conflict as international or non-international. Under the ICC Statute, such a distinction is clearly made.[126] Hence, the application of these rules depends on the nature of the conflict. Although there is no 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 Article 270.[127] The provision does not define or classify the application of the subsequent articles on war crimes based on the nature of the armed conflict. Under the definition given by ICTY armed conflict does not only encompass 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'.[128] Hence, unlike the ICC Statute, the Ethiopian Criminal law provisions on war crimes are applicable irrespective of the nature of the conflict. This in turn has its advantages. The first is a procedural advantage. The Ethiopian courts need not pass through the complex and rigorous process of characterization. And, in practice that has happened in the *Legesse Asfaw et*

[126] While articles 8(2) (a) and (b) of the ICC Statute cover acts committed in an international armed conflict, articles 8(2) (c) and (e) refer to those acts committed in a non-international armed conflict.

[127] It reads that war crimes against civilians could be committed 'in times of war, armed conflict or occupation'. *Chapeau* of Article 270 of the FDRE Criminal Code.

[128] ICTY, *Tadic v Prosecutor*, *supra note 117*, para. 77. See also, ICC, *Prosecutor v. Lubanga*, Trial Chamber. (Judgement), ICC-01/04-01/06, (14 March 2012), para. 533.

al. case. Second, substantively, unlike the ICC, in which not all kinds of war crimes are punishable when committed in non-international armed conflicts, all acts listed in the criminal law as war crimes are punishable irrespective of the nature of the armed conflict.[129] More interestingly, this is crucial because the recent atrocities committed in the country are the result of internal armed conflict, such as between the Federal Government and Tigray Region although it may be characterised as an 'internationalised' non-international armed conflict because of the involvement of Eritrean troops later.[130] 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.[131]

Against this backdrop, Tadesse believes that ultimately the Criminal Code 'only allows the direct application of IHL treaties, thereby excluding the applicability of war crimes defined in customary international law' which could 'serve as a legal basis to consider several war crimes as punishable when committed in the context of internal armed conflicts.'[132] The failure to recognize customary international law as a *legal basis* for war crimes by the Criminal Code, in turn, results in the limited application of IHL rules to the situation of non-international armed conflict i.e. only the minimum treatments stipulated under common article III to the four Geneva Conventions and

[129] See, Tadesse, *supra note 2* at 312.

[130] Furthermore, Tadesse argued that this is a positive development when it is seen from recent laws such as the ICC statute where 'not all kinds of war crimes are punishable when committed in non-international armed conflicts. This includes Article 8(2) (b) (iv), (v), (vi), (vii) & (viii). See Tadesse, *supra note 2* at 310 & 311.

[131] *Ibid*, at 309.

[132] For instance, some of the customary international rules applicable to non-international armed conflict including means and method of warfare are rules prohibiting the use of poison or poisoned weapons, asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, bullets which expand or flatten easily in the human body, such as bullets with a hard envelope, which does not entirely cover the core or is pierced with incisions under article 8(2) (e) of the statute. Tadesse, *supra note 2 at* 312.

Additional Protocol II.[133] However, it seems important to question the necessity of explicit recognition of 'customary law' by the Criminal Code for the application of such rules in Ethiopia in the case of war crimes. The answer seems not affirmative because, once a certain rule is already crystallised into a custom, it is binding upon all states except in the case of the '*persistent objector*' rule, which Ethiopia is not.[134] Therefore, one could argue that it can neither opt out of the application of such custom nor require specific recognition of the custom for its application.

2.4.3. Individual Acts of War Crime: General Stipulations of the FDRE Criminal Code

The ICC statute contains a long list of individual acts of war crimes (more than 50) under Articles 8(2)(a)(i) to 8(2)(e)(xv). However, most of them are listed twice based on the applications of the rules in the case of international and non-international armed conflict. Whereas, the Ethiopian counterparts contain around 35 individual acts of war crime which were applicable without the distinction to the nature of the conflict. In terms of organisation, there are flaws in the stipulation of the category of these individual acts under the Ethiopian Criminal Code. For instance, some of the acts of war crimes that could potentially fall under the category of prohibited means and methods of warfare were listed under Article 270 of the Criminal Code which deals with

[133] Tadesse described such failure as a 'regressive development 'despite its long progress in abolishing the distinction as to the nature of armed conflict in its conventional definition of war crime. See, Tadesse, *supra note 2* at 307.

[134] James R Crawford, Brownlies's Principles of Public International Law, Oxford, 9th edition, (2019) 30; Michael Akehurst, Custom as a Source of International Law, The British Yearbook of International Law, 1(1976). Based on the decision of the ICJ, customary international law both globally and regionally comprises two components: an extensive and uniform consistent *state practice* and the belief that the practice is required by law (*opinio juris*). See ICJ North Sea Continental Shelf Case (FRG v Denmark) (FRG v The Netherlands) (1969) Rep 3, para 77.

war crimes against civilians.[135] Moreover, the individual acts under the Criminal Code appear to be stipulated in a more generic term than the ICC Statute.[136]

Concluding remarks

This paper undertook a helicopter view comparison of the way atrocity crimes are regulated under Ethiopian law vis-a'-vis relevant International Criminal Law rules and jurisprudence. It has accordingly uncovered some peculiar facets of the Ethiopian counterpart. Crime of genocide, as proscribed under Article 269 of the Ethiopian Criminal Code is regulated relatively in a similar fashion to the 1948 Genocide Convention, and the Statutes of the ICC, ICTY and ICTR. However, unlike the latter two, the Criminal Code is not a verbatim copy of the Genocide Convention. It includes an extra list to the category of protected groups i.e., *political*, *nation*, *nationality*, and *colour groups* in addition to four exhaustive lists under the Convention - *racial*, *ethnic*, *national*, and *religious*. Likewise, it has added another *actus reus* element of crime 'causing members of a group to disappear' and compulsory movement or dispersion of not only children but also '*people*', which is not mentioned under the Convention. There is no specific provision governing Crimes against humanity in the Criminal Code. The term is merely mentioned as a broad category of crime that encompasses international crimes, such as genocide and war crimes. Consequently, the application of the definition and

[135] See Article 270 of the FDRE Criminal Code which says 'using any means or method of combat against the natural environment to cause widespread, long term, and severe damage and thereby to prejudice the health or survival of the population'. Similarly, article 270 (o) reads 'attacking dams, dykes, and nuclear electrical generating stations, if their attack causes the release of dangerous forces and consequent severe losses among the civilian population'. Indeed, these acts directly affect the civilian population. However, in terms of classification, they better fit to be stated in the part dealing with the prohibited means and method of warfare in the subsequent article of 276 (unlawful methods and means of warfare). For more see Tadesse, *supra note 2*, at 332.

[136] *Ibid*, at 326.

elements of the crime developed under customary international law can potentially be proposed as a solution to fill the gap. Conducts which amounts to war crimes are proscribed under the Criminal Code. A reference is also made to the IHL rules to which Ethiopia is a party. However, unlike the Statutes of ICC, ICTY, and ICTR, it is not defined as a 'grave' breach of the Geneva Conventions and includes some prohibited acts that do not satisfy the required threshold of severity under the IHL. Furthermore, unlike the ICC Statute, a plan or policy as part of a large-scale commission of war crimes is not required under the Criminal Code. Moreover, the Criminal Code provisions on war crimes are applicable regardless of the nature of the conflict (international/non-international) unlike such distinction under the Statute of ICC and Additional Protocol II of the Geneva Convention on the Law of War.