

BETWEEN “LAW ENFORCEMENT” AND “CONDUCT OF HOSTILITIES”: THE SHIFTING NARRATIVE OF THE CONFLICT IN TIGRAY AND ITS IMPLICATION FOR INTERNATIONAL LAW

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Abstract

Since the early days of November 2020, there have been large-scale military confrontations between on the one hand, the Federal government of Ethiopia (the Federal government) and armed forces allied to it, and regular and irregular armed forces commanded and controlled by the Tigray Peoples’ Liberation Front (TPLF), on the other. International humanitarian law (IHL) is the main body of international law designed to regulate such situations of armed conflict. To apply the rules of IHL, the existence of an armed conflict needs to be established. However, the conflict in northern Ethiopia, which was initially (and mainly) conducted in the Tigray region of Ethiopia and later spilled over to the neighbouring areas in the Amhara and Afar regions, has been portrayed in conflicting terms by the Federal government of Ethiopia – oscillating between characterizing it as a law enforcement operation and a full-scale armed conflict. This article examines the Federal government’s shifting narrative of the conflict and probes whether these diverse depictions of the conflict arose from calculated policy decisions or unintended oversights. This investigation holds immense significance due to its direct link to the application of IHL to the conflict. It also sheds light on the Federal government’s intentions related to the consequences

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of its actions under international law. Furthermore, the article analyses the possible implications of the shifting narrative upon applying the relevant rules regulating the use of force under international law and ensuring accountability for human rights and humanitarian law violations that have occurred during the conflict.

Keywords: *armed conflict, armed groups, conflict in Tigray, IHL, human rights, NIAC, accountability, Ethiopia.*

Introduction

For over a year, since early November 2020, northern Ethiopia, particularly the Tigray region, has witnessed a situation of armed conflict in which participation of various parties is observed. The conflict pitted the Ethiopian National Defence Force (ENDF) and its allies, including paramilitary armed forces from the neighboring Amhara and Afar Regional States of Ethiopia, as well as the Eritrean Defence Forces (EDF), against the armed forces under the Tigray Peoples' Liberation Front (TPLF) - mainly the regional special police force (later self-proclaimed as the 'Tigray Defence Force (TDF)') alongside local militias. Since the outbreak of the conflict on 03 November 2020, there has been a shifting characterization¹ of the nature of the situation by the Federal Government of Ethiopia. Initially, the Federal Government regarded the attack on the Northern Command of the ENDF, which sparked the armed conflict, and the consequent military confrontation against the armed forces under the

¹ In the context of IHL, the term 'conflict characterisation' typically refers to the classification or identification of the nature of a conflict – as an international armed conflict, a non-international armed conflict, or other situation of violence that falls outside the scope of IHL. However, in this article, the term 'characterisation' is used in a different sense, signifying the act of describing or depicting a particular situation.

TPLF as an armed attack, in the sense of a war situation.² TPLF also claimed the situation as an ‘armed attack’ – thus a *war* – waged against the Tigray region. A few days later (since 08 November 2020), the Federal Government shifted its narrative and regarded the armed hostility as a ‘law enforcement operation’ to maintain constitutional order and the rule of law. However, the TPLF and many other observers disputed this characterization, claiming it is a civil war situation. As the conflict dragged on, international actors began expressing their concern about the possible commission of, among other things, war crimes by the various actors involved in the fight, thereby affirming the existence of an armed conflict.³

This article argues that the uncertainty created by the Federal government in the characterization of the conflict has far-reaching legal implications with regard to the enforcement of the obligations and responsibilities of the various parties to the conflict under international law, particularly under IHL. In this respect, it would be sufficient to mention two contexts. First, the formidable resistance on the side of the Federal Government against calls by various regional and international actors to observe its international law obligations was grounded on the allegation that the situation is a domestic matter, and for this reason, it consistently invoked the international law principle of non-intervention in the internal affairs of a sovereign State. Arguably, this may impact the observance of applicable international law obligations

² Report of the Ethiopian Human Rights Commission (EHRC) and 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* (03 November 2021) 1.

³ In the realm of international law, it is a fundamental principle that war crimes are perpetrated within the context of an armed conflict. When a situation of armed violence does not meet the criteria specified in the definition of armed conflicts as outlined in IHL, any violations occurring within that context may not be classified as war crimes.

by the parties to the conflict. Second, the state of uncertainty created regarding the involvement of the EDF in the conflict, partly due to the problem of defining the conflict as a purely domestic law enforcement operation, may have complicated ascertaining the obligations and responsibility of EDF for violations committed during the conflict. The intervention of the EDF – whether upon the implied consent of the government of Ethiopia or on the ground of self-defence (as alleged by the Prime Minister of Ethiopia)⁴, also triggers the issue of international responsibility for the actions of the EDF, prompting considerations of accountability that extend to the Federal Government.

The main objective of this article is to appraise whether the initial insistence of the Federal Government in its narrative of the conflict in northern Ethiopia (in Tigray) as a law enforcement operation was/is policy-oriented or is merely unintentional oblivious to its implications regarding the obligations deriving from international law, particularly IHL obligations. In this regard, whether the lack of a domestic constitutional framework recognizing internal military operations by the Federal government as an armed conflict had a bearing on the government's position is examined. Moreover, the authors, arguing that the shifting narrative of the situation by the Federal government has apparent legal implications, aim to assess the implication of such a description on the observance of international law obligations by the various actors involved in the conflict. The authors will deal with this issue with the underlining assumption that a meticulous and rigorous understanding of the nature the conflict and the international law

⁴ As will be discussed in more detail below, the Ethiopian government officially acknowledged the participation of the EDF in the Tigray conflict only after a couple of months, in March 2021, despite the existence of credible allegations that substantiated their presence right from the outset. Similarly, official confirmation from Eritrea came only in April 2021. See the Report of the International Commission of Human Rights Experts on Ethiopia, A/HRC/54/55, 14 September 2023, para 43.

obligations and responsibilities of the parties to the conflict is crucial in ensuring accountability for violations committed during the conflict.

The article does not deal with the classification of the conflict under IHL. However, as argued elsewhere by one of the authors of this article,⁵ multiple other commentators,⁶ and also reaffirmed in various reports⁷, right from the outset, the conflict in Tigray meets the thresholds required for an armed violence to be classified as a non-international armed conflict (NIAC) under IHL.⁸ Consequently, the

⁵ Fikire Birhane, Observations on the ongoing Confrontation in Northern Ethiopia from IHL Perspective: Classification of the Situation in Focus, AAU-IHL Clinic (blogpost), 28 November 2020.

⁶ Fekade Abebe, Detention in Non-International Armed Conflicts: Overview of the Scholarly Debate in the Context of the Conflict in Northern Ethiopia, AAU-IHL Clinic [blogpost], 05 December 2020; Taddese Kebebew and Joshua Niyo, Instant Non-International Armed Conflict? Classifying the situation in Northern Ethiopia under IHL', Armed Groups and International Law [blogpost], 09 December 2020; Rule of Law in Armed Conflict (RULAC), A Non-International Armed Conflict in Ethiopia's Tigray Region, [Database], available at <<https://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-ethiopia#collapse4accord>>, accessed on 12 August 2022.

⁷ *Inter alia*, see the Report of the EHRC and OHCHR, (n 2), para 37; *Report of the International Commission of Human Rights Experts on Ethiopia*, A/HRC/51/46 (19 September 2022, Annex II, para 4; Amnesty International, "I Don't Know if they Realized I was a Person": Rape and Other Sexual Violence in the Conflict in Tigray, Ethiopia (August 2021, 30); Human Rights Watch, 'Q&A: Conflict in Ethiopia and International Law', available at <<https://www.hrw.org/news/2020/11/25/qa-conflict-ethiopia-and-international-law>>, 25 November 2020.

⁸ A reading of Common Article 3 reveals that there is no formal definition of a NIAC that could, by extension, be used to determine the time in which a situation can be classified as an armed conflict per IHL. Eventually, international case law developed a legal test for determining this, first set out by the ICTY. In *Tadić*, the ICTY determined that the threshold for a NIAC is reached when there is a 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'. See ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94- 1-T, Appeals Chamber, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, 02 October 1995, para 70. This test, developed by the ICTY and broadly recognized and applied ever since, is distilled into two criteria, viz. the intensity of the conflict and the level of organization of the parties to the conflict. The intensity criterion is relevant to determine the time in

conflict is governed under IHL applicable to a NIAC, mainly Common Article 3 to the Geneva Conventions of 1949⁹ and Additional Protocol II,¹⁰ and customary rules of IHL. Also, international human rights laws (IHRL) and other treaty laws ratified by Ethiopia and relevant customary international law govern the conduct of the parties to the conflict.¹¹ The involvement of the EDF in support of the Ethiopian government does not affect the classification of the conflict.

which a situation is classified as a NIAC, and international jurisprudence, including the one cited above, developed factual indicators relevant for assessment in this regard. It should, therefore, be noted that, duration of a conflict is not a decisive criterion. Particularly, as the ICTY interpreted in subsequent cases, protractedness refers to intensity and, therefore, a NIAC may exist if the conflict is of a sufficient intensity. ICTY, *Prosecutor v. Ramush Haradinaj, et al.* Case No. IT-04-84-T, Trial Chamber Judgement, April 2008, para 49; Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019) 182. The authors of this article are persuaded that the situation under analysis qualifies to be an ‘instant NIAC’, which means that since the beginning of the conflict, the situation qualifies as a NIAC. For a detailed analysis on this point, see Taddese Kebebew and Joshua Niyo, *Instant Non-International Armed Conflict?* (n 6); RULAC, *A Non-International Armed Conflict in Ethiopia’s Tigray Region* (n 6).

⁹ Art 3 common to the four Geneva Conventions of 1949 (I–IV) (Common Art 3), 12 August 1949, 75 UNTS 31. Ethiopia ratified the Geneva Conventions on 02 October 1969.

¹⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. Ethiopia acceded to the Protocol on 08 April 1994.

¹¹ The continued applicability of human rights law during armed conflicts is foreseen under some international human rights treaties such as the Convention on the Rights of the Child (Art.38) and its Optional Protocol on the Involvement of Children in Armed Conflict (Arts. 4&5); the Convention on the Rights of Persons with Disabilities (Art.11); the Convention on Enforced Disappearance of Persons (Art.15(2); and the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (Art.11). The concurrent application of IHL and IHRL during armed conflict has been well recognized in case laws. See, for instance, the International Court of Justice (ICJ), *Legality of the Threat or Use of nuclear weapons*, Advisory Opinion of 8 July 1996, para 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para 106; and *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, para 216. Also, see, the International Criminal Tribunal

The article is structured into two main sections. Section one delves into examining the Ethiopian government's shifting narrative, mainly during the initial phase of the Tigray conflict.¹² Analysing it from the perspectives of both domestic constitutional law and international law, this section aims to uncover the potential reasons behind the Federal government's shifting characterization of the conflict in Tigray - oscillating between 'law enforcement operation' and 'armed conflict.' Section two extends the analysis to explore the consequences of this shifting characterization on enforcing IHL and other international law obligations. This includes considerations related to ensuring accountability for international law violations throughout the Tigray conflict. The article concludes with summary of the insights discussed in the article.

1. Shifting Narratives: 'Law Enforcement Operation' Vs. 'Armed Conflict'

One of the puzzling matters related to the conflict in Northern Ethiopia, in the Tigray region, was the Federal government's initial insistence on characterizing the situation as a "law and order enforcement operation". The "law enforcement operation", as per the

for the former Yugoslavia (ICTY), *Prosecutor v. Dusko Tadić* (n 8) para 97; the European Court of Human Rights, *Hassan v. The United Kingdom*, No.29750/09, Grand Chamber Judgement, 16 September 2014, para104; The Inter-American Court of Human Rights, *Las Palmeras v. Colombia*, Judgement (*Preliminary Objections*), 4 February 2000, para 32-33; the Inter-American Commission on Human Rights, *Ecuador vs. Colombia*, No.112/10, Admissibility, 21 October 2010, para 113-126; the African Commission of Human and People's Rights, *DRC v. Burundi, Rwanda, and Uganda*, Communication 227/99, May 2003, para 64-65, and *Thomas Kwoyelo v. Uganda*, Communication 431/12, 62nd Ordinary Session, 25 April – 9 July 2018, para 148.

¹² This timeline covers the period starting from the outbreak of the conflict on 03 November 2020 and extends up to the declaration of a ceasefire by the Federal government, along with the alleged unilateral withdrawal of the ENDF from Mekelle, the capital of the Tigray region, in June 2021.

Federal government, was aimed at restoring law and order in the Tigray region and the country at large, defending and preserving the sovereignty and territorial integrity of the country and bringing to justice the perpetrators of crimes against the State.¹³ Such a narrative has been pursued at least in the first few months of the conflict to refute any claim that depicts the military confrontation as a situation of civil war or an armed conflict between the Federal government and the TPLF. The Federal government objected to the media's use of the word 'civil war', contending that it is an inaccurate depiction of its 'policing operation' to maintain law and order in the Tigray region. Nonetheless, despite such a general posture, a closer look at the language and acts of the government reveals the inconsistency in the Federal government's narrative.

In the wake of the armed attack on the Northern Command of the ENDF on the night of 03 November 2020 by the Tigray special police force and allied militia, the ultimate act that triggered the armed conflict¹⁴, Prime Minister Abiy Ahmed issued a statement that regarded the attack as a situation of 'war'. The statement, issued on 04 November 2020, clearly stated that:

While the Federal government has used all means to thwart *a military engagement* against the TPLF, *a war*, however, cannot be

¹³ See the various statements issued by the Office of the Prime Minister (OPM). For example, "Updates on the Unfolding Developments in Ethiopia", <https://www.pmo.gov.et/media/documents/November_6_Press_Release.pdf>, 06 November 2020; and "Adherence to the Principle of Non-intervention in the Internal Affairs", <<https://web.facebook.com/photo/?fbid=412638196817516&set=pcb.412638343484168>>, 25 November 2020.

¹⁴ Report of EHRC and OHCHR, (n 4), p.1; Lauren Blanchard, Ethiopia's Transition and the Tigray Conflict, Congressional Research Service, 09 September 2021, 5.

prevented only on the goodwill and decision of one side but on the mutual choice for peace by both parties.¹⁵

Subsequent Federal government statements issued at the onset of the conflict also reiterated the existence of an armed attack, a military confrontation or TPLF waging *war*¹⁶ against the Federal government, overall intimating a situation of an armed conflict.¹⁷ However, a couple of days later, the Federal government made a significant shift in its narrative and began defining the military engagement as a “rule of law enforcement measure”.¹⁸ By that, it meant that the Federal government was merely enforcing its mandate to enforce law and order within the country as per its responsibility under the Constitution.¹⁹ The ‘law enforcement measures’ are allegedly aimed at apprehending TPLF officials responsible for the armed attack on the ENDF Northern

¹⁵ OPM, “TPLF Attacks Ethiopian National Defence Forces Base in Tigray”, <https://www.pmo.gov.et/media/documents/November_4_Press_Release_.pdf>, 04 November 2020 (emphasis added).

¹⁶ Unlike its common usage, the notion of ‘war’ under international law inherently refers to armed conflicts that occur between States. The corresponding terms for armed conflicts involving insurgent armed groups are civil war, insurgency or internal armed conflict. Since the adoption of the 1949 Geneva Conventions, the term “Conflict of Non-International Character” (or, NIAC) has been employed to describe those internal armed conflicts that meet the requisite threshold under Common Art 3 of the Geneva Conventions. Also, in the Geneva Conventions, the term war is replaced with ‘armed conflict’ to avoid ambiguities related to the definition of and establishment of the existence of war in its formal sense. Therefore, in this article, the word *war* is italicized, following the style used by Professor Andrew Clapham in his recent book. This usage distinguishes it from its formal meaning under international law, which typically pertains to inter-State armed conflicts. For further details on the notion of war under international law, see Andrew Clapham, *War* (Oxford University Press 2021).

¹⁷ See, “Abiy Ahmed on Current Situation”, <<https://www.youtube.com/watch?v=YvgGMDzru-4>>, 04 November 202; OPM, “Federal Council of Ministers Declares State of Emergency in Tigray Region”, <https://www.pmo.gov.et/media/documents/November_4_Press_Release-_SOE.pdf>, 04 November 2020.

¹⁸ OPM, “Updates on the Unfolding Developments in Ethiopia” (n 12).

¹⁹ *Ibid*; Abiy Ahmed, “Operations to Restore Law and Order in Ethiopia’s Tigray Region: How Did We Get Here?”, <<https://www.pmo.gov.et/articles/8/>>, 24 December 2020.

Command and containing illegal and violent activities within the Tigray region that threaten the country's peace, safety and security.²⁰ Apparently, from this time onwards, for a significant period, the description "law enforcement operation" became the prevailing narrative of the Federal government.

Yet, the Federal government did not restrain itself completely from making statements that also regarded the situation as an armed conflict. For example, when the Federal government forces took control of Mekelle (the capital of the Tigray Region) in late November 2020, the Prime Minister officially declared the cessation of "*the military operation* in the Tigray Region".²¹ Also, in subsequent statements, the premier often mentioned launching *defensive operations*, averting *war crimes*, or large-scale civilian casualties.²² In addition, a pocket-size brochure distributed to the members of the ENDF during the military operation in Tigray included a list of *international humanitarian law* principles applicable during an armed conflict, which would otherwise not be relevant in a law enforcement operation.²³ Not only these, the Federal government often accused TPLF of mobilizing the youth for *war*, forcing children and older people to the *frontlines*, using civilians as human shields and civilian

²⁰ OPM, "Federal Council of Ministers Declares State of Emergency in Tigray Region" (n 16).

²¹ Tweet by Prime Minister Abiy Ahmed on 28 November 2020 (official letter attached), <<https://twitter.com/AbiyAhmedAli/status/1332740110039846914>> (emphasis added), 04 November 2020.

²² Abiy Ahmed, "Operations to Restore Law and Order in Ethiopia's Tigray Region: How Did We Get Here?" (n 19).

²³ The pamphlet, entitled "The Rules of Engagement during the Law Enforcement Operation", was classified as a top secret and was distributed (at least at the initial phase of the conflict) only to members of the ENDF. The existence of such a booklet is noted in a report by the Minister of Justice. See FDRE Ministry of Justice, "A Summary of Efforts to Ensure Accountability Regarding Violations of International Humanitarian Law and Other Legal Norms in the Regional State of Tigray" (21 May 2021).

objects as hideouts during military operations, and indiscriminate attacks against civilians.²⁴

Besides the conflicting accounts at the onset of the conflict, the Federal government did not manage to maintain and prolong its narrative of “law enforcement operation” at the later stages of the conflict. Apparently, a shift in narrative occurred following the withdrawal of the Federal government forces from the Tigray region, including the capital Mekelle, in late June 2021. When the withdrawal was effected, the Federal government officially declared a “*unilateral humanitarian ceasefire*” and decided to pause all *military activities* in Tigray region.²⁵ Later, when the conflict spread to the neighbouring Amhara and Afar regions, the Federal government issued a national call to “all capable Ethiopians” to join the armed forces in “*the battle*” to defend the sovereignty and territorial integrity of the country against “the terrorist TPLF”.²⁶ Also, in his statement commemorating the first year of the attack on the Northern Command, the Prime Minister referred to the situation as *war*: “*During the war*, the ENDF fought valiantly and sacrificed for their motherland”.²⁷

Overall, as the phrasing in the above various statements evidence, the Federal government could not avoid characterizing the situation as an

²⁴ Abiy Ahmed, “Ultimatum for Tigrayan Forces to Surrender” (22 November 2020); OPM, “Current Phase of the Rule of Law Operations in Tigray Region” (07 December 2020); OPM, Statement on Current Affairs and a National Call (10 August 2021).

²⁵ Ministry of Foreign Affairs of Ethiopia, Ethiopian Government’s Decision in Response to Proposal of Tigray Interim Administration, <<https://twitter.com/mfaethiopia/status/1409637867551219714>>, 29 June 2021.

²⁶ OPM, Current Phase of the Rule of Law Operations in Tigray Region (n 23) (emphasis added). Prior to the national call, the federal government was mobilizing police forces in the regional states to reinforce the ENDF. See “Three more regions reinforce Ethiopian army, Amhara against Tigray forces” *Reuters* (16 July 2021).

²⁷ OPM, “Message from PM Abiy Ahmed Commemorating the November 3, 2020, attacks on the Northern Command” (03 November 2021) (emphasis added).

armed conflict. The question, then, would be why the Federal government was so adamant with the “law enforcement operation” narrative while it often uses languages and has in fact engaged in a state of armed conflict or a situation of *civil war*. It is necessary to examine the possible legal and policy rationales behind such shifting narrative by the Federal government.

In general, the legal justification could possibly relate to the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution),²⁸ which apparently envisages *war* or an armed conflict, mainly in the case of an external invasion or threat against the State. The policy rationale, on the other hand, could possibly relate to the intention of the Federal government to circumvent international law regulation of the conflict, particularly the application of IHL, and avoid the possible pressure from the international community.

Two points are worth noting here. First, from the start of the armed conflict, TPLF rejected “the law enforcement operation” narrative and has been asserting the “declaration of *war*” by the Federal government and allied forces.²⁹ Even way before the outbreak of the conflict, TPLF was mindful of the possibility of *war* against the regional government by the Federal government.³⁰ Second, from an international law point of view, the labelling of a situation of armed violence as a *civil war*³¹ is

²⁸ The Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution), Federal *Negarit Gazeta*, 1st Year No.1 (1995).

²⁹ ‘Ethiopia is set to remove government of defiant Tigray region’, *Associated Press*, 07 November 2020; Global Conflict Tracker, ‘War in Ethiopia’, <<https://www.cfr.org/global-conflict-tracker/conflict/conflict-ethiopia>>, accessed on 19 July 2022.

³⁰ Crisis Group, *Steering Ethiopia’s Tigray Crisis Away from Conflict*, <<https://www.jstor.org/stable/resrep31509>> 30 October 2020.

³¹ In social sciences disciplines, a *civil war* is often defined as “an armed combat within the boundaries of a recognized sovereign entity between [or among] parties subject to a

no longer a legally relevant concept. Traditionally, the notion was associated with large-scale internal armed conflicts that pit the *de jure* government against a well-organized insurgent group controlling a territory and possessing a state-like organization.³² In such a case, international law applies to the conflict, and the parties are bound by international law through the doctrines of recognition of belligerency or insurgency.³³ However, with the advent of the 1949 Geneva Conventions, which introduced the notion of NIAC without the requirement of recognition of belligerency or insurgency, the applicability of IHL to a situation of internal armed violence is determined based on specific objective facts³⁴ without regard to the designation of the conflict as a civil war. Therefore, today, referring to a conflict as a ‘civil war’ has no succinct legal relevance, perhaps beyond suggesting the large-scale nature of the violence in an internal armed conflict.³⁵ Therefore, in this article, the terms ‘civil war’ and ‘internal

common authority at the outset of hostilities.” Besides being an internal armed conflict, for an armed violence to qualify as a *civil war*, *inter alia*, the territorial government has to be a party to the conflict and the violence has to cause at least 1,000 “cumulative battle-related deaths”. Nelson Kasfir, ‘Rebel Governance – Constructing a Field of Inquiry: Definitions, Scope, Patterns, Order, Causes’ in Ana Arjona, Nelson Kasfir and Zachariah Mampilly (eds), *Rebel Governance in Civil War* (Cambridge University Press 2015) 23. Also see Fotini Christia, *Alliance Formation in Civil Wars* (Cambridge University Press 2012) 10; Nicholas Sambanis, ‘What Is Civil War? Conceptual and Empirical Complexities of an Operational Definition’ (2004) 48 *The Journal of Conflict Resolution* 814.

³² Vernon A O’Rourke, ‘Recognition of Belligerency and the Spanish War’ (1937) 31 *The American Journal of International Law* 398.

³³ Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press 2013) 182–183.

³⁴ International Committee of the Red Cross (ICRC), Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Commentary of 2020 (GCIII, Commentary of 2020), para 421.

³⁵ Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2nd Edition, Cambridge University Press 2016) 97.

armed conflict' are solely intended to denote the NIAC nature of the armed conflict.

1.1. National Law Consideration: Bypassing Constitutional Lacuna?

The FDRE Constitution, the supreme law of the land, bestowed upon the Federal government the authority and responsibility to protect the country's peace and sovereignty and maintain law and order in the event of a state of war.³⁶ The House of People's Representatives (HPR), the national legislative council, is entrusted with the power to declare a state of war. The executive body, the Council of Ministers, is mandated to prepare a draft declaration to this effect and submit it to the HPR for approval.³⁷

However, the Constitution does not provide specific circumstances in which a declaration of war could be made. Nor has the HPR issued any declaration to date from which the possible circumstances and conditions for such a declaration could be inferred.³⁸ Nonetheless, considering international practice, the HPR could make such a declaration in the event of external aggression against the State or, in

³⁶ FDRE Constitution, Art. 55(9) and 93.

³⁷ *Ibid*, Art. 77(11).

³⁸ In 1998, following the invasion of parts of the northern territories of Ethiopia by Eritrea, the parliament (the House of People's Representative (HPR)) had passed a resolution condemning the invasion and demanding the unconditional and immediate withdrawal of Eritrean forces. Though Eritrea claimed that the resolution was a declaration of war by Ethiopia, according to the Eritrea-Ethiopia Claims Commission, it cannot be taken as such since it did not express the belligerent intent of Ethiopia and explicit assertion of the existence of a state of war which is a requirement under international law. Rather, the resolution was regarded as a mere expression of the readiness of Ethiopia to defend its territory against the invading force. *See* Eritrea-Ethiopia Claims Commission, Partial Award: *Jus Ad Bellum*, Ethiopia's Claims 1-8, 2005, paras 6-17.

cases where the State is involved in a war under the framework of collective self-defence as enshrined under the UN Charter.³⁹

The main point here is that, as per the FDRE Constitution, arguably, a declaration by the HPR is a prerequisite for the Federal government to engage in a state of *war* or an armed conflict *per se*.

When the Federal government deployed its armed forces to counter the alleged attack by the TPLF on the ENDF's Northern Command, there was no declaration of *war* nor any other explicit authorization on the use of force from the HPR.⁴⁰ Instead, the House of Federation (HoF)⁴¹, the upper chamber of Ethiopia's bi-cameral parliament, through its power to order the Federal government's intervention in regional states⁴², on 07 November 2020 - three days after the conflict in Tigray broke out - authorized the deployment of ENDF and other security forces in the Tigray region.⁴³ Such an order is ordinarily issued, *inter alia*, when the HoF determines that there is a disturbance of peace and security or an armed uprising within a regional state has endangered

³⁹ For a detailed discussion of the contemporary international law understanding of the notion of 'declaration of the state of war', see Clapham (n 18).

⁴⁰ On 07 November 2020, the HPR passed a resolution endorsing six months of State of Emergency in the Tigray region. But, beyond stating the Federal government's responsibility to maintain peace and security in the region, the resolution does not authorize the intervention of the Federal government since such power lies mainly with the upper legislative house, the House of Federation (HoF). See PMO, "Federal Council of Ministers Declares State of Emergency in Tigray Region" (n 19); UN OCHA, Ethiopia: Tigray Region Humanitarian Update – Situation Report No.1, 7 November 2020.

⁴¹ The House of Federation (HoF) is composed of representatives of each ethnic group in the country. The main mandates of the council are overseeing the rights of nations, nationalities, and peoples, and interpreting the Constitution. FDRE Constitution, Art. 62.

⁴² *Ibid*, Art. 62(9).

⁴³ HoF, "Resolution for Establishing an Interim Government in Tigray", 07 November 2020; Fana Broadcasting Corporation, "HoF Approves Resolution Allowing Federal Gov't to Intervene, Form Interim Administration in Tigray", 07 November 2020.

the Constitution and the country's constitutional order,⁴⁴ with the purpose of enabling the Federal government to contain the resulting insecurity and maintain law and order.⁴⁵

Therefore, it can be inferred that the Federal government may have used the term "law enforcement operation" for its military operation in the Tigray region considering this constitutional framework. If the HPR did not declare a state of war or acknowledge the existence of an armed conflict, it would have been constitutionally improper for the Federal government to characterize its military action in the Tigray region as an armed conflict. Consequently, it should have continued to describe the operation solely as a 'law enforcement' operation.

Therefore, constitutionally speaking, an armed conflict or a state of *war* and intervention in a regional state to enforce law and order are two different things. A state of *war* or an armed conflict as such requires a declaration by the HPR while the HoF may authorize a law enforcement operation. However, it is also important to note that the mere deployment of the military force (intervention) by the federal government in a situation of armed violence in regional states does not automatically make the situation an armed conflict in the sense of IHL.⁴⁶

⁴⁴ FDRE Constitution, Arts. 51(14), 55(16), and 62(9); Proclamation No.359/2003, System for the Intervention of the Federal Government in the Regions, *Federal Negarit Gazeta*, 9th Year No.80, Art.12 (2003).

⁴⁵ *Ibid*, Art.14.

⁴⁶ Under international law, States possess the authority to employ their military forces, in exceptional circumstances, to maintain law and order. See the UN Code of Conduct for Law Enforcement Officials, adopted by the General Assembly Res. 34/169 of 17 December 1979, commentary to Art 1; African Commission on Human and Peoples' Rights, General Comment No.3 on the African Charter on Human and Peoples' Rights: The Right to Life (Art 4), 2015, para 29.

Considering the dual approach under the Constitution and other relevant national laws, it could be argued that the FDRE Constitution does not envisage the authority of the Federal government to formally engage in a state of *war* or an armed conflict against an insurgent armed group or dissident armed forces such as the TPLF. In other words, the Constitution's setting might have compelled the federal government to refrain from formally adopting a 'state of *war* (armed conflict)' narrative and instead frame its military engagement in the Tigray region as a "law enforcement operation".

Nevertheless, as previously noted, the Federal government did not entirely refrain from employing the '*war* or armed conflict' narrative. In fact, following the withdrawal of the ENDF from Mekelle in June 2021, the narrative has predominantly revolved around 'armed conflict.' Notably, this shift occurred without any formal declaration or resolution from the HPR. Considering this, asserting that the Federal government was espousing its conflicting narrative solely due to constitutional constraints becomes challenging.

1.2. Policy Consideration: Circumventing International Regulation

The Ethiopian government is not an exception in denying or not explicitly recognizing the existence of a NIAC or an insurgency to which international law would be applicable. As studies on States' practice regarding the application of Common Article 3 of the 1949 Geneva Conventions, which applies to NIACs, reveal, States often deny the regulation of international law even if facts on the ground prove the existence of large-scale armed conflict or a civil war *per se*.⁴⁷ Indeed,

⁴⁷ For analyses of the practice of States in relation to Common Art 3 of the 1949 Geneva Conventions, see James E Bond, 'Internal Conflict and Article Three of the Geneva Conventions' (1971) 48 Denver Law Journal 24; Lindsay Moir, *The Law of Internal*

the denial by States of the existence of intra-state armed conflict predates the adoption of the 1949 Geneva Conventions. As one author observed in 1922: “One can rarely find a government that wants to recognize officially a civil war in its country before being overthrown or placed in an unfavourable situation. As a general rule, a government, dealing with internal unrest, shall always assert that it is just a simple riot”.⁴⁸

This remains the case even though the majority of armed conflicts in the 20th century (mainly since the end of the Second World War) remain internal armed conflicts or civil wars. There are only rare instances where States fighting against insurgencies accepted the appropriateness of international regulation and recognized the applicability of Common Article 3 or other fundamental rules under the Geneva Conventions. The civil wars in Algeria (1954-1962), Nigeria (Biafra) (1967-70), Congo (the first civil war 1960-65), and Yemen (1962-1970) were some of these rare instances where the State parties to the conflict accepted (explicitly or impliedly) to abide by Common Article 3 or by the fundamental principles in the Geneva Conventions.⁴⁹

Armed Conflict (Cambridge University Press 2002); Howard J Taubenfeld, ‘The Applicability of the Laws of War in Civil War’ in John Norton Moore (ed), *Law and Civil War in the Modern World* (The Johns Hopkins University Press 1974).

⁴⁸ Rapport M Lodygeusky for the ICRC, 5 May 1922, ICRC Archives CR 22/1, as quoted in Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 200.

⁴⁹ Moir (n 49) 67–88; Bond (n 49) 270–273; Richard A Falk (ed), *The International Law of Civil War* (Reprint edition, The Lawbook Exchange, Ltd 2010); Sylvie Junod, ‘Additional Protocol II: History and Scope’ (1983) 33 American University Law Review 29. Though the majority of experts in the area assert the resistance of States towards the application of IHL in armed conflicts within their territories, Sandesh Sivakumaran holds, based on numerous examples, that States do recognize international law obligations albeit in various ways. Sivakumaran (n 50) 200–205.

In recent decades as well, States often deny the existence of an armed conflict within their territories. Among the notable instances was the position of England regarding the conflict in Northern Ireland that lasted for 30 years, from about 1968 to 1998. In the words of John Murphy, “the United Kingdom never acknowledged ‘the ‘Troubles’ in Northern Ireland as an ‘armed conflict’ to which the law of armed conflict might apply”.⁵⁰ According to Charles Garraway:

The United Kingdom consistently refused to accept that the campaign by the Irish Republican Army (IRA) and other Republican factions in Northern Ireland amounted to armed conflict. Even the deployment of large numbers of British military forces did not change that position. They were deployed in the capacity of military aid to the civilian power, were subject to civilian control and were at all times subject to domestic law. Thus, insofar as the use of force was concerned, they operated in a *law enforcement paradigm*, not in an armed conflict one.⁵¹

The armed conflict between Turkey and the Kurdish insurgency (PKK) in the Kurdistan region is another instance in which Turkey has presented the situation (at least since 2005) as “a matter of *law enforcement* against a terrorist organization”.⁵² Similarly, Russia (regarding the first Chechnyan war in the early 2000s) and Colombia (in the late 1990s regarding the long-lasting conflict against the FARC) denied the existence of a state of *war* or armed conflict against insurgent groups.⁵³ Interestingly, Russia named its confrontation an

⁵⁰ John Murphy, ‘Will-o’-the Wisp? The Search for Law in Non-International Armed Conflicts’ in Kenneth Watkin and Norris Andrew (eds), *Non-International Armed Conflicts in the Twenty-First Century*, vol 88 (Brill | Nijhoff 2012) 15.

⁵¹ Charles Garraway, ‘War and Peace: Where Is the Divide?’ in Kenneth Watkin and Norris Andrew (eds), *Non-International Armed Conflicts in the Twenty-First Century*, vol 88 (Brill | Nijhoff) 101. (emphasis added).

⁵² Sivakumaran (n 50) 200. (emphasis added).

⁵³ *Ibid* 205.

“operation on the restoration of the constitutional order in Chechnya”.⁵⁴ More recently, during the Libyan crisis in 2011, Muammar Gaddafi claimed that the opposition forces were terrorists affiliated with al-Qaida; hence, there was a counter-terrorism *law enforcement operation*, not an armed conflict.⁵⁵

One of the reasons behind States’ temptation to deny is the concern that any formal recognition of the existence of an armed conflict within their territories will invite the intervention of international regulation of internal affairs. This concern is mainly related to the desire of States to subdue rebellion, riots, or insurrection without the bounds of international law obligations, specifically obligations under IHL.⁵⁶ Allegedly, the vague formulation of the relevant IHL provision governing NIACs, i.e., Common Article 3, particularly the lack of definition of the notion of NIACs, had created a fertile ground for states to manipulate the law, pursue varied definitions, and, thereby, deny the applicability of international law.⁵⁷

However, the definitional challenge was settled mainly after the International Criminal Tribunal for the former Yugoslavia (ICTY)

⁵⁴ Kostia Gorobets, Russian “Special Military Operation” and the Language of Empire, *Opinio Juris* Blog Post, <http://opiniojuris.org/2022/05/24/russian-special-military-operation-and-the-language-of-empire/> 24 May 2022.

⁵⁵ Xan Rice, ‘Gaddafi is the terrorist man’: Derna denies being al-Qaida hotbed, *The Guardian*, 12 May 2011.

⁵⁶ Bond (n 49); Moir (n 49) 88.

⁵⁷ The ICRC recognized this challenge during the 1974-77 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law. It was stated that “Common Article 3 does not contain a definition of armed conflict. In the absence of clarity of this concept, it gave rise to a great variety of interpretation and in practice its applicability was often denied”. See ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Commentary of 1987 (ICRC, Protocol II, Commentary of 1987) para 4448.

stepped in to bridge the gap through its celebrated definition of NIAC adopted in 1995. According to ICTY, a NIAC exists “whenever there is a ... protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.⁵⁸ Besides the definition, ICTY and subsequent *ad hoc* international criminal tribunals also developed the so-called “convenient criteria” that eased the challenge of determining the existence of a NIAC.⁵⁹ However, despite the normative developments and clarity of the notion of NIACs, as in the recent cases mentioned above, States continued to resist acknowledging the existence of armed conflict due to the fear that it would constrain their authority to use repressive measures against insurgents.⁶⁰

The Ethiopian Federal government’s resistance to formally recognizing the existence of an armed conflict could also be seen in the above broader international context. Within days of the outbreak of the conflict in Tigray, the Federal government issued an official statement invoking the ‘principle of non-intervention in internal affairs’ in response to appeals from international actors, including the UN, the African Union and the EU, for a cessation of hostilities and compliance international law obligations.⁶¹ Subsequent official statements also

⁵⁸ See ICTY, *Prosecutor v. Dusko* (n 6) para 70.

⁵⁹ See ICTY, *Prosecutor v. Ramush Haradinaj, et al.*, (n 8) para 60; The International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Chamber I, Judgement, 2 September 1998, paras 619-621; ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment and Sentence, 6 December 1999, para 93; and the Special Criminal Tribunal for Sierra Leone (SCSL), *Prosecutor v. Issa Hassan Sesay, et al.*, Case No. SCSL-04-15-T, Trial Chamber I, Judgement, para 95.

⁶⁰ Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press 2010) 57.

⁶¹ BBC, Ethiopia’s Tigray Crisis: Abiy Ahmed ‘rejects international interference’, 25 November 2020; ‘United States Supports International Efforts to End Conflict in Northern Ethiopia’ (2022) 116 American Journal of International Law 438 <<https://doi.org/10.1017/ajil.2022.9>>.

unequivocally asserted the Federal government's capability and resolve to manage 'its own rule of law operations *according to the laws of the land without any external intervention*'.⁶² This declaration appears primarily intended to circumvent what the government perceived as interference in the country's internal affairs. At the same time, it also suggests a reluctance to assume international legal responsibilities, likely stemming from concerns that such recognition could constrain the government's discretion in dealing with its adversary - which was often described during the conflict as a "Junta" - a clique of renegades within the TPLF.

Another reason for States' reluctance to acknowledge the existence of an armed conflict is the concern that doing so may confer a degree of legitimacy to insurgent armed groups. There is a long-standing fear that formal recognition of the existence of an armed conflict, and the consequent application of IHL, could place insurgents on an equal footing with government armed forces.⁶³ States may also be concerned that such recognition would imply that government's armed forces become lawful targets in the same way as the members of insurgent armed groups.⁶⁴ In turn, this may deprive State armed forces of the

⁶² OPM, "The Federal Government of Ethiopia is Asserting its Constitutional Mandate to uphold the rule of law According to the laws of the land", <<https://twitter.com/pmethiopia/status/1327934396817616901?lang=en>>, 15 November 2020; Abiy Ahmed, "Adherence to the Principle of Non-Intervention in Internal Affairs", <<https://twitter.com/pmethiopia/status/1331475021085237248>>, 25 November 2020. (emphasis added).

⁶³ Antonio Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (1981) 30 *International & Comparative Law Quarterly* 416.

⁶⁴ Dieter Fleck, 'The Law of Non-International Armed Conflict' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (4th Edition, Oxford University Press 2021).

privilege they would otherwise enjoy retain when undertaking policing or law enforcement operations under domestic laws

These concerns are rooted in the doctrine of equality of belligerents, one of the fundamental tenets of IHL applicable to NIACs. The doctrine provides for the equal rights and obligations of the parties to the conflict. As endorsed by Common Article 3, ‘*each party to the conflict*’ in a NIAC is bound by the obligations set out therein. Accordingly, it is widely accepted that Common Article 3 directly addresses non-state parties, and that the reference to ‘each party’ signifies a degree of international recognition of rebels as bearer of obligations under international law.⁶⁵ Consequently, under IHL, the established government of a State and rebel groups are generally treated as equals for the purpose of applying the relevant rules. *Prima facie*, therefore, the extent of the duties and responsibilities of rebels is the same as that of the government.⁶⁶ The purpose of this principle is clear: as the ICRC has stated, it is “purely humanitarian” character⁶⁷, meaning that “it is in no way concerned with the internal affairs of States, and that it merely ensures respect for the few essential rules of humanity which all nations consider valid everywhere, in all circumstances”.⁶⁸

In other words, the principle of belligerent equality is intended to ensure respect for fundamental humanitarian principles by all parties to an internal armed conflict. Moreover, as explicitly endorsed in

⁶⁵ Sassòli (n 10) 583.

⁶⁶ *Ibid*, 584.

⁶⁷ ICRC, Protocol II, Commentary of 1987, paras 4440-4442.

⁶⁸ ICRC, GCIII, Commentary of 2020, § 900; ICRC, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, Commentary of 1952 (GCI, Commentary of 1952) 60.

Common Article 3⁶⁹ and in certain subsequent treaties regulating the conduct of non-state armed groups⁷⁰, the recognition that international law applies to a civil war does not affect the legal status of insurgents, nor does it confer any legitimacy or authority of any kind on the belligerent armed groups.

Despite these normative guarantees, States party to internal armed conflicts almost always seek to delegitimize opposing armed groups and reduce them to the level of criminals.⁷¹ As practice shows, States continue to classify violence within their territory as an armed conflict, or to accept that dissident groups that have taken up arms against them to be treated as equal in any respect whatsoever.⁷² Therefore, to dispel the perceived legitimization of a non-state armed group, the first step is often to characterize the violence as a mere breakdown of law and order and deny the existence of an armed conflict.⁷³ As Andrew Clapham aptly summarized:

⁶⁹ Common Art 3, para 3.

⁷⁰ See, for instance, the Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague (14 May 1954), Art.19(4); Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague (26 March 1999), Art.22(6); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (25 May 2000), Art.4(3); and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (The Kampala Convention) (23 October 2009), Art. VII(2).

⁷¹ Cassese (n 65); Sivakumaran (n 50) 204.

⁷² ICRC, GCIII, Commentary of 2020, § 904; Sassòli (n 10) 586. However, since recently, concerning extra-territorial NIACs, i.e., NIACs happening outside the territory of the State party to the conflict or in the territory of a third State, there has been a growing inclination among States parties to accept the characterization of such situations as a NIAC and the applicability of IHL. This has been considered as a notable departure from the past when States often deny the legal characterization of a situation or armed violence as an armed conflict subject to the regulation of IHL. See Lawrence Hill-Cawthorne, 'Humanitarian Law, Human Rights Law and the Bifurcation of Armed Conflict' (2015) 64 *International & Comparative Law Quarterly* 293.

⁷³ Sivakumaran (n 50) 200.

The designation of a situation as ‘an armed conflict not of an international character’, so as to trigger the application of Common Article 3 to the Geneva Conventions of 1949, is obviously an act of considerable political importance for all sides to the conflict. The rebels will often welcome the designation of their attacks as constituting armed conflict as this confers a curious sort of international recognition on them; ... On the other hand, the government may be less willing to acknowledge the situation as one of armed conflict, preferring instead to portray it as a fight against criminals and terrorists.⁷⁴

A cursory review of Ethiopian governments ‘official statements, particularly in the early stages of the armed conflict in Tigray, suggests that the government was indeed concerned not to accord any legal status or legitimacy to the TPLF by recognizing the situation as an armed conflict. When the government described its military action as a ‘policing operation’ to apprehend and bring to justice the “Junta” responsible for the attacks on the Northern Command, it was explicitly denying that the situation constituted an armed conflict while simultaneously emphasising the criminality of its adversary. In one of his video addresses in the early days of the conflict, the Prime Minister of Ethiopia expressed concern about legitimizing “the TPLF criminal clique” when he cautioned the international community not to make “any mistake in treating the federal government *as equal with criminal groups*”.⁷⁵ Since then, the Federal government referred to the TPLF as the “Junta” or “the criminal clique” until it was eventually designated

⁷⁴ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 275.

⁷⁵ OPM, “Putting an End to Impunity: The Case for Enforcing Federal Laws in Tigray”, <<https://www.youtube.com/watch?v=ReZ3A-2Ozjs>>, 08 November 2020 (emphasis added).

as a “criminal terrorist organization” on 08 May 2021, in another step to outlaw its adversary and deprive it of any legitimacy whatsoever.⁷⁶

However, from the perspective of international law, the Federal government’s political concern is unfounded. From an IHL standpoint, the law does not impede States from suppressing insurgency or conducting military operations in the manner they deem fit. Rather, IHL requires States to align their measures with the fundamental guarantees of international law.⁷⁷ Likewise, the application of IHL obligations does not in any way enhance the legal status of the rebels, prevent the established government from maintaining law and order within its territory, prevent a State from treating its enemies as bandits, terrorists, or ordinary criminals, or affect its right to prosecute, try, and sentence members of the belligerent group under domestic law.⁷⁸ It follows that insurgent armed groups cannot claim special status or immunity from prosecution merely because they are subject to obligations under international law.⁷⁹ In addition, as noted above, the applicability of the IHL in NIACs is automatic where the normative requirements are met. Once an armed conflict exists, the law applies on the basis of the prevailing facts, without regard to the discretionary assessment of the State party to the conflict.⁸⁰

Therefore, given the official statements by the Federal government invoking the ‘principle of non-intervention in internal affairs’, its

⁷⁶ OPM, “Categorizing “Tigray People’s Liberation Front (TPLF)” and “Shene” as Terrorist Organizations”, https://pmo.gov.et/media/documents/Categorizing_TPLF__Shene_as_Terrorist_Groups.pdf, 01 May 2021.

⁷⁷ Cullen (n 62) 56.

⁷⁸ ICRC, GCIII, Commentary of 2020, para 903, 61. This has also been reaffirmed under the Additional Protocol II, Art. 3.

⁷⁹ ICRC, GCI, Commentary of 1952, 61.

⁸⁰ GCIII, Commentary of 2020, para 906; Junod (n 51).

concerns about international intervention in what it considered a domestic matter, and its subsequent decision to proscribe the TPLF, it appears reasonable to conclude that the effort to characterize the Tigray conflict as a “law enforcement operation” was driven primarily by a desire to avoid international intervention, including regulation under IHL.

To summarize, when the forgoing analysis is applied to the conflict in northern Ethiopia, the Federal government’s decision not to frame the situation in Tigray as an armed conflict would not prevent the applicability of IHL. As previously noted, human rights law also remained relevant and applicable regardless of the narrative the federal government chose to adopt. According, denying the existence of an armed conflict or advancing an alternative characterization is not a valid means of circumventing international human rights law responsibilities either. Nonetheless, as will be examined in the next section, the Federal government’s opposition to formally recognising the existence of an armed conflict may have implications for implementation of international law obligations by the parties to the conflict. It may also affect accountability for the egregious, large-scale and the all too frequent violations witnessed during the conflict.

2. Implications of the Shifting Narratives

As the discussion above demonstrates, States are often unwilling, in their relations with rebel groups, to formally acknowledge the existence of an internal armed conflict, thereby inhibiting the identification and application of appropriate international law frameworks to particular cases arising during the conflict. The Federal government of Ethiopia has adopted a similar approach in relation to the conflict it has been engaged against the dissident armed group TPLF, including advancing

conflicting narratives about the situation at different points in time. The following discussion will analyse the implications of these conflicting narratives for determining the applicable international normative framework and the obligations arising under it, with particular focus on the rules governing the use of force and on ensuring accountability for violations committed during the conflict.

It should be noted that, as previously emphasised, the application of IHL to a situation of armed violence is determined by the facts on the ground, using objective criteria: the intensity of the armed violence and the organization of the non-state party to the conflict. It does not depend on the parties' subjective characterisation of the conflict. Accordingly, the Federal government's ambiguous narrative of the nature of the conflict does not affect the applicability of IHL. The following discussion should therefore not be understood as an assessment of the parties' positions in determining the applicable legal frameworks. Rather, it is intended solely to illustrate the potential practical consequences - such as its impacts on military operational decisions and compliance with international law obligations - arising from the conflicting narrative adopted by the Federal government regarding the conflict in Tigray.

2.1. Applicable Paradigm to Regulate Use of (Lethal) Force

In international law, the legal regimes governing the use of force against persons are IHL and IHRL. Accordingly, in a situation of armed conflict such as the situation in northern Ethiopia, the use of lethal or potentially lethal force by armed forces and law-enforcement officials is governed by two different paradigms: the conduct of hostilities paradigm (CHP), derived from IHL, and the law enforcement paradigm (LEP), derived mainly from IHRL. In other words, in armed

conflict, both IHL and HRL apply concurrently.⁸¹ However, on several matters, especially those related to the legality of the use of lethal force, they impose different standards governing the use of force, including operational planning, the rules of engagement to be followed during operations, and investigation into violations that may have occurred.

International law does not clearly define the concept of law enforcement, nor does it provide sufficient guidance on which acts by a State in an armed conflict may fall under the LEP. However, the UN has attempted to provide some rules in soft law documents adopted in the 1980s and 1990s that set out basic principles on the use of force by law enforcement personnel. These include the UN Code of Conduct for Law Enforcement Officials⁸² and the UN Basic Principles on the Use of Force and Firearms.⁸³ According to the Code of Conduct, “law enforcement officials may be authorized to use force as is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting lawful arrest of offenders or suspected offenders.”⁸⁴ Accordingly, LEP concerns the use of lethal or potentially lethal force by a State’s police powers in the exercise of conventional police duties, such as preventing crimes, carrying out arrest and detention, or quelling a riot.⁸⁵ These are fundamental law and order

⁸¹ See *supra* (n 11).

⁸² UN Code of Conduct for Law Enforcement Officials, General Assembly Resolution 34/169, 17 December 1979, commentary to Article 3.

⁸³ UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eight UN Congress on the Prevention of Crime and the Treatment of Offenders and welcomed by UNGA Res. 45/166, 18 December 1990, Principle 5.

⁸⁴ UN Code of Conduct for Law Enforcement Officials (n 83).

⁸⁵ ICRC, *The Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms*, 2013; Gloria Gaggioli and Nils Melzer, ‘Conceptual Distinction and Overlaps between Law Enforcement and the Conduct of Hostilities’ in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Second edition, Oxford University Press 2015).

enforcement measures in any State, and they are often carried out by police forces. Even when such powers are exercised by the State's military or other security forces, the act still constitutes a law enforcement measure, and the actors are also regarded as law enforcement officers. In other words, the nature of the acts, not the type of state security agencies involved, matters most.⁸⁶

On the other hand, the concept of CHP concerns armed hostilities between belligerent parties to an armed conflict and governs the use of lethal force during the conflict.⁸⁷ Thus, the paradigm applies only during armed conflict and where the use of force is directed toward achieving a military objective.⁸⁸ The primary purpose of using firearms is to defeat or overpower the enemy and to compel its complete or partial submission. In this respect, the purpose is fundamentally different from that of LEP. It may be argued that, particularly from the perspective of the State party to the conflict, the ultimate goal of militarily confronting insurgents is also to maintain domestic law and order.⁸⁹ This may be true in practical terms. Nonetheless, it does not affect the characterization of the situation or the applicable law: the CHP governs the military confrontation and other acts that have a nexus to the armed conflict.⁹⁰ Thus, compliance with international law requires a careful appreciating of the conceptual distinction between the two paradigms applicable and an accurate determination of the paradigm applicable to a particular situation, particularly in regulating the use of lethal force in a given context. In light of these

⁸⁶ ICRC, *The Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms* (n 86), 12.

⁸⁷ Gaggioli and Melzer (n 88).

⁸⁸ African Commission on Human and Peoples' Rights, *General Comment No.3*, (n 46), para 32-35.

⁸⁹ Gaggioli and Melzer (n 88).

⁹⁰ For detailed analysis on this, see Sassòli (n 10) 200ff.

considerations, the competing narrative of the situation by the Federal government affect the determination of whether the use of lethal force in various incidents by all parties to the conflict conforms to international law obligations. This also has implications for the accountability mechanisms to violations committed by different actors, which must be assessed against the applicable legal standards in each case.

The CHP provides the following cardinal rules for determining the lawfulness of the use of force: military necessity, proportionality, and precautions.⁹¹ By contrast, the LEP provides that the use of lethal force in law enforcement is permitted only when it is strictly necessary to pursue a legitimate aim, proportionate to that aim, and accompanied by due regard for strict precaution to avoid the use of lethal force as far as possible.⁹²

To elaborate on these points, although both paradigms share similar principles for regulating the use of force, namely the principles of necessity, proportionality, and precautions, these principles are understood under the two paradigms differently.

To begin with military necessity, which is implied by the IHL principle of distinction, the necessity to use force against lawful targets is presumed under the CHP. In other words, IHL presumes that fighters, including members of State armed forces and fighting members of organized armed groups), may be attacked by lawful means. At the same time, civilians are protected against direct attack unless and for

⁹¹ *Ibid*, 29.

⁹² See Human Rights Committee, General Comment No. 36, CCPR/C/GC/36, 2018, paras 10 ff.

such time as they take a direct part in hostilities.⁹³ By contrast, under IHRL, the use of force in law enforcement operations must be absolutely necessary in the particular circumstances. Accordingly, the principle of “absolute necessity” under the LEP implies that force may be used only to protect human life from unlawful attack and only as a last resort when other available means proven ineffective or are unlikely to achieve the intended result.⁹⁴

In light of these differences, the Federal government’s insistence that the situation in Tigray constitutes law enforcement would suggest that the use of lethal force in the conflict should be assessed solely under the LEP. This means that, except in cases where regular and irregular forces used lethal force against individual members of the opposing party while those individuals posed an imminent threat to their lives and no other means were available to counter the threat, all other uses of lethal force, even against legitimate targets under IHL, would be considered unnecessary and therefore unlawful.⁹⁵ By contrast, if the situation is viewed as an armed conflict, a different standard applies: the use of lethal force against certain individuals, namely legitimate targets, would be lawful.

Consequently, it can be argued that the shifting narrative by the Federal government of the situation in norther Ethiopia has implications for the effective determination of which cases would constitute violations under the principle of necessity and which would not. It also has the potential to mislead responsible bodies, such as commanders), in

⁹³ See ICRC Study on Customary International Humanitarian Law, Rules 1 and 6.

⁹⁴ Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC 2016) 90–91.

⁹⁵ It should be noted that the use of lethal force during armed conflicts against individuals that are legitimate targets is lawful under IHL. Thus, it would not constitute violation.

fulfilling their duty to ensure compliance with international law obligations during operations they undertake.

Both paradigms also require observance of the principle of proportionality. However, the principle is conceived differently under each. IHL prohibits an attack on a legitimate target if the attack “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”⁹⁶ In other words, the IHL principle of proportionality protects only civilians and civilian objects from damage when that damage would be excessive in relation to the concrete and direct military advantage anticipated by the attack. Legitimate targets of an attack, namely combatants or fighters or civilians directly participating in hostilities, are not protected by the principle of proportionality under IHL.⁹⁷

In contrast, under the LEP, when State agents use force against an individual during law enforcement, the principle of proportionality requires a balance between the risks posed by the individual and the potential harm to that individual as well as to surrounding persons. Hence, unlike IHL, under IHRL, the life of the individual posing an imminent threat must be taken into account. If the individual does not pose an imminent threat of death or serious injury, the use of lethal or potentially lethal force would be proportionate would therefore constitute a violation.⁹⁸ Additionally, even where the lawful use of force against an individual is unavoidable, the LEP proportionality test

⁹⁶ See the ICRC Study on Customary International Humanitarian Law, Rule 14.

⁹⁷ For analysis of the relevant IHL rule on this, see Sassòli (n 10) 360–361.

⁹⁸ Noam Lubell, ‘Challenges in Applying Human Rights Law to Armed Conflict’ (2005) 87 *International Review of the Red Cross* 746.

requires an escalation of force approach, meaning the use of the smallest amount of force necessary, including, depending on the circumstances, less-than-lethal weapons, unless this is impossible in the particular circumstances.⁹⁹

Accordingly, the different conception of proportionality under the two paradigms has implications for assessing the lawfulness of force in a particular situation. In this regard, the shifting narrative of the situation in Tigray, in addition to operational planning concerning the use of force, had the potential to blur the determination of lawfulness in the numerous cases where individuals were killed through the use of force, whether targeted intentionally or incidentally. This, in turn, would challenge the application and effectiveness of accountability mechanisms in cases of violations, which requires a prior and proper determination of the applicable standard for assessment.

Regarding the principle of precaution, the CHP requires parties to armed conflicts to exercise constant care to spare civilians and civilian objects.¹⁰⁰ In contrast, under the LEP, all precautions must be taken to avoid, as far as possible, the use of force itself, and not merely incidental death or injury to civilians or damage to civilian objects. Accordingly, State agents using force must endeavor, to the greatest extent possible, to minimize harm and to respect and preserve human life.¹⁰¹

In this regard, it is clear that lethal force has been used by all parties to the conflict in the Tigray region. However, as with other differences and their implications discussed above, the shifting narrative

⁹⁹ *Ibid*, 737.

¹⁰⁰ See ICRC Study on Customary International Humanitarian Law, Rules 15-24.

¹⁰¹ UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (n 84), Principle 5.

surrounding the situation may complicate the assessment of whether the principle of precaution has been observed, and thus whether the use of force was lawful. This is because, even where all other rules and principles are complied with, disregard of the principle of precautions would still render the use of force unlawful. Yet, as noted above, the two paradigms conceive this principle differently, and accurate assessments of lawfulness can be made only when the relevant standard is identified and applied to the specific case.

In sum, because the two paradigms governing the use of force different in content, correctly determining the applicable paradigm has a crucial impact on the humanitarian consequences of an operation. Under the CHP, the killing of lawful targets is permitted, provided that, among other requirements, the IHL principles of proportionality and precautions are satisfied.¹⁰² By contrast, under the LEP, lethal force may be used only as a last resort, when other available means are ineffective or unlikely to achieve the intended result.¹⁰³ In other words, the LEP requires ‘an escalation of force approach,’ which implies a “capture rather than kill” approach to dealing with a suspect, unless that persons

¹⁰² The underlying reason for this is that the basic rules of IHL governing the conduct of hostilities were crafted to reflect the reality of armed conflict. They are based on the assumption that the use of force is inherent to engaging in armed conflict because the ultimate aim of military operations is to prevail over the enemy’s armed forces. Consequently, under IHL, parties to an armed conflict are permitted, or at least are not legally barred from, attacking each other’s military personnel and military objectives. See ICRC Study on Customary International Humanitarian Law, Rules 1-10.

¹⁰³ This is because IHRL was initially conceived to protect individuals from abuse by their State. Hence, its rules aimed at regulating the use of force in law enforcement are designed to essentially provide guidance on how force can be used by State agents when it is absolutely necessary in self-defense; to prevent crime, to effect or assist in the lawful arrest of offenders or suspected offenders; to prevent the escape of offenders or suspected offenders and in quelling a riot. See UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, (n 84), Principle 9; UN Code of Conduct for Law Enforcement Officials (n 83), commentary on Article 3.

poses an imminent threat to life. In additions, the CHP paradigm tolerates greater incidental loss of life than the LEP. The two paradigms also different in terms of operational planning.¹⁰⁴

These differences show that the Federal government's accurate characterization of a situation as one of law enforcement or armed conflict was indispensable, because the resulting determination of the applicable paradigm directly affects how its armed forces may use lethal force against individuals, which cases trigger a duty to investigate possible violations, and the effective implementation of the international law obligations applicable to the situation as a whole.

2.2. Accountability for Violations: the Duty to Investigate

Since the early days of the outbreak of the conflict in Tigray, reports of serious violations committed in the context of the conflict surfaced. These include civilian massacres, sexual and gender-based violence, extrajudicial killings, the destruction and looting of public and private property, and attacks on healthcare institutions as well as religious and cultural objects.¹⁰⁵ Both IHL and IHRL impose obligations to ensure accountability for violations, which requires independent and impartial investigations. Accordingly, the duty to investigate in situations of armed conflict derives from both bodies of law. However, as they differ in the standard governing the lawful use of lethal force, they also differ in the scope and purpose of the duty to investigate.

According to prominent IHL commentators, under the CHP, an investigation is required only where there is reasonable suspicion, a

¹⁰⁴ For instance, as opposed to the LEP, the CHP does not necessarily suppose the use of less-than-lethal weapons.

¹⁰⁵ For e.g. see the Report of the EHRC and OHCHR (n 3).

credible allegation, or a possibility that serious violations of IHL, meaning war crimes, have been committed.¹⁰⁶ This shows that under the CHP, not every death triggers a duty to investigate. The reason is that, under IHL, legitimate targets such as fighters and civilians directly participating in hostilities may be lawfully killed, and incidental loss of civilian life does not amount to a violation of IHL so long as the principles of proportionality and precautions have been respected. In other words, IHL recognizes that some deaths are inherent in the conduct of hostilities in situations of armed conflict.

In contrast, IHRL, which was initially conceived to regulate peacetime situations in which any use of force is exceptional, imposes a much more stringent obligation to investigate after the use of force results in death or serious injury.¹⁰⁷ According to human rights bodies, under the LEP, an effective investigation should be conducted each time a person is killed in a law enforcement operation and at least where there is an allegation of a violation of the right to life arising from the operation.¹⁰⁸

In this regard, the competing narrative of the situation in Tigray affects the scope and purpose of any investigation into possible violations. In this regard, where the federal government insists on characterizing the situation as law enforcement, it bears the obligation to undertake investigations into all, or at least most, of the deaths that have occurred during the law enforcement operations, including the deaths of persons

¹⁰⁶ For e.g. see Michael N Schmitt, 'Investigating Violations of International Law in Armed Conflict' (2011) 2 *Harvard National Security Journal* 587; Marco Sassòli and Laura M Olson, 'The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 90 *International Review of the Red Cross* 599 .

¹⁰⁷ See UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (n 84), commentary on Art 3.

¹⁰⁸ For e.g. see Report of the Special Rapporteur on the Extrajudicial, Summary and Arbitrary Executions, Philip Alston, 2006, UN Doc. E/CN.4/2006/53, paras 35-36.

who would have been legitimate targets had the situation been treated as an armed conflict. However, this would not only amount to an inaccurate application of international law to the situation, thereby undermining the intended aim in the particular circumstances, arguably, but would also be arguable as unrealistic. Moreover, violations that could constitute war crimes cannot be identified as such under the LEP, because such crimes do not exist within that framework. Consequently, by characterizing the situation as a law enforcement operation when it is otherwise, those responsible for war crimes could escape justice for the crimes they committed.

Additionally, because the IHL obligation to investigate is linked to war crimes, its purpose is generally to establish individual criminal responsibility for violations. By contrast, the purpose of the obligation to investigate under IHRL is to establish State responsibility for violations, and it may be considered effectively undertaken even if it is impossible to identify and punish the particular individual responsible. This, in turn, implies different standards of proof under each paradigm because, because establishing individual criminal responsibility must be proved beyond a reasonable doubt, whereas establishing State responsibility requires a less stringent standard of proof. Consequently, the competing narrative about the conflict in Tigray seriously affects the accountability mechanism for violations, since these depend on the findings of an investigation into the situation.

Finally, the shifting narrative advanced by the Ethiopian government has had implications for both the recognition of Eritrean intervention on the side of the Ethiopian government and the attribution of responsibility and accountability for violations committed by the EDF. Despite allegations of EDF presence since the early days of the conflict,

the Ethiopian government denied the allegations for months¹⁰⁹ until the Prime Minister eventually admitted, on 23 March 2021, the presence of Eritrean troops in the Tigray region.¹¹⁰ However, even then, the government did not acknowledge that Eritrea had entered the conflict in support of the Ethiopian government. According to the government officials, there was no “official invitation for Eritrean troops to be involved”, nor was there an “official military agreement ... between the two countries”.¹¹¹ Instead, as the Prime Minister of Ethiopia maintained, Eritrea intervened in self-defence against armed attacks by TPLF forces, such as the rockets launched at the Eritrean capital, Asmara, and other threats the TPLF posed to Eritrea’s security.¹¹²

Setting aside other considerations,¹¹³ the denial by the Ethiopian government may be attributed to the competing narrative it adopted in characterizing the conflict as an internal law and order issue. Explaining a third State’s military intervention in a domestic law enforcement operation would have been contradictory and difficult.

¹⁰⁹ Phil Stewart, ‘U.S. says reports of Eritrean Troops in Ethiopia’s Tigray are Credible’, *Reuters*, 11 December 2020.

¹¹⁰ ‘Ethiopia PM Ahmed Abiy Admits Eritrea forces in Tigray’, BBC, 23 March 2021; Report of the International Commission of Human Rights Experts on Ethiopia, (n 4), para 43.

¹¹¹ Sisay Sahlu, ‘No Ethiopian Official Invitation for Eritrean Troops, MoFA’, *The Reporter*, 06 March 2021.

¹¹² ‘Ethiopia PM admits Eritrean Soldiers entered Tigray region’, *Al Jazeera*, 23 March 2021.

¹¹³ For background on Eritrean role in the Tigray conflict, see Mirjam van Reisen, Ethiopia at Crossroad: The Role of Eritrea in the Tigray War, (Presentation at the Hearing Organized by the European Parliament), <https://www.researchgate.net/publication/356790836_Ethiopia_at_Crossroad_the_Role_of_Eritrea_in_the_Tigray_War> 6 December 2021.

Nevertheless, even though there was no official consent, this does not absolve the Ethiopian government of its obligation to account for violations of international law committed by the EDF within Ethiopian territory. Indeed, the Ethiopian government later acknowledged its responsibility to investigate circumstances involving human rights violations by the EDF.¹¹⁴ On the other hand, had Eritrea intervened as the Ethiopia's invitation or with its consent to assist with law enforcement, Eritrea might still have conducted a law enforcement operation in support of Ethiopia to maintain law and order within its territory.¹¹⁵ In that sense, investigations into violations by the EDF should also be considered in light of both the law enforcement and conduct of hostilities paradigms. Nonetheless, uncertainty about the characterization of the conflict may complicate the investigation into, and the establishment of responsibility for, violations by EDF in the same way as it affects the nature, purpose, and scope of investigations into violations by other parties to the conflict.

Conclusion

As discussed in this article, the Federal government of Ethiopia has adopted shifting narratives regarding the conflict in Tigray. While it was mainly described as a law enforcement operation, the government sometimes acknowledged that an armed conflict existed. Such competing narratives have far-reaching practical implications for the application and enforcement of the relevant bodies of international

¹¹⁴ Report of EHRC and OHCHR, (n 2), Annex V – Response by the Government of Ethiopia, para 25.

¹¹⁵ According to the ICRC, “an intervening third State may conduct law enforcement operations with the consent of the territorial (or host) State to help the latter maintain or restore law and order”. ICRC, *The Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms* (n 87), 1.

law, particularly IHL. The article examined whether the Federal government's insistence on characterizing the situation as a law enforcement operation, despite its fulfillment of the objective criteria under IHL for an armed conflict, may have been driven by an intention to bypass the constitutional standards requiring authorization from the HPR before engaging in an armed conflict. However, as the article pointed out, it is difficult to conclude that constitutional considerations drove its competing narratives. By contrast, the article demonstrated that the Federal government's principal aim may have been to circumvent perceived international (law) intervention and regulation of the conflict in Tigray, which it viewed as an entirely internal matter. This appears to have been the main factor driving factor the Federal government's approach. In any event, it has been argued that the Federal government did not adopt this competing narrative by chance; rather, it was a deliberate effort to avoid international legal regulation.

Despite this policy consideration, the competing narrative has implications for determining the applicable international legal framework governing the use of lethal force during the conflict and for the standards that ensure accountability for violations. Notably, uncertainty over the characterization of the conflict obscures the Federal government's obligation to investigate IHL violations committed during the conflict that may amount to war crimes.
