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

*Fikre Tinsae Birhane** and *Marishet Mohammed Hamza***

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.

BOUNDARIES AND THE MAKING OF STRANGERS: THE ETHIOPIAN CONSTITUTION AND THE POLITICS OF DIFFERENCE

Adeno Addis*

Abstract

Law can play the role of either transforming strangers into co-participants in a common project or make strangers out of neighbors. This could manifest in various processes: in the way law defines the relevant communities indicating as to who belongs and who does not; in the manner it draws boundaries (both physical and conceptual); in the way it defines the relationship between the individual and a collectivity, etc. In the process of defining boundaries, the law constitutes what issues or relationships are important and what the appropriate disposition or attitude towards them should be. Even more importantly, the law often constitutes who we are and how we should view our interlocutors: whether we should view them as co-participants in a common project or think of them as outsiders or even as existential threats. This essay will pursue this general thesis by using the Federal Constitution of Ethiopia as an example. The claim is that this basic document has transformed neighbors into strangers both in the way it has drawn boundaries (physical and conceptual) and in how it has inclined Ethiopian citizens to view themselves and one another. The Constitution could, of course, be structured to realize the opposite possibility of law, its potential to transform strangers into co-participants in a common project; its capacity to minimize the sacrifices and violence of boundaries (both physical and non-physical) without sacrificing their advantages altogether. The dignity of equal

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citizenship at all levels of governmental structures is one such integrative mechanism.

Key-terms: *Ethiopian Constitution; ethnic federalism; constitutional identity; ethnonationalism; equal citizenship*

Introduction

There is a view of law that is prominent in the legal academy. Referred to as the *instrumentalist* view, it conceives of law as an instrument for pursuing (and achieving) an independently ascertained or established interests or values. The law is a means to an end.¹ It is a means of doing. Under this account, the law is not implicated in the way the end is defined or even in the identity of the actors or participants in pursuit of that end. This, I have argued elsewhere, is an incomplete view of law.² In this essay, I argue that the law is not just an instrument of pursuing independently set or established values and interests (a means of doing). It often constitutes those very interests, directly or indirectly. Even more importantly, it shapes the nature and character of the actors pursuing those interests. That is, the law has a constitutive, not just regulative, dimension to it. It is not just a means of doing; it is also a

¹ See Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press, 2006). See also Adrian Vermuele, Book Review: 'Instrumentalism' (reviewing Brian Z. Tamanaha's, *Law as a Means to an End*) (2007) 120 Harv. L. Rev. 2113. As Vermuele notes, there are varieties of instrumentalism, but for our purpose here the collective label will be sufficient.

² See Adeno Addis, 'Imagining the International Community: The Constitutive Dimension of Universal Jurisdiction' (2009) 31 Hum. Rts. Q. 129, 132; Adeno Addis, 'Law as a Process of Communication: Reisman Meets Habermas', in Mahnouch Arsajani, et al. (eds), *Looking to the Future: Essays in International Law in Honor of W. Michael Reisman* (Martinus Nijhoff Publishers, 2011) 33, 35; Adeno Addis, 'Economic Sanctions and the Problem of Evil' (2003) 25 Hum. Rts. Q. 573; Adeno Addis, 'Role Models and the Politics of Recognition' (1996) 144 U. Pa. L. Rev. 1377.

means of being.³ Lest I be misunderstood, the claim here is not that law is the only (or even the most dominant) means of being. There are, of course, many other factors and processes that go on to define who we are. Rather, the claim here is simply that we should never neglect the fact that the law does contribute, often significantly and decisively, to how we view and understand ourselves as agents and how we position ourselves in relation to others.

I shall explore this constitutive role of law by using the current Ethiopian Constitution as an example. The claim is that the Constitution made strangers out of neighbors, imagined pure (authentic) communities out of a country of hybridity, transformed co-participants in a common project (citizens) into competitors for domination, inclining participants to view competitors as constant existential threats. Of course, there were linguistic and ethnic groups prior to the adoption of the Constitution. No one denies that the country is richly endowed with diverse cultures. But what the Constitution did was essentialize those groups, organizing and mobilizing them in a way that transformed the differences into hard

³ See Adeno Addis, *Imagining the International Community*, *ibid*, 132; Joseph Raz, 'Can There be a Theory of Law?', in Martin P. Golding & William A. Edmundson (eds), *Blackwell Guide to the Philosophy of Law and Legal Theory* 324, 333 (Blackwell publishing, 2005) ("In large measure what we study when we study the nature of law is the nature of our own self-understanding.") Law, for Raz, is constitutive of who we are. It is a means of being not just a means of doing. But cf. Ronald Dworkin, *Justice in Robs* (Belknap Press, 2006) 229. Dworkin asserts, somewhat too quickly that the law has no such constitutive role. ("[I]f we want to study our own self-consciousness we would do much better to turn to fiction, politics, biography depth psychology, and social sciences. We reflect on the character of law to know what we must do not what we are.") In this dispute, I take Raz's side. Law cannot be understood exclusively in instrumental terms, as a means of doing. What we must, or need to, do is to a large extent suggested by who we are or who we think we are. See also Axel Honneth, 'Beyond the Law: A Response to William Schuerman' (2017) 24 *Constellations* 126, 128 (Honneth argues that modern legal systems are "a constitutive sphere of action within our societies, insofar as they provide a state-sanctioned form of mutual recognition... [or misrecognition].")

parameters (thick identities) and often the primary means through which individuals and groups assess not only the issues before them but one another as well. An important purpose of constitutions is to soften hard parameters over time. The Ethiopian Constitution went in a different direction. As a matter of law, it entrenched and even hardened those parameters.

What is imagined or constituted can, of course, be unimagined, or constituted differently.⁴ A separate project I am working on will attempt to show how that could be done in relation to the Ethiopian Constitution. This (the current) essay is mainly concerned with the issue of how the Constitutions transformed differences into hard parameters by essentializing groups and differences. In the subsequent essay, entitled “The Making of a People,” I shall explore how the rich diversity that defines Ethiopia could be accommodated in the contexts of an integrative constitutional order where the dignity of equal citizenship is real and where citizens view themselves as co-participants in a common project rather than as competitors for domination.

⁴ Benedict Anderson in his classic work, *Imagined Communities*, argued that “all communities larger than primordial villages of face-to-face contact (and perhaps even these) are imagined.” The reason why he says that they are imagined is because members will never know fellow-members, meet them or even hear of them, and “yet in the minds of each lives the image of their communion.” Benedict Anderson, *Imagined Communities: Reflection on the Origin and Spread of Nationalism* (2d edn, Verso, 1991)

6. To say that communities are imagined is not to say that they are false. Communities are distinguished not on the basis of the falsity or genuineness of a community, but rather “by the style in which they are imagined.” The style in which the Ethiopian Constitution imagined communities is in the form of nations with all of the historical connotations and difficulties of the term. That process of imagining has had significant impact on how groups viewed one another, as members or strangers.

1. The Ethiopian Constitution and the Making of Strangers

1.1. Boundaries

The world is full of boundaries—both physical and social. Boundaries “form indispensable protection against violation and violence”⁵ but the divisions those boundaries sustain “also carry cruelty and violence.” Put another way, boundaries supply the conditions for identity and agency, “but they also close off possibilities of being that might otherwise flourish.”⁶ Boundaries are preconditions for freedom, but they can also be sources of competition, conflict, and domination.

Although boundaries are drawn in all sorts of ways and by all sorts of means, many boundaries that organize and regulate our lives are drawn by law, whether the boundaries are physical, social, or conceptual. The Ethiopian Constitution has drawn such boundaries which have had enormous impact on the nature of the relationship among citizens and the nature and condition of the political community within which they live. Those boundaries, I claim, have, as a formal matter, transformed a people into peoples, a nation into a form of a united nations, neighbors into strangers, and a country of hybridity into ill-defined nations and nationalities some of whom view each other as strangers or even constant threats to their own survival.

1.2. We “the People” v. We “the Nations, Nationalities and Peoples” (The Conceptual Boundary)

1. Constitutional Identity

A constitution is the basic or fundamental law of the state. It is basic or fundamental in two senses. First, it is the source of all other laws within

⁵ Connolly, *The Ethos of Pluralization* (Univ. of Minnesota Press, 1995) 163.

⁶ *Ibid.*

a particular political community. Other laws within that community that are inconsistent with it will be preempted. Constitutions are at the head of a hierarchy of laws.⁷

Constitutions are fundamental in yet another sense. They define the basic structure of the political community—whether the political community should organize itself as a parliamentary or presidential republic, whether to have a federal or unitary state, etc. It establishes the institutions and system of government. This is foundationalism in the *institutional* sense. Even more importantly, however, a constitution is fundamental in that it seeks to define the nature and character (the identity) of the political community.⁸ It attempt to create a coherent narrative of selfhood or peoplehood. We might refer to this as *identitarian* foundationalism.⁹ As I have argued elsewhere¹⁰, the story a constitution narrates about the political community might be true or false, but the act of making it an official story enables the narrative to take hold as factual and even primordial. That is what narratives do. They constitute that which they claim to be describing.

⁷ For an example of a supremacy clause, see Article 9 of the Ethiopian Constitution which provides that the “Constitution is the supreme law of the land. Any law ... which contravenes this Constitution shall be of no effect.” See also Article VI of the U.S. Constitution which has a more robust notion of supremacy.

⁸ Martin Loughlin, *Against Constitutionalism* (Harvard University Press, 2022) 112-113 (arguing that constitutions serve a symbolic or collective political identity). Jonathan Gould, ‘Puzzles of Progressive Constitutionalism’ (2022) 135 *Harvard Law Review* 2054, 2074 (“Under constitutionalism, a constitution shapes not only the structures of government but also national identity.”); Gary Jeffery Jacobsohn, *Constitutional Identity* (Harvard University Press, 2010); Michael Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge, 2010).

⁹ For a description of the notion of identitarianism in the contexts of inter-tribunal dialogue, see Adeno Addis and Jonathan Remy Nash, ‘Identitarian Anxieties and the Nature of Inter-Tribunal Deliberations’ (2009) 9 *Chicago University J. Int’l L.* 613.

¹⁰ Adeno Addis, ‘Constitutional Preambles and Narratives of Peoplehood’ (2018) 12 *ICL* 125.

Quite often it is constitutional preambles that attempt, albeit briefly, to define the basic identity of the political community (the people, nations, citizens, etc.) which is supposed to have ordained and established the document itself. The paradox, of course, is that the document often constitutes the very people or the nations which are said to be the sources of authority for the document.¹¹

2. From Citizens to Strangers

Whatever system of government constitutions set up and however differently they might distribute power (vertically or horizontally), generally constitutions have one common purpose. They are meant to forge and develop a political community that enables members to see each other as co-participants in a common project. Constitutions are supposed to bind people together, not to set them apart. They are meant to constitute the demos, the people—a sustainable political community.

Often, constitutions announce in their preambles who the sovereign is who has adopted and granted the constitution or on whose behalf the constitution was adopted. Almost all national constitutions which have preambles (and most do) begin with “we the people [of country x]” or its variations such as “the people of [country x]” as the ultimate sovereign which have ordained and established the constitution. The reference is to one people [singular] either as a descriptive or (more likely) as a normative matter.¹²

¹¹ To see how scholars attempt to resolve this paradox, see Adeno Addis, *ibid.*

¹² By “normative” here I mean to refer to the common aspiration of constituting a people that binds citizens together and the commitment to the norms that would further that aspiration. See, *ibid.* When the Constitutions of India and Nigeria, countries defined by

The Ethiopian Constitution is the only national constitution¹³ in force in the world today that refers to “peoples” [plural] and “nations” as the source of the Constitution and in whom all sovereignty reside, as Article 8 provides.¹⁴ The Constitution fragmented (or sorted) a people into peoples and a nation into nations and in the process transformed the nation-state from a country of citizens (at least aspirationally¹⁵) into “a nation of nations,” as one author put it.¹⁶ Under this construct, as a constitutional matter Ethiopians are sovereign not as undifferentiated Ethiopian citizens but as members of the various nations, nationalities, and peoples. Ethiopians are not linked to one another directly as citizens or as members of a people (singular). Their link is mediated through their membership to the various nations¹⁷ to which they are

diverse ethnic and religious groups, begin with “we, the people” the declarations can reasonably be understood to be normative assertions.

¹³ See Adeno Addis, ‘The Making of Strangers: Reflections on the Ethiopian Constitution’ (2022) 38 *Journal of Developing Societies* 421; Adeno Addis, ‘From a Nation of Citizens to a Nation of Nations: National Citizenship without Depth’ (2021) 14 *International Journal of Ethiopian Studies* 141; Adeno Addis, ‘The Making of Strangers: The Ethiopian Constitution as a Suicide Pact, Ethiopia Insight’ (September 18, 2020).

¹⁴ Bosnia-Herzegovina is the only other country that refers to “peoples”. However, even then there is a difference between the Bosnian and the Ethiopian approach. Bosnia-Herzegovina’s Constitution refers to the undifferentiated “citizens of Bosnia-Herzegovina” as having a say in ordaining and establishing the document. No such thing in the Ethiopian Constitution.

¹⁵ Of course, to say that the country was, as a structural matter, a nation of citizens is not to claim that there was in fact equal citizenship. Far from it. Citizens were unequal along many metrics. But as an institutional matter, the aspiration was to work towards the dignity of equal citizenship. On the other hand, it is in the very nature of things that a country divided into nations will be unable to provide equal citizenship across the land for the idea of a nation is that there are insiders and outsiders, indigenes and non-indigenes, for important governance and ownership purposes.

¹⁶ Fasil Nahum, *Constitution for a Nation of Nations: The Ethiopian Prospect* (The Red Sea Press, 1997).

¹⁷ For purposes of efficiency, I shall use “nations” to refer to all three categories that are said to be units of sovereignty under the Federal Constitution: nations, nationalities and peoples. After all, the Constitution itself treats them as if they refer to the same thing. See Article 39(5).

said to belong. That identity, not Ethiopian citizenship, becomes the prism through which individuals see and evaluate not only the issues before them but one another as well. Put simply, under the current Ethiopian constitutional arrangement, Ethiopian citizenship plays a secondary (derivative) role. Membership to the ethnonation is primary and thick.¹⁸ As I shall indicate later, some of the regional states' constitutions appear to have been drafted under that assumption.

Even though the Ethiopian Constitution is alone among national constitutions in using the plural “peoples,”¹⁹ there is another basic law that uses that term as part of its opening phrase. That document is the United Nations Charter (Charter), the constitution of the United Nations. Its preamble begins with the phrase “we the peoples.”²⁰ The term “peoples” here refers to countries. The Charter was establishing an organization, a forum, for independent states, not a federal or an even confederal system. It seems, therefore, unsurprising that the nations and peoples which are organized as regional states under the Ethiopian constitutional arrangement seem to act as if they were mini-countries with their own “nationals” negotiating for the best interest of their nation which, according to the Federal Constitution, can transform themselves into fully independent countries if they so

¹⁸ See Adeno Addis, ‘The Unbearable Thinness of national Citizenship in a Country Organized as a “Nation of Nations”: The Case of Ethiopia’ in Abadir M. Ibrahim and Kokebe Wolde (eds), *Between Failure and Redemption: The Future of the Ethiopian Social Contract* (Northwestern Roberta Buffett Institute for Global Affairs and Northwestern University Libraries, 2022) 191.

¹⁹ Even Switzerland starts with “we the Swiss people”. The preamble begins: “We, the Swiss People and Cantons...” see, Federal Constitution of the Swiss Confederation, 1999.

²⁰ UN Charter’s Preamble opens thusly: “We the Peoples of the United Nations...” See the UN Charter, 1945.

wished.²¹ Even more directly, some of these mini-countries view one another as existential threats.

So, while almost all national constitutions are designed to transform strangers into co-participants in a common project, the Ethiopian Constitution turned a people into peoples, a nation into a form of a united nations, and neighbors into strangers (even if they have lived together for generations) on the account that they belonged to different nations, nationalities or peoples. Rather than being a document for integrative association, the Constitution has ended up being a document for a dissociation order. From the very beginning of the document--the preamble--the Constitution sets out to sort people into different nations, nationalities, and peoples and to make those identities, not Ethiopian citizenship, as the most important or salient legal and political identities. The constitution created formal conceptual boundaries that recognized categories exclusive of other categories. One is either a member of this nation or that nationality. In a country of hybridity, exclusivity reigns supreme in the constitutional setup.

1.3. From Conceptual to Physical Boundaries: Article 47 and the Never-Ending Search for the Authentic (Pure) Community

The conceptual boundaries that sorted citizens into members of ill-defined nations, nationalities and peoples²² were firmed-up with physical boundaries. The Constitution created ethnically or linguistically organized regional states as the constituent parts of the

²¹ See, Article 39 (1).

²² Article 39 attempts to define these terms. However, not only is the definition somewhat vague ("a common psychological make-up?"), but apparently the same definition applies to all three terms—nations, nationalities and peoples. Why the three terms are listed separately when they apparently mean the same thing is rather unclear.

federation (some might say confederation). The physical boundaries formalized and entrenched the conceptual and social boundaries of nations, nationalities, and peoples. They turned cultural and linguistic differences into hard parameters.

Article 47 established nine regional states most of which were named after the dominant ethnic or linguistic group of the regional state.²³ In some cases, the regional state is specifically referred to as the state of that people making it unmistakably clear as to who the primary stakeholders are. Thus, for example, the Harari regional state is referred to as “the State of the Harari People” and the Gambela regional state as the “State of the Gambela Peoples.”

These constitutionally defined and entrenched identities have had enormous symbolic, substantive, and practical consequences on the nature of the relationship among Ethiopian citizens. First, the naming of a region after a particular ethnic or linguistic group symbolically excludes Ethiopian citizens who happen to belong to other ethnic or linguistic groups, even though those individuals might have lived in the region for generations. Their membership to a different ethnic or linguistic group becomes a mark of alienage.

Second, this linguistic and symbolic exclusion is, in fact, accompanied by substantive exclusion or disenfranchisement. Several constitutions of the regional states, apparently relying on what they believe to be authority granted to them by the Federal Constitution,²⁴ have adopted provisions which specifically make distinctions between members of

²³ In some cases, it is a minority ethnic or linguistic group after which the state is named and by which the state is said to be owned. Hararis make up only 9 percent of the population of the state in the State of the Harari People.

²⁴ Preamble, Article 8, Article 39(5) and Article 52(2)(b).

the particular nation (ethnic or linguistic group) after which the state is named and other Ethiopians--between indigenes and non-indigenes, primary stakeholders and others. Again, take as an example the Constitution of the State of the Harari People. The Constitution codifies the view that significant sovereign authority is reserved for ethnic Hararis. It, for example, provides that membership to the upper house of the state's parliament is to be restricted to ethnic Hararis.²⁵ The Constitution of Benishangul-Gumuz takes it even further. Article 2 declares that "ownership of the state remains" in five, apparently indigenous, ethnic groups listed therein. Other Ethiopians who happen to reside within the state are not to be regarded as proper owners of the State regardless of how long or for how many generations they might have resided in the state. Those who are not consider indigenes do not enjoy equal sovereign and ownership authority. Under the Constitution of Benishangul-Gumuz, therefore, Ethiopian citizens are not one another's equal. There are indigenes and settlers, primary stakeholders and people with less than ownership stakes, members of the relevant nations and non-members, etc.

The Constitution of the Oromia Regional State also endorses the distinction between insiders and outsiders, members of the nation and non-members, albeit less directly. Thus, the preamble begins "We the People of the Oromo Nation," not "We the People of the Oromia Regional State" as the people who have ordained and established the Constitution as a manifestation of their right to self-determination. Given how a "nation" is defined in the Federal Constitution, the reference to the "Oromo nation" cannot be said to be inclusive of non-Oromo Ethiopians in the regional state as entitled to the same measure of self-determination as members of the Oromo nation. Indeed, Article

²⁵ See Constitution of the State of the Harari People, Articles 48 and 49.

14 of the Constitution of the Oromia Regional State makes that clear. It is “the people of the Oromo nation” who are entitled to a “full measure of self-government.”

As these regional state constitutions indicate, there is grading among Ethiopian citizens. The many internal displacements and mass killings within the various regional states are premised on and inspired by the proposition that the victims are not proper members of the particular “nation.” They did not belong.²⁶ Their ethnic and linguistic affiliations are viewed as markers of alienage. The story of alienage and displacement is a story that is far too common across many parts of the country. Sorting people into “us” and “them” has become a constitutional and political culture.²⁷

²⁶ During the identity-based killings and displacements that took place in Shashemene following the murder of Hachalu Hundessa, many non-Oromos were told, as they were murdered or displaced, that they did not belong there even though they were born there and had lived their entire lives in the area. One resident put it this way: “I was born and raised in Shashemene, it is the only place I know. But to the rioters I was suddenly an outsider who did not belong here.” S. Getachew & G. York, ‘Ethiopia’s Latest Violence Exposes Ethnic Fault Lines, Threatening the Country’s Democratic Dreams,’ *Wardheer News*. Retrieved from <https://wardheernews.com/ethiopias-latest-violence-exposes-ethnic-fault-lines-threatening-the-countrys-democratic-dreams/>. Not to belong means not to be regarded as part of the “nation.”

²⁷ Some argue that it is not the Constitution but only the manner in which it has been enforced (or not) that has led us to our current predicament where citizens see fellow citizens who happen to be members of other ethnic or linguistic groups as strangers who did not belong to this or that “nation.” It is true that malevolent or incompetent leaders have misused the Constitution to achieve ends inconsistent with the constitutional mandate or even ignored parts of the Constitution which were meant to constrain the reach of government. After all, the Constitution includes every conceivable human right taken wholesale from international human rights documents. Yet, those constitutional rights did not seem to have made much difference in how successive government acted towards their citizens in the last three decades. However, it would be a mistake to attribute the constitutional failure to lack of enforcement alone. Even if fully and faithfully enforced, a constitution that divides people into mutually exclusive groups called nations, where some Ethiopians are members of the nation and

Despite the Federal Constitution's claim of the pre-existence of distinct "nations" which are supposed to have adopted the document as a measure of their self-determination, the fact is that these "nations, nationalities and peoples" are to a large degree the creation of the document itself and those of ethno-political entrepreneurs. The Preamble, Article 8, Article 39, Article 47 and Article 52 have constituted the several nations by the very fact of asserting their existence. That is what narratives do; they constitute the very thing they claim to be describing. The assertion of the pre-existence of distinct nations might be normative claims disguised as a description of historical facts. The Constitution transformed a country of hybridity into a nation of distinct and mutually exclusive nations. It turned the historical into the primordial and the normative into the factual. The consequence has been that ethnic identity has become the primary means through which issues and disputes are evaluated and one's very attitude towards fellow Ethiopians determined. It is not, therefore, the existence of diversity that haunts Ethiopia, but rather how that diversity has been organized and shaped by the Constitution. The Constitution froze and indeed hardened certain identities as hard parameters.

Article 47 gave a geographic dimension to the politics of difference. Not only did it establish ethnations (nine of them at the start), but it also provided for a process for creating more physical boundaries to usher in more "nations" into regional states. Two more regional states have been added to the federation pursuant to the right provided for in Article 47 that "nations, nationalities and peoples" within existing

others not, where some are primary stakeholders and others with a lesser degree of ownership and sovereign authority, cannot but lead to the rather common controversy as to who properly belongs to this or that nation. It is primarily the nature and structure of the Constitution that has led the country to where it finds itself—fractured—where intergroup trust is in short supply.

states may establish their own state “at any time.”²⁸ And more groups are demanding that they be given their own ethnic state as well.²⁹ The Constitution continues to sort people in the name of searching for the elusive authentic community. As I have argued elsewhere, the search for the ever more pure community in a country of hybridity is like carving a crystal. The size gets smaller, but the same structure will be reproduced at that smaller level. There are likely to be minority “nations” within the new structure with their own members, their own interests, and with the same intensity to assert their identities. The same issues and questions will emerge, albeit in a smaller unit.

The paradox of the politics of difference is that in the name of “liberating nations” it has ushered in an era of exclusion and oppression of minorities within those nations. The idea that one can work through the challenges of diversity through a process of creating more ethnonational states in a country of 80 or so ethnic or linguistic groups is rather puzzling. Rather than getting a handle on the challenges of diversity, continual sorting of people into nations will risk what the noted German social theorist Jurgen Habermas calls “blood purification rituals” exposing “new minorities to new waves of repression”³⁰ and perhaps even ethnic cleansing.³¹ The challenges of diversity do not disappear because more nations are created to get to the authentic community. There is no such thing. We turn diversity from a challenge into a rich resource not by running away from it but by creating diverse communities whose members view one another as equals and engaged in a common project. In a diverse country such as

²⁸ Article 47(2).

²⁹ The Wolayetas and the Gurages are two good examples.

³⁰ Jurgen Habermas, *The Inclusion of the Other: Studies in Political Theory* (The MIT Press, 1996) 142.

³¹ *Ibid.* 219.

Ethiopia, the way to develop the culture of living with difference is to start cultivating the condition for diverse communities, not by chasing the elusive authentic nation.

1.4. Article 39: From Separation to Divorce (The Drawing of the Ultimate Boundary)

While Article 47 transformed a nation of citizens into a nation of nations both as a conceptual and physical (geographic) matter, Article 39 took it further. It recognized the “unconditional” rights of these nations to complete the process and establish themselves as full-fledged countries if they so wished. “Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including secession,” declares Article 39.³² Political divorce would be realized if “the demand” for secession were “supported by a [simple] majority” of the residents of the particular regional state.³³ The Ethiopian Constitution created nations some of which view themselves as “countries in waiting.” The Preamble, Article 8 and Article 47 created nations and Article 39(4) provided for the process through which those nations become nation-states.

Viewed this way, the Constitution constructed structures that, in stages, would turn citizens into strangers to one another, culminating in the ultimate manifestation of estrangement: political divorce. Ethiopia is almost alone in the world to have entrenched the right of secession or political divorce in its constitution.³⁴

³² Art 39(1).

³³ Art 39 (4).

³⁴ See Tom Ginsburg & Mila Vertseeg, ‘From Catalonia to California: Secession in Constitutional Law’ (2019) 70 *Alabama Law Review* 923-985. The entrenchment of the right of secession in national constitutions is a rare event. Article 113 of St. Kitts and Nevis and Article 74 of Uzbekistan Constitutions provide for secession, the former to

Article 39 by its very existence supplies the language of law to those who seek to use the right to divorce as leverage to extract resources or power. A “people” or a “nation” (to be more precise, the elite) may find it useful to threaten, either explicitly or impliedly, to secede if it does not get its way on matters of resources or power allocation, even if its demands are unjustified.³⁵ We have seen this scenario play out in Ethiopia in the last few years. As more nations and nationalities seek, may “demand,” and attain legal recognition as regional states, the occasions for more, and more intensified, politics of difference will likely increase.

A fully ethnicized political structure with the right of secession to the constituent parts of the federation at any time for any purpose will continue to be a disincentive for a collective life and an integrative process. The process of open and sincere deliberation about fair terms of cooperation, essential for collective life, will be the casualty of the entrenched right of political divorce and the politics of difference generally.

ensure that the Island of Nevis was willing to join the federation after independence from Great Britain and the latter to allow only one republic (Karakalpakstan) to leave. France adopted a secession provision in 1959 (repealed in 1995) to allow states to leave the French Community, the constitutional organization set up in 1958 between France and its remaining African colonies. Art 4 of the Liechtenstein’s 1921 Constitution provided for the secession of communes. In 2005 Sudan adopted a provision (Article 219) in its constitution so as to allow the secession of South Sudan as part of the settlement ending the long conflict. As it is clear, the issues that these countries faced were very different from those that Ethiopia faced and still faces. They were dealing with either a one-off issue (the case of South Sudan) or as a condition of merger between islands (the case of Nevis) or to deal with the circumstances of colonial possessions (France), etc.

³⁵ Cass Sunstein, ‘Constitutionalism and Secession’ (1991) 58 University of Chicago Law Review 633.

Article 39 does not just create a process for dissociation, but it creates the attitude and disposition of the interlocutors as well. It inclines members of the various nations to view one another as strangers locked in constant struggle for resources and power, not as engaged in a common project. The Constitution established the identity of groups and, even more importantly, it shaped the attitude of members of the various groups towards one another. It created social boundaries to go along with the physical and conceptual boundaries it entrenched.

The Constitution entrenches Article 39 in a manner that makes it almost impossible to amend. The politics of difference protected under Article 39 gets full protection under Article 105's amendment process. Not only do the House of Representatives and the House of the Federation need to approve a proposed amendment to Chapter Three, in which Article 39 is placed, by two-thirds majority each, but "all State Councils" must concur as well.³⁶ The odds of getting unanimity among the states are very long and are getting even longer as more "peoples" (or is it "nations and nationalities"?!) invoke their right under Article 47 to establish their own ethnostates. Interestingly, the amendment process in Articles 104 & 105 is itself to be amended through the same procedure required for amending Article 39: there has to be an affirmative vote from all regional states.³⁷ Such is the double entrenchment of the politics of difference.

Nothing is more dangerous to the idea of a stable and democratic national political community than a majority that is continually frustrated by a small minority veto such that the basic document will

³⁶ Article 105 (1).

³⁷ See, Art 105(1).

be unable to respond to the urgent needs of the national political community.³⁸

To say that constitutionalizing secession has a corrosive effect on the national body politic (a position I hold) is very different from maintaining that as a matter of political morality there are never any circumstances that would justify exit from a union, even if secession is not entrenched as a constitutional right. That is a different issue altogether. It might be that there are circumstances when a group has been, and continues to be, dominated in a morally arbitrary way such that political divorce is the only remedy available and ought to be permitted, whether or not the right is a constitutional right.³⁹

1.5. Language and Boundaries

The minimum requirement for a diverse society to exist as a stable political community is that members of the various groups be willing and able to communicate with one another. Political communities can sustain themselves over a long period of time only if there is shared understanding among members. There cannot be such understanding if people cannot communicate with one another and have access to some of the same forums of political and social debates or conversations.⁴⁰

³⁸ Thus, for example, the State Council of Benishangul-Gumuz regional state with less than 800,000 residents can veto a proposed amendment regarding any aspect of Chapter III or the amendment process itself even if the rest of the country (over 100 million people) is in agreement to amend.

³⁹ See, Allen Buchanan, 'Toward a Theory of Secession' (1991) 101 *Ethics* 322.

⁴⁰ See Adeno Addis, 'Cultural Integrity and Political Unity: The Question of Language in Multilingual States' (2001) 33 *Arizona State Law J.* 719; Adeno Addis, 'Deliberative Democracy in Fractured Societies' (2009) 16 *Indiana Journal of Global Legal Studies* 59.

The Federal Constitution provides that every nation, nationality, and people “has the right to speak, to write and to develop its own language.”⁴¹ At first glance, this provision, just like the ones I have examined in the preceding pages, appears to create a boundary that risks transforming neighbors into strangers, but that view is not necessarily accurate. Language is not just a means of communication but an important cultural resource. It is often the means by which members of the linguistic group attach meaning and give structure to their cultural activities and rituals. The preservation of a language is important not just to the group of which it is the language, but for the entire national community as well. The cultural heritage of one group enriches the entire cultural pool within the country. In that sense, the heritage becomes a heritage for all. The right of a group to speak and write in its language will ensure the survival and flourishing of the language and the general culture to which the language often gives access.⁴² Article 5(3) of the Constitution also gives members of the federation the authority to choose “their respective working languages.” Several states have chosen the language of the ethnic or linguistic group after which the state is named as the working language of governmental institutions.⁴³ This won’t necessarily be fatal to the idea of a united and stable Ethiopia to the extent that there is a common language or common (national) languages⁴⁴ through which citizens can engage one another across the land. But if there is no common national language, the rich linguistic diversity of the political community could be used not as a celebration of diverse cultures, but as a way of erecting

⁴¹ Art 39(2).

⁴² See, Adeno Addis, *Deliberative Democracy in Fractured Societies* (n 40).

⁴³ The Oromia, Somali, and Tigray regional states are good examples.

⁴⁴ Whether or not the country can adopt more than one national language is a question of resources. For a country such as Ethiopia, my hunch is it will probably be financially prohibitive and administratively chaotic to have more than two (perhaps three) national languages.

boundaries among citizens and group of citizens such that citizens would be inclined to view one another as strangers rather than as people engaged in a common project. Nothing signals more, and more strongly, that people are strangers to one another than their inability to comprehend each other.

It is true that the Constitution has adopted Amharic as “the working language of the Federal Government,”⁴⁵ but that does not ensure that the vast majority of people who do not aspire to work in the federal bureaucracy or have little opportunity to do so will have developed the linguistic capacity or skills to engage with one another. In the long term, the impact of not having a national language or national languages might be that linguistic groups increasingly become strangers to one another.

At a minimum, therefore, a national political community must adopt a policy that requires that children across the land be taught a national language or languages to ensure that citizens develop the minimum linguistic capacity to communicate and share the same forums of political and social debates and to feel that they indeed engage in a common project.

The cultivation of linguistic diversity coupled with the adoption of a national language would turn what would otherwise be a marker of difference and alienage (a hard parameter) into a celebration of cultural richness.

⁴⁵ Art 5(2).

2. Boundaries and the Trust Deficit

One of the most important social commodities (social capital⁴⁶) in social and political life is trust. No society can function well for long if its members do not have a sufficient degree of trust both in relation to co-members and the institutions within and through which decisions respecting public life are made. Well-designed constitutions structure government and governmental institutions with the view of creating the conditions for building trust both among members and towards public institutions. Trust towards institutions is vital if decisions and policies are to have legitimacy among and acceptance by citizens.

There is of course a view in political theory that runs from Thomas Jefferson⁴⁷ to Jeremy Bentham⁴⁸, and Russel Hardin⁴⁹ that views constitutional design as premised primarily on distrust of government and with view of constraining governmental institutions. Bentham, for example, made distrust central to his constitutional design.⁵⁰ It is true that constitutions are generally designed with the purpose of making

⁴⁶ I use the phrase in the way that James Coleman used it. Coleman distinguished among three kinds of capital: physical, human and social. He appropriated the notion of social capital to import the economist's principle of rational action for use in the analysis of social systems, as a means of understanding the social structure of relationships among people. James Coleman, *The Foundations of Social Theory* (Belknap Press, 1990) 300-21. See, also James Coleman, 'Social Capital in the Creation of Human Capital' (1988) 94 Am. J. Sociology S95-S120.

⁴⁷ Thomas Jefferson, 'Resolutions Relative to the Alien and Sedition Acts' in Philip Kurland and Ralph Lerner (eds), *The Founders' Constitution*, vol.1 (University of Chicago Press, 1987), vol. 1, 292-3 ([F]ree government is founded in jealousy, and not in confidence, it is jealousy and not confidence which prescribes limited constitutions, to bind down those whom we are obliged to trust with power.”).

⁴⁸ Jeremy Bentham, *The Works of Jeremy Bentham* (John Bowering ed., William Tait, 1838-43).

⁴⁹ Russel Hardin, 'Liberal Distrust' (2002) 10 European Rev. 73.

⁵⁰ Jeremy Bentham, (n 48), volume ix, 6. (“[E]very good political institution is founded upon [a system of distrust]”, for “whom ought we to distrust, if not those to whom is committed great authority, with great temptations to abuse it?”)

government accountable within the governmental structure itself—power centers checking and restraining other power centers (separation of powers and federalism are good examples)—and ultimate to the people themselves, the ultimate sovereign. However, such arrangement is meant not so much to manifest distrust as a constant attitude, but rather to ensure that the mechanisms of checks and balances and an open process will build trust among citizens such that decisions of public and governmental institutions will be accepted as legitimate. A constitutional system that is designed with distrust as its foundational principle will be unable to cultivate a political community that will endure.

However feasible the value of distrust as an organizing principle in terms of citizens' attitude towards their governments it may be, it is entirely destructive to design a constitution that entrenches distrust or has the functional consequence of entrenching (institutionalizing) distrust among members of the political community (citizens). If citizens are institutionally organized in such a manner that they view other members as strangers (or even threats to their very existence) rather than as participants in a common project, the viability of that political community will be in doubt.

Trust among citizens, “the belief in the goodwill of the other,”⁵¹ that others are co-participants in a common project and will not take advantage of one as if one were a stranger or an existential threat, is the sort of attitude necessary for a compromise essential for a collective life. The process of open and sincere deliberation about fair terms of cooperation, essential for collective life, will be the casualty of the hard parameter of ethnonational identity that the Ethiopian Constitution

⁵¹ Adam Seligman, *The Problem of Trust* (Princeton University Press, 1997) 43.

has entrenched and champions. Trust as a constitutional value creates a bridge among strangers.

The Ethiopian Constitution created boundaries, not bridges. The Constitution created both physical and social boundaries that fundamentalized (made more salient) differences among ethnic and linguistic groups. Politics then became a competition for domination. The distrust one observes among the various ethnic groups is not a natural phenomenon. It has been cultivated and entrenched through law, primarily through the Constitution itself. The Constitution did not merely classify people as belonging to different nations and nationalities, but it also shaped the disposition and attitude of members of those nations and nationalities towards one another. Those identities became the primary framework through which issues are perceived and analyzed and co-members appraised. Lines are then drawn sharply (both within a regional state and across regional states) and the question then becomes which group wins and which loses, not what is fair and equitable. Decisions taken under such conditions or in such circumstances are unlikely to enjoy sufficiently wide legitimacy. Philip Pettit is entirely correct when he observed that “Only by guarding against enforced vulnerability can a society facilitate the voluntary assumption of vulnerability—that is associated with trust.”⁵²

Studies have shown that distrust is not inherent in the mere existence of diversity.⁵³ It is how that diversity is organized and managed that

⁵² Philip Pettit, ‘The Cunning of Trust’ (1995) 24 *Philosophy and Public Affairs* 202, 224.

⁵³ Eric M. Uslaner, ‘Does Diversity Drive Down Trust?’ in Per Selle and Sanjeev Prakash (eds) *Civil Society, the State and Social Capital: Theory, Evidence and Policy*, (Routledge, 2008). See, also Barbara Walter, *How Civil Wars Start and How to Stop Them* (Penguin Books, 2022). Walter’s study shows that one of the most highly predictive factors of a civil war and instability in relation to a state is whether that state

shapes the attitudes of members of those diverse groups, whether they view others as strangers or even existential threats or as members of one national community.

3. The Trust Deficit and the Challenge of Building a Democratic Culture

A fully ethnicized political and constitutional culture overlaid with a constitutionalized right to secession will have difficulty building a democratic culture. First, such an arrangement, as I have explained above, cannot guarantee equal citizenship across the land to the extent that citizens are classified as members of a “nation” (indigene) or not (settler or alien). Under those circumstances, trust among citizens and trust towards institutions increasingly fades. When citizens do not believe that they are equal participants both as originators and addressees of the law,⁵⁴ including the basic document, it becomes very difficult to build a democratic culture and the condition for a deliberative process about fair terms of cooperation.

Second, one of the tragic consequences of ethnic federalism of the Ethiopian version has been that the politics of difference has defined not only public life and public institutions but private life and civic associations as well. This has seriously diminished the possibilities or the odds of the emergence of strong civic associations across ethnic lines as checks on governments at all levels. The trust deficit is a problem in all aspects of life.

has started to organize itself primarily or exclusively around ethnic, racial or religious identities.

⁵⁴ For the notion that citizens are both the authors and addressees of the law, see, Jurgen Habermas, *Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy* 415 (William Rheg trans., MIT Press, 1996), See also *Ibid.* 449.

Third, since the constitutional arrangement appears to be one of a dissociation order, one that encourages the politics of difference, the country will continue to be defined by conflict and instability. Conflicts about borders or boundaries will continue to be sources of disputes. An adjustment of internal borders that might not have been remarkable in another context becomes highly charged, even existential, when the adjustment is made in the context of a country made up of nations which have the right to secede if they so desired. In this circumstance, the adjustment becomes an attack on, or a diminishment of, the nationhood of the ethnostate. In a country of “we the nations,” “we the people” will continue to have difficulty entrenching a democratic culture.

4. The Dignity of Citizenship: Transforming Hard Parameters into Soft Ones

A constitution is an expression of a political community’s desire to establish a mode of politics for collective life. That is, the normative underpinning of a well-designed and well-structured constitutional order is an integrative process of association. The Ethiopian Constitution seems to have adopted a model of a dissociation constitutional order—a process of developing strangers among citizens in stages. In this, the document stands almost alone among national constitutions currently in force. Under such a constitutional order, the long-term viability of Ethiopia as a coherent political community, let alone a prosperous and democratic one, will, in my view, continue to be at serious risk.

If Ethiopians of different ethnic and linguistic groups are to see themselves as one another’s equals and engaged in a common project, the basic document has to enshrine and *make practical* the dignity of

equal citizenship, not the politics of difference. Equal citizenship is a vital integrative mechanism. As Jurgen Habermas notes, “the moral promise of equal respect for everybody” that the notion of human dignity signals “is supposed to be cashed out” in the social and legal currency of equal citizenship, where citizens are recognized by all other citizens as “subjects of equal actionable rights.”⁵⁵

As I have argued elsewhere⁵⁶, it is in the very nature of things that a country organized as a nation of nations rather than a nation of citizens will be unable to provide equal citizenship across the land. The various regional states’ constitutions and the political practices that have accompanied them amply illustrate the point. The ethno-federalist arrangement in Ethiopia will continue to encourage ethnic entrepreneurs to construct and sharpen differences (real or imagined) for the purpose of attaining and holding on to power. That will not be conducive to establishing stability, let alone a democratic process or culture.

To foster the dignity of equal citizenship, the conceptual and physical boundaries that have fundamentalized differences, transforming identities into hard parameters, must be reassessed. To say that national citizenship is one vital means of integrative association and to argue that a well-designed constitution is one of integrative association is not, as often misunderstood, to argue against accommodation. As I have outlined in an earlier article⁵⁷ that integration and accommodation are not opposed normative commitments but in fact

⁵⁵ Habermas, ‘Human Dignity and the Realistic Utopia of Human Rights’ (2010) 41 *Metaphilosophy* 470, 472.

⁵⁶ Adeno Addis, ‘From a Nation of Citizens to a Nation of Nations: National Citizenship without Depth’ (2022) 14 *International Journal of Ethiopian Studies* 141.

⁵⁷ Adeno Addis, *Deliberative Democracy in Fractured Societies* (n 40).

two sides of the same coin. An integrative order will better accommodate minorities more than the current dissociation order under which minorities within some nations have been subjected to discriminatory and exclusionary policies on the account that they did not belong in the nation. In the name of pluralizing power, the Constitution fundamentalized the notion of ethnonationhood. Consolidating the idea of a “nation” at the regional level is, at times, pursued by ethnic entrepreneurs through a process of creating the “ethnic Other” as the negation.

Conclusion

I have explored in this essay what I believe to be the major constitutionally entrenched boundaries—conceptual, social and physical—that have turned soft differences into hard parameters, consequently turning Ethiopian citizens into strangers to one another. The normative underpinnings of a well-designed and well-structured constitutional order is an integrative order of association. Constitutions are meant to bind citizens together so that those citizens view themselves as engaged in a common project and as one another’s equal. The Ethiopian Constitution seems to do exactly the opposite. It seems to have adopted a dissociation model, unique among national constitutions currently in force.

The long-term viability of Ethiopia as a coherent political community, let alone a prosperous one, under such a constitutional order is, in my view, at serious risk. It is time that there is a broad and inclusive conversation⁵⁸

⁵⁸ The importance of wide and inclusive conversation in the constitution-making process is highlighted by the overwhelming defeat (in a referendum) of Chile’s draft constitution in 2022. See Eloise Barry, ‘Why Chileans Voters Rejected a New, Progressive Constitution’, *TIME* (September 5, 2022). One of the reasons for the defeat apparently was that a significant constituency (conservatives) felt excluded from the process and campaigned against the approval of the draft. A document drafted and

about the constitutional way forward, about a constitutional arrangement that will strike the appropriate balance between honoring the country's diversity and forging a strong and durable Ethiopian identity.

approved through a flawed and exclusionary process will have difficulty garnering legitimacy among those it is meant to bind. It will lack what social theorists refer to as sociological legitimacy. Another reason for the defeat of Chile's draft constitution is attributed to the fact that it was unwieldy long (388 articles) and confusing. This is generally a problem with constitutions of developing countries, for they attempt to turn every issue into a constitutional issue and to resolve it as such. However, not every issue can or should be resolved constitutionally. Some issues can best be resolved in the political and legislative process later when conditions become conducive to tackling them. The development of a political and constitutional culture as well as the emergence of trust among various groups and among citizens might lessen the intensity of the division in relation to a particular issue over time making resolution of the issue much easier. For a very interesting example of how some very divisive issues were fruitfully deferred in the constitution-making process in Israel, see Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge University Press, 2011). Lerner also explores the process of constitution-making in India and the notion of what she calls "constructive ambiguity"; *Ibid.* 109-151. I have made similar argument in earlier works. See, Adeno Addis, *Deliberative Democracy in Fractured Societies* (n 40); Adeno Addis, 'Individualism, Communitarianism and the Rights of Ethnic Minorities' (1999) 67(3) *Notre Dame Law Rev.* 674-676.

THE CONFLICT IN NORTHERN ETHIOPIA: THE PEACE VS. JUSTICE DILEMMA

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Abstract

This article examines the peace–justice dilemma arising from Ethiopia’s recent armed conflict and explores the choices, constraints, and possibilities associated with addressing atrocity crimes while pursuing a negotiated political settlement. Drawing on the literature on transitional justice and an analysis of Ethiopia’s historical responses to political violence and conflict-related abuses, the article examines the relationship between peace negotiations and criminal accountability. It argues that accountability should not be pursued merely in response to external pressure or international expectations. Rather, credible justice mechanisms are essential because of their potential to contribute to sustainable peace, the consolidation of the rule of law, and democratic development. The article concludes that while political negotiations may be necessary to end armed conflict, durable peace in Ethiopia is unlikely to be achieved without meaningful accountability for atrocity crimes.

Key-terms: *Ethiopia; justice; peace; transitional justice; accountability; international crimes*

Introduction

In November 2020, an armed conflict erupted in Ethiopia’s Tigray region. The conflict was characterized by a high level of violence and has been, by all accounts, an extremely brutal war, resulting in massive

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loss of life, displacement and destruction of property. According to reports, all parties to the conflict have committed grave violations of international humanitarian, human rights, and refugee laws.¹ Several of the alleged violations may constitute war crimes and crimes against humanity.² At the moment, parties to the conflict have agreed to a cessation of hostilities and have taken preliminary steps toward a negotiated settlement. Whether this will be successful remains to be seen. At the same time, there have been persistent demands for accountability for atrocity crimes committed during the conflict.³ Similarly, since the beginning of the war, there has been a strong call to resolve the conflict politically, that is, via negotiation and compromise.

The situation in Ethiopia therefore presents a profound peace–justice dilemma. On the one hand, the Ethiopian government and other stakeholders face the urgent task of ending armed conflict and restoring stability through political negotiation and compromise. On the other hand, they must address serious international crimes committed during the conflict and respond to victims’ demands for truth, accountability, and reparations. Reconciling these competing objectives presents one of the most difficult challenges facing post-conflict societies.

¹ Ethiopian Human Rights Commission (EHRC) and Office of the United Nations High Commissioner for Human Rights (OHCHR), *Report of the EHRC/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* (3 November 2021).

² *Ibid.*, 5.

³ See UN Human Rights Council, *Resolution S-33/1 on the situation of human rights in Ethiopia*, adopted at its 33rd Special Session, UN Doc. A/HRC/RES/S-33/1 (December 17, 2021); Amnesty International and Human Rights Watch, “*We Will Erase You From This Land*”: *Crimes Against Humanity and Ethnic Cleansing in Ethiopia’s Western Tigray Zone*, April 6, 2022; Amnesty International, *UN and AU Must Prioritize Justice, Truth, and Reparations in Ethiopia*, September 2022.

The government's own approach to the conflict illustrates this tension. Since the War in northern Ethiopia began in November 2020, the interests guiding the government of Ethiopia's strategy and decision-making have been shifting over the course of the war. At the beginning, the government invoked justice to justify the war efforts and rejected calls for peaceful resolution of the conflict, implying that justice was the only guiding principle of government decision-making.⁴ However, as the conflict escalated and allegations of serious violations were directed against all parties, the government's position gradually shifted. In a bid to stop the war, the government released senior TPLF officials whom it had arrested and imprisoned, declared a cessation of hostilities, and nominated negotiators, signifying a shift in its commitment from an exclusive emphasis on accountability to a negotiated settlement of the conflict.

Nevertheless, finding a morally and legally defensible balance between peace and justice remains highly challenging. The central question is not simply whether Ethiopia should pursue peace or justice, but how the country can design a framework capable of advancing both objectives in a context of political fragility, limited institutional capacity, and competing interests. This article examines the peace–justice dilemma in Ethiopia and explores the choices, constraints, and possibilities associated with addressing atrocity crimes while pursuing political settlement. It argues that accountability should not be pursued merely as a response to external pressure or international expectations. Rather, credible justice mechanisms are essential because of their potential contribution to sustainable peace, the consolidation of the rule of law, and democratic development. By examining Ethiopia's

⁴ *BBC News*, "Tigray crisis: Ethiopian Prime Minister Abiy Ahmed rejects peace talks," *BBC News*, November 11, 2020, <<https://www.bbc.com/news/world-africa-54900769>> accessed on July 8, 2022.

historical responses to political violence and conflict-related abuses, the article demonstrates that ignoring accountability risks perpetuating cycles of impunity and instability, whereas meaningful justice can contribute to building a more durable peace.

The paper proceeds in five parts after this introduction. Part 1 contextualizes the article by describing the dilemma, presenting arguments in favor of peace and justice, and reviewing selected empirical studies. Part 2 provides a brief overview of the Ethiopian conflict. Part 3 provides a brief overview of political transitions in Ethiopia and justice-related responses. Part 4 examines justice-related responses and peacemaking efforts. The last part offers concluding remarks.

1. The Peace vs. Justice Dilemma

Three decades ago, there were no restrictions on peace talks taking place during or after a war. Without having to worry about issues of accountability for atrocity crimes committed during a war, the parties to the conflict may agree to a peace agreement.⁵ Granting leaders amnesty was a recurring element of the peace agreement, and it was viewed as a crucial tool for political transition. The sovereign had the right to grant amnesty, which had the effect of making impunity the rule rather than the exception.

With the advancement of individual human rights and international criminal law, this situation has fundamentally changed. Currently, almost all conflicts around the world are accompanied by demands for accountability for egregious violations of basic human rights. The

⁵ See, e.g., Naomi Roht-Arriaza and Lauren Gibson, "The Developing Jurisprudence on Amnesty," (1998) 20 *Human Rights Quarterly* 843–885.

increase in accountability measures strengthened and tipped the scales in favor of justice and accountability. This change significantly constrained states' unrestricted ability to grant amnesty in the name of promoting peace. At least in theory, the result is that after heinous atrocity crimes, a broad amnesty is not acceptable.

Thus, countries emerging from a repressive regime or a devastating war face enormous challenge. On the one hand, they must continue with reconstruction and restoration efforts in order to strengthen the wartime economy and reestablish societal bonds. On the other hand, they must confront the past and deal with fundamental human rights violations and atrocity crimes committed by the repressive regime, or during wartime. In dealing with the past, they must consider measures to prevent similar future violations and redress victims, as well as promote democracy, peace, and human rights without jeopardizing the fragile peace and reconstruction efforts that follow a repressive regime or devastating war. This necessitates balancing competing demands, which is a significant challenge to meet.⁶

The question of how to deal with the past has sparked a significant body of scholarly work,⁷ frequently presented as a peace vs. justice debate. The main points of contention are whether the pursuit of justice should trump peaceful dispute resolution and whether the protection of human rights ought to take precedence in post-conflict environments. The debate over which of the two values should come first has not yet

⁶ See, e.g., Kai Ambos, Judith Large and Marieke Wierda (eds.), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (Springer 2009).

⁷ See, e.g., Ruti G. Teitel, *Transitional Justice* (OUP 2000); Chandra Lekha Sriram and Suren Pillay (eds.), *Peace versus Justice? The Dilemma of Transitional Justice in Africa* (James Currey 2010); Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (OUP 2008).

found a consensus, and the creation of the International Criminal Court has only served to fuel it. A third approach to the debate seeks to bridge the gap between those who support peace and those who support justice by emphasizing that both are necessary to achieve sustainable peace and build democracy. The arguments advanced by proponents are highlighted in the following sections.

1.1. The Case for Negotiated Settlement

Advocates of peace contend that seeking justice should be subordinated to resolving conflicts through negotiation and compromise. The justifications put forth by those who favor negotiations and compromises are typically opposed to pursuing justice through criminal prosecution and are largely grounded in pragmatic considerations. They contend that peace eliminates the conditions that allow innocent civilians to be targeted for attack during times of war. In an ongoing conflict, ending the war prevents the loss of life and the destruction of vital infrastructure and services.⁸

Some claim that seeking justice could prolong a conflict⁹, and that the longer a conflict lasts, the more civilian infrastructure and property are destroyed, the more civilians are targeted and killed, and the more challenging intergroup reconciliation becomes.¹⁰ Others claim that criminal prosecution weakens already precarious transitions by forcing leaders who might be held accountable to fight longer and harder to

⁸ See, Anonymous, 'Human Rights in Peace Negotiations', (1996) 18(2) *Human Rights Quarterly* 249–258.

⁹ Priscilla Hayner, *The Peacemaker's Paradox: Pursuing Justice in the Shadow of Conflict* (Routledge 2018) 37; See Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace* (OUP 2016); Jack Snyder and Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice', (2003) 28 *International Security* 6.

¹⁰ See Mark Kersten (n 9), and Jack Snyder and Leslie Vinjamuri, (n 9).

escape prosecution.¹¹ They contend that upholding justice directly jeopardizes the political and personal safety of warring parties' leaders, a risk that political leaders are unwilling to take. Conversely, peaceful conflict resolution through negotiation allows for the beginning of a reconstruction process and the redirection of war budgets for the construction of infrastructure severely damaged by the war.¹²

In addition, those who are opposed to the use of criminal prosecution have argued that the use of criminal prosecution can make reconciliation extremely difficult and can even lead to the remobilization of troops for another conflict. What is more, because of the sheer magnitude of the crimes that have been committed and the number of people who have been involved in the commission of those crimes, the standard criminal justice system is not suitable to deal with crimes of this magnitude. It would be counterproductive and ineffective to make an effort to investigate the large number of people who were involved in committing these crimes.¹³

Based on the foregoing reasons, advocates who argue for negotiation and compromise reject criminal prosecution for dealing with the past. Instead, they argue for amnesty and forgiveness, which according to proponents are more likely to promote national reconciliation and social healing. However, the moral and legal foundations of amnesty for serious crimes are highly contentious, and at least amnesty for

¹¹ See Jack Snyder and Leslie Vinjamuri (n 9) 5–44.

¹² Anthony D'Amato, 'Peace vs. Accountability in Bosnia', (1994) 88 *American Journal of International Law*, 88 (1994) 500–506.

¹³ Erin Daly and Jeremy Sarkin, *Reconciliation in Divided Societies: Finding Common Ground* (University of Pennsylvania Press 2011).

serious international crimes is said to be inconsistent with international human rights standards.¹⁴

1.2. The Case for Justice

Demanding justice for human rights violations by rights and victims' groups is increasingly becoming common. Extreme example of seeking justice is demonstrated by the saying "*Fiat Justitia pereat mundus*," which means "Let justice be done, even if it means the end of the world," or "*Fiat Justitia, Ruat Coelum*", which means "Let justice be done, even if the heavens fall"¹⁵. The modern understanding of justice seeks to justify itself by raising the moral and legal foundations on which victims' justice is based, as well as the values that will be promoted by pursuing justice. Those who advocate for justice insist that ensuring justice is of the utmost importance in order to reduce the likelihood of future violence.¹⁶ They argue that ensuring justice breaks the cycle of violence caused by impunity, since impunity leads to a disregard for moral and legal obligations.

Some proponents contend that peace treaties that are predicated on a culture of impunity do not endure for an extended period of time and are more likely to fall apart sooner or later. According to them, a long-lasting peace is unlikely to be achieved unless those responsible for atrocities and other violations of human rights are made to account for

¹⁴ Helena Cobban, *Amnesty After Atrocity? Healing Nations after Genocide and War Crimes* (Routledge 2015).

¹⁵ See Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* (Ted Humphrey tr, Hackett Publishing Co. 1795), Appendix I; William A. Schabas, 'The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace', (2013) 34 *Third World Quarterly* 841–860.

¹⁶ See Antonio Cassese, 'Reflections on International Criminal Justice', (1998) 61 *The Modern Law Review* 1–10; Diane F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 2537–2615.

their actions.¹⁷ Moreover, a culture of impunity breeds mistrust and resentment among victims, which in turn erodes respect for the rule of law and human rights. According to proponents of this view, impunity does not restore the dignity of the victims, their families, or the communities in which they live.¹⁸ Instead, it leads to retaliation and further cycles of violence.¹⁹ On the contrary, advocates argue that accountability helps to cultivate a culture of respect for the rule of law and human rights, as well as contribute to the growth and development of democratic institutions.²⁰ In turn, this contributes to the resolution of conflicts through legal and democratic means, which in turn contributes to sustainable peace. Also, it makes people less likely to violate human rights in the future and helps build an environment that is good for human rights and democracy.²¹

Moreover, since parties to a conflict will typically deny responsibility for acts that violate fundamental human rights, proponents of justice argue that judicial fact findings assist in establishing contested facts as well as the truth in an independent and impartial manner.²² This avoids future pointing fingers, shifting blame, and attempting to justify the commission of serious violations of human rights, all of which are harmful to the peaceful coexistence of societies affected by a devastating war. In addition to this, it keeps the historical record

¹⁷ See Naomi Roht-Arriaza and Javier Mariezcurrena (eds.), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge University Press 2006).

¹⁸ See United Nations Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616 (2004).

¹⁹ Naomi Roht-Arriaza, *Impunity and Human Rights in International Law and Practice* (OUP 1995).

²⁰ Teitel, *Transitional Justice* (n 7).

²¹ Samantha Darehshori, *Selling Justice Short: Why Accountability Matters for Peace* (Human Rights Watch 2009).

²² Orentlicher (n 16).

straight and acts as a deterrent to those who want to deny the commission of atrocities. By keeping the record straight, it stops future political leaders from trying to manipulate the past in order to sow the seeds of future conflict and further their own political goals.

Furthermore, others argue that by putting the blame for serious violations on the shoulders of the individuals who are responsible, criminal accountability helps to prevent the perception that everyone within the community of perpetrators is collectively responsible for wrongful acts.²³ The idea is that the removal of individuals who are responsible for atrocity crimes makes it possible for communities to find peace with one another. This helps keep the perpetrators' community from feeling guilty and ashamed as a whole and the victim community from blaming everyone in the perpetrators' community.

Some relate the case for accountability to the rights of victims recognized in international human rights instruments. In international law, victims have the right to justice and reparation, and in order to exercise these rights, the responsible parties need to be held accountable for their actions. In connection with this, holding those responsible for serious human rights violations not only restores the victims' dignity but also brings satisfaction to the victims' families and the community in which the crimes took place. It helps to ease the feeling of helplessness that victims or whole communities may have after terrible crimes or violent conflicts.²⁴

Finally, proponents of accountability argue that democracy and the rule of law cannot be sustainably established where those responsible

²³ See Antonio Cassese, *International Criminal Law* (3rd ed., OUP 2013).

²⁴ M. Cherif Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability', (2017) *International Crimes* 113–132.

for serious crimes enjoy impunity.²⁵ Accountability, they argue, strengthens faith in the law and contributes to the development of a culture of resolving political disputes legally and respecting human rights.²⁶

1.3. Alternative Approaches

Although many disagree on the form that accountability should take, there has been an increasing global consensus on pursuing accountability in post-conflict situations, at least in relation to the most serious crimes such as war crimes, crimes against humanity, and genocide.

Some argue that states have a legal duty to prosecute the most serious international crimes.²⁷ As such, retributive or criminal justice is advocated by some as an effective means of achieving justice for victims of violence. This means that states are not allowed to grant amnesty to perpetrators in order to pursue political goals.²⁸ Others argue that the duty to prosecute should be approached with flexibility in a manner that allows flexibility to pursue other policy objectives, such as reconciliation processes. According to this view, if pursuing other policy objectives than criminal prosecution is found to be necessary, the choice between abandoning criminal prosecution and pursuing an alternative justice approach should not be closed.²⁹ The argument is that, depending on the context in which they are implemented, accountability mechanisms might vary in their effectiveness in

²⁵ Teitel (n 7).

²⁶ *Ibid.*

²⁷ Orentlicher (n 16).

²⁸ See M. Cherif Bassiouni, *International Criminal Law*, vol. I: *Sources, Subjects and Contents* (3rd ed., Martinus Nijhoff Publishers 2008).

²⁹ See Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Bloomsbury Publishing 2008).

achieving desired results. As a result, policymakers should be able to choose from any method of justice

Alternative approaches to criminal prosecution include Truth and Reconciliation Commissions (TRCs), reparations, institutional reform, memorialization, traditional justice mechanisms, and vetting and lustration processes.³⁰ Generally, truth Commission is perceived as more restorative than criminal prosecution, falling between the extremes of criminal prosecution and blanket amnesty. South Africa's Truth and Reconciliation Commission is often held up as a model of an effective post-conflict justice mechanism.³¹ Not everyone agrees, but many think the TRC in South Africa was successful in easing the country's transition from apartheid and ushering in democracy. In recent years, Colombia has established a novel justice and accountability process that combines both restorative and retributive purposes. The Comprehensive System of Truth, Justice, Reparation, and Non-Repetition (SIVJRNR) consists of three mechanisms, including a mechanism to prosecute and punish those responsible for the most serious crimes committed in the context of the armed conflict in Colombia. These mechanisms are the Truth, Coexistence, and Non-Repetition Commission (CEV), the Search Unit for Persons Presumed Disappeared in the Context of the Conflict (UBDP), and the Special Jurisdiction for Peace (JEP). Those who qualify for the Special Jurisdiction for Peace (JEP) face lenient punishments and are given the chance to reintegrate into society.³² JEP, in contrast to the formal

³⁰ See United Nations Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, 23 August 2004.

³¹ Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd ed., Routledge 2011).

³² See Government of Colombia and Revolutionary Armed Forces of Colombia (FARC-EP), *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace* (24 November 2016), Point 5 (Victims).

criminal justice system, prioritizes the needs of victims, gives them a voice to have their suffering recognized and incorporates reparation mechanisms.³³

1.4. Empirical Research

Because most of the literature on peace and justice offer no systematic evidence to support transitional justice claims, some have labeled the claims as wishful thinking unsupported by evidence. The intrinsic difficulty of quantifying the effects of justice processes, whether in terms of generating durable peace or democracy or influencing important players' conduct, contributes to the lack of evidence.³⁴ Furthermore, justice systems are complicated and contentious, which complicates gauging the outcomes of justice procedures. Even so, there have been more attempts to measure both the effects of transitional justice procedures and the theoretical assumptions that they are based on.

The data collected so far, and the conclusions show a mixed result, partly because of the inherent difficulty of measuring the effect of post conflict interventions. Nonetheless, findings from empirical research suggest that a single mechanism is unlikely to provide the desired goals, such as democracy, long-term peace, and reconciliation of communities that have been devastated by conflict.³⁵ The data also clearly shows that prosecuting and trying key individuals responsible for serious crimes is vital to achieving the desired objectives, such as

³³ Ted Piccone, *Peace with Justice: The Colombian Experience with Transitional Justice* (Foreign Policy at Brookings 2019) 1–31.

³⁴ Paul Gready and Simon Robins, 'Transitional Justice and Theories of Change: Towards Evaluation as Understanding', (2020) 14(2) *International Journal of Transitional Justice* 280–299.

³⁵ See Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Routledge 2010).

establishing the rule of law and democracy.³⁶ For example, trials could be linked with a truth and reconciliation commission or victim reparation procedures. The International Center for Transitional Justice (ICTJ) also advocates for a comprehensive approach to transitional justice that includes truth-telling, reparation mechanisms, and institutional changes in combination with prosecution.

For instance, Lie, Binningsbø and Gates examined the effectiveness of post-conflict justice mechanisms in promoting durable peace.³⁷ They found that criminal trials are associated with longer post-conflict peace, but this positive effect is largely confined to conflicts that ended in decisive military victory rather than negotiated settlements.³⁸ They also found that victim-centered processes like reparations and truth commissions are useful in forging lasting peace, but not as effective in non-democratic cultures. By contrast, amnesties tend to be destabilizing and are generally associated with shorter post-conflict peace.

In a similar vein, Olsen, Payne, and Reiter empirically examined claims regarding the effectiveness of transitional justice mechanisms in promoting democracy and improving respect for human rights.³⁹ They underscore the effectiveness of trials in promoting democracy and respect for human rights when combined with other mechanisms. According to them, TJ mechanisms are not mutually exclusive, but rather complement one another to bring about

³⁶ *Ibid.*

³⁷ Tove Grete Lie, Helga Malmin Binningsbø and Scott Gates, 'Post-Conflict Justice and Sustainable Peace', *World Bank Policy Research Working Paper*, No. 4191 (2007).

³⁸ Matthew M. DeTommaso, Moritz Schulz and Sarah B. Lem, 'Choices of Justice: Effects of Civil War Termination on Post-conflict Justice Mechanisms Implemented by the State' (2017) 11(2) *International Journal of Transitional Justice* 218–238.

³⁹ Olsen, Payne and Reiter (n 35).

democracy and stability, including trials and amnesty.⁴⁰ They conclude that a single mechanism alone is not likely to succeed and address all human rights abuses or strengthen democracy and that “most successful transitional projects for achieving stronger democracies and human rights records will include trials and amnesty”.⁴¹ They argue that a single mechanism as means of addressing past violence is counterproductive.

On the other hand, Stromseth, Wippman, and Brooks examine post-conflict scenarios in which prosecutions and other approaches have been used to determine whether trials help the development of the rule of law and the strengthening of domestic judicial systems.⁴² They found that it does and identified the circumstances under which the pursuit of accountability mechanisms may be successful, depending on their demonstration effect and their capacity-building effect.⁴³ They conclude that fairness is critical for accountability to work in promoting the rule of law and strengthening the domestic justice system, because both the people who were affected and those responsible for the wrongdoing must think the justice response was fair. Their final thesis is that courtroom justice only succeeds when embedded within a comprehensive, multi-sector, and socially inclusive reconstruction blueprint.

2. A Brief Overview of The Ethiopian Conflicts

The conflicts in Ethiopia present a significant case study for the investigation of the tension between peace and justice due to several

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Jane Stromseth, David Wippman and Rosa Brooks, *Can Might Make Rights? Building the Rule of Law After Military Interventions* (Cambridge University Press 2006).

⁴³ *Ibid.*

distinctive characteristics. Ethiopian conflicts have taken various forms, ranging from intense armed confrontations involving heavy weaponry to lower-intensity conflicts that do not involve such weapons, as well as ethnically motivated rebellions targeting civilians and interethnic conflicts. However, the Tigray conflict in northern Ethiopia is unique in several respects. It differs from other conflicts in Ethiopia due to the scale of violence, geographic scope, weaponry employed, actors involved, and the magnitude of the humanitarian crisis. Consequently, it is not surprising that the conflict has attracted significant attention from observers around the world and the international community.

The outbreak of the Tigray war represented a watershed moment in Ethiopia's political crisis, as it effectively ended the possibility of resolving the disputes between the federal government and the TPLF through negotiated means. After the conflict began, the complexity of the situation grew rapidly. While every aspect of the war is debatable, including when and why it began, there appears to be general agreement that the TPLF attacked the Northern command in what it called "anticipatory self-defense."⁴⁴ On the night of November 3, 2020, the TPLF launched an attack on the Northern Command and took control of the command base in Tigray. Following this, the Federal government launched a counter-offensive on November 4, 2020. Along with the federal government, the Amhara Special Forces (ASF) and allied militia, as well as the Eritrean Defense Force (EDF), joined the counter-offensive against the TPLF forces.⁴⁵ These forces deposed the

⁴⁴ Sekoture Getachew, 'Interview with Dimtsi Woyane', YouTube, 14 November 2020 <<https://www.youtube.com/watch?v=K2d4WAtbhBc>> 17 July 2022.

⁴⁵ EHRC/OHCHR (n 1) para. 37.

TPLF, seized control of Mekelle, and the federal government established an interim administration in the region.

Subsequently, Tigray forces engaged in guerilla warfare, and the TPLF regained control of Mekelle, and the government withdrew from Tigray in June 2021 and declared a unilateral ceasefire. However, the fighting did not stop. Instead, the TPLF advanced into the Amhara and Afar regional states, threatening to seize Addis Ababa and depose the federal government. Afterward, the balance of power shifted in favor of the federal government, and the TPLF was pushed back to Tigray. The federal government declared a humanitarian truce on March 24, 2022.⁴⁶ Soon after, the TPLF-led government for the Tigray region agreed to a cessation of hostilities.⁴⁷

As already noted, the armed conflict in northern Ethiopia is not the only conflict affecting the country, as conflicts of varying intensity have emerged in many parts of Ethiopia. For instance, another major conflict is taking place in the Oromia regional state, pitting the Oromia Special Forces and Militia as well as the ENDF against the Oromo Liberation Front Army (OLF). This conflict has caused massive human suffering, complete disregard for human life, property destruction, and population displacement.⁴⁸ Nevertheless, there has been no indication

⁴⁶ Federal Democratic Republic of Ethiopia Government Communication Service, 'Declaration of a Humanitarian Truce by the Government of Ethiopia', Facebook, 24 March 2022
<<https://www.facebook.com/FDRECommunicationService/posts/137573522116463>> accessed on 22 July 2022.

⁴⁷ Tigray External Affairs Office, 'Statement on Humanitarian Truce', Twitter, 24 March 2022<<https://twitter.com/TigrayEAO/status/1507108987107430407>> accessed on 17 July 2022.

⁴⁸ Human Rights Watch, 'Ethiopia's Other Conflict: Ethiopia's Tigray War Overshadows Ongoing Cycles of Violence in Oromia', Human Rights Watch Commentary, 4 July 2022<<https://www.hrw.org/news/2022/07/04/ethiopias-other-conflict>> accessed on 17 July 2022.

that the parties to the conflict are willing to resolve their differences through political means. Consequently, the conflict remains ongoing, making a negotiated settlement increasingly unlikely. Sadly, civilians are caught in the middle, have been the target of ethnically motivated attacks, and are feeling the burn of the fire as a result.

The violent conflict in Northern Ethiopia has caused unspeakable human suffering and destruction of property. The parties to the conflict completely disregarded the fundamental rules of international law and customs of war, as well as the rights and dignity of civilians.⁴⁹ According to the OHCHR-EHRC Report, all parties to the conflict have flagrantly violated international humanitarian law and caused enormous suffering to civilians, including grave violations of human rights and refugee law.⁵⁰ The report indicates that serious crimes have been committed, including attacks on civilians and civilian objects, unlawful killings and extra-judicial executions, torture and other forms of ill-treatment, arbitrary detentions, abductions, and enforced disappearances, sexual and gender-based violence, forced displacement of civilians, and plunder, looting, and property destruction.⁵¹ Some of these violations may amount to crimes against humanity or war crimes, according to the JIT.

The human cost of the war remains controversial, but Belgium's Ghent University estimate puts the death toll at around 500,000.⁵² More than

⁴⁹ See EHRC/OHCHR (n 1).

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² Geoffrey York, 'Tigray War Has Seen Up to Half a Million Dead from Violence and Starvation, Say Researchers', *The Globe and Mail*, 14 March 2022 <<https://www.theglobeandmail.com/world/article-tigray-war-has-seen-up-to-half-a-million-dead-from-violence-and/>> accessed on 17 July 2022.

2.6 million people have been internally displaced as a result of the war.⁵³ This, however, does not include the deaths and displacement caused by other conflicts across the country.

3. Conflict and Responses Related to Justice

A brief examination of the responses of successive Ethiopian governments to violent political crises will help us comprehend how historical events have shaped the current state of affairs. Today's violence in Ethiopia is not a spontaneous, temporary hiccup caused by the country's current political climate. Instead, it is part of a five-decade-long cycle of violence and egregious violations of human rights. To better understand the current situation in Ethiopia, the next section examines the justice-related responses of successive regimes to violent conflicts.

3.1. The Dergue

The dawn of the modern period of Ethiopia's history of conflict and war dates back to the 1960s. In September 1974, popular protests and uprisings brought Emperor Haile Selassie's government to an end. The lack of leadership during the popular uprising allowed the Derg to seize the opportunity, organize itself, present itself as the leader of the uprising, and remove the emperor. The deposition of the Emperor and the transfer of power to the Derg were remarkably peaceful and largely unopposed. Selected officers went to the emperor's palace and informed him that they were there to remove him, and the emperor agreed to accompany them.⁵⁴ The Derg then declared that the emperor

⁵³ USA for UNHCR, 'Ethiopia's Tigray Refugee Crisis Explained', *UNHCR News*, 13 June 2023<<https://www.unrefugees.org/news/ethiopia-s-tigray-refugee-crisis-explained/>> accessed on 18 July 2022.

⁵⁴ See René Lefort, *Ethiopia: An Heretical Revolution?* (Zed Press 1983).

had been deposed and that the Derg would act as a provisional government.

Following the deposition of the emperor, the Derg implemented a revolutionary system of justice against both the old regime's leadership and dissident groups. It summarily executed sixty former officials of the emperor and instituted an eliminationist ideology toward dissident groups. In the years that followed, not only did the Derg engage in armed conflicts on multiple fronts, but it also employed violence, such as arbitrary detention, summary execution, and torture, as a means of governance and unleashed nationwide repression. It stripped the courts of their authority over what it deemed to be political matters and gave it to the *kebele* officials. This meant that even if a person was merely suspected of being a supporter or member of an opposition group, this could have grave consequences for their freedom and life.

The Derg met all forms of opposition with violence. During this period, the seeds of resolving political disputes through the use of extreme force were sown. Thus, the origins of the pattern of addressing political opposition through violence can be traced back to the brutal violence Ethiopia experienced under the Derg regime. In this sense, the 1970s laid the foundation for a political culture in which violence and the use of force became accepted means of pursuing political objectives, a pattern that continues to persist today. The continued prevalence of violence as a means of resolving political disputes can, in part, be understood in light of the fact that some of the actors who relied on violence during earlier periods continued to exercise significant political influence in the country.

The human and material cost of 17 years of persecution and brutality is difficult to quantify, but they were undoubtedly immense. However,

one tragic reality is plainly clear: the Derg's 17 years of persecution and outrage against Ethiopians did not provide the foundation for long-term security and peace in Ethiopia, nor did they achieve their primary purpose of preserving Ethiopia's territorial integrity. In doing so, the period during the Derg regime laid the groundwork for Ethiopia's intractable conflict, and Ethiopia has never been at peace since.

3.2. The EPDRF

The Derg was overthrown in 1991 after years of vicious and violent military struggle, and the EPRDF/TPLF, a coalition of ethnic groups led by the TPLF, assumed control. Unlike the transfer of power from the Emperor to the Derg, the transfer of power from the Derg to the EPRDF/TPLF was bloody and came after a long violent armed conflict that resulted in the Derg regime's collapse. In 1991, the EPRDF, a coalition of ethnically formed parties dominated by the TPLF, seized power and established a transitional government. In a significant departure from Derg's approach, and partly due to the complete collapse of the regime, which made such action more feasible, the EPRDF established a special prosecution office and pursued justice through criminal trials, bringing members of the Derg leadership before the courts.

The Special Prosecution Office (SPO) had the authority to investigate and prosecute crimes committed by the Derg regime's leadership. The trials conducted after the fall of the Derg regime, commonly known as the Red Terror Trials, represented one of the largest and most ambitious attempts to prosecute the leadership of a fallen authoritarian regime. The trials' primary goal was not just to hold the Derg accountable for its cruelty but also to educate about atrocity crimes and avoid future recurrence. Although the trials contributed to establishing

accountability by bringing several senior Derg officials before the courts, they failed in promoting democratic culture and respect for human rights, as well as in averting a bloodshed recurrence. In this sense, it is sufficient to recall the 27 years of persecution and significant human rights abuses experienced in Ethiopia, both during and after the trials. From this point of view, it is not surprising that many saw the trials as victor's justice, show trials, and an effort to legitimize the EPRDF/ TPLF's apparent illegitimacy in the eyes of the world community. Thus, it is not surprising that the legacy of the Red Terror Trials faded into obscurity in Ethiopian history, having little influence on the development of democracy and human rights. This demonstrates that trials lacking legitimacy are unlikely to foster a culture of respect for the law, even among those responsible for designing and implementing the process.

3.3. The 2018 Transition

Ethiopia underwent a transition for the second time after 27 years in April 2018. Unlike its predecessor, which collapsed due to military defeat, the EPRDF/TPLF regime was brought to an end after decades of repression by popular protests across the country, first in Oromia and then in Amhara and elsewhere. This was a negotiated transition rather than a regime collapse. Thus, rather than a clean break from the EPDRF/TPLF, there was continuity, albeit in a different form. The dominant party, the TPLF, lost its hold on the center and was pushed to the Tigray region, but it kept enormous influence and military capabilities.

As a result, justice in the form of a criminal prosecution for grave crimes was not only difficult; it could have threatened the transition itself. The transition was too fragile to pursue full-scale criminal

prosecution against former high profile TPLF officials who still possessed significant power and wealth. Consequently, the government adopted various strategies to circumvent this challenge. Firstly, the government employed strategic rhetoric aimed at discrediting the former officials of the TPLF. Secondly, there were some cases of reshuffling. Thirdly, there were few cases of targeted prosecution for corruption and abuse of power. The transition and transformation of government were widely welcomed both domestically and internationally, generating considerable hope for a more peaceful and democratic future in Ethiopia. Since the measures adopted by the government during this period have been extensively documented elsewhere, there is no need to revisit them in detail here.

However, the transition sacrificed key principles of justice, favoring a political settlement to end the enduring instability in the country. Accountability for 27 years of gross human rights violations was ignored, victims were not heard, or their interests were not considered in the transition. In the transition, issues of human rights violations were put aside because the dominant party conceded to relinquish its dominant position. There was no repentance and no one acknowledged responsibility for causing great suffering to victims. The transition failed to strike a balance between the interests of justice and political pragmatism, favoring the transfer of power instead of negotiating accountability for past crimes as part of the transition. Given that the transition was founded on impunity, Ethiopia's relapse into violence was not a question of if, but when. The culture of impunity for massive human rights abuses lies at the center of Ethiopia's relapse into violence. Three years after the transition, a deadly armed conflict erupted in Tigray. The brutal conflict resulted in massive civilian suffering, the destruction of infrastructure and property, and significant economic losses.

4. The Tigray Conflict in Ethiopia: The Peace and Justice Puzzle

The origins of conflicts in Ethiopia are controversial, making it one of the most contentious issues in the country. Some argue that Ethiopia's conflict stems from competing visions for the country's future.⁵⁵ Others argue that Ethiopia's conflicts are rooted in the history of the country and its state structure.⁵⁶ Nevertheless, the sources and interests driving Ethiopian conflicts are diverse. Looking at the situation in Ethiopia as a whole, there are several reasons that cause conflicts, including elite power struggles, questions about autonomy or administrative boundaries, conflicts between communities over scarce resources, and conflicts between those who are regarded as natives and settlers.⁵⁷

Despite the huge controversy surrounding it, the immediate cause of the beginning of the war in Tigray was the attack on the Northern Command, which had its base in Tigray. According to the government, the conflict in Tigray began because all previous attempts to resolve political differences between the TPLF and the Federal Government peacefully failed and the TPLF attacked the Northern Command. In the language of the government, the war was imposed on it, and the government had exhausted all other options for peacefully resolving the country's political disputes.

⁵⁵ Patrick Wight, 'Ethiopia's Civil War: Competing Visions on the Nature of the State', *ACCORD Conflict & Resilience Monitor*, 2 December 2020

<<https://www.accord.org.za/analysis/ethiopias-civil-war-competing-visions-on-the-nature-of-the-state/>> accessed on 18 July 2022.

⁵⁶ Teferi Mergo, 'The War in Tigray Is a Fight Over Ethiopia's Past—and Future', *Foreign Policy*, 18 December 2020 <<https://foreignpolicy.com/2020/12/18/the-war-in-tigray-is-a-fight-over-ethiopias-past-and-future/>> accessed on 18 July 2022.

⁵⁷ Berihi Asgele Siyum, 'Underlying Causes of Conflict in Ethiopia: Historical, Political, and Institutional?', *Proceedings of the 2nd World Conference on Social Sciences Studies* (October 2021).

This argument, however, emerged within a broader context of political instability and increasing demands for the government to uphold the rule of law. Even before the Tigray crisis began, calls for greater protection of citizens and accountability for violations were becoming increasingly prominent. Illegal acts were widespread, attacks against civilians and their property were increasing, and ordinary citizens accused the government of failing to protect them. Many people lived in a state of insecurity, with their livelihoods and ways of life severely affected. Several critics highlighted the government's perceived inaction and indifference in the face of widespread violence against civilians. Conversely, the government attributed Ethiopia's broader crisis to the TPLF, accusing it of fueling instability and supporting attacks against civilians in different parts of the country in order to divert attention from democratic reforms and economic development.

Against this backdrop, the federal government sought to frame its response to the Tigray crisis not merely as a military intervention but as a law enforcement action aimed at restoring constitutional order and ensuring accountability for those responsible. In the Tigray operation, the entire justice system was activated to investigate and take legal action against those responsible for the attacks on the Northern Command. The Ethiopian government characterized the operation in northern Ethiopia as a "law enforcement operation."⁵⁸ Accordingly, the stated objectives of the operation were to uphold the law and "apprehend those responsible for the attacks on the Northern Command of the Ethiopian National Defense Forces."⁵⁹ The goal was,

⁵⁸ Abiy Ahmed, 'Statement by Prime Minister Abiy Ahmed, Putting an End to Impunity: The Case for Enforcing Federal Laws in Tigray', Embassy of Ethiopia, London, 17 November 2020<<https://www.ethioembassy.org.uk/putting-an-end-to-impunity-the-case-for-enforcing-federal-laws-in-tigray/>> accessed on 18 July 2022.

⁵⁹ *Ibid.*

therefore, to either bring the TPLF's top leaders to justice if they turned themselves in or were captured, or to totally destroy the TPLF once and for all.⁶⁰

In line with these objectives, arrest warrants were issued against senior TPF officials. Subsequently, on February 14, 2021, the Office of the Attorney General issued a press release outlining the scope of the investigation into TPLF members. The statement identified 349 suspects, including 253 current and former members of the Ethiopian National Defense Force and the Federal Police, and 96 senior TPLF officials.⁶¹ In addition to outlining the scope of the investigation, the Attorney General described the legal nature of the alleged offenses. The allegations include high treason, crimes against the constitutional order, and terrorism. It is interesting to note that the Office of the Attorney General was not investigating international crimes such as war crimes and crimes against humanity. Additionally, according to the press release, 123 individuals were arrested and were being held at the time.⁶² Thus, this was initially successful as some key TPLF leaders were arrested and a few of them were executed. Overtime, however, both winning the war and bringing the leaders of the TPLF and the remaining TPLF leaders proved to be difficult.

As consequence, the government's strategy was refashioned in two ways. First, the government released the officials of the TPLF who had

⁶⁰ *Ibid.*

⁶¹ Office of the Federal Attorney General of Ethiopia, 'Attorney General – Press Release on the Investigation into TPLF's Attack against the Northern Command of the National Defense Force and Related Grave Criminal Offences', Embassy of Ethiopia, Washington, D.C., 5 February 2021 <<https://ethiopianembassy.org/attorney-general-press-release-on-the-investigation-into-tplfs-attack-against-the-northern-command-of-the-national-defense-force-and-related-grave-criminal-offences-february-4-2021/>> accessed on 18 July 2022.

⁶² *Ibid.*

been apprehended and imprisoned.⁶³ Secondly, the original goal of the war, namely to hold responsible TPLF officials accountable through the law enforcement operation, was abandoned. Instead, a ceasefire was announced, and the parties to the conflict have remained in a state of neither peace nor war up to this point.

Often times, rather than being a purely hypothetical debate, the peace and justice dilemma represents a practical challenge that conflict-affected countries must confront. This also applies to the case of Ethiopia. The difficulty is evident in the government's shifting position regarding the resolution of the conflict in the country, which has oscillated between pursuing justice and peace. There is no magic formula to resolve this dilemma. Countries have used a variety of policies and tactics throughout history to resolve implacable political conflicts and bring about peace. While the conflicts in the former Yugoslavia and Rwanda were addressed largely through criminal accountability mechanisms, South Africa established the Truth and Reconciliation Commission (TRC) as a means of promoting national healing and reconciliation. An approach that proved effective in a particular context may not necessarily be suitable for Ethiopia, given the unique historical, political, and social circumstances of the country.

4.1. Justice Efforts

As already mentioned, the conflict in Ethiopia has been marked by excessive brutality and cruelty on both sides, causing enormous suffering among the civilian population. Early in the battle, evidence of serious international crimes, including crimes against humanity and

⁶³ BBC News, 'Tigray Conflict: Ethiopia Frees Rebel Leaders in Christmas Amnesty', *BBC News*, 10 January 2022 <<https://www.bbc.com/news/world-africa-59919539>> accessed on 18 July 2022.

war crimes, started to emerge.⁶⁴ The underlying crimes perpetrated throughout the conflict range from the deliberate killing of wounded troops and civilians to rape, torture, indiscriminate murders, and excessive destruction of property not justified by military necessity.⁶⁵ As previously stated, the government has characterized its action in the north as a law enforcement operation, and as such, the operation was designed to hold those responsible accountable.

Nonetheless, as evidence of atrocities involving both sides of the conflict accumulated, the call and pressure for comprehensive justice grew. As a result, international and national investigation mechanisms have been established to conduct impartial investigations into alleged abuses and violations of the law and customs of war. So far, an investigation into the alleged crimes has been conducted on three fronts.

First, as noted earlier in this article, the Joint UN Human Rights Office-Ethiopian Human Rights Commission investigation launched independent and impartial investigations. This collaborative team provided a credible account of serious violations of international humanitarian law committed by all parties to the conflict. The report concluded that serious crimes, including unlawful or extrajudicial killings and executions; torture; arbitrary detentions and enforced disappearances; pillaging, looting, and property destruction; sexual and gender-based violence; and forcible displacement of civilians, have been committed.⁶⁶ In addition to calling for an immediate cessation of

⁶⁴ Zecharias Zelalem, 'Survivors recount horrific details of Mai Kadra massacre,' *Al Jazeera*, December 12, 2020 <<https://www.aljazeera.com/news/2020/12/12/survivors-recount-horrific-details-of-mai-kadra-massacre>> accessed on July 18, 2022.

⁶⁵ EHRC/OHCHR (n 7).

⁶⁶ EHRC/OHCHR (n 1).

hostilities, the report calls for independent and impartial bodies to conduct prompt, thorough, and effective investigations into allegations of violations and to hold those responsible accountable.⁶⁷ The Ethiopian government welcomed the report as a way to complement the ongoing efforts to "provide redress to victims, ensure accountability, and take preventive measures."⁶⁸ The government was also pleased to know that the report did not come to the conclusion that genocide may have happened. In contrast, the TPLF rejected the report, mostly opposing the involvement of the Ethiopian Human Rights Commission in the investigation of the conflict.⁶⁹

Subsequently, the Ethiopian government announced the formation of an Inter-Ministerial Taskforce on Accountability and Redress of Violations Committed in the Context of the Conflict in Northern Ethiopia on November 29, 2021. The task force has its own secretariat and was created to implement the recommendations included in the report of the joint investigation. Four committees comprise the task force: investigations and prosecutions, refugees and IDP affairs, sexual and gender-based violence, and resource mobilization.⁷⁰ The investigative and prosecution committee is comprised of a specialized joint civil-military investigative and prosecutorial unit and has been instructed to immediately begin its work. According to recent statements made by the head of the Secretariat, 158 experts with diverse

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ Ethiopian Monitor, 'PM Recognizes Joint UN Ethiopia Investigation Team's Report on Tigray Conflict', *Ethiopian Monitor*, 3 November 2021 <<https://ethiopianmonitor.com/2021/11/03/pm-recognizes-joint-un-ethiopia-investigation-teams-report-on-tigray-conflict/>> accessed on 18 July 2022.

⁷⁰ Addis Standard, 'Ministry of justice establishes inter-ministerial task force to oversee investigation, legal action against human rights violations in northern Ethiopia conflict,' *Addis Standard*, 30 November 2021 <<https://addisstandard.com/23412-2/>> accessed on July 18, 2022.

professional backgrounds have been assembled to investigate grave violations of international human rights in the northern region of the country.⁷¹ During a briefing for EU diplomats, the head of the secretariat reported that in the regional states of Afar and Amhara, investigators had gathered evidence of "2,712 extrajudicial killings of civilians, 1,228 serious bodily injuries, 969 rapes, and 421 cases of inhuman treatment of civilians."⁷² In addition, the head of the team stated that the first phase of the investigation was complete and that the team was proceeding with prosecution of the responsible parties.⁷³ Given that the Task Force does not currently have access to the Tigray Regional State, where the vast majority of crimes were committed, it is unlikely that its investigations will be exhaustive and objective. Besides, the Tigray side may find it hard to believe that the task force will be able to conduct a fair investigation and ensure that all victims receive justice. As a result, the task force will operate with a serious lack of legitimacy, which seriously limits its capacity to promote accountability. No matter how accurate or impartial the investigation's findings may be, the legitimacy gap means they will almost inevitably be perceived as political. Consequently, rejecting the manner in which the task force was established will almost certainly lead to the rejection of the investigation's findings.

Finally, on December 17, 2021, the UN Human Rights Council established the Commission of Human Rights Experts on Ethiopia

⁷¹ Africa-Press, 'EU Diplomats in Addis Briefed on Accountability Measures Taken by Ethiopia', *Africa-Press*, 1 June 2022 <<https://www.africa-press.net/ethiopia/all-news/eu-diplomats-in-addis-briefed-on-accountability-measures-taken-by-ethiopia>> accessed on 18 July 2022.

⁷² *Ibid.*

⁷³ *Ibid.*

through resolution S-33/1.⁷⁴ The Commission's mandate includes conducting an exhaustive and impartial investigation into allegations of violations and abuses of IHL and other laws, as well as providing guidance on transitional justice. The Commission's most important authority relates to its mandate to "establish the facts and circumstances surrounding the alleged violations and abuses, collect and preserve evidence, identify those responsible, where possible, and make such information accessible and usable in support of ongoing and future accountability efforts."⁷⁵

Initially, Ethiopia vehemently opposed the formation of the United Nations Commission of Experts.⁷⁶ The Council nevertheless voted in favor of establishing the Commission despite Ethiopia's opposition. Ethiopia subsequently announced that it would not cooperate with the Commission, characterizing it as a tool of political pressure and an unfair mechanism.⁷⁷ Ethiopia has recently demonstrated a willingness to engage with the Commission. Members of the Commission made their first trip to Ethiopia since the Commission's inception in July 2021, where they were able to meet with high government officials and other stakeholders in an effort to gain unfettered access to crime scenes.⁷⁸ While this progress in relation to the Ethiopian government

⁷⁴ International Commission of Human Rights Experts on Ethiopia (ICHREE), 'International Commission of Human Rights Experts on Ethiopia Portal', *Office of the United Nations High Commissioner for Human Rights (OHCHR)*, 2023 <<https://www.ohchr.org/en/hr-bodies/hrc/ichre-ethiopia/index>> accessed on 18 August 2023.

⁷⁵ *Ibid.*

⁷⁶ *The Reporter*, 'Ethiopia Rejects UN Human Rights Council Resolution', 18 December 2021 <<https://www.thereporterethiopia.com/12440/>> accessed on 18 July 2022.

⁷⁷ *Ibid.*

⁷⁸ Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Press Release: Members of Human Rights Body Conclude First Mission to Ethiopia', 2 August 2022 <<https://www.ohchr.org/en/press-releases/2022/08/members-human-rights-body-conclude-first-mission-ethiopia>> accessed on 18 August 2022.

is encouraging, the Commission faces severe resource constraints in carrying out its mandates. In its most recent update to the Human Rights Council, the Commission stated openly that it lacks both human and financial resources to fulfill its mandate, and the head of the Commission stated bluntly, "if this Council expects us to accomplish what it requested in December, we need more resources."⁷⁹ By their very nature, international investigations of atrocity crimes require substantial financial and human resources. However, the Commission is already facing significant resource constraints. It remains to be seen whether the Council and states will provide the necessary resources for the Commission. Potential financial providers, such as the European Union and member states, have shifted their focus to the war in Ukraine, which has a significant impact on the resources available to the Commission. Furthermore, despite the Commission's positive progress in establishing cooperative relations with the Ethiopian government, there is currently no assurance that the Commission will have complete access to the crime scenes. If access is denied, it will severely hinder the Commission's capacity to conduct a thorough and impartial investigation. Moreover, the Commission's investigation is the initial step on the long path to ensuring justice for victims of violence in Ethiopia. Nevertheless, despite these and other limitations, if the commission is able to overcome its obstacles, it has the potential to investigate grave violations of human rights and humanitarian law in the Ethiopian conflict in an independent and impartial manner.

⁷⁹ International Commission of Human Rights Experts on Ethiopia (ICHREE), 'Oral Update of the International Commission of Human Rights Experts on Ethiopia to the UN Human Rights Council', *Human Rights Council*, 50th Session, Geneva, 30 June 2022.

4.2. Peace Making Efforts

Immediately following the outbreak of the war in northern Ethiopia, the international community and other observers increasingly called for dialogue and a negotiated political settlement to the conflict that was devastating the country. According to proponents of this view, the challenge facing Ethiopia was fundamentally political and should therefore be addressed through political means. Nevertheless, all parties to the conflict rejected the prospect of a peaceful resolution when they believed victory was within reach.⁸⁰ From the government side, a tweet from Prime Minister Abiy illustrates this;

*Our law enforcement operations in Tigray are proceeding as planned: operations will cease as soon as the criminal junta is disarmed, legitimate administration in the region restored, and fugitives apprehended & brought to justice - all of them rapidly coming within reach.*⁸¹

Similarly, when victory appeared imminent, the TPLF showed limited willingness to compromise with the federal government. As Tigrayan forces advanced toward Addis Ababa in November 2021, TPLF leaders maintained that negotiations could not proceed without prior

⁸⁰ Abiy Ahmed Ali (@AbiyAhmedAli), "አሁንም ደግሜ ለኢትዮጵያውያን ላረጋግጥላችሁ የምወደው የህግ የበላይነት የማረጋገጥ ስራችን ሳይጠናቀቅ ከዚህ ጁንታ ጋር ድርድር እንደማይኖር ነው። 2/2," *X (formerly Twitter)*, November 10, 2020 <<https://twitter.com/AbiyAhmedAli/status/1326216995247951874>> accessed on July 18, 2022.

⁸¹ *BBC News*, "Tigray crisis: Ethiopian Prime Minister Abiy Ahmed rejects peace talks," *BBC News*, November 11, 2020 <<https://www.bbc.com/news/world-africa-54900769>> accessed on July 18, 2022.

concessions from the federal government, including the withdrawal of federal-aligned forces and the lifting of restrictions on Tigray.⁸²

Recently, both parties have shifted their positions on negotiating a peaceful resolution to the conflict. On June 14, 2022, the Ethiopian government announced its intention to negotiate peace with the TPLF and established a committee to examine how to proceed with the peace negotiations. The government subsequently announced the members of the negotiating team that would represent it in the planned peace talks.⁸³ Despite the government's unequivocal willingness to participate in negotiations for peace, the most recent announcement does not specify the conditions for peace talks with the TPLF. In fact, the recent government position seems to indicate that the government is willing to start the peace talks without preconditions. The Ethiopian government even explicitly stated that there should be no preconditions for beginning negotiations. Thus, it is unclear whether accountability for serious international crimes will be included in the government's peace proposal.

Likewise, the TPLF has expressed its willingness to engage in peace negotiations⁸⁴ and appointed members of the negotiating team.⁸⁵

⁸² *Al Jazeera*, 'Ethiopia Gov't Outlines Terms for Possible Tigray Ceasefire Talks', 11 November 2021 <[aljazeera.com](https://www.aljazeera.com)> accessed on July 18, 2022.

⁸³ Fana Broadcasting Corporate (FBC), "Ethiopia appoints negotiating team to resolve conflict in the north peacefully," *Fana Broadcasting Corporate*, June 27, 2022 <<https://www.fanabc.com/english/ethiopia-appoints-negotiating-team-to-resolve-conflict-in-the-north-peacefully/>> accessed on August 18, 2022.

⁸⁴ Debretsion Gebremichael (President of the Government of Tigray), "Open Letter from the President of the Government of Tigray on peace talks," June 3, 2022 <<https://secureservercdn.net/198.71.233.26/yky.03a.myftpupload.com/wp-content/uploads/2022/06/Open-Letter-from-the-President-of-the-Government-of-Tigray-on-peace-talks-.pdf>> accessed on August 18, 2022.

⁸⁵ Borkena Ethiopian News, "TPLF says it has set up negotiating team for talks with Ethiopian gov't," *Borkena*, July 18, 2022 <<https://borkena.com/2022/07/18/tplf-says-it->

Analysts offer several explanations for why the parties decided to engage in peace talks after initially rejecting negotiations when the prospect of total victory appeared imminent, including the recognition that achieving complete victory was unattainable.⁸⁶ The negotiations face numerous complex and contentious issues that may prove difficult to resolve, making it uncertain whether they will ultimately lead to a lasting resolution of the conflict.⁸⁷ For now the most contentious issue has been the parties' selection of a potential mediator; the Ethiopian government preferred the AU, while the TPLF preferred the Kenyan president, Uhuru Kenyatta.

However, even if the negotiations succeed in producing a political settlement, a fundamental question remains: what role will accountability play in the process? It remains unclear whether accountability will form part of the negotiations, assuming that negotiations proceed. All parties to the conflict bear responsibility for reported violations of human rights, and none was able to achieve total victory. The parties came to the negotiating table not necessarily out of a genuine willingness to resolve their political differences through negotiation, but rather because they were exhausted by a protracted conflict. Moreover, because those who may bear the greatest responsibility continue to hold significant political and military power, negotiations over accountability are likely to be particularly difficult. From this perspective, political pragmatism is more likely to take precedence over justice.

has-set-up-negotiating-team-for-talks-with-ethiopian-govt/> accessed on August 18, 2022.

⁸⁶ William Davison, "At Long Last, Ethiopia Prepares for Peace Talks," *International Crisis Group*, July 4, 2022 <<https://www.crisisgroup.org/qna/africa/ethiopia/long-last-ethiopia-prepares-peace-talks>> accessed on July 18, 2022.

⁸⁷ *Ibid.*

The tension between peace and justice is not determined solely by the preferences of the domestic parties to the conflict. External actors can also play a significant role in shaping whether accountability is pursued or whether political compromises, including forms of amnesty, become more likely.⁸⁸ In the case of Ethiopia, both domestic and international human rights organizations have consistently called for accountability for atrocity crimes and have played an important role in documenting and reporting violations committed during the conflict. At the same time, external political actors, particularly the United States and the European Union, appear to possess considerable influence over the government's policy choices. They have put great pressure on the government to negotiate a peaceful end to the conflict in the north ever since the start of the war. Following allegations of serious human rights violations, the United States suspended Ethiopia from its duty-free trade programme,⁸⁹ while the European Union withheld financial support pending progress on issues including humanitarian access and accountability.⁹⁰ Nevertheless, both the European Union and the United States have continued to call for accountability for serious human rights violations while simultaneously supporting a peaceful resolution of the conflict through political means.

⁸⁸ See Chandra Lekha Sriram, *Confronting Past Human Rights Violations: Justice vs. Peace in Times of Transition* (Routledge 2004).

⁸⁹ Reuters, "U.S. cuts off Ethiopia, Mali, Guinea from Africa duty-free trade program," *Reuters*, January 2, 2022 <<https://www.reuters.com/world/africa/us-cuts-off-ethiopia-mali-guinea-africa-duty-free-trade-program-2022-01-01/>> accessed on August 17, 2022.

⁹⁰ Reuters, "EU suspends Ethiopian budget support over Tigray crisis," *Reuters*, January 15, 2021 <<https://www.reuters.com/article/us-ethiopia-conflict-eu-idUSKBN29K1SS>> accessed on July 18, 2022.

Concluding Remarks: Building Ethiopia's Future with Justice and Peace

As the foregoing discussion demonstrates, the peace–justice dilemma is not merely a theoretical question that Ethiopia may confront in the future; it has been a practical and enduring challenge since the outbreak of the war in the north. Those who prioritize a political settlement argue that the conflict in Ethiopia is fundamentally political and that its resolution must therefore be political rather than judicial. From this perspective, an emphasis on criminal accountability risks undermining peace initiatives, prolonging armed confrontation, increasing civilian suffering, threatening national cohesion, and contributing to state fragility. Conversely, critics of this approach maintain that overlooking accountability for grave violations is neither morally nor legally sustainable. They argue that political settlements negotiated without meaningful consideration of victims' rights risk marginalizing those who suffered most from the conflict and may fail to address demands for truth, justice, and reparations. Moreover, peace achieved through broad impunity may prove fragile, as it can weaken public confidence in the rule of law and hinder the development of democratic institutions. The experience of Ethiopia illustrates the complexity of reconciling these competing objectives. Although the parties to the conflict initially rejected negotiations and pursued military solutions, their positions shifted when neither side was able to secure a decisive victory, but a return to hostilities cannot be ruled out.

There is no simple answer to the dilemma Ethiopia faces or to the question of how the country should reconcile the potentially competing demands of peace and justice. The tensions between these objectives create profound political and institutional challenges, and identifying a workable solution is inherently difficult. On the one hand, applying

ordinary rule-of-law principles developed in times of peace is challenging in the aftermath of widespread violence. In contexts involving mass atrocities, it may be practically impossible to prosecute every individual responsible for international crimes, particularly where the number of perpetrators, victims, and incidents is extremely high. Moreover, an immediate and comprehensive pursuit of criminal accountability during an active conflict may risk intensifying political resistance and prolonging violence, thereby exposing civilians to further harm and worsening humanitarian conditions.

The current circumstances in Ethiopia suggest that peacemaking is likely to receive greater political priority than justice in the short term. The immediate objectives of ending armed conflicts and preventing a renewed escalation of violence, particularly in Tigray, may outweigh efforts to pursue extensive accountability measures. First, the conflicts have severely affected Ethiopia's political economy, contributing to declining investment, pressure on foreign reserves, inflation, and broader economic instability. Addressing these challenges and preventing further economic deterioration are likely to remain central government priorities. Second, Ethiopia continues to face significant humanitarian challenges, including food insecurity, drought, and large-scale internal displacement, which require urgent responses. Third, the conflict in the north did not end as a result of a decisive victory by one of the warring parties, but rather as a result of both sides reaching their breaking point. In such circumstances, political bargaining and compromise are more likely outcomes than comprehensive justice measures. Finally, negotiated settlements often provide quicker mechanisms for reducing violence and managing political disputes than the complex and resource-intensive process of accountability.

Nevertheless, the prioritization of peace negotiations should not obscure the long-term importance of justice. Although some justice demands may exceed the immediate political willingness of the parties, accountability ultimately depends on political commitment. Compared with negotiated settlements, justice processes are slower, costly, and require substantial institutional capacity and financial resources—resources that Ethiopia currently lacks. Their benefits may also not be immediately visible. However, Ethiopia’s historical experience demonstrates that political settlements without meaningful justice mechanisms have rarely produced sustainable peace.

A review of Ethiopia’s responses to political violence reveals that impartial and legitimate justice has seldom occupied a central place in post-conflict transitions. Following the 1974 revolution, the Derg regime established a revolutionary justice system that was accompanied by widespread repression and human rights violations. After the EPRDF came to power, it pursued prosecutions against former Derg officials, but this approach was largely characterized as victor’s justice rather than a comprehensive and impartial accountability process. The transition from the Derg regime did not eliminate patterns of repression, and serious human rights violations continued under the EPRDF government, including the use of torture in detention facilities such as Ma’ekelawi in Addis Ababa.

The political transition that began in 2018 provides another example of the difficulties associated with negotiated transitions. By their nature, negotiated transitions often prioritize political stability and the management of potential spoilers over comprehensive accountability for past abuses. While such approaches may facilitate short-term political change, they risk leaving unresolved grievances and patterns of impunity. Building democracy and respect for human rights on a

foundation of unaddressed violations creates significant risks for long-term stability.

Therefore, sacrificing justice entirely in pursuit of political pragmatism may produce only temporary stability rather than durable peace. Although peace agreements that provide explicit or implicit forms of amnesty may contribute to ending immediate violence, they may fail to address the underlying causes of repeated cycles of conflict. Ethiopia's past experience demonstrates that sustainable peace requires more than the cessation of hostilities; it requires credible mechanisms capable of addressing victims' demands for truth, accountability, and recognition. The central challenge for Ethiopia is therefore not choosing between peace and justice as mutually exclusive alternatives, but developing a transitional framework capable of advancing both objectives in a realistic and context-sensitive manner.

CONSTITUTION MAKING IN ETHIOPIA: A LOOK BACK AT THE FAULTY FOUNDATION OF THE FEDERATION

Simeneh Kiros Assefa*

Abstract

The Transitional Government of Ethiopia Council of Representatives was constituted of ethnic armed groups, the prominent ones being the EPRDF and OLF. This organ paved the way for the ethnic-based federation, that was to be formally instituted by the FDRE Constitution of 1995, under the guise of self-administration, while it aggressively and effectively worked to perpetually deny assuming local power to those identified as “non-indigenous people”. The constitution-making process was so flawed it involved several unacceptable practices by common sense which now also include “unconstitutional” local rules and state practices.

Both the formation of the TGE and the adoption of the FDRE Constitution were to give a mere semblance of legitimacy to the TPLF Government. This article argues that the current constitutional order did not have foundational legitimacy; neither has it acquired subsequent legitimacy by a fair and inclusive application of its rules. Any dialogue for constitutional amendment should take these facts into consideration.

Key-terms. *Political representation, Transitional Government of Ethiopia, indigenous people, exogenous people, gerrymandering, quota seat*

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Introduction

Ethiopia had always been a unitary state despite the diversity of its people.¹ In the last days of the Military Government (also known as the Derg) and its vanguard party, the Workers' Party of Ethiopia ("WPE"), the United States mediated the London Conference where the Ethiopian Government, Ethiopian People Revolutionary Democratic Front ("EPRDF") led by Tigray People's Liberation Front ("TPLF"), Oromo Liberation Front ("OLF") and Eritrean People's Liberation Front ("EPLF") were participants. When the Conference collapsed because of EPRDF's advance to Addis Ababa, the US under-secretary Herman Cohen advised the EPRDF army to enter Addis Ababa and control political power. EPRDF then called a conference where the Transitional Government of Ethiopia ("TGE") would be established. The participants of the conference were handpicked by the TPLF leadership; they were armed factions and prominent personalities of the day most of whom later established political organizations along their ethnic lines.

The conference adopted the Transitional Period Charter which established the Council of Representatives with 87 seats. The participants of the conference scrambled 81 of those seats among themselves. The remaining 6 seats were also allocated to other minority groups.

The majority of the population, because they were not ethnically aligned, were not represented both at the conference and later in the TGE. Yet, the Transitional Government of Ethiopia made key decisions the effect of which continues to date. Included is the establishment of administrative regions based on ethnic lines under the guise of

¹ There were local/regional kings, but there was a king of kings at the center.

conducting local elections as per *National/Regional Self-Governments Establishment Proclamation No 7/1992* (“Proc No 7/1992”). The current federal structure was created by the Federal Democratic Republic of Ethiopia Constitution without significant changes to the administrative arrangement made under the statute Proc No 7/1992.²

Although the Constitution of the Federal Democratic Republic of Ethiopia (“FDRE Constitution”) has several rosy provisions, their application is nullified by state constitutions and key local legislation. The Constitution subscribes to the wrong narrative that one ethnic group oppressed another. This would come with the consequence that the newly established ethnic-based regional states are liberated from such dominion. That would further come up with provisions in the constitutions of the respective regional states recognizing ownership of the state to those “indigenous” people, and subsidiary laws perpetually excluding so-called “exogenous” people domiciled in those regional states from sharing political power.

This article argues that the TGE is established without any semblance of representation of those who are not ethnically aligned, who would constitute the majority of the population at the time. The lack of representation, for the most part, is the lack of ethnic nationalism consciousness at the time, but there was also the systematic exclusion of certain groups from any form of political opportunity by those who had power. The lack of representation subjected those who were not aligned ethnically to all forms of physical abuse and human rights violations, including genocide and crimes against humanity. The state, both the federal and the respective states, consistently failed to even

² Everyone at the Conference would claim their share of the Federation; whatever is left would later constitute Region Three or now Amhara National Regional State.

recognize the incidents in their proper designation let alone to take corrective measures, which in turn gives the impression that the state structure is abating those atrocious crimes.

The study is made based on a review of the primary documents, such as minutes of parliamentary proceedings,³ the legislation adopted through the process, standing and ad-hoc committee investigative reports, and minutes of the Constitutional Assembly. To reconstruct the socio-political conditions of the time, only state-issued news reports are reviewed.⁴ Some court decisions are also reviewed.

Section one advances the argument that the current constitutional order lacks both foundational and continued legitimacy. Strengthening this argument, section two deals with the formation of the TGE, the initial selection of participants of the Conference, and the (standards for) allocation of seats in the Council of Representatives of the TGE. It also discusses the establishment of political organizations for those groups that did not have such organizations at the July conference and the creation of a coalition for those political organizations claiming to represent one people.

Section three discusses key decisions that impact the nature of the state and other interests, such as the formation of the TGE, the establishment

³ The minutes were not taken verbatim, nor were they properly recorded. The minutes contain grammatical errors and, in some instances, the whole paragraph does not make sense. Effort is made to make sense of critical part of the minutes by reading in the context of minutes of other proceedings.

⁴ There were limited private news media, exclusively newspapers and magazines. However, as they were considered as biased and sensational by the Government, and many of the reporters and editors were charged for violation of the media law, I do not review those materials. I rather stick to the state issued reports because they are raw reports of facts and amount to be admission by the state. The joint reading of the minutes and the news reports give, I hope, clearer picture of events of the day.

of the self-government regions under the guise of the first local elections, the standards for the geographic and ethnic demarcation and designation of localities/regions, and the deliberations conducted in the process. This section further discusses the predicaments of members of the Council of Representatives in making genuine decisions.

Section four discusses subsequent developments, such as the adoption of the FDRE Constitution under the strict supervision of the TPLF-controlled Council of Representatives to ensure the original design is preserved, and the adoption of the respective regional constitutions defining whom those regions belong to with the intent to exclude exogenous people residing in those regions from local political power. This section further illustrates the physical violence and atrocious crimes committed against the exogenous people residing in those regions. The previous sections argue that the current constitutional order does not have foundational legitimacy; a part of section three, and the subsequent section are intended to show that the current constitutional order has failed to acquire subsequent legitimacy by inclusive application. The article concludes with remarks on the way forward.

1. Setting the Argument for Lack of Legitimacy of the Current Constitutional Order

In constitutional making, both in the development of the instrument and the institutions of governance, public participation is essential for the legitimacy of the government that would come to power.⁵ A constitutional order may obtain its legitimacy either at the foundational level or subsequently by a fair and inclusive application of

⁵ Justin Blount, 'Participation in Constitutional Design' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar 2011) 38, 39.

such constitution.⁶ This article argues that the current Ethiopian constitutional order neither had the foundational legitimacy in its making nor has it acquired subsequent legitimacy by inclusive application of those constitutional rules.

The FDRE Constitution is not made when the convention was called in 1995. Rather, its making started much earlier during the conduct of the July 1991 Conference establishing the TGE which was in charge for two and a half years. At the same time, the July conference would be traced back to the London Conference mediated by the US where the main ethnic-based armed movements—EPRDF, OLF, and EPLF⁷—were negotiating with the then Ethiopian Government under WPE for the sharing of the political power of sorts to form a transitional government. However, events fast unfolded and the President of the Republic, Mengistu Hailemariam, fled the country to Zimbabwe.⁸ Mr. Herman Cohen “advised” the EPRDF army to enter the city and take control of political power. The initial opposition to such a process was stated at a hearing by the US Congress Foreign Affairs Committee that the London Conference was structurally defective because it does not represent the majority of the population that is not ethnically aligned whether armed or other political organization.⁹

⁶ Randy E Barnett, ‘Constitutional Legitimacy’ (2003) *103 Colum L Rev* 111; Richard H Fallon Jr. ‘Legitimacy and the Constitution’ (2005) *118 Harvard LR* 1787.

⁷ Reference to a particular people, place or political organization is made as it used to be referred to by the time the discussions were made. Further, EPLF participated in the conference as Eritrea was part of the state of Ethiopia by then.

⁸ EPRDF was demanding postponement of the negotiation as it was advancing to Addis Ababa. *Addis Zemen*, at ‘Press Statement from Council of State’ *Addis Zemen* (May 17, 1991, Addis Ababa) 1, 6.

⁹ Protest in foreign offices is reported in the local newspapers. See for instance public protest in Rome, Washington DC, which is blamed on those Ethiopianist movements. ‘Anti-Peace Forces in Foreign Land Plotting Harm’ *Addis Zemen*, June 7, 1991, Addis Ababa) 1, 4.

Yet, the formation of the TGE, a façade for creating the impression of legitimacy, was an important milestone for the current federal structure.¹⁰ The participation in the formation of the TGE should have been made taking into account the social, political, ethnic, religious and other faultlines into consideration. The participants of the July 1991 Conference were handpicked by TPLF from those armed factions that were said to have fought for their ethnic group, or individuals as though they represented a people of some kind, many of whom form political organizations later in the process. Ethnic identity has informed the selection of participants, the discussion in the formation of the TGE, and the outcome of the Conference.

The majority of the population which had not been organized along ethnic lines were not represented both at the July Conference or the TGE Council of Representatives which made significant decisions that determine the fate of the nation. Goshu Wolde's comparison of Yasir Arafat (of PLO) and George Habash (of Popular Front for the Liberation of Palestine) deciding on the fate of the State of Israel without the state of Israel participating in the process, to that of the London Conference is a sensible comparison.

What happened was that an unelected group that participated in the Conference established the TGE, granted itself the supreme power of the Central Government in the TGE,¹¹ and authorized itself to define

¹⁰ The US under-secretary Herman Cohen made it clear to the Foreign Relations Subcommittee that the US Government had been in contact with the EPRDF for the previous two years and they made it clear to EPRDF that 'No democratization - no US cooperation'. Thus, EPRDF had to prove it was a democratic force.

¹¹ *Transitional Period Charter Proclamation No 1/1991*, art 8. Further, in relation to the power of the regional administrative authority, the Chairman of the Council explains what supreme political authority means. Minutes of 22nd Regular Session of the Council of Representatives of TGE (November 14, 16, 1991 Addis Ababa) 3.

administrative boundaries, and conducted local elections to assume power at the regional level. Even when the first elections were conducted, it was not for election of members of the Council of Representatives, which is the supreme political organ; it was just a local election. It is a group that just come together and in a continuous drama creates the impression of the legitimacy of its existence as a government, its powers and subsequent actions. It would also decide the content of the constitution finally adopted as FDRE Constitution.

The TGE adopted fundamental pieces of legislation that would define the constitutional state of affairs, such as Proc No 7/1992; *Creation of Appropriate Conditions for Conducting National/Regional Self-Government Elections Proclamation No 9/1992* ("Proc No 9/1992") and *National/Regional and Wereda Councils Members Election Commission Establishment Proclamation No 11/1992* ("Proc No 11/1992"). While those statutes contained provisions that were meant to preclude effective contest for power from previous regime officials, subsidiary legislation in the form of directives vest all powers and opportunities to those that have assumed power. Accordingly, former members of WPE, armed forces, police forces and security services would not participate in the local election either as electorate or candidates.¹² The guidelines adopted by the Election Commission designate two major contending political organizations in the respective constituency both as candidates and executors of the election both at the national and local level.¹³

¹² *National/Regional and Wereda Councils Members Election Commission Establishment Proclamation No 11/1992* ("Proc No 11/1992") art 26.

¹³ Guideline regarding the execution of the local election adopted by the National Election Commission as per the provisions of Proclamation No 11/1992, *Ibid*. In this guideline, the two main contending political organizations in the respective regions and zones

In the discussion for the adoption of the above-mentioned legislation, members of the Council were explicit in how to exclude whom they refer to as “exogenous” people from running for national regional office and to reduce the impact of their votes because they constitute the majority in urban centers in Southern Ethiopia, and in some rural places, such as Gambella and Benishangul.¹⁴ Initially, the designation was made based on language, but later the discussion focuses on primordial ethnic origin.¹⁵

Different mechanisms were devised to protect those so-called “political powers of indigenous people”. In many places, certain quotas were reserved in the city or regional council for those who are said to be “owners” of the region; in some places, to dilute the votes of those “exogenous people”, gerrymandering was legally introduced and implemented. Those were the debates members of the TGE Council of Representatives had.¹⁶ Not all those explicit parliamentary discussions were translated into law, save the quota seat and gerrymandering.

were designated as election executors. *Addis Zemen* (May 19, 1992, Addis Ababa) 1, 3, and 5. See (n 52).

¹⁴ Minutes of the 20th Regular Session of the Council of Representatives of TGE (October 31, November 2, 5, 7, 1991 Addis Ababa) at 3 ff.; Minutes of 30th Regular Session of the Council of Representatives of TGE (January 2, 1992) 7 – 8.

¹⁵ Minutes of the 23rd Regular Session of the Council of Representatives of the TGE (November 21, 23, 1991, Addis Ababa) 6 – 9. In fact, in finalizing the discussion on the draft of would-be Proc No 7/1992, the members made it clear they focus on the biological identity.

¹⁶ See, for instance, Simeneh Kiros Assefa “Legitimizing Gerrymandering in Harari Regional State Contrary to the Principle of Equality of Votes” (2021) 15 (1) *Mizan Law Review* 271; Twentieth Regular Session (n 14).

These legal and institutional arrangements have continued to date and the last general elections (of 2021) were conducted based on them.¹⁷ The provisions of the Constitution such as the right to equality, popular sovereignty and universal and equal suffrage are circumvented by various state practices and subsidiary legislation. Neither the federal government nor the states have taken corrective measures for decades.¹⁸

2. The July 1991 Conference and Formation of the TGE

2.1. Selection of Participants of the Conference

On May 28, 1991, EPRDF took control of the City of Addis Ababa. One of the largest armies in Africa belonging to the military government that had ruled the country since 1974 was demobilized.¹⁹ Likewise, those state institutions which EPRDF considers institutions of oppression of the previous regime, such as the police, prison and security services, including WPE and related institutions were “formally” banned.²⁰ There were several armed factions that were said

¹⁷ *The National Election Board of Ethiopia v Harari National Council of the Harari People State Council of Representatives* (May 27, 2021, Federal Supreme Court Cassation Division File No 207036).

¹⁸ *Ibid.* Many of those issues were not discussed at all but even those raised were rejected. See, text for note 159 *infra*.

¹⁹ Initially, the Provisional Government, by a directive, established a Rehabilitation Commission. The Commission was mandated to reintegrate members of the Armed Forces back to their civilian life, to select those qualified to join the would-be established army of the Central Government, to retire those who sustained severe physical injury. ‘Directive for the Establishment of Rehabilitation Commission’ *Addis Zemen* (June 16, 1991, Addis Ababa) 1, 6. However, later at the Parliamentary discussion, the President of the TGE ruled that none of the members of those Armed Forces was qualified to join the new national defence force. Thus, the EPRDF army was decided to be the TGE Defence Force. Minutes of the 7th Regular Session of the Council of Representatives of the TGE (August 8, 1991, Addis Ababa) 12 – 14.

²⁰ Those institutions were abolished by a directive issued by the Office of the Acting Prime Minister of the Provisional Government on June 18, 1991. While the Directive was

to have fought against the central government which would contend for power, and the size of the EPRDF armed force was not significant for the country.

It appears to be a continuation of the London conference that EPRDF would call a national conference for the formation of a transitional government (hereinafter referred to as “July Conference”) that involved those armed groups and other ethnic liberation movements. It was stated by the organizers of the Conference—chaired by Meles Zenawi, the Chairman of EPRDF—that EPRDF made the selection of those who would participate in the Conference; and they made personal contacts with those factions and individuals.²¹ It was, therefore, the sole discretion of EPRDF in selecting the participants. EPRDF has a critical assessment of the strength of each armed group both in the July Conference and after the formation of the Transitional Government to control matters before the election that would come as a local election.²²

It is stated by the Chairman of EPRDF that there were political organizations who would want to participate in the July Conference. He further stated that not all of them were invited to the Conference. There is no record showing those who were excluded and the grounds for such exclusion of applicants. However, it was stated that the

meant to re-establish state public service, article 1.2 and 1.3 abolishes such institutions. *Directive Issued to Re-Established State Public Service Addis Zemen*, June 20, 1991, Addis Ababa 1 and 3. Further, the Charter (n 11) Preamble, para 5, alluded: “all institutions of repression installed by the previous regime shall be dismantled”.

²¹ Opening Speech of the Provisional President of Ethiopia, Meles Zenawi at the National Conference for the Establishment of Transitional Government, *Addis Zemen* (July 2, 1991, Addis Ababa) 3.

²² OLF, recognized by the US to be a member of the London Conference, was the only other group that finally got 12 (the “highest” number of) seats in the Council of Representatives. See text accompanying (n 31).

selection criteria were whether a particular group had contributed to the fight to depose the previous regime and whether they represented a particular idea or set of beliefs that is worth entertaining.²³

The Chairman would also state that those who participated in the Conference were based on a set of beliefs and ideas, not identity; and that there was no political opinion excluded. This, he repeated in his opening speech at the Conference.²⁴ The question was what was the opinion entertained at the Conference? It was the adoption of the Transitional Period Charter and the establishment of the TGE. But it appears that the EPRDF had invited those it believed it could “work with” and excluded those whom it believed it “would not work with”.²⁵

Those invited to participate in the July Conference were presented to be predominantly armed movements; they were said to have been fighting to liberate a particular ethnic group they claim to represent. Thus, before the 1992 local elections, those who claimed to have an army were required to fill in a form declaring they have an army. Once that is ascertained by the Defence and Security Standing Committee of the Council of Representatives of the TGE, the size of the army was determined for internment into military barracks, distribution of

²³ See, for instance, the case of EDU (n 35).

²⁴ Opening Speech (n 21). Also, see *the Editorial* “It should be viewed from the Perspective of Public Good” *Addis Zemen* (July 2, 1991, Addis Ababa) 2.

²⁵ EPRDF and OLF, after discussions facilitated by the US representative, made several rounds of joint press statements that they agreed to work together, including taking seminars together on high-ranking officials levels. See, for instance, *Addis Zemen* (October 20, 1991, Addis Ababa) 1, 8; *Addis Zemen* (October 30, 1991, Addis Ababa) 1, 5.

uniforms, stipend, etc.²⁶ There were also a few representatives of particular ethnic groups or institutions that did not have armies.

2.2. Participants of the July Conference, formation of the TGE

It is stated above that most of the participants of the Conference were handpicked by EPRDF. A few of them were armed factions formed to liberate a particular ethnic group they claim to represent, and most of those other ethnic-based organizations were formed in the process. National political organizations were given very little place. The list of participants as read by the Chairman at the Conference was:²⁷

1. Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), comprising: (a) Ethiopian People's Democratic Movement (EPDM), (b) Tigray People's Liberation Front (TPLF), (c) Oromo People's Democratic Organization (OPDO), and (d) Ethiopian Democratic Officers' Revolutionary Movement (EDORM),
2. Oromo Liberation Front (OLF),
3. Afar Liberation Front (ALF),
4. Benishangul People's Liberation Movement (BPLM),
5. Gambella People's Liberation Movement (GPLM),

²⁶ It should also be noted that this Committee was in charge of the demobilization of the former army. See for instance, Minutes of 18th Regular Session of the Council of Representatives of TGE (October 15, 17, 1991 Addis Ababa) 13 ff.

²⁷ "Participants and Observers of the Conference" *Addis Zemen* (July 7, 1991, Addis Ababa) 1, 7. The list is not as reported in the newspaper though. Under the PDRE there was only one political party – the WPE. Because no other political party was allowed, those opposing political organizations were fronts or movements. The newly created political organizations also followed suit in that establishment of fronts and movements was easier than establishing a political party in the absence of a registration office. The *Political Parties Registration Proclamation No 46/1993* was adopted only on April 15, 1993.

6. Gurage People's Democratic Front (GPDF),
7. Sidama People's Liberation Movement (SLM),
8. Islamic Front for the Liberation of Oromia (IFLO),
9. Oromo Abbo Liberation Front (OALF),
10. Oromo People's Liberation Front (OPLF),
11. Hadiya National Democratic Organization (HNDO),
12. Wolayita People's Democratic Front (WPDF),
13. Western Somali Liberation Front (WSLF),
14. Issa and Gurgura Liberation Front,
15. Horiyal,
16. Ethiopian Democratic Union (EDU),
17. Ethiopian National Democratic Organization (ENDO),
18. Ethiopian Democratic Coalition (EDC),
19. Ethiopian Democratic Movement Group (EDAG)²⁸

There were also those named as prominent personalities representing the following people:

20. Adere (Harari),²⁹
21. Kenbata, and
22. The Omotic people.

²⁸ The news report under numbers (n 24) and (n 25) repeats University Representatives and Workers Representatives. Some of those political organizations are created later in the process. By the time the Conference was progressing, many of the participants, despite they were designated to represent particular ethnic groups, did not have political organizations.

²⁹ The Adere representative announced to the Members of the Council of Representatives that the Adere people would thereafter be referred to as Harari People. Twenty-Third Regular Session (n 15) 2.

Further participants of the following institutions:

23. Addis Ababa University, and

24. The Labour Group.

There is no record showing a specific number of seats allocated to a particular group; the seats were rather allocated to the political organization or the people said to be represented. Even those individuals who did not have a political organization were treated as if they would represent a particular ethnic group. In the process of the adoption of the Transitional Period Charter and the establishment of TGE, decisions were made by consensus.

The Chairman frequently stated that it is opinions that were represented in the Conference, not identity. However, a mere reading of the name of those armed factions, or those people represented at the Conference, shows participants were defined along ethnic line.

2.3. Distribution of Parliamentary Seats in TGE

The Transitional Period Charter established a Council of Representatives with 87 seats.³⁰ The Charter provides that the “Council of Representatives shall be composed of representatives of national liberation movements, other political organizations and prominent individuals.” The selection process is not provided for; those who participated in the Conference continued to be members of the Council of Representatives of the Transitional Government. As in the selection of participants of the July Conference, the number of seats allocated to each group is designated by TPLF. Thus, of those 81 seats 32 were taken by EPRDF, and 12 were given to OLF. The remaining seats were

³⁰ The Charter (n 11), art 7.

distributed among 27 political organizations – 14 organizations were given 1 seat each; 10 organizations were given 2 seats each and 3 organizations were given 3 seats each, including those newcomers.³¹

The standards for the allocation of seats appear to be indeterminate. However, because those armed factions were meant for the “liberation” of the ethnic group they belong to, it gives a wrong impression that the seats were allocated in proportion to the people they represent. However, a review of the documents reveals that the seats were allocated to the political group³² in proportion to the size of the army of the respective armed groups.

While the EPRDF army would be transformed into the Transitional Government army until a constitutional government is established,³³ OLF army was determined to be 20,000 which was estimated to be the largest next to the EPRDF's. Afar Liberation Front's (ALF) army was determined to be 2,500, while those of the Benishangul People's Liberation Movement (BPLM) and Gambella Peoples' Liberation Movement's (GPLM) army were estimated to have 1,500 and 1,200

³¹ The allocations of seats was approved by majority vote of those who attended the July Conference. “TGE House Seats are Allocated” *Addis Zemen* (July 6, and 7, 1991, Addis Ababa) 1, 4.

³² It is the political organization that determines who represent such organization. For instance, where Oromo Abbo Liberation Front was divided into two, the House left the matter to the organization to determine its representative. Likewise, the minutes show individual representatives change by the respective organization. Minutes of 38th Regular Session of the Council of Representatives of TGE (April 2 and 7, 1992, Addis Ababa) 12 – 15.

³³ Seventh Regular Session (n 19) 15 – 18. *Deployment of the State Defence Army of the Central Transitional Government and the Establishment of the Police Force Proclamation No 8/1991*, art 3(1) provides that as per the decision of the Council of Representatives in its Seventh Regular Session, EPRDF army would serve as the TGE army. Minutes of the 25th Regular Session of the Council of Representatives of TGE (December 5, 1991).

fighters, respectively.³⁴ While the Oromo Liberation Islamic Front (IFLO) did not complete the form, it is interesting to note that Western Somali Liberation Front (WSLF), Ethiopian Democratic Union (EDU),³⁵ United Oromo People Liberation Front (UOPLF) were reported by the Committee as having no army.

2.4. Distribution of the Remaining 6 Seats

Of those 87 seats, 6 were reserved for new applicants to join the Council of Representatives. There were more than 20 applicants to take those seats.³⁶ Records show that the majority of the Council Members agreed that those 6 new seats should be allocated to those who were not already represented in the Council.³⁷ A committee would be established by the Council of Representatives to make proposed decisions. Thus, the Committee was given the standard for the development of the proposed decision for allocation of those 6 seats that it “should not consider those which can organize freely, it should consider those people who cannot organize” and “those which are not represented in the Council directly or indirectly”.³⁸

When the ad-hoc committee was reporting its proposed decision to the plenary session, on August 27, 1991, a member raised a question regarding what “measures it [the committee] has taken to have the

³⁴ Report of the Defence and Security Policy Standing Committee to the TGE Council of Representatives, April 11, 1992 (Saturday), presented at the Thirty-Ninth Regular Session, 5.

³⁵ EDU claimed it had fought against the WPE regime in Begemder; EPRDF sternly responded there was no EDU army when EPRDF controls Gondar. Seventh Regular Session (n 19) 16.

³⁶ “Statement of TGE Council of Representatives” *Addis Zemen* (September 28, 1991, Addis Ababa) 6.

³⁷ Seventh Regular Session (n 19) 10.

³⁸ *Ibid.* 9 – 10.

Amhara Nationality represented”.³⁹ It was replied “an explanation is included under number 7 of the report”. The report is not accessible. However, based on the 1984 census⁴⁰ the remaining seats were allocated as follows:⁴¹

1. Agew People Democratic Movement, 1 seat;
2. Kefa Administrative Region People Democratic Union, 2 seats;
3. Gedeo People Democratic Organization, 1 seat;
4. Yem Nation Movement, 1 seat;
5. Burji People Democratic Organization, 1 seat.

A review of events of the day from the readings of *Addis Zemen*, the official and the only newspaper of the time, depicts that those organizations were established to obtain seats in the Council of Representatives of the TGE.⁴² Yet, the Amhara conference was called after all the 87 parliamentary seats were allocated.⁴³ Ironically, research commissioned by TPLF (Tigray Government) in March 2018 reveals

³⁹ Minutes of 12th Regular Session of the Council of Representatives of TGE (August 22, 27, 28, and 29, 1991 Addis Ababa) 6, 7. It should be noted that all the proceedings were closed to the public. It is only in its Twenty-Ninth Regular Session the Council considers whether such hearings would be open to the public.

⁴⁰ The Council had reservation for the determination of electoral districts but it applied in this case including denying a seat to Tigre Worji. Note that members of the Council of Representatives and political organizations who allocate seats to themselves in proportion to the size of their army, now distribute seats based on population size. The population of Agew people was 489,834; that of Burji people 43,259; Gedeo people 455,408; Keffa people 467,585 and Yem people 124,378. *Addis Zemen* (September 28, 1991 Addis Ababa) 7.

⁴¹ “Statement of TGE Council of Representatives” (n 36) 6.

⁴² For instance, the Yem People Democratic Movement established itself and introduced its Action-Plan to member of the ethnic group. *Addis Zemen* (September 24, 1991 Addis Ababa) 1 and 5.

⁴³ The first officially recognized meeting in the now-called Amhara region was in Bahir Dar, then an insignificant small town, and the participants were office and household furniture workers. It appears a test meeting in the Region. *Addis Zemen* (October 30, 1991, Addis Ababa) 5.

that the so-called “conference” at Gondar was rather meant to convince the Ethiopian People’s Democratic Movement (EPDM) cadres of the inclusion of Wolkait in the Tigray region.⁴⁴

2.5. Significance of Participation in the July Conference

Participation in the Conference is participation in the actual constitutional-making and continued participation in governance, including defining the content of the FDRE Constitution.⁴⁵ However, it also literally was about representing oneself in defining one’s interests and realizing such interests. That means, they were handpicked by TPLF, but in the end they were the ones that would decide the fate of the nation in critical decisions under the tutelage of TPLF. The participants of the Conference adopted the Transitional Period Charter; forming a government to govern the nation for the coming two and a half years.⁴⁶ They authorize themselves, through the Charter, to establish local administrative organs;⁴⁷ hold local elections within three months of the adoption of the Charter.⁴⁸ The TGE appointed ministers and commissioners of the Central Government.⁴⁹

Three lasting effects could be gleaned from such self-authorization. First, the Transitional Government Council of Representatives

⁴⁴ It was presented to high-ranking officials including the then Deputy President of the Region. Once the finding is determined to be not aligned to their expectations, TPLF banned any conversation on the research and its outcomes, a researcher involved confided to this author.

⁴⁵ See, the text accompanying (n 140–142).

⁴⁶ The Charter (n 11) arts 6, 8.

⁴⁷ *Ibid.*, art 13.

⁴⁸ The Charter, under article 13 provides that: “There shall be a law establishing local and regional councils for local administrative purposes defined on the basis of nationality. Elections for such local and regional councils shall be held within three months of the establishment of the Transitional Government, wherever local conditions allow.”

⁴⁹ Minutes of 8th Regular Session of the Council of Representatives of TGE (August 10, 1991 Addis Ababa) 1– 5.

established a standing committee that would facilitate conducting the national/regional elections. To conduct the election, electoral districts needed to be determined. Under the pretext of determining electoral districts, administrative arrangements were determined. The Committee came up with a new administrative structure based on identity, classifying the country into thirteen ethnic-based administrative regions, with the capital Addis Ababa as the fourteenth region.⁵⁰

Second, in the Seventh Regular Session of the Council, the Chairman of the Defence and Security Policy Standing Committee stated that “the fundamental principle of the new order is nations and nationalities shall have self-governance; therefore, they would address security issues, among others, in their respective territory/region”. Looking back, this speaks to the unstated agreement that, eventually, the various armed factions would administer “their respective territories”.

However, because their power was found to be limited and there were ongoing conflicts in many places, the Council of Representatives, by a proclamation, established provisional local administration.⁵¹ Even though members of the provisional *Kebele* and *Woreda* administration would be elected by the community, excluded were members of Dergue/WPE, former security, police and armed forces. Thus, those armed groups represented in the Council had an exclusive chance to be

⁵⁰ Minutes of the 16th Regular Session of the Council of Representatives of TGE (October 3, 5, and 8, 1991 Addis Ababa) 5 - 7. The Charter, under article 2, provides that “[t]he rights of nations, nationalities and peoples to self-determination is affirmed.” Sub-article (b) further provides that “each nation, nationality and people is guaranteed the right to [a]dminister its own affairs within its own defined territory and effectively participate in the central government on the basis of freedom, and fair and proper representation”.

⁵¹ *Creation of Appropriate Conditions for Conducting National/Regional Self-Government Elections Proclamation No 9/1992* (“Proc No 9/1992”) art 5.

elected in the provisional administration, and the subsequent election for the formation of national/regional government.

They solidified their local power because they decided to be election executors in their respective regions/states.⁵² Accordingly, TPLF controlled Region One (later referred to as Tigray), OLF and later OPDO controlled Region Four (later referred to as Oromia), Harari National League became in charge of Region Thirteen (Harari State), Benishangul Peoples' Liberation Movement seized Region Six (Benishangul), Gambella People's Liberation Movement controlled Gambella Region, and Afar Liberation Front would took charge of Region Two (Afar). This way, they fully uprooted the bureaucracy of the previous government.⁵³

Third, the Council of Representatives considered the issue of language in education an essential part of the determination of identity. The issue of language was frequently discussed because the new academic

⁵² Proclamation No 11/1992 (n 12) art 10 establishes National/Regional Electoral Committee, Zone Electoral Committee, Wereda Electoral Committee, and Polling Station Electoral Committee. The various directives and guidelines adopted by the Election Executive Committee authorize designation of election committee members by the two major contending parties in a constituency. For instance, for Woreda Election Committee, the two major contending parties each designate one representative and the chairperson is elected by the public in the presence of the two representatives. *Addis Zemen* (June 02, 1992 Addis Ababa) 1 and 11. For Zonal Election Committee the two major contending parties each designate two representatives but the chairperson is designated by the national Election Executive Committee. *Addis Zemen* (May 28, 1992, Addis Ababa) 1, 6, and 7; *Addis Zemen* (May 29, 1992 Addis Ababa) 9; *Addis Zemen* (May 31, 1992 Addis Ababa) 1 and 11. There was no contending party in Region 1 for TPLF. The consequential fairness of the process was discussed in the Thirty-First Regular Session. Minutes of 31st Regular Session of the Council of Representatives of TGE (January 9, 14, and 16, 1992 Addis Ababa) 2 – 3. In fact, of those 31 political organizations 20 were members of the Council and 11 were not. Minutes of 34th Regular Session of the Council of Representatives of TGE (February 13, 1992, Addis Ababa) 3.

⁵³ See, text accompanying (n 109).

year would start already. Because the Ministry of Education was believed not to have addressed the issue well, a committee of seven members was established to address the matter.⁵⁴ At some point, OLF even proposed to replace the staff of the Ministry of Education with OLF's own staff.⁵⁵ The important thing was, several of ethnic groups those who use other languages than Amharic/Tigrigna preferred the Latin alphabet to *Geez Fidel* and it was discussed whether it would be feasible to begin class that academic year.⁵⁶ In the same process History, as subject of study, would be banned from schools.⁵⁷

Those political organizations did the best they can in implementing their "aspirations". This is particularly manifested by OLF in promoting *Afan Oromo* to be scripted in the Latin alphabet.⁵⁸ It launched a newspaper entitled "Bekelcha Oromia" in Oromiffa and

⁵⁴ Members of the committee were: (1) Dr Gebreab Bernabas, (2) Ato Mohammed Ougas Abdi, (3) Ato Alemayehu Tarekegn, (4) Ato Mohammed Abdurahman (Chair), (5) Ato Abajebel Tahiro, (6) Ato Tewodros Ephraim, and (7) Ato Woldeamanuel Dubale. Sixteenth Regular Session (n 50) 4.

⁵⁵ Eighteenth Regular Session (n 26) 26, 27.

⁵⁶ Minutes of the 17th Regular Session of the Council of Representatives of TGE (October 10, 1991, Addis Ababa) 3 – 5. Eighteenth Regular Session (n 26) 24 ff. Those who finally decided to use the Latin alphabet were Oromo and Sidama representatives. *Ibid.*, 31.

⁵⁷ It was raised by the Chairman and an OLF representative vigorously supported the proposal to ban history subject in schools. Eighteenth Regular Session (n 26) 27 – 30. It is worth mentioning that whether Amharic should be taught as a subject and whether it should be given at grade 1, 4 or 7 is debated; *Ibid.*, 24; Seventeenth Regular Session (n 56) 5.

⁵⁸ Some of the reports were misrepresented. "Oromo Elders Conference Concluded" *Addis Zemen* (November 1, 1991, Addis Ababa) 1, 5. "Association of Wollo Oromo Established in Addis Ababa", *Addis Zemen* (November 6, 1991, Addis Ababa) 1, 5. All the five Oromo political organizations were present and it was decided Latin alphabet is preferred to *Geez Fidel* for *Afan Oromo* which was presented by OLF as part of the Council of Representatives decision.

Amharic and the *Oromiffa* version would be written in the Latin alphabet.⁵⁹

2.6. Subsequent Developments Relative to “the Participants”

As noted earlier, the participants of the July Conference were political organizations and prominent individuals. There were two ways of progress relative to participants of the Conference. First, for those individuals who participated in the Conference with an ethnic name tag, the required political organizations would be created. For instance, the Omotic People Democratic Front (OPDF) and Kenbata People Congress (KPC) were freshly established. Likewise, the Harari National League was established on August 25, 1991,⁶⁰ and put forward its demands and had it approved by the TGE Council of Representatives.⁶¹ Finally, the Yem people's representative later established the Yem National Democratic Movement (YNDM).⁶²

In some instances, several groups were claiming to fight for the freedom of a particular ethnic group. Their participation in the July

⁵⁹ “A newspapers *Bekelcha Oromia* is launched” *Addis Zemen* (September 24, 1991 Addis Ababa) 1, 5. OLF gave training to several trainees to teach *Afan Oromo*.

⁶⁰ The author is not able to obtain information regarding the existence of political organizations, such as the Gurage People Democratic Front (GPDF), Hadiya National Democratic Organization (HNDO), and Wolayta People Democratic Front (WPDF) before the July Conference. It is to be noted that some of the participants of the Conference were invited in their personal capacity and believed to have a social base of sorts. Those fronts were not registered; *de facto*, they were considered to be good enough to participate at the TGE Council of Representatives.

⁶¹ *Addis Zemen* (September 14, 1991, Addis Ababa) 1, 8. “Harari National League Opens Branch Office in Nazreth” *Addis Zemen* (September 25, 1991, Addis Ababa). Minutes of the 102nd Regular Session of the Council of Representatives of Transitional Government of Ethiopia (March 15, 1995 Addis Ababa). ENA “Harari National League Members Elected” *Addis Zemen* (September 14, 1991) 1, 8.

⁶² “YNDM Introduced Its Political Programs” *Addis Zemen* (September 24, 1991, Addis Ababa) 1. In the parliamentary proceedings minutes the organization is referred to as “Yem Democratic Movement”, YDM).

Conference allowed those members to govern a portion of the country, their claimed territory. This would create an opportunity for some groups, to work together to minimize the friction for power. For instance, three political organizations which were meant to represent the Somali people (Ethiopian Somali Democratic Movement, Western Somali Liberation Front and Democratic Unity Party (National Union Party) signed an agreement to work together with the intent to merge in the future.⁶³ Likewise, it was reported political organizations created in the name of Oromo people would work together.⁶⁴

3. Key Decision of the July Conference and TGE

3.1. Designating Regions: The Standard

The provisions of article 13 of the Charter sought the adoption of a law that establishes the regional councils defined based on nationality for local administration. The election of members of those regional councils would be conducted within three months as local circumstances permit. The TGE Council of Representatives, thus, established three standing committees – The defence and Security Policy Committee, the National/Regional Election Commission, and Media Utilization Committee.⁶⁵ All three committees had important roles but the first two were relatively more important. Members of the Election Commission were chosen from 7 political organizations;

⁶³ “Three political organizations of Ethiopia Somali People agreed to work together” *Addis Zemen* (September 19, 1991 Addis Ababa) 1; Also see *Addis Zemen* (September 22, 1991, Addis Ababa) 1.

⁶⁴ “Political Organizations Established in the Name of Oromo People should be United” *Addis Zemen* (September 26, 1991, Addis Ababa) 3. Later, four Oromo political organizations, excluding OLF, made a pact. *Addis Zemen* (November 10, 1991 Addis Ababa) 1, 3, and 8.

⁶⁵ Minutes of 4th and 5th Regular Session of the Council of Representatives of the Transitional Government of Ethiopia (July 31, 1991 – August 1, 1991).

except EPRDF which had 2 representatives, others OLF, SLM, WSLF, OPDF, WPDF, and UOPLF had one representative each.⁶⁶

The election in question was for national/regional administration only and did not involve election to the central government institutions. Members of the Council of Representatives were selected by EPRDF; likewise, the ministerial positions are appointed based on the proposal of EPRDF.⁶⁷ Initially, the Council of Representatives Election Committee was tasked with the demarcation of electoral districts. However, under the guise of the designation of electoral districts, to conduct the said national regional election, the Election Committee effectively transformed into a boundary demarcating committee.⁶⁸

The standard for the designation of regions was not clear from the initial assignment. It was made clear by propounding the provisions of articles 2 and 13 of the Charter in subsequent sessions. Thus, language was taken as a significant standard. However, contiguity in the settlement and psychological factors were also taken to support the language factor.⁶⁹

⁶⁶ Fourth and Fifth Regular Session, (n 65) 6. Ato Abiyu Geleta (OLF), Ato Wolde-Amanuel Dubale (SLM), Ato Mohammed Hassen Kahin (WSLF), Ato Dawit Yohannes (EPDM), Fitawrari Mekonnen Dori (OPDF), Ato Leoule-Sellassie Timamo (WPDF), Ato Abajebel Tahiro (UOPLF), and Dr. Gebreab Bernabas (TPLF). This Commission/Committee should not be confused with the *Election Commission* or the *Executive Committee*, Proc No 11/1992. See (n 86).

⁶⁷ See text accompanying (n 49).

⁶⁸ It is properly referred to as “National Demarcation and Election Execution Committee” in the Minutes of the 24th Regular Session of the Council of Representatives of TGE (November 26 and 28, 1991, Addis Ababa). The places which the Council of Representatives claimed would be designated in consultation with the public were not disclosed to the public. Twenty-Second Regular session, (n 11) 2.

⁶⁹ Seventh Regular Session (n 19) 5.

The proposed sources of information for the decision were: (a) the study conducted by the Institute for the Study of Ethiopian Nationalities, which was used to structure the administrative zones in 1989,⁷⁰ (b) the 1984 Census, and regarding the “nomads”, the records of Relief and Rehabilitation Commission. The first one would have been the most relevant and important information source. However, as there is a conflict in value, there were (frequent) objections to it and it was decided it could be taken as one input.⁷¹

The minutes further reflect that the Committee came up with a revised designation of 14 regions at its Sixteenth Regular Session.⁷² When the report was finally adopted into a law, it introduced some changes.⁷³

⁷⁰ Ethiopia was structured based on the following laws: *Autonomous and Administrative Regions Establishment Proclamation No 14/1987*; *Definition of Powers and Duties of the Organs of Power and Administration of the Autonomous Region of Eritrea Proclamation No 15/1987*; and *Definition of Powers and Duties of the Organs of Autonomous Regions of Tigray, Assab, Dire Dawa, and Ogaden Proclamation No 16/1987*.

⁷¹ Seventh Regular Session (n 19) 6.

⁷² The report is not accessible but it created regions 1 to 14, listing which ethnic group lives in the regions: Region One – (1) Tigray, (2) Saho, and (3) Kunama; Region Two – (4) Afar; Region Three – (5) Amhara, (6) Agew-Kamirgna, and (7) Agew-Awongigna; Region Four – (8) Oromo; Region Five – (9) Somali; Region Six – (10) Gumuz, (11) Koma, (12) Berta, (13) North Mao, (14) South Mao, (15) Benishangul, and (16) Shinasha; Region Seven – (17) Guraghe, (18) Hadiya, (19) Kembata, (20) Alaba, (21) Tembaro, and (22) Yewasa; Region Eight – (23) Sidama, (24) Gedeo, (25) Burji, and (26) Amaro/Koyera; Region Nine – (27) Wolaita, (28) Dawuro, (29) Konta, (30) Aydi, (31) Gewada, (32) Melon, (33) Gofa, (34) Zeyisse, (35) Gebez, (36) Bussa, (37) Konssa, and (38) Gidole; Region Ten – (39) Besketo, (40) Mursi, (41) Ari, (42) Hamer, (43) Arbore, (44) Dassenech, (45) Gngangatom, (46) Tsemai, (47) Maley, (48) Dimme, and (49) Bodi; Region Eleven – (50) Keficho, (51) Nao, (52) Dizo, (53) Surma, (54) Zelmam, and (55) Mocha; Region Twelve – (56) Agnuak, (57) Nuwer, (58) Sheko, (59) Mesengo-North Middle and South; Region Thirteen – (60) Adere Nationality (Harar Surrounding); and Region Fourteen – Addis Ababa.

⁷³ Sixteenth Regular Session (n 50) 5 – 7. See, *National/Regional Self-Governments Establishment Proclamation No 7/1992* (“Proc No 7/1992”) art 3. Thus, “Oromo (Around Kalu)” was included as a fourth tribe in Region Three; “South Mao” is deleted

3.2. Debates in the Process of Designation of Territories

Those regional and woreda boundaries were defined by members of the Council of Representatives who themselves have an interest in the outcome of their own decision.⁷⁴ In any case, only the debates in the plenary session were recorded in the minutes. Matters such as whether a particular province (in the former designation) should be included in the ethnic-based would-be state or whether a particular woreda should be included in one or the other region was hotly debated.

Interesting to note that in the 15th Regular Session, the first and the most hotly debated case was the inclusion of former Wollo province into Region Three. The Standing Committee proposed the issue of Wollo and Jigjiga be resolved by the plenary session of the Council of Representatives for once.⁷⁵ The Committee appears to have proposed that territory other than that was included in Region Two (now Afar Regional State) be included in Region Three (now Amhara Regional State).

However, a UOPLF representative claimed that he was not in attendance when matters of Wollo were resolved; he, thus, inquired to know how it was decided. It was explained to him it was decided Wollo

from the list in Region Six; under Region Seven “Yewasa” was changed to “Yem”. Under Region Eight, “Amarao/Koyera” was changed to “Amaro (Kore)”, and “Gidicho” and “Gamo” were added to Region Nine. Under Region Eleven, “Mocha” is improvised to “Shekocho (Mocha)” and “Minit”, “Chara”, “Bench” and “Sheko” were added. Sheko was part of Region Twelve, in the draft. Under Region Twelve, “Mesengo” was changed to “Mejenger”; and Region Thirteen was changed to “Harari Nationality (Harari City)”.

⁷⁴ The demarcation of “the Regions” was proposed by the Election Commission of the TGE Standing Committee established by the Council on July 31 of 1991. Fourth and Fifth Regular Sessions (n 65). The demarcation of the Woredas was proposed by the “Executive Committee” of the Election Commission. Proc No 11/1992 (n 12), arts 4, 10(1), and 13.

⁷⁵ Sixteenth Regular Session (n 50) 8. The Minutes reflect that the former province of Wollo was referred to as “Wollo nationality”.

would remain Amhara. At this juncture, an OLF representative argued that “Wollo, although it speaks Amharic because of assimilation, is of Oromo identity. Therefore, it should remain separate, or be given a different name.” It was explained to him, by the Chairman of the Council that that would contradict the language requirement. Because he insisted, it was explained to him this is only for administrative purposes and the decision would be made later.⁷⁶

Because some members of the Council claimed they would make decisions after discussing those issues in their respective organizations, the decision was postponed. The issue of Wollo was discussed again thoroughly in the Sixteenth Regular Session of the Council for the agenda was supported by one-third of the Members.⁷⁷

The Members of the Standing Committee presenting their report explained at the session that the proposal was made as per the decision that language, contiguity of settlement and psychology is taken into consideration, and Woreda is the lowest administrative structure. Where it cannot be resolved, for the transitional period’s purpose, the woreda in question would be absorbed by the people constituting more than 50 % of the population. Yet it would be further resolved in consultation with the local people concerned.⁷⁸ Because there were several issues to be finalized, the Committee further invited members if they would have questions to submit sooner on the proposed decision.

⁷⁶ Minutes of 15th Regular Session of the Council of Representatives of TGE (September 17, 19 and October 1, 1991, Addis Ababa) 6, 7.

⁷⁷ Sixteenth Regular Session (n 50) 2.

⁷⁸ *Ibid.*

A representative of OLF argued that Wollo should be seen in the light of one of the standards, psychological factor. Even though Wollo speaks Amharic, its psychology is different from Amhara; language is simple; psychological factors need study. Therefore, Wollo should remain recognized as Wollo for the coming two years until a final decision is made.⁷⁹ However, the Chairman of the Council stated that the standard is language; not origin. As the majority is Amharic speaking it should remain with Amhara; and if there are pockets of those who speak Oromiffa, it may be addressed at a woreda level. Because IFLO and OLF insisted, the Chairman reminded them that Tegre Worji is not recognized as a nationality because OLF objected to such recognition that Tegre Worji would not constitute an identity as the people do not speak a different language; therefore, OLF should be consistent in its argument.

The issue of Wollo was presented to vote either to remain a separate entity for the two years or to be part of the Amhara people. By 44 votes and 11 opposition, Wollo was decided to be part of Amhara.⁸⁰ As it is well-known, the decision to make Wollo remain a part of Amhara was made in the absence of an Amhara representative.⁸¹

3.3. From Designation of Regions to that of Woredas

As can be read from the provisions of Proc No 7/1992, article 4, those regional designations were made as per the language-based identity of the respective ethnic groups. The designation of Regions would appear to have been made on paper. In the demarcation of those regions, the lowest administrative unit was taken as Woreda as existed before

⁷⁹ *Ibid.*, 11.

⁸⁰ *Ibid.*, 12 – 14.

⁸¹ Records show that the word ‘Amhara’ was in reference to the people, while the proposed region would be called “Region Three”.

1974.⁸² The reasons for picking 1974 are not clear from the minutes; however, one member is quoted as stating “after 1974, the number of woredas in Tigray dropped”.⁸³

It was decided that the determination of woredas would be based on the identity of the people residing in that woreda because the identity-based geographic designation of electoral districts was meant to enable the self-governance of people. However, which woreda was to be included in which Region was not decided until the Thirtieth Regular Session because the determination of dominant ethnic group(s) in each woreda was said to have required detailed information. In some instances, such a decision was said to be left to “the Regions”.⁸⁴

Later, the Election Commission would be established as per *National/Regional and Woreda Councils Members Election Commission Establishment Proclamation No 11/1992*. The Proclamation further established an *Executive Committee* composed of ten members of the Council of Representatives.⁸⁵ Members of the Election Executive Committee were 3 from EPRDF, 2 from OLF, 1 each from GPDF, WSLM, HNDO, and Labour Group. The Chairman was the Harari Representative.⁸⁶

⁸² Proc No 7/1992 (n 73), art 4(2)(a).

⁸³ Thirtieth Regular Session (n 14) 6.

⁸⁴ Twenty-Second Regular Session (n 12) 2.

⁸⁵ Proc No 11/1992 (n 12), art 12(1).

⁸⁶ Minutes of the 26th Regular Session of the Council of Representatives of TGE (December 3, 5, and 7, 1991 Addis Ababa) 6. Ato Alemayehu Tarekegn (OLF), Mohammed Abdurrahman (Harari), Chair; Dr. Gebreab Bernabas (TPLF), Ato Biya Abajebel (OLF), Dr. Negaso Gidada (OPDO), Ato Dawit Yohannes (EPDM), Dr. Haile Woldemichael (GPDF), Ato Mohammed Hassan Kahn (WSLM), Dr. Beyene Petros (HNDO), and Ato Assefa Wodajo (The Labour Group). In fact, the assignment is made temporarily to execute this particular election. Twenty-Fifth Regular Session (n 33) 19.

The Chairman of the Election Executive Committee, exercising the powers and responsibilities of the Election Commission,⁸⁷ reported to the Council of Representatives that despite regional administrations being already defined, the actual determination of which woreda is included in which region and the actual demarcation of woredas on the ground for the administration of election proved difficult.⁸⁸ Of the 577 woredas in the country, the Committee was not able to resolve the regional assignment of 94 woredas.⁸⁹ The Chairman of the Council demanded that the number should be reduced to 10 to be resolved by the Council in plenary session.⁹⁰ In fact, based on a 'leaked' geographic map of Ethiopia, it was mentioned by a member that there was an objection from the people of Metema and Tach-Armachi'ho regarding how they were included in the Benishangul region while there is no Gumuz tribe in the area.⁹¹

In its Thirty-First Regular Session, the Election Executive Committee reported that it resolved the case of 79 woredas and only 15 remained unresolved because of "lack of knowledge on the part of the committee members", of which 11 were claimed by Amharas, which are the following woredas: (1) in former Gondar province – Dib-Bahir, and Telemt woredas (2) in former Wollo province⁹² – Kobo, and Wofla

⁸⁷ The Election Commission was given all the powers required to conduct the election; the Executive Committee in turn is given the power that was given to the Election Commission. Proc No 11/1992 (n 12), arts 9 and 13, respectively.

⁸⁸ Thirtieth Regular Session (n 14) 3 – 5.

⁸⁹ *Ibid.*, 3

⁹⁰ *Ibid.*, 4 – 5.

⁹¹ *Ibid.*, 5. The map is reproduced in *Addis Zemen* (May 23, 1992, Addis Ababa) 5, with a caption "rejected because it is circulated without the approval of the Council". However, the Council continued enforcing the contents of the map as leaked by even adopting several directives listed under n 52, *supra*.

⁹² It should be noted that in its Sixteenth Regular Session (n 50), Wollo was decided to remain Amhara for the transitional period. The discussion on Kobo and Wofla woredas was made in isolation from the already made decision on Wollo province.

woredas, (3) in former Gojjam province – Wonbera, and Dibate woredas, (4) in former Shewa province – Siyadebir and Wayu, Fentale, and Dera woredas, (5) in former Keffa province – Gura-ferda woreda.⁹³ Again, it is to be noted that there was no Amhara representative in the Council to claim these are Amhara territories or that Amhara constitute the majority in those woredas.

3.4. Deliberating on Excluding “Exogenous” People from Local Political Process

In the TGE Council of Representatives, there were several instances of discussions to exclude those people considered “exogenous” from the national regional political process. Only four such instances where explicit discussions were made are mentioned here. The first discussion was made in the 20th Regular Session when the Council was considering (the now) article 5(2) of Proc No 7/1992. One member of the Committee raised the issue that “several towns in southern Ethiopia are dominated by non-indigenous Amharic speaking people.” Regarding the election of local leadership, he suggested that “the Council should make a thoughtful and balanced decision in light of the international human rights principle of universal and equal suffrage”.⁹⁴ The Chairman then asked the Election Executive Committee what was proposed “to resolve a conflict between self-governance and limiting the electoral process to indigenous people”.⁹⁵

In further discussion, it was stated by the same representative that “as self-governance is the fundamental principle of the transitional period

⁹³ Thirty-First Regular Session (n 52). Several of these localities are where several rounds of ethnic-based attacks were reportedly committed against ethnic Amharas.

⁹⁴ Twentieth Regular Session (n 14) 3 – 8.

⁹⁵ *Ibid.* The Minutes do not show the response to such question. Further, the absence of discussion as to its content gives the impression that there is a shared understanding of the words ‘non-indigenous’ or ‘exogenous’.

and not all rights are respected without limitation, and because rights conflict, a type of limitation ...has to be contemplated”.⁹⁶ Another member would reiterate that “there are several major cities in southern Ethiopia (such as Assela, and Yirgalem) where more than 50% of residents are Amharic speaking. Without impeding their right to reside in those regions, the conflict between the two rights should be carefully resolved”.⁹⁷

The Sidama representative was explicit in referring to the decision to recognize a “homeland” for the Harari people. He further argued that “even though everyone is entitled to live and work anywhere, reserving the political power to indigenous people is not contrary to the Charter; and it is in conformity with the self-governance in one’s geographic territory.”⁹⁸ He also opined that “those non-indigenous Amharic speaking people do not have the right of nationality and they cannot participate in elections”.⁹⁹

Another member stated that “particularly in urban centres there are activities to restore the previous regime; the matter should be a primary focus not to open doors to the *neftegna*, without contradicting the spirit of the Charter”.¹⁰⁰ Not surprisingly, the Chairman proposed that “if the indigenous are living in the rural areas, the urban dwellers and the rural

⁹⁶ *Ibid.*, 5 – 10.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*, 6.

⁹⁹ *Ibid.*, 6, 7.

¹⁰⁰ *Ibid.*, 7. “*neftegna*” is a pejorative term to refer to Amhara people. This is so frequently used, but it is explicitly used in the Harari Report which is approved by the Council of Representatives even after the adoption of the FDRE Constitution. See (n 114) 115.

dwellers should vote separately to minimize the impact of urban votes on rural votes.”¹⁰¹

The discussions that transpired in the Council clearly show that the members of the Council were keen to find ways of excluding those so-called exogenous people from those national regional elections. For example, they tried to make a distinction between “residence” and “domicile” with consequences; they also played with the idea of giving more weight to the rural vote in such a way that “one rural vote would equal three urban votes”, which they believed would be “within the power of the Council to decide”.¹⁰² In fact, one mechanism of excluding an exogenous person from running for national regional election was thought to be language proficiency requirement. In the 23rd Regular Session, members of the Council even went beyond the issue of language, that even though one speaks the language of the region where he seeks candidature, he has to be member of the nation/nationality considered to be indigenous to the region.¹⁰³

The issue would be raised again in the Thirtieth Regular Session when the Chairman of the Election Executive Committee reported to the Council that the Committee was not able to determine the fate of 94 woredas based on the 50%+ one vote rule to which region they should be included.¹⁰⁴ One OLF representative recalled a prior decision of the Council that despite “those other people dominating cities and towns due to commerce and army, they cannot form self-administration; they would rather be incorporated into the surrounding rural

¹⁰¹ Twentieth Regular Session (n 14) 4 – 6, 7 – 10. This seminal proposal by the Chairman of the Council would be given effect in different regional legislation governing urban center administration. See, text accompanying (n 156 ff).

¹⁰² Twentieth Regular Session (n 14) 9, 10.

¹⁰³ Twenty-third Regular Session (n 15) 6.

¹⁰⁴ Thirtieth Regular Session (n 14) 4, 7.

administration.” He blamed such a state of affairs on the 1984 census which he would question. He also raised a question as to whether the Council revised its decision to the effect that “those settlers in Gambella and Benishangul *rural areas* would not establish self-administration” to which the Chairman of the Council replied in the negative.¹⁰⁵

This author could not find prior decision referenced by the OLF representative. However, during the 23rd Regular Session, at which the five-year residency requirement for a candidature was discussed (Proc No 11/1992, art 35(3)), it was raised that the number of “settlers” is far exceeding that of the size of “residents” demanding a special measure. Records show that instruction was given to the Committee to draw up new rules if the number is likely to change the “identity of the local council of representatives”.¹⁰⁶

Another OLF representative raised a specific question on “how the problem in Arsi regarding the Oromo and the non-Oromo should be resolved”. The Chairman of the Council replied: “there would be no problem regarding nationalities residing in pocket areas”.¹⁰⁷

The third discussion for the exclusion of those so-called exogenous people from national/regional elections was made at the 40th Regular Session, in relation to a dispute over who could administer the elections in Dire Dawa City. The dispute was between Western Somali Liberation Movement claiming to represent Somali people, and OLF claiming to represent Oromo people. The WSLM representative argued

¹⁰⁵ *Ibid.*, 7. It should be clear that the OLF representative raised his concern because the discussion is on how to exclude those so-called “exogenous” city dwellers, and those in the Gambella and Benishangul were “settlers” in rural areas.

¹⁰⁶ Twenty-third Regular Session (n 15) 10.

¹⁰⁷ *Ibid.*, 8.

that “Dire Dawa was known as Issa and Gurgura Awraja during the previous (Derg) government, and is dominated by Somalis even though other nationalities are also living there”.¹⁰⁸ The OLF representative was bold in stating that: “among those who live in Issa and Gurgura Awraja, 46.7% were Oromo, 39.9% Amhara and 6.8% Somali. The *percentage calculation excluding Amhara* is 80% Oromo and 15% Somali (emphasis added); thus, it should be administered by the Oromo election executive committee”.¹⁰⁹ The Chairman took the claim of the WSLM and OLF and proposed the establishment of a committee to determine to whom Dire Dawa would belong – the Somali or the Oromo.¹¹⁰

The fourth discussion to exclude those so-called exogenous people from running for office and to limit the impact of its vote through gerrymandering was made in the determination of the territorial scope of the Harari state in its 55th and 102nd Regular Sessions.¹¹¹ The Council provided the most favorable treatment to Harari people. The Adere representative, at the Sixteenth Regular Session, requested the postponement of a decision on the designation of the regional administration until he would receive the necessary documents from the people he represented.¹¹²

¹⁰⁸ Minutes of the 40th Regular Session of the Council of Representatives of the TGE (April 21, 1992 Addis Ababa) 8.

¹⁰⁹ *Ibid.*, 10.

¹¹⁰ *Ibid.* Members of the Committee were: (1) Ato Kifle Wodajo, (2) Fitawrari Zewde Otorro, and (3) Ato Alesa Mengesha. They presented their report to the Council at its Forty-Sixth Regular Session.

¹¹¹ See, *infra* n 114. It might be appropriate to note that the Harari state is established as Region Thirteen with the political support of TPLF by including surrounding areas habited by the Oromo people. The Chairman of the Election Executive Committee, designating woredas belonging to regions, is the only Harari representative at the July Conference who later established the Harari National League.

¹¹² Sixteenth Regular Session (n 50) 1.

However, the Council approved the establishment of Region Thirteen (Harari) at its Sixteenth Regular Session contrary to the already established numerical and geographic rules “because the Harari people require special protection”.¹¹³ Later, the Harari representative, was an “observer” when Harari representatives and the surrounding Oromo farmers signed an agreement designating Hunde Woreda to be included in the would-be Harari Region.¹¹⁴ In fact, as the Chairman of the Election Executive Committee, he is the one who finally submitted the report, as approved and supported by the Election Executive Committee, to the Council of Representatives at its 55th Regular Session.¹¹⁵

What is unique about the above-noted report is that the documents are complete; and openly claims that the *neftegna* is a threat, and that measures should be designed not only to exclude the *neftegna* from running for public office but also to minimize the effect of their votes. Thus, it proposed a definition of residents and settlers; introduced gerrymandering; and the would-be final content of the Harari State Constitution is approved by the TGE Council of Representatives which

¹¹³ Minutes of the 33rd Regular Session of the Council of Representatives of TGE (March 3, 12, and 17, 1992) 1 – 2. The Report recognizes that the Harari people neither had the required population nor the geographic land outside of Jugol enclosure to constitute a viable Region. So, it was decided to include Hunde Woreda into Harari Region.

¹¹⁴ Report on the Designation of the Geographical Size of Region Thirteen by Agreement between the Concerned Harari and Oromo Organizations, and Representatives of the Two People, October 26, 1993.

¹¹⁵ The report also includes three things. The first is a proposal by “Harari experts” defining “neftegna” and “settlers” as non-residents, and the Harari as “residents”. In order to reduce the numerical impact of those “settlers”, the report proposed gerrymandering and quota of seats reserved for the Harari, which remains in force to date. The second is the list of government employees in Harar under four categories – Harari, Oromo, Amhara and Others, depicting Amhara employees nearly twice all others combined. The third is a letter said to have been written by Emperor Menelik when he controlled Harar.

remained unchanged even after the adoption of the FDRE Constitution.¹¹⁶

3.5. The First National/Regional Election, Its Significance

Once the Transitional Period Charter was adopted, the first election was held for national/regional administration. The Council of Representatives had to decide which political organization would participate in which region. The decisions were published in the *Addis Zemen*, some of them as directives issued by the Election Commission (Election Executive Committee) and others as press statements.¹¹⁷

It can also be seen in the context of two statements made at the Council's Sessions. First, in the Seventh Regular Session, the Chairman of the Defence and Security Policy Standing Committee stated that "the fundamental principle of the new order is nations and nationalities shall have self-governance; therefore, they would address security issues, among others, in their respective territory/region". Further, the Chairman of the Council noted "where there are different ethnic groups in a given locality, the group that obtained majority vote shall govern, but the rights of the minority shall be respected".¹¹⁸

Such views were translated into two laws which were meant to "facilitate the local election" - Creation of Appropriate Conditions for Conducting National/Regional Self-Governments Elections Proclamation No 9/1992, and National/Regional and Woreda Councils

¹¹⁶ It is this decision of the Council of Representatives after the adoption of the FDRE Constitution used to justify the decision of the Federal Supreme Court Cassation Division against the National Electoral Board of Ethiopia. For an in-depth discussion see, Simeneh (n 16).

¹¹⁷ See, n 52.

¹¹⁸ Seventh Regular Session (n 19) 11.

Members Election Commissions Establishment Proclamation No 11/1992.

These laws were consequential. First, EPRDF neutralized former government's local power. As noted earlier, Proclamation No 9/1992, established a provisional administration: for *Woredas* a committee composed of 7 members and for *Kebeles* a committee composed of 5 members, not related to the previous regime.¹¹⁹ These *Woreda* and *Kebele* Provisional Administrations had the power, among others, to disarm former lower-ranking Dergue/WPE officials, former members of the army, police and security services at the local and rural level, establishing local offices, and detaining those who "break the law".¹²⁰ They would operate until a National/Regional Government was elected according to Proc. No 7/1992.¹²¹

Second, EPRDF would deny other contending political organizations their power. Thus, the Proclamation provides for the determination of whether they have an army and the size of the army of each political organization that had seats in the Council.¹²² Once that was determined, then the armies were to be interned into military barracks to have a "peaceful election".

Third, the electoral law in question also paved the way for the EPRDF to effectively exclude any meaningful political participation in the first national/regional election. One can easily see that the law establishing the Election Commission excludes former WPE, security members, and members of armed forces not rehabilitated both from being voters

¹¹⁹ Proc No 9/1992 (n 51) art 4.

¹²⁰ *Ibid.*, art 8.

¹²¹ *Ibid.*, art 9.

¹²² *Ibid.*, arts 20 – 26.

and candidates.¹²³ What is more, one need not forget that it was the Organizations that were members of the TGE Council of Representatives that were designated as election executors.¹²⁴

In any case, this first election went down in history as the first ethnic-based election in the country at the regional level. For the implementation of the election, the Woredas of each National/Regional Self-Government established by Proc. No 7/1992 were taken as constituencies.¹²⁵ The law further provides that towns would be incorporated into the adjoining woreda administration for the purpose of the first national/regional election.¹²⁶ Administrative structure was made based on ethnic identity, and obviously, the purpose of the election is “self-governance of nation, nationality and people”.¹²⁷ Thus, one of the important data to be recorded in the Register of Voters was ethnic identity; candidates would be required to speak the language of the nation/nationality where they seek candidacy.¹²⁸ What is not expressly provided for but which was strictly enforced was that candidates should belong to the ethnic group they claim to represent, more than speaking its language.¹²⁹

3.6. Problems Plaguing the Transitional Period

In its course, the Transitional Period is affected by a host of problems. The reading of the minutes of proceedings depicts two problems that

¹²³ Proc No 11/1992, (n 12), arts 26 and 36, respectively. Also see, Minutes of 10th Regular Session of the Council of Representatives of TGE (August 14, 1991, Addis Ababa) 27.

¹²⁴ See, text accompanying n 52.

¹²⁵ Proc No 11/1992, (n 12), art 22. It should be noted that even by the time this statute was adopted the designation of woredas was not completed.

¹²⁶ *Ibid.*, art 23(2).

¹²⁷ *Ibid.*, Preamble; art 9(1).

¹²⁸ *Ibid.*, arts 35(1) and 29(6), respectively.

¹²⁹ See, text accompanying n 16.

would stand out. Members of the Council of Representatives were not aware of their rights, privileges, and responsibilities.¹³⁰ They did not have personal security, salary, and even admission identification card to the compound at critical formative times of the TGE.¹³¹ In some instances, there were insinuated threats against Members of the Council.¹³²

Different forms of intimidation and pressure were exerted on the parties participating in the TGE by the EPRDF. An instance whereby the Ethiopian Democratic Coalition representative was coerced by the Chairman of the Council to retract a statement he made regarding the lack of democratic process relating to the conduct of the Conference establishing the TGE outside of the meeting hall was a case in point.¹³³ It should also be stated that the Chairman of the Council was both the President of the TGE and the Chairman of EPRDF whose only army

¹³⁰ Fourth and fifth Regular Session (n 65). Members' Code of Conduct appears to be discussed in the Fourth Regular Session. *Ibid.*, 7. However, the first code of conduct for members of the Council published in the *Negarit Gazeta* was adopted as *The House of Peoples' Representatives Legislative Procedure, Committees Structure, and Working Proclamation No 271/2002*.

¹³¹ The first record of self-restraint by a member in parliamentary discussion is seen at the Tenth Regular Session (n 123) 30 – 31. Here, the Omotic people's representative complained to the Council of Representatives that he would exercise self-restraint as he was receiving death threats for the opinions he expresses in the Parliament. He was rather told in parliament, by a member not identified in the report that, unless he reports to the Defence and Security Committee the threats he received, EPRDF would file complaints against him; Twelfth Regular Session (n 39) 12. Members of the Council requested for ID Card, they were not given because the emblem for the TGE was not adopted; Sixteenth Regular Session (n 50) 2.

¹³² For instance, regarding freedom of members, the Chair explained that the Council may take measures against its members, the content of which was not defined but which was stated to include impeachment from office, and in some instances facing criminal charges before regular courts. Fourth and Fifth Regular Session (n 65) 8, 9.

¹³³ Tenth Regular Session (n 123). In fact, a committee composed of (1) Ato Dima Negwo, (2) Ato Dawit Yohannes and (3) Ato Tesfaye Habisso was established; *Ibid.*, 11 – 14.

was in charge of law enforcement. It is doubtful that members of the Council were making decisions freely according to their conscience.¹³⁴

The country was immersed in conflicts of every kind. Specific mention was made of unprovoked violence including “looting and killing” by those who engaged in acts of ethnic cleansing and this was brought to the attention of the Council as early as during its Seventh Regular Session.¹³⁵ At its Twelfth Regular Session, the Council of Representatives received several complaints of conflicts and unrest in several places under its miscellaneous agenda. Some of them raised their concerns about displacement of the farmers in Harar, Arsi and Alaba.

For instance, on August 26, 1991, the Benishangul People’s Liberation Front (BPLM) submitted a written complaint to the Council against OLF.¹³⁶ There was an initial finding against OLF and it put points to be complied with, which the latter agrees to implement. However, because OLF fails to comply with the conditions as agreed, such as paying compensation and withdrawing from Assosa, and because a second complaint was filed against OLF for waging war against, and pushing into the territory of BPLF, among others, the Defence and Security Committee submitted a report of its findings to the plenary session on November 28, 1991.

The Council of Representatives had also to send a five- person committee from the members of the Council of Representatives to

¹³⁴ It appears to the author that there were shadow political organizations for Council Members who speak up opposing EPRDF in parliamentary proceedings.

¹³⁵ Seventh Regular Session (n 19) 17 – 19.

¹³⁶ In accordance with the procedure, the agenda had the support of one-third of the Members present and it was referred to the Defence and Security Committee. Twelfth Regular Session (n 39) 9.

investigate the incidents in Wonji Sugar Factory relating to the OLF office in the premises of the factory.¹³⁷ There were several such grave incidents in different places which demanded several rounds of investigation by ad-hoc committees.¹³⁸ Finally, the Council established a standing committee to hear such so-called security-related complaints.¹³⁹

4. The Continued Effect of TPLF Decisions Made During TGE

4.1. Adoption of the FDR Ethiopia Constitution

The Transitional Period Charter has two transitional programmes, one of which is a political programme. Article 10 provides that the “Council of Representatives shall constitute a Constitutional Commission to draw up a draft constitution”. It further provides that such “Constitutional Commission shall submit to the Council of Representatives the draft constitution”. Article 11 grants the Council of Representatives the power to adopt the draft constitution submitted to it before it is submitted to the public for discussion. It is the final draft of the constitution that would be presented to “the Constituent Assembly to be elected under the final draft of the Constitution”.

¹³⁷ The members were: (1) Ato Petros Aman (GPLM), (2) Ato Tadele Mebratu (the Labor Group), (3) Ato Mohammed Seid (EDROM), (4) Ato Ahmed Ajemel (OLF), and (5) Ato Tekelet Mekiso (KPC). The committee was mandated to investigate an alleged attack against the Metehara Sugar Factory by OLF. Unlike other incidents where the Defence and Security Committee reported to the plenary session, the ad-hoc committee reported to the Defence and Security Committee in the month of October 1991 and the matter was discussed at the 32nd Regular Session of the Council of Representatives of TGE (January 19, 1992, Addis Ababa).

¹³⁸ This was the case for Beddeno, Hadiya, Wolaita, etc.

¹³⁹ The Members of the Committee were 1) Ato Kifle Wodajo, 2) Ato Abdulfetah Yusuf, 3) Dr Ashenafi Mamo, 4) Ato Ate'yib Ahmed, 5) Ato Ali Helem, 6) Ato Kassa Deme (alternate), 7) Ato Tadesse Debesu (alternate); Thirty-fourth Regular Session, (n 52) 2. One of the investigations made by this Committee was the Metekel case. Minutes of the 42nd Regular Session of the Council of Representatives of TGE (May 12, and 14, 1992).

Accordingly, the Draft FDRE Constitution, adopted by the Council of Representatives on May 3, 1994, was submitted to the Constituent Assembly.¹⁴⁰

This constitution-making process may be seen from two perspectives. The membership and identity of the Council of Representatives are extensively discussed in Section 2.1. The Chairman, the Deputy Chairman, the Secretary and other key members of the Constitutional Commission were also members of the Council of Representatives.¹⁴¹ For instance, the Chairman of the Constituent Assembly, Dr. Negaso Giddada, Minister of Labour and Social Affairs at the time, was also a member of both the Constitutional Commission which drafted the Constitution and the Council of Representatives. The Council of Representatives was in full control of the process.

The Constituent Assembly was composed of more than 80% EPRDF representatives, and was hostile to opinions different from the ones it favored.¹⁴² Those who had strong opinions against certain positions had been insulted and denigrated, with the acquiescence of the Chairman of the Assembly.¹⁴³ This was particularly the case with regard

¹⁴⁰ Minutes of the Constituent Assembly of Ethiopia Volume 1 (October 29, 1994, Addis Ababa) 18, 19.

¹⁴¹ Kifle Wodajo was the Chairman, Mohammed Abdurahman was Deputy Chair while Dawit Yohannes was Secretary. Other members of the Commission include Fitawrari Zewde Ottoro, Dr Negaso Giddada, and Abreha GebreMeskel. They were all members of the Council of Representatives. It should be stated that these individuals took part in several assignments during the transitional period. For instance, they participated in the first national/regional election in key positions, many of them as members of the Election Execution Committee; others as chairs of various ad-hoc committees.

¹⁴² Minutes Vol 1 (n 140) 11, 14, 54. The Chairman, the Secretary and several chairs of the ten sub-committees were all EPRDF members; *Ibid.*, 25.

¹⁴³ The discussions were primarily self-defecating in blaming the previous regime for anything that went wrong and those who questioned certain facts and assumptions were treated as part of that regime. Maj. Admassie was a case in point. See, for instance, *Ibid.*, 87, 88.

to Maj. Admassie Zeleke who consistently strongly stated that the draft constitution was not discussed by the public and Daniel Belayneh, who also raised other nationally important issues.¹⁴⁴

In terms of content, one of the important aspects of the Constitution would be setting up the federal structure. The contents of the provisions of article 4 of Proclamation No 7/1992, were simply reproduced in the Draft Constitution without significant modification. They were not a part of the discussion because of a skewed assignment of subjects for each of the ten sub-committees;¹⁴⁵ the discussion was whether Ethiopia should adopt an ethnic-based federal system, not one based on the geographic scope of each state.¹⁴⁶

For instance, on the boundaries of the nations, some members raised the demarcation of internal boundaries among the regions to avoid conflict but the suggestion was rejected as not related to the issue at hand.¹⁴⁷ Yet the Draft Constitution would finally be approved without any significant change from the original draft as approved by the Council of Representatives. Under such strict control by the Council of Representatives, one may wonder about the significance and effects of the involvement of the Constituent Assembly in the constitution-making process.

4.2. Some Contents of the FDRE Constitution

The FDRE Constitution has several provisions that give the impression that it is a national constitution. The federal Constitution is the

¹⁴⁴ *Ibid.*, 85.

¹⁴⁵ See, how the topics are allocated to each sub-committee; *Ibid.*, 28 – 38.

¹⁴⁶ *Ibid.*, 92 – 95.

¹⁴⁷ Ato Daniel Belayneh from Region 14 stated his objection to the inclusion of a part of Gondar province, Setit Humera, into Tigray; *Ibid.*, 104.

supreme law of the land. Article 9(1) provides that “[a]ny law, customary practice or a decision of an organ of a state or public official which contravenes [the] Constitution shall be of no effect”.

Article 10(1) provides that “human rights and freedoms, emanating from the nature of mankind are inviolable and inalienable.” Those rights include the right to life, security of person and the right to liberty, each of which is separately provided for under articles 15 - 18. Based on national identity, article 32(1) provides that “[a]ny Ethiopian ...has, within the national territory, the right to liberty of movement and freedom to choose his residence”. Likewise, article 38 provides that “[e]very Ethiopian national, without any discrimination based on colour, race, nation, nationality, sex, language, religion, political or other opinion or another status, has the following rights:

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives,
- (b) on the attainment of 18 years of age, to vote by the law,
- (c) to vote and to be elected at periodic elections to any office at any level of government”.

The right to private property (excluding of course the right to private ownership of land) protected by the Constitution can also be highlighted as an important constitutional safeguard.

Those rights are, however, nullified by sub-national constitutions of various regions and their subsidiary legislation. There are regional state constitutional provisions which are contrary to the provision of the FDRE Constitution reproduced above. They are enforced by subsidiary local legislation. Only two aspects are discussed below.

4.2.1. Establishment of Regional States and Ownership of Regions

Adopting the National/Regional Self-Government Establishment Proclamation No 7/1992, the Transitional Government created a de facto federal structure. As noted earlier in the article, it restructured the country into 14 Regions based on—except in the case of region 14 (Addis Ababa)—ethnic lines.¹⁴⁸ The designation of administrative regions based on ethnic lines is the beginning of ethnic-nationalistic actions in several corners of the country.¹⁴⁹

The parliamentary debates of members of TGE Council of Representatives on how to exclude “non-indigenous” people from running for national/regional office have been given effect through various post-constitution local laws. Once the “new” constitutional order was established, the regional constitutions provide (in various wordings) for “owners” of the respective regional states. In not few cases, those are translated into subsidiary legislation governing who runs for office and also by reserving the majority seat for those so-called indigenous.

In the Eighteenth Regular Session of the Council of the TGE, for instance, it was decided that the Jugol wall includes only Hararis. However, as a designation of Jugol is not viable, the Council granted time to negotiate the inclusion of adjacent land into Harari state, by promising the right of those other nationalities residing in the region to be respected.¹⁵⁰ The Adere representative reasserted his demand that Harar is a place where about 5 ethnic groups reside peacefully making Harar a cosmopolitan place, but Jugol is exclusively that of Adere, but

¹⁴⁸ Proc No 7/1992 (n 73) art 3.

¹⁴⁹ Seventh Regular Session (n 19) 17 – 19.

¹⁵⁰ Eighteenth Regular Session (n 26) 5.

to be approved by the Council after the necessary study is conducted, and it was already decided it would be the 13th state during the Transitional Period.¹⁵¹

The Harari Constitution is the only constitution whose main principles were adopted by the TGE Council of Representatives. It is designed to exclude the “non-indigenous” from any form of political power or representation. First, all 14 seats in the upper house would be held by the Harari only; also, those 4 of the 22 seats of the lower house would be held by the Harari. The remaining seats are up for grabs by “any candidate”. It should not be forgotten that language is a requirement. Second, it designed and implemented effective gerrymandering to reduce the impact of “non-indigenous” votes as adopted by the Council. Those non-indigenous people were referred to as “*neftegna*, *sefari*, and Dergue/WPE” in its inception document.

However, this conception of ownership of a region is not particular to Harari. The Revised Afar Constitution (1994 EC) article 8(1) provides that “sovereignty in the Regional State belongs to the Afar people.” This “sovereignty is expressed in participation through their elected representatives”. The Benishangul Gumuz Regional State Constitution is even more explicit. Article 2 of the constitution provides that “although it is known that other nationalities reside in the state, the owners of the state are Berta, Gumuz, Shinasha, Mao and Komo.” Likewise, the Gambella Regional State Constitution in its preamble refers to “we Agnua, Nuer, Mezejenger, Oppo and Komo nationalities”. Oromia’s Revised Constitution (of 1995 EC), article 8, provides that “Sovereign power resides in the Oromo people which is expressed through its elected representatives.” The Revised Constitution of the

¹⁵¹ *Ibid.*, 8, 9.

SNNPR (of 1994 EC), article 8, provides that sovereign power resides in the people of Southern Region Nations, Nationalities and People.

4.2.2. Subsidiary Laws Excluding “Exogenous” People from Political Participation

In the determination of *woredas* belonging to the respective regions, and in the course of the discussion to exclude those so-called exogenous from running for local office, the Chairman of the TGE Council of Representatives suggested conducting separate elections for the urban centres and rural areas; later, it was determined that “although the *neftegnas* may constitute a majority in cities and towns, having come to these places because of trade and other purposes, they shall not have self-governance rights; they would rather be included into the adjacent local administrations”.¹⁵² Further, an OLF representative also raised his concern regarding the Oromos and non-Oromos in Arsi to which the Chairman of the Council replied “other ethnic groups in pocket areas would not be a problem”.¹⁵³ In reference to prior decisions, the Chairman of the Council was asked “whether the Council has reversed its decision that in Gambella and Benishangul settlers would not constitute self-governance” to which the Chair replied in the negative.¹⁵⁴

These tentative decisions became the basis for the constitutions as well as subsidiary legislation of the regional states that legislated the status of the members of the “non-indigenous” groups in the regions they

¹⁵² Getachew Assefa, “Federalism and Legal Pluralism in Ethiopia: Preliminary Observations on Their Impacts on the Protection of Human Rights” (2011) 17 *East African Journal of Peace and Human Rights* 173, 181. Getachew is clear in stating that such actions are meant to “perpetually keep the non-endogenous groups in the region out of political power”; *Ibid.*

¹⁵³ Thirtieth Regular Session (n 14) 8.

¹⁵⁴ *Ibid.*, 7. Getachew (n 152) 181.

inhabit. The discriminatory treatment of “non-indigenous” citizens remains part of the legal systems of most of the regional states of the federation. For instance, the *Urban Local Government Proclamation of Oromia National Regional State No 65/2003* classifies cities into four categories. Grade One city is a city with a population of greater than 90,000 people, and grade two has 45,000 to 89,999 residents.¹⁵⁵

The city council is the highest organ of the city which has the power to determine taxes, among others. While the city council is expected to have between 15 and 81 seats, where the “Oromos are a minority in a given city, the Regional Executive Council may reserve up to 30% of the council seats for the Oromos”. Further, 5% of the city council seats were reserved for “hinterland rural kebeles surrounding the urban local government”.¹⁵⁶ While the word “a minority” is vague for implementation and the decision is made by the Regional Executive Council, the rules were amended.

Proclamation No 116/2006 was adopted to Amend Proclamation No 65 of 2003. The amended *Urban Local Government Proclamation of Oromia National State*, under article 2(4) provides that “[w]hen the number of Oromo residents in 1st and 2nd grade city is found minor or undersized, the administrative council of the National Regional Government may notice the number of Oromo people against other people and reserve 50% of the seats in the city council.” It further provides that it is also applicable to the “*Kebele* council”. Further, “20% of the city council seats are reserved for Oromos living in the surrounding rural counties.”

¹⁵⁵ *Urban Local Government Proclamation Oromia National Regional State No 65/2003*, art 6(1).

¹⁵⁶ *Ibid.*, arts 13(2), and (4), respectively.

Also, in Benishangul-Gumuz State, Proclamation No 69/2007 provides “at least 55% of the seats of city councils must be reserved for indigenous ethno-national groups”. Getachew Assefa argues that, in this case too, those provisions would reduce urban non-indigenous majority into minorities by design¹⁵⁷ with intent again to “perpetually keep the non-endogenous groups in the region out of political power”.¹⁵⁸

These unconstitutional, and indeed anti-democratic, provisions are yet to be challenged. However, even when they are challenged, Getachew discusses the lack of remedies both before the Council of Constitutional Inquiry (“CCI”) and the House of Federation (“HoF”).¹⁵⁹

4.3. Atrocious Crimes against Exogenous People – then and now

Since the coming to power of EPRDF, ethnic-based violence against those so-called exogenous people is becoming a common practice. In this section, only two of those incidents are reviewed because they are investigated and reported by the state, followed by criminal prosecution. While EPRDF controls the power of the central government at Addis Ababa, OLF was administering the place now called Oromia, particularly the then Harar and Wollega provinces. OLF jailed those non-Oromos in the region but the great majority of them

¹⁵⁷ For detailed comments see, Getachew (n 152) 181; Christophe van der Beken, “Balancing between Empowerment and Inclusion: Multinational Federalism and Citizenship Rights in Ethiopia” (2019) 27 *African Journal of International and Comparative Law* 588; Yonatan Tesfaye Fisseha and Christophe van der Beken, “Ethnic Federalism and Internal Minorities: The Legal Protection of Internal Minorities in Ethiopia” (2013) 21 *African Journal of International and Comparative Law* 32.

¹⁵⁸ Getachew (n 152) 181.

¹⁵⁹ *Ibid.*, 182 – 85.

were Amhara on the ground of suspicion they would pass information to EPRDF, or other organizations.¹⁶⁰

While those political organizations administering the respective territories were supposed to mitigate matters, they appear to have incited some of the conducts. Thus, on a Mawlid holiday in 1991, six organizations sent out warning to “unidentified group” in Harar City. The organizations were IFLO, OLF, Gurage, Harari National League and OPDO /EPRDF. The content of the statements state that “bureaucrats in every office will be disclosed”.¹⁶¹ The same message was passed in Dire Dawa on the same day.¹⁶²

This can only be seen in context. The Harari National League in its so-called study and report, submitted to the TGE Council of Representatives, was explicit in using pejorative terms, such as *neftegna* and *sefari*.¹⁶³ Further, it annexed a list of office employees indicating their number in each government office along with their ethnicity.¹⁶⁴ Subsequent periodic reports of the Ethiopian Human Rights Council indicated that non-Hararis were summarily dismissed from their jobs.¹⁶⁵ Further, a document allegedly made by groups opposing the then-ongoing political narrative portrayed as “anti-Charter” was annexed to the report.

¹⁶⁰ Seventh Regular Session (n 19) 18, 19.

¹⁶¹ “There would be a fight against those who pursue their selfish interest” *Addis Zemen* (September 24, 1991, Addis Ababa) 1 and 7.

¹⁶² “Those who strive to create inter-ethnic conflict should be fought back” *Addis Zemen* (September 25, 1991, Addis Ababa) 1 and 7.

¹⁶³ Harari Report (n 114).

¹⁶⁴ *Ibid.*

¹⁶⁵ Ethiopian Human Rights Council, 12th Report, 1997 Compilation, 39 – 40.

Minutes of the Council of Representatives indicate that there were “conflicts” between those who claim to be indigenous demanding those so-called exogenous to leave places, such as in Harar, Arsi, Bale and Wolayta to which they were said not to belong. A parliamentary ad-hoc committee investigated the massacre in Beddeno and Wetter in Eastern Hararghe (Oromia). The report annexed to the Minutes of the 44th Regular Session of the Council of Representatives indicates the absolute majority of the victims in Beddeno were Amharas who were under OLF detention.

The ad-hoc committee report depicts that those who were under detention by OLF in Beddeno were killed between March 14, 1992, and April 10, 1992, while the area was under the control of OLF.¹⁶⁶ It was reported that the killing was not a one-time action; it was committed over a long time by design following a certain chain of command.¹⁶⁷ Further, the committee reported that the public called the attention of the Committee to several other crimes, but the committee declined to investigate those other crimes stating it was not within its mandate.¹⁶⁸

There was no meaningful action taken against OLF based on this report.¹⁶⁹ However, once OLF and EPRDF faced a fallout, OLF

¹⁶⁶ Evidence Annexed to the ad-hoc Committee Beddeno, Wetter Investigation Report to the Council of Representatives (1991, Addis Ababa) 3.

¹⁶⁷ *Ibid.*, 5. It should be noted that OLF Deputy Secretary General in Dire Dawa, and OLF representative in the Council of Representatives denied the conduct was committed by OLF; *Ibid.*, 7 and 8, respectively.

¹⁶⁸ *Ibid.*

¹⁶⁹ The Council finally finds that: (1) brutal crime has been committed; (2) this was committed by OLF, as an institution; and (3) both the individuals involved in the act and OLF as an organization were responsible. The grounds of responsibility were stated to be (1) failing to prevent the crime; (2) denying the commission of the crime until the investigation report is presented; and (3) the crime is committed on the ground that victims were supporters of another political organization. Minutes of 44th Regular Session of the Council of Representatives of TGE (May 26, 1992 Addis Ababa) 12.

withdrew from the Council of Representatives, the Council of Ministers, and from the electoral processes, the OLF soldiers were detained and charged for “waging war against the state”.¹⁷⁰ It was stated in those criminal charges that the crimes were said to have been committed after OLF withdrew from the Council of Representatives of the TGE. However, the evidence produced against those OLF soldiers showed the crimes committed while OLF was in control of the region as part of the TGE.¹⁷¹ The judicial evidence graphically depicts how those atrocities were committed¹⁷² and the trial of some of them continued until 2005.

The second round of atrocious crime that I want to mention was committed relatively recently subsequent to the reports of the assassination of Artist Hachalu Hundessa on June 29, 2020. OMN TV was broadcasting messages that can be characterized as containing statements that insinuate incitement to violence, followed by the widespread and systematic killing of “non-indigenous” people. The Ethiopian Human Rights Commission conducted a rapid investigation in 40 Oromia towns and the report shows that between June 30 and

¹⁷⁰ Judicial records show that the conflict between EPRDF and OLF took place from June 1992 to September 1993.

¹⁷¹ However, when the OLF withdrew from the TGE Council of Representatives and Council of Ministers, and said to have waged war against the TPLF led Central Government, several thousands were captured. Investigators from Addis Ababa questioned those suspects and only 214 were prosecuted for violating the criminal law. They were sent to Zeway where the Central High Court conducted pre-trial hearings. The charges that were brought against those were for breach of the provisions of articles 252, 281 and 284 of the 1957 Penal Code. The Minutes of the 44th Regular Session of the TGE Council of Representatives were attached as evidence in *Public Prosecutor v Beyan Ahmed, et al, 7 defendants* (15 October 2004, Crim File No 03139 Federal High Court).

¹⁷² For instance, in *Central Public Prosecutor v Abdulkadir Mohammed, et al* (16 January 2004, Crim File No 01392, Federal High Court) it is proved that 21 ethnic Amharas were taken out of their detention place and handed over to OLF commando trainees to practice killing by mere chocking.

July 2, 2020, 123 people were killed, 500 were injured, and property was damaged and looted.¹⁷³ The report concludes that (a) the attack was directed against so-called non-indigenous, although it focuses on Amhara, in some places those offenders had a list of their victims; (b) those offenders were committing those acts organized in groups, they were chanting “*neftegna*”, “*menze*”, “*gondere* leave our land”; (c) it was invariably testified by the survivors of such conduct, the police were not helpful, claiming they are overwhelmed, or did not get an order from the upper echelon. The Commission concluded that atrocious crimes and crimes against humanity were committed.¹⁷⁴

In other prior incidents, where ethnic-based acts of violence were reported, Getachew argued that the state in charge is slow in responding to avert the incident.¹⁷⁵ The same is reported here; the law enforcement officials were not responding to the repeated calls of victims. In some instances, the crimes were committed while the police were standing and watching the events unfold.¹⁷⁶

There were criminal prosecutions against those perpetrators of the crime. Mahderwork reviewed the prosecution and concludes that the process was far from sufficient from the point of view of damage to

¹⁷³ The report is made in Amharic (56 pages) and the English version was only an executive summary. It should be noted the executive summary of the English version is entitled as “Oromia: Crimes Against Humanity in the Aftermath of Hachalu Hundessa’s Death”. The Amharic version rather is entitled “Human Rights Violations in the Aftermath of the Assassination of Hachalu Hundesa”. Further, the Commission on January 13, 2021 issued an explanation that what was committed is crimes against humanity, not genocide. However, in the Amharic report at pp. 14, 17, 18, 22, 27 - 29, 41, 45, and 48, illustrative derogatory statements against victims were reported showing the intent to destroy specific ethnic and religious groups.

¹⁷⁴ *Ibid.*

¹⁷⁵ Getachew (n 152) 185.

¹⁷⁶ EHRC Report (n 173) 14, 18, 21, 25.

property constituting the crime of genocide.¹⁷⁷ However, the study sheds light on the whole process. There was a prosecution of 3,359 individuals before Oromia Supreme Court divisions by federal prosecutors.¹⁷⁸ Of those accused, 2,552 were arrested, and 1,007 were not arrested; 448 were tried in absentia, and the case was discontinued for 559 individuals of which 465 could not be tried in absentia.

The prosecution was not successful for various reasons. Witnesses fail to testify the truth because of threats to the life and physical security of witnesses or their families.¹⁷⁹ Such threats were posed by those perpetrators who were not arrested, or the family of suspects, and in some instances, the community is also involved.¹⁸⁰ Some witnesses even after testifying before the court disappeared from the place for fear of reprisal. Witnesses were not given the appropriate legal protection.¹⁸¹ Many of those perpetrators were transported from another place that they could not be identified by the victims.¹⁸²

For those who got convicted, Mahderework evaluated the punishment to be nominal because the provision under which conviction is entered is changed to a less serious one.¹⁸³ There was no civil action against those perpetrators for compensation because which individual caused what harm is not specifically identified; there was no assistance from

¹⁷⁷ Mahderwork Regassa Dadi "Obligation of Regional State to Protect Property Rights in the Event of Identify Based Violence in Ethiopia: Case Analysis from Oromia National Regional State" LL.M. Thesis, Addis Ababa University Law School, 2022 (unpublished).

¹⁷⁸ There were 128 criminal cases, including 12 cases in Bale, 42 in Adama, 25 in Shashemene, 25 in Assela, 16 in Jimma and 1 in Sebeta benches; *Ibid.*

¹⁷⁹ *Ibid.*, 44. It is reported, those perpetrators even made investigation difficult; *Ibid.*

¹⁸⁰ *Ibid.*, 45.

¹⁸¹ *Ibid.*, 41, and 45.

¹⁸² This statement gives the impression that those who appear as witnesses were only victims.

¹⁸³ *Ibid.*, 47.

the regional state government either.¹⁸⁴ In sum, the state was seen to afford neither protection nor remedies.

Ending Remarks

The current constitutional order is reflective of the failed London Conference that involved a few ethnically organized political groups to form a transitional government. The July 1991 conference excluded those who were not ethnically aligned. Those who participated in the Conference were the ones who divided among themselves the parliamentary seats of the TGE after adopting the Transitional Period Charter.

The article has shown that the parliamentary debates in the establishment of local governments were meant to take local governance based on ethnically aligned organizations, to the exclusion of others identified as non-indigenous. The debates were explicit in their intention to exclude those so-called exogenous people from the local elections and perpetually exclude them from sharing local power. That is enforced through regional state constitutions and subsidiary legislation in effect to date. The ethnic-based arrangement results in countless violence that are not redressed because those victims considered not to belong to the region have not been represented at the local level. Thus, the current constitutional arrangement was built on faulty foundations hugely impactive of its foundational as well as redemptive legitimacy. Thus, any dialogue on constitutional amendment would remain window dressing unless it addresses state constitutions and their subsidiary legislation.

¹⁸⁴ *Ibid.*, 48, 49.

INTERNATIONAL HUMANITARIAN LAW AND ITS CONTRIBUTIONS TO THE PURSUIT OF PEACE: THE CASE OF ETHIOPIA

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Abstract

International humanitarian law (IHL) is often referred to as the 'law of war' and, as such, many identify it more with war than with peace. Certainly, IHL regulates acts of belligerence, and its material and temporal scope of application is intertwined with the existence of armed conflict. It generally operates in situations of armed conflict and often ceases to apply the moment peace and normalcy return. However, IHL also plays a significant role not just in governing acts of war but also in facilitating and building peace. In non-international armed conflicts in particular, respect for IHL, including ensuring accountability for war crimes, creates conditions conducive to peace and makes peace more attainable. IHL conventions also contain provisions allowing, and even encouraging, warring parties to take steps that may generate reciprocal goodwill and mutual trust and, ultimately, reconciliation and lasting peace. Accordingly, this article asserts that the success of ongoing peace initiatives to permanently end the civil war in Ethiopia depends, at least partly, on the extent to which the parties strictly comply with the rules of armed conflict and their willingness to exploit the legal avenues offered by existing IHL conventions to promote reciprocal peace gestures. This is also reflected in the recently signed peace agreement between the Ethiopian Government and the

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Tigray People's Liberation Front, which explicitly refers to the relevant rules of IHL pertaining to, among others, the protection of civilians and civilian objects, unfettered humanitarian access, and accountability for serious violations affecting victims of the armed conflict.

Key-terms: *IHL, peacebuilding, detention, transitional justice, conduct of hostilities, Pretoria peace agreement*

Introduction

International humanitarian law, at first glance, seems to have no meaningful relation with peace and its role appears to be limited just to the regulation of war/armed conflicts. This (mis)perception stems from the fact that IHL as a body of law has historically developed in the context of war and its domain of application is still mainly dependent on the existence of such context. However, a thorough examination of its rules reveals that IHL plays a significant role in facilitating reconciliation in conflict-affected societies and building a lasting peace. Most notably, by limiting the destructive effects of war, promoting accountability for serious human rights violations, and establishing obligations on parties to a conflict requiring them to endeavor to grant amnesties, IHL facilitates peace initiatives. It also requires parties to take some steps such as keeping record of the dead and the missing to enable victims of armed conflict to search and find the truth—an important element of post-conflict peace processes. As a result, it is not uncommon to see reference being made to rules of IHL in peace accords intended to end war and bring about peace.¹

¹ See Arts 4.12, and 5.1.4, the Final Agreement to End the Armed Conflict in Colombia and Build a Stable and Lasting Peace (signed on 24 November 2016), Preambular paras

Unsurprisingly, like many other peace deals, the recent peace agreements signed between the Ethiopian government and the Tigray People's Liberation Front (TPLF), to permanently stop a two-year civil war, affirmed the importance of IHL to build a lasting peace. In the agreements, the parties committed themselves to “upholding applicable international humanitarian law instruments to which Ethiopia is a party”.² The agreements further incorporated several rules of IHL in the areas of protection of civilians and civilian objects from attacks, reunification of family, and humanitarian access to victims of war. This article argues that, contrary to conventional wisdom, IHL plays a significant role in promoting peace during active hostilities and at the end of armed conflicts.

Using the conflict in the Tigray region as a case study, the article attempts to demonstrate how IHL is useful in creating conditions for peace, by regulating the means, methods and effects of war. The article first offers some background on the conflict, including the actors, recent ongoing peace initiatives, and the applicability of IHL. Having positively affirmed the application of IHL to the armed conflict between TPLF and the Ethiopian government and allied forces, the paper proceeds to discuss the major obligations of the parties involved in the conflict under IHL and highlights areas where IHL may be valuable in

4 and 8, Arts 17, 36, 42 and 44; Libyan Political Agreement, 17 December 2015, Arts 2.1.10.8, 5.3.3.1, 5.3.5.3; South Sudan Peace Agreement Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) (12 September 2018).

² Agreement for Lasting Peace through a Permanent Cessation of Hostilities between the Government of the Federal Democratic Republic of Ethiopia and the Tigray People's Liberation Front (TPLF), done at Pretoria, the Republic of South Africa (2 November 2022), art 4 ('The Pretoria Peace Agreement' or 'PPA').

building trust, facilitate peace negotiations and bring about sustainable peace.

1. Background on the Conflict and Peace Initiatives

An armed conflict has been raging in Ethiopia for over two years between the government and different armed groups, notably, the Tigrayan People's Liberation Front (TPLF) and the Oromo Liberation Army (OLA). In addition to these armed conflagrations, low-scale skirmishes and ethnic-based violence have also been prevalent in many parts of the country. The war in Tigray broke out on 4th November 2020 when the government officially announced a military operation against the TPLF in response to the latter's attack on the Northern Command of the Ethiopian National Defence Forces (ENDF) on the previous day.³

There are several reasons why the armed conflict in Tigray dominated national and international discussion on Ethiopia while the other conflicts in the country received little or no media attention. First, the war in Tigray is between the government and TPLF—a relatively strong and well-organized armed group with an established command structure and fighting capability. Most of the latter's political and military leaders were also dominant figures in the country for almost thirty years until 2018, when they were dislodged from power following sustained public protests.⁴ Second, the war involved multiple actors, including foreign

³ Giulia Paravicini and Dawit Endeshaw 'Ethiopia sends army into Tigray region, heavy fighting reported', *Reuters* (4 November 2022), < <https://www.reuters.com/article/us-ethiopia-conflict-idUSKBN27K0ZS>> accessed 20 August 2022.

⁴ Alexandra M. Dias and Yared Debebe Yetena, 'Anatomies of Protest and the Trajectories of the Actors at Play, Ethiopia 2015-2018', in Edalina Rodrigues Sanches (ed.), *Popular Protest, Political Opportunities, and Change in Africa* (1st edn, Routledge, 2022) 181; Declan Walsh and Abdi Latif Dahir, 'Why Is Ethiopia at War With Itself?', *The New*

forces. In the course of the war, the ENDF were assisted by regional special and paramilitary forces. It is also reported that Eritrean Defence Forces (EDF) have fought along with the government. Thirdly, as the conflict dragged on, allegations of serious human rights violations, including war crimes and crimes against humanity and reports of severe humanitarian crisis have emerged.⁵ Fourthly, the conflict in Tigray later expanded into neighboring Amhara and Afar regions and caused enormous casualties and destruction. At some point, the TPLF forces even threatened to unseat the central government after their quick advance on towns located less than two hundred kilometers from the capital city, Addis Ababa.⁶ Finally, TPLF's existing international networks, which it had established during its twenty-seven years of outsized share in the country's politics, economy and security apparatus, have helped its international diplomacy in the course of the conflict. The Tigrayan diaspora elites have also played a great role in sensitizing the international community on the conflict through coordinated international campaigns.⁷

York Times (16 March 2022) < <https://www.nytimes.com/article/ethiopia-tigray-conflict-explained.html> > accessed on 15 September 2022.

⁵ 'Grave human rights situation in Ethiopia' *Office of the High Commissioner for Human Rights* (17 December 2021); <<https://www.ohchr.org/en/2021/12/grave-human-rights-situation-ethiopia>> accessed on 2 September 2022; Sinisa Marolt, '9.4 million people are 'living their worst nightmare' in northern Ethiopia due to ongoing conflict', *World Food Programme* (24 November 2021) <<https://news.un.org/en/story/2021/11/1106522> > accessed on 24 August 2022.

⁶ Max Bearak, 'Rebel advance to within 200 miles of Ethiopia's capital puts the city and wider region on edge', *The Washington Post* (Nairobi, 6 November 2021) <<https://www.washingtonpost.com/world/2021/11/06/ethiopia-addis-ababa-tplf/> > accessed on 18 July 2022.

⁷ Sara Fissehaye and John Tanza, 'Hundreds March in Washington to Denounce Ethiopian Government on 1st Anniversary of Tigray Conflict', *VOA news* (Washington, 5 November 2021) <<https://www.voanews.com/a/hundreds-march-in-washington-to-denounce-ethiopian-government-on-1st-anniversary-of-tigray-conflict/6301063.html>> accessed on 11 October 2022.

The widespread media coverage eventually led to an international outcry and a persistent call for an end to the war and accountability for gross human rights violations. The United Nations Security Council alone convened several meetings both privately and in open sessions to discuss the situation. On almost all occasions, it urged parties to cease hostilities, engage in political dialogue with a view to resolving the root causes of the war and ensuring accountability for gross human rights violations.⁸ In response, the Ethiopian Human Rights Commission (EHRC) and the UN Office of the High Commissioner for Human Rights (OHCHR) undertook a joint investigation into alleged human rights abuses and violations of international humanitarian law committed in the context of the conflict in Tigray. The final report of the joint investigation came out on 3rd of November 2021 and revealed that the conflict has resulted in serious violations of international human rights law, humanitarian, and refugee law, committed by all actors to the conflict.⁹

Subsequently, on 17 December 2021, the United Nations Human Rights Council established the UN International Commission of Human Rights Experts on Ethiopia.¹⁰ The Commission is mandated, *inter*

⁸ 'Security Council Press Statement on Ethiopia', SC/14501 22 April 2021 <<https://press.un.org/en/2021/sc14501.doc.htm>>; 'Security Council Press Statement on Ethiopia' SC/14691 (5 November 2021) <<https://press.un.org/en/2021/sc14691.doc.htm>> accessed on 3 October 2022.

⁹ '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' (3 November 2021) the report is available here:- <<https://www.ohchr.org/sites/default/files/2021-11/OHCHR-EHRC-Tigray-Report.pdf>> accessed on 4 September 2022.

¹⁰ Note that in comparison to the EHRC and OHCHR's joint investigation, the investigation of the Commission of Experts has broad temporal and territorial scope. The former covered human rights violations committed mainly in Tigray and limited other places

alia, “to conduct a thorough and impartial investigation into allegations of violations and abuses of international human rights law and violations of international humanitarian law and international refugee law”, and “provide guidance on transitional justice, including accountability, reconciliation and healing”.¹¹ The Commission officially launched its work in March 2022 with the appointment of three Commissioners¹² and it undertook its first visit to Ethiopia from 25 to 30 July 2022. The Commission released its Preliminary Report on 19 September 2022 in which it concluded that “there are reasonable grounds to believe that ...violations of human rights amounting to war crimes and crimes against humanity were committed”.¹³

Following the government’s unilateral declaration of humanitarian truce on 24 March 2022 in order to allow access to aid in Tigray, active hostilities diminished in the north, until the last week of August 2022, when the conflict reignited again.¹⁴ With the resurgence of active hostilities in the north, many were again dismayed by the escalation of the

in Amhara regions from 3 November 2020 to 28 June 2021, the day the federal government of Ethiopia declared a unilateral ceasefire and withdrew from Tigray region. In contrast, the Commission of Experts’ temporal and geographical scope of its mandate begin from 3 November 2020 open-endedly and to the whole of the ‘territory of the Federal Democratic Republic of Ethiopia, with a focus on areas affected by the recent conflict’. This, theoretically, could cover those human rights violations committed outside Tigray, Afar and Amhara regions and could also encompass those reported to have occurred in Oromia, Benishangul-Gumuz and other regions.

¹¹ A/HRC/RES/S-33/1 of the United Nations Human Rights Council (on 21 December 2021).

¹² ‘President of Human Rights Council appoints members of investigative body in Ethiopia’, (Geneva, 2 March 2022) <<https://www.ohchr.org/en/press-releases/2022/03/president-human-rights-council-appoints-members-investigative-body-ethiopia>> accessed on 4 October 2022.

¹³ Report of the International Commission of Human Rights Experts on Ethiopia (A/HRC/51/46), 19 September 2022.

¹⁴ ‘Fighting Erupts Again in Ethiopia’s Northern Tigray Region’, *VOA news* 5 September 2022 <<https://www.voanews.com/a/fighting-erupts-again-in-ethiopia-s-northern-tigray-region-/6732343.html>> accessed on 10 September 2022.

conflict and the increased suffering of civilians. Gravely concerned by the situation, in September and October 2022, the African Union, the United States, and the European Union engaged in a coordinated shuttle diplomacy to put pressure on TPLF and the Ethiopian government to sit for negotiations and resolve their differences peacefully. The efforts finally bore fruits and after a week-long face-to-face ‘intense’ negotiations, the government and TPLF, on 2 November 2022, signed a peace agreement in Pretoria, South Africa (the ‘Pretoria Peace Agreement’).¹⁵ Ten days later, the military commanders from both sides signed a Declaration on the Modalities for the Implementation of the Pretoria Peace Agreement on 12 November 2022, in Nairobi, Kenya (‘the Nairobi Declaration’).¹⁶

The peace deals covered various areas, including permanent cessation of hostilities, access to humanitarian assistance, protection of civilians and disarmament, demobilization and reintegration (DDR) and embedded fundamental rules of IHL. In the Pretoria Peace Agreement, the Parties particularly expressed their consent to “commit to upholding”

¹⁵ The Pretoria Peace Agreement.

¹⁶ Although the Nairobi Declaration claims to be ‘based on’ and ‘consistent with’ the Pretoria Peace Agreement, it has introduced some points which were not explicitly agreed upon in the latter. For example, Art 2 (2.1) (d) of the Nairobi Declaration appears to make the disarmament of heavy weapons of Tigrayan combatants conditional upon the withdrawal of foreign and non-ENDF forces from Tigray. If one is to take the literal meaning of the provision, s/he inevitably enters into the controversial terrain of contested lands between Amhara and Tigray regions and Eritrea’s participation in the conflict. Indeed, many people reacted to the inclusion of such provision saying that it is qualifying what was agreed in the Pretoria Peace Agreement, which only prescribed that the issue of contested lands will be settled in accordance with the constitution of the country, without requiring disarmament to be done ‘concurrently’ with the withdrawal of foreign (Eritrea) and non-ENDF (Amhara and from other regions) forces from Tigray.

the laws and customs of war enshrined in IHL treaties ratified by Ethiopia and to protect civilians.¹⁷ Albeit not so unusual,¹⁸ it is striking to see the reference to IHL in a peace agreement of this kind, which seeks to permanently end hostilities. As will be seen below, IHL generally operates in armed conflict situations and has little to do with the protection of civilians in peacetime. Yet, peace agreement's reference to IHL appears to be dictated by pragmatic considerations relating to the uphill task of 'silencing the guns'.¹⁹ It is also an affirmation of the important role of IHL in creating conducive environment for peace to sprout and flourish.

2. The Scope of Application of International Humanitarian Law

This section will provide an overview of the scope of application of IHL. It is necessary to grasp the scope of IHL's application in order to address the main claim of the article that IHL, beyond its conventionally understood role, also plays a pivotal role in peacebuilding.

In terms of its material scope of application, IHL governs armed conflicts occurring between States, also known as 'international armed conflicts' (IACs), and those armed conflicts between a State or a group

¹⁷ The Pretoria Peace Agreement (n 2).

¹⁸ See (n 1).

¹⁹ In the fourth preambular paragraph, the Peace Agreement reiterates 'the Parties' commitment to the African Union's Agenda of Silencing the Guns by 2030, consistent with the spirit of 'African solutions to African problems'. As could be seen from Art 11 (8) and (9) of the Agreement, the Parties were alive to the fact that there may be a possible breach of the cessation of hostilities, in which case IHL will continue to apply.

of States and non-State armed groups or among those groups, also referred to as ‘non-international armed conflicts’ (NIACs).²⁰ Other situations of political or diplomatic disputes between States or internal disturbances, isolated and sporadic acts of violence, tensions and acts of a similar nature are outside the remit of IHL, since they are not considered as armed conflicts.²¹ From the perspective of victims of armed conflict, the distinction between IACs and NIACs is irrelevant.²² A growing body of rules of customary international law of armed conflict is also increasingly narrowing the gap in the protection accorded to victims of IACs and NIACs.²³ However, IHL still primarily operates based on such distinction and accordingly, the classification of a particular conflict is generally taken as the *sine qua non* for invoking the relevant rules of IHL applicable to the conflict. It is imperative therefore that we first determine whether the situation in Ethiopia constitutes an armed conflict and then qualify it as either IAC or NIAC. At the outset,

²⁰ See J. Kleffner ‘Scope of Application of International Humanitarian Law’ in D. Fleck (ed.) *The Handbook of International Humanitarian Law* (3rd ed. Oxford University Press, 2013) 43; Terry D. Gill, ‘Rethinking the Scope of Application of International Humanitarian Law and its Place in the International Legal System’ (2022) 60, *Military Law and Law of War Review* 1-14.

²¹ See Art 1 (2), Additional Protocol II.

²² Accordingly, many have criticized the distinction as ‘unjustified’, ‘arbitrary’, ‘undesirable’ and something which ‘frustrates the humanitarian purpose of the law of war in most of the instances in which war now occurs’. G. Aldrich, ‘The laws of war on laud’, (2000) 94 *American Journal of International Law* 62; Ingrid Detter de Frankopan, *The Law of War* (Cambridge University Press, London, 2002) 49; C. Warbrick and P. Rowe, ‘The International Criminal Tribunal for Yugoslavia: The decision of the Appeals Chamber on the interlocutory appeal on jurisdiction in the Tadic case’, (1996) 45 *International & Comparative Law Quarterly* 698.

²³ On this point, the Appeal Chamber of the International Criminal Tribunal for Former Yugoslavia (ICTY) observed that ‘Since the 1930s, ... distinction (between ‘belligerency and insurgency’, i.e., between international and internal conflicts) became more and more blurred and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict. ... If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight’. *Prosecutor v. Tadic*, Appeal Chamber, 2 October 1995, para. 97.

though, it should be noted that Ethiopia is a State Party to the Four Geneva Conventions (1949)²⁴ and the two Additional Protocols²⁵, and major regional and international human rights treaties²⁶, which continue to apply during armed conflict situations.²⁷ Furthermore, Ethiopia has ratified the Cultural Charter for Africa pursuant to which it is obliged to ensure the protection of cultural property both in times of peace and war.²⁸

The Threshold Requirement

According to Common Article 2 to the Four Geneva Conventions international armed conflict constitutes all cases of declared war or of any armed conflict that may arise between two or more States regardless of the fact that either or both parties recognize or deny the existence of the war.²⁹ Accordingly, an international armed conflict is said to exist when one or more State(s) use(s) its armed force against (an)other

²⁴ It ratified the Conventions on 2 October 1949.

²⁵ It ratified the Additional Protocols on 8 April 1994.

²⁶ Ethiopia is a State Party to the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). At regional level, Ethiopia is also a Party to the African Charter on Human and Peoples' Rights.

²⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, paras. 24–25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, para. 106; *Coard et al. v. United States*, Inter-American Commission on Human Rights (IACo-mHR), Case No. 10.951, Report No. 109/99, 29 September 1999, para. 42.

²⁸ Article 27, Organization of African Unity (OAU), Cultural Charter for Africa (adopted in July 1974). Ethiopia deposited its instrument of ratification on 16 June 1977.

²⁹ Common Art 2 to GC I, GC II, GC III and GC IV (1949).

State(s) irrespective of the reasons advanced or the intensity of the conflict.³⁰ IACs do not depend on the existence of an armed resistance or military response from the other State. Furthermore, pursuant to Common Article 2 to the Four Geneva Conventions, rules of IHL regulating IACs also apply to all cases of partial or total occupation of the territory of a State by another, even if “the occupation meets with no armed resistance”. In other words, insofar as a State uses its armed group to invade, occupy or attack another State, an IAC is said to exist regardless of the fact that the latter State failed to resist or defend itself. What is rather important is that the former has engaged in such conduct violating the territorial integrity of the latter, contrary to the will and consent of the latter. It is also important to note that apart from the regular inter-state conflicts, Article 1(4) of AP I expands the definition of IACs to cover armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination.

On the other hand, NIACs occur when States fight against armed groups or armed groups fight against each other.³¹ In this regard, common Article 3 to the Four Geneva Conventions provides a residual definition to NIACs as one “not of an international character”. Similarly, Article 1 of AP II provides that the Protocol applies to:

all armed conflicts which are not covered by Article 1 of [AP I] and which take place in the territory of a High Contracting Party between

³⁰ Common Art 2 to the Four Geneva Conventions requires that the confrontation must be between ‘two or more of the *High Contracting Parties*’, clearly affirming that IACs happen between two or more States. As regards the intensity threshold, Pictet points out that the ‘first shot’ is adequate to trigger NIAC. See also Jean Pictet, *ICRC Commentary* GC I (1952) 6-7.

³¹ In comparison to Common Art 2, Common Art 3 to the Geneva Conventions talks about ‘*each party* to the conflict’, not High Contracting Parties, suggesting that NIACs do not necessarily involve States.

its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

As can be discerned from this provision, NIACs require some threshold of intensity (as regards the confrontation) and organization (of the armed group(s)). The armed group(s) should also exercise some control over a specific territory enabling them to engage in “a protracted armed violence”³² and implement or enforce rules of IHL. This requirement of a minimum degree of *organization* differentiates NIACs from ‘banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law’.³³ In this connection, international criminal tribunals developed a non-exhaustive (indicative) list of factors to determine the element of organization or being organized, such as the existence of a command structure; the military (operational) capacity of the armed group; its logistical capacity; the existence of an internal disciplinary system and the ability to implement IHL; and its ability to speak with one voice.³⁴ It is not enough that a ‘handful of [isolated] individuals’ rebel against the State ‘without coordination’ but there must be “an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for

³² *Prosecutor v. Dusko Tadić a/k/a 'Dule'*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (1995) IT-94-1-T, T.Ch. II (ICTY) 70.

³³ *Ibid*, §562, see also *Prosecutor v. Akayesu* (1998) ICTR-96-4-T (International Criminal Tribunal for Rwanda) [620]; *Prosecutor v Lubanga*, Decision on the Confirmation of Charges (2007) ICC-01/04-01/06-803-tEN (International Criminal Court) 233.

³⁴ *Prosecutor v Boškoski and Tarculovski* (2008) IT-04-82-T (ICTY) 197–203, see also *Prosecutor v Fatmir Limaj, Haradin Bala & Isak Musliu* (2005) IT-03-66-T (ICTY) [90]; *Prosecutor v Ramush Haradinaj et al.* (2008) IT-04-84-T (ICTY) 60.

the Geneva Conventions”.³⁵ Accordingly, the laws of NIACs do “not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts”.³⁶

On the other hand, in *Prosecutor v. Ramush Haradinaj et al.*, the International Criminal Tribunal for Former Yugoslavia (ICTY) summarized the relevant factors to determine the *protracted* nature of the conflict which, according to the Trial Chamber, relates to the intensity of the conflict as follows:

Trial Chambers have relied on indicative factors relevant for assessing the "intensity" criterion, none of which are, in themselves, essential to establish that the criterion is satisfied. These indicative factors include the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and caliber of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.³⁷

³⁵ Jean Pictet (ed.), *Commentary: IV Geneva Conventions of 12 August 1949* (International Committee of the Red Cross 1958) 35; see also Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross & Martinus Nijhoff 1987) 1351.

³⁶ Art 2 (2) AP II.

³⁷ *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Judgment, April 3, 2008, Case No. IT-04-84-T, para 49.

3. The Application of International Humanitarian Law to the Conflict in Ethiopia

Among the various questions the Tigray conflict evokes is the question of whether we have an armed conflict of international or non-international character. In other words, do we have one or more IAC(s) or NIAC(s) or both IAC(s) in parallel? How should we characterize the relatively protracted and more intense armed conflict between the TPLF, and the Ethiopian Government, Eritrea and its local allies?

It is now beyond contention that the war between TPLF, on the one hand, and the ENDF, EDF and Amhara and Afar regional forces, on the other hand, constitutes a typical case of NIAC. The war has been protracted for two years, the intensity of the actual military confrontations has been of high magnitude, involving various armed forces, and the weapons that have been used for the conduct of hostilities are of high caliber and combat weapons, generally used by armed forces. The human and material cost of the war has also been enormous. It is reported that more than two million people have been displaced in Amhara, Tigray and Afar regions and hundreds of thousands are estimated to have died.³⁸ Ironically, the war involved former and current members of the ENDF and regional paramilitary forces with the participation of over a million active combatants from both sides. Additionally, the African Union and the United Nations through their high officials and respective Security Councils have been seized of the matter. The

³⁸ See Bobby Ghosh, 'The World's Deadliest War Isn't in Ukraine, But in Ethiopia', *Bloomberg* (22 March 2022) < <https://www.bloomberg.com/opinion/articles/2022-03-22/ethiopia-s-war-toll-grows-as-the-world-looks-away> > accessed on 1 November 2022.

UN Security Council has had fifteen formal and informal meetings on the situation in Tigray showing the severity of the conflict.³⁹

Furthermore, the non-State armed group, that is, TPLF, has also had territorial control over Tigray region, at least, since June 2021.⁴⁰ It enacted legislation, for example, criminalizing armed robbery and ‘collaborating with the enemy’⁴¹, demonstrating that it had not only an effective control of the region but also was capable of promulgating and enforcing laws and was in a position to implement IHL norms. In the Pretoria Peace Agreement, TPLF also committed itself to respect IHL treaties ratified by Ethiopia,⁴² further showing its willingness and capacity to ensure full adherence to the laws of war among its combatants. Consequently, it can be submitted that a situation of NIAC has existed between the government and TPLF forces.⁴³ At this point, it should be

³⁹ See the list of meetings here <<https://www.securitycouncilreport.org/ethiopia/>> accessed on 14 October 2022.

⁴⁰ Pursuant to the Pretoria Agreement, TPLF agreed that its administration will be disbanded and the federal government will take control of the region and establish a transitional administration pending elections. This might end up usurping TPLF’s territorial control of Tigray if it is not going to retain its dominance in the transitional administration.

⁴¹ See ‘CPJ urges Tigrayan rebels to release five detained journalists’, *Agence France-Presse* (Addis Ababa, 22 July 2022); See also ‘Robbery and Theft are disturbing Tigray’s Towns’ *BBC Amharic* (4 June 2022) <<https://www.bbc.com/amharic/articles/c2j8x5y0yylo>> accessed on 28 June 2022.

⁴² See *supra* (n 2), 19.

⁴³ On the basis of Article 1 of AP I and relying on what TPLF has consistently claimed, that is, it is fighting for self-determination of the Tigrayan people, one may contend that the war is an IAC. Nonetheless, even if one were to accept TPLF’s claims, the import of Article 1 of AP I does not seem to cover cases of internal self-determination of the kind existing in Ethiopia. Although TPLF occasionally mentioned that it would consider to have a referendum for Tigray’s independence, it has not pushed for that in any of its official communications. Furthermore, AP I refers to a situation where ‘peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination’ and none of these (colonial domination, alien occupation or a racist regime) exists in Ethiopia to make the war an IAC. On the

appreciated that the involvement of EDF forces on the side of the government does not change the categorization of the conflict but rather makes it “an internationalized” NIAC.⁴⁴ This would be different if EDF or any other foreign State was fighting along TPLF forces in which case, the nature of the conflict would be an IAC and the applicable IHL rules would be those governing IAC as well.

4. The Role of IHL in Building Peace

Generally speaking, IHL is wartime law. But it also occasionally applies in peacetime as a precaution or preparatory measure to reduce the potential effect of war in the event it occurs in the future⁴⁵ or when it occurs, it may continue to apply even after cessation of hostilities where victims of armed conflicts continue to seek its protection.⁴⁶ There is therefore not much dispute on the occasional extended application of

historical genesis of Article 1 of AP I, see Yves Sandoz, *Christophe Swinarski and Bruno Zimmerman (eds), Commentary on the Additional Protocols* (ICRC, Geneva, 1987).

⁴⁴ See on this, Hans-Peter Gasser, ‘Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon’, (1982) 33(1) *American University Law Review* 145–159.

⁴⁵ IHL requires States to take certain measures such as dissemination of knowledge of IHL in peacetime to ensure the respect of IHL in the event that an armed conflict occurs. Those rules requiring the use of distinctive emblems to specific persons, objects and circumstances also apply in peacetime. See Art 47 GC I, Article 48 GC II, Article 127 GC III, Art 144 GC IV, Art 83 of AP II. For a comprehensive overview, see also Marco Sassòli, *International Humanitarian Law: Rules, Solutions to Problems Arising in Warfare and Controversies* (Edward Elgar Publishing, 2019) 117–125.

⁴⁶ For example, Art 118 of the Third Geneva Convention ordains that ‘Prisoners of war shall be released and repatriated without delay *after* the cessation of active hostilities’ (emphasis added). There is therefore a possibility that the rules of IHL concerning the protection of Prisoners of War continue to apply after the formal conclusion of a peace agreement ending active hostilities. In NIAC, IHL also requires States to offer amnesty, at the end of the war, to persons who are detained for having participated in active hostilities (see Art 2 of AP II).

IHL to places or situations where there might no longer be an active conflict.

However, the potential contribution of IHL to creating or building peace at the end of hostilities is not much explored in the literature.⁴⁷ The proper application and full compliance with IHL, the argument is, will likely generate not only conditions for smooth cessation of hostilities but also promote the prospect of peace.⁴⁸ The High Contracting Parties of the AP I seem to have taken cognizance of this when they recalled that “every State has the duty to refrain from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations”⁴⁹ and proclaimed “their earnest wish to see peace prevail among peoples”.⁵⁰

⁴⁷ The only scholarly work that the writer found are the articles authored by César Rojas-Orozco and Elizabeth Salmón in the international review of the Red Cross, which discuss the contribution of IHL to peace processes in Southern America. See César Rsojas-Orozco, ‘The role of international humanitarian law in the search for peace: Lessons from Colombia’, (2021) *International Review of the Red Cross*, No. 914, Elizabeth Salmón, ‘Reflections on International Humanitarian Law and Transitional Justice: Lessons to Be Learnt from the Latin American Experience’, (2006) 88 *International Review of the Red Cross*, No. 862.

⁴⁸ Salmón rightly pointed out that ‘There is unquestionably a close link between the way the parties act during an armed conflict and the chances of achieving peace and reconciliation while restoring the rule of law once the hostilities have ended. Compliance with or violations of IHL will undoubtedly influence the conduct of the judiciary, the situation of the victims and the correlation of forces in the post-conflict society’; *Ibid* 327-328.

⁴⁹ One of the principal purposes of the United Nations is ‘[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace’; Art 1 (1) (2) of the United Nations Charter, 1945.

⁵⁰ *Preambular* para 1, AP I.

Currently, there is a growing acceptance among humanitarian actors and States that IHL plays a vital role in creating peace or the conditions required for peace.⁵¹ As a result, national and international efforts aimed at ending war and facilitating peace processes often refer to the importance of strict adherence to the norms of IHL. For instance, in almost all of its resolutions in relation to countries where there are active hostilities, the UN Security Council consistently called on parties to conflicts to fully comply with their obligations under IHL and at the same time, engage in broad-based peace efforts.⁵² This is yet another recognition of the important nexus between respect for IHL norms and peace-building. In both IACs and NIACs, whenever parties to a conflict fail to comply with IHL, there is risk of prolonging the conflict and engendering long-term disastrous effects that will eventually impede progress towards peace. Humanizing war by complying with the laws of war creates an environment where peace can easily return and flourish.⁵³ As the experiences of some countries have shown, some rules of IHL also play an instrumental role in facilitating the resolution of conflicts and promotion of peace.⁵⁴

In the next sub-section, the article identifies and discusses three areas where IHL will help in either facilitating or building a lasting peace by focusing on the conflict in Tigray. In this connection, it should be observed that most of the customary rules of IHL equally apply to both

⁵¹ Peter Maurer, 'The Contribution of Humanitarian Action to Peace', *SIPRI Forum on Peace and Development*, Stockholm, 4 May 2019, available at: <www.icrc.org/en/document/where-humanitarian-action-meets-peace-building> accessed on 22 October 2022.

⁵² See, e.g., UN Security Council Resolution on Yemen, Resolution 2624 (2022) 28 February 2022; Resolution on Syria, Res. 2268 (2016) 26 February 2016; Resolution on Libya S/RES/25702570 (2021) 16 April 2021.

⁵³ César Rojas-Orozco, *The role of international humanitarian law in the search for peace* (2021) (n 47).

⁵⁴ *Ibid.*

NIAC and IAC and contribute to peace efforts regardless of the nature of the conflict.⁵⁵ Consequently, reference will be made to such rules to the extent that they are applicable to the conflict in Ethiopia.

5.1. Detention and Treatment of Detainees

a) Arbitrary detentions by all parties to the conflict

Since the first day it erupted, i.e., 4th of November 2020, the conflict in Tigray has been marked by mass detention of both civilians and security and military officers. Immediately after attacking the Northern Command of the ENDF, the first thing that TPLF did was seizing the heavy military equipment and detaining thousands of ENDF soldiers. The reason for the mass detention of members of ENDF was purportedly to make them defect and join the side of TPLF or prevent them from fighting on the side of the Federal government.

In the first weeks into the conflict, according to the findings of the Joint Investigation Team (JIT) of the EHRC and OHCHR, TPLF also engaged in mass detention of ethnic Amharas in the disputed areas of Humera, Samre and Maicadra for their perceived support for the Federal government and forcefully transferred them to Tigrayan towns such as Shire, Axum, and Mekelle.⁵⁶ TPLF also claimed to have captured thousands of captives during its counter-offensives against ENDF in June 2021. Similarly, the ENDF, EDF, Amhara forces and other security forces arrested and detained, in different parts of the country, thousands of Tigrayan civilians who were perceived to have

⁵⁵ Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2009) 344 ('ICRC Customary Law Study (2009)').

⁵⁶ EHRC and OHCHR Joint Investigation Report, paras. 145-146.

affiliation with TPLF.⁵⁷ They also captured members of Tigrayan armed militia in various detention facilities in Tigray, after most of Tigray became under the control of ENDF and its allied forces in the first months of the war and after the second resumption of hostilities.⁵⁸

b) Legality of detentions in armed conflicts

There is no explicit prohibition of arbitrary detentions in any of the provisions of the Four Geneva Conventions or the Additional Protocols. However, there is a wide consensus that customary rules of IHL forbid arbitrary detention of individuals in armed conflict situations.⁵⁹ International human rights law also continues to apply during armed conflict and as such, the prohibition of arbitrary detention has an alternative legal basis in treaty law.⁶⁰ Arbitrary detention is also deemed to be incongruent with the requirement of humane treatment stipulated in the various rules of international and non-international armed conflict.⁶¹

⁵⁷ Leni Kinzil, 'Ethiopia: Mass arbitrary arrests target Tigrayans, says UN rights office', *UN Press Release* (16 November 2021).

⁵⁸ EHRC and OHCHR Joint Investigation Report, paras. 148-150

⁵⁹ See, Rule 99, ICRC Customary Law Study (2009).

⁶⁰ See, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, I. C. J Reports (1986), paras. 24-25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I. C. J. Reports (2004), para.106; UN Human Rights Committee, *General Comment 31* (2004), para. 11; Concluding observations of the Human Rights Committee, Israel CCPR/CO/78/ISR 5 August 2003, para. 11; *Coard et al. v. United States*, Inter-America Human Rights Commission, Case 10.951, Report N° 109/99, September 29, 1999), para. 42; *Hassen v. The United Kingdom*, European Court of Human Rights, judgment 16 September 2014, para. 77 (all affirmed the applicability of IHRL in times of armed conflicts).

⁶¹ Common article 3 to the Four Geneva Conventions, Art 13 GC III, Art 27; Fourth Geneva Convention (GC IV), Art 75(1) Additional Protocol to the Four Geneva Conventions (1977) (AP I), Art 4(1) Additional Protocol to the Four Geneva Conventions (1977) (AP II). See, *ICRC Customary Law Study* (2009) 344.

In IACs, regardless of the legality of the war or reasons for fighting, parties (i.e., States) have the unquestionable right to detain enemy combatants to prevent them from re-joining the battlefield and/or those civilians posing a threat to their national or military security.⁶² In comparison, in NIACs, both Common Article 3 of the Geneva Conventions and AP II regulate detention as a fact without expressly prohibiting or allowing it. The reason is that States do not want to cede their sovereign power to use force to non-State armed groups, certainly not by expressly authorizing detention to be carried out by such groups.⁶³ By virtue of their sovereignty and the concomitant power of monopoly over the means of violence, States retain the exclusive legitimate right to detain individuals who threaten their security or existence. This automatically renders the very existence of non-state armed groups inherently illegal and more so, their right to use force or detain enemy (government) forces who they capture in the midst of war.⁶⁴

⁶² See, Arts 21 and 118, GC III and Art 11 of Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (1907). This may itself be considered as a national security measure in its wider sense. As rightly pointed out by ICRC, POWs ‘may use force, i. e., target and kill or injure other persons taking a direct part in hostilities and attack military objectives. Because such activity is obviously *prejudicial to the security of the adverse party*, the Third Geneva Convention provides that a detaining State ‘may subject prisoners of war to internment’ (emphasis added). (See, ‘Internment in Armed Conflict: Basic Rules and Challenges International Committee of the Red Cross (ICRC)’ *Opinion Paper*, (November 2014) 4. Unlike in the case of civilian internees, the State is not required to show the existence of necessity to detain POWs. Necessity is presumed and no judicial review is required. Note however that POWs may also be detained if they are lawfully prosecuted or have been lawfully convicted of crimes. Arts 85, 99, 119, 129 GC III.

⁶³ For an exhaustive analysis of the issue, see Zelalem Mogessie Teferra, ‘National Security and the Right to Liberty in Armed Conflict: The Legality and Limits of Security Detention in International Humanitarian Law (2016) *International Review of the Red Cross*, vol. 98 966-971.

⁶⁴ Professor Sassòli, the leading expert in the field, stated that ‘[f]or a long time, States took the position that such conflicts are internal affairs exclusively governed by domestic law.

Nonetheless, it is a common reality that non-state actors also engage in detention of enemy forces of the State or that of other non-State groups as well as civilians who they suspect of supporting the adversary. As mentioned above, in the war in Tigray, too, TPLF, a non-State armed group, has detained thousands of ENDF soldiers, and civilians whom it suspected of having affiliation with the federal government. This is despite the fact that TPLF did not have the right to do so and its very existence was viewed by the Federal government as illegal.⁶⁵ It is in recognition of this reality that both Common Article 3 of the Four Geneva Conventions and AP II focus more on the humane treatment of detainees than the permissibility of detention by non-State armed groups. In this regard, all parties to NIAC are required to treat all detainees humanely without discrimination on the basis of their race, color, religion, faith, sex, birth, health or any other similar ground.⁶⁶ Accordingly, violence to life and person, such as murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; collective punishment, rape, terrorism, slavery, the passing of

As for combatant and POW status, no State accepts that its citizens can wage war against their own government. No government would renounce in advance the right to punish its own citizen for participating in a rebellion which would be necessary to apply all of IHL of IACs to the situation'. Sassòli (n 61), 209-210.

⁶⁵ In May 2021, the Ethiopian parliament designated TPLF as a terrorist group terminating its legal personality as a legitimate group. See 'Ethiopia Declares Tigray, Oromia Groups Terrorist Organizations', *Bloomberg News*, 6 May 2021, < <https://www.bloomberg.com/news/articles/2021-05-06/ethiopia-declares-tigray-romia-groups-terrorist-organizations?leadSource=uverify%20wall> > accessed on 4 October 2022. However, in the Peace Agreement, the Federal government agreed to 'Facilitate the lifting of the terrorist designation of the TPLF by the House of Peoples' Representatives'; see Art 7 (2) (c) of the Pretoria Peace Agreement.

⁶⁶ Common Art 3, Four Geneva Conventions (1949); Art 2 (1) AP II.

sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court are prohibited.⁶⁷ Any conduct that flouts this prohibition potentially entails State responsibility as well as individual criminal responsibility.⁶⁸ Consequently, arbitrary detentions and mistreatment of detainees reported to have been carried out by all parties to the conflict in Ethiopia violate not only established rules of IHL but also possibly constitute a war crime in both international law and domestic law.⁶⁹

c) Rules of IHL governing detention and peace efforts

The rules of IHL regulating detention and treatment of detainees, as other rules of war, seek to preserve humanity during war. The respect for these rules minimizes the potential social, economic and psychological impacts of war and increases the chance for reconciliation between warring parties and making of peace. On the contrary, when parties engage in arbitrary detentions or mistreatment of detainees by disregarding IHL norms, the road to peaceful resolution of the conflict will be hampered by resentment and the desire to avenge members of the enemy. Most modern NIACs are often fought by States and groups

⁶⁷ *Ibid*, Arts 4 (1)-7 of AP II, Rules 87-105, ICRC Customary Law Study (2009). See, also Art 75 of AP I, which is also considered to offer basic human rights guarantees that form part of customary international law, hence, applicable to both NIAC and IAC; see Inter-American Commission of Human Rights, 'Report on Terrorism and Human Rights' (2002) OAS Doc No OEA/Ser.L/V/II.116. Doc.5/1, para 64.

⁶⁸ *Prosecutor v. Joseph Mpambara*, The Hague District Court, 09/750009-06 and 09/750007-07, 23 March 2009, para 12; see, also *Prosecutor v. Tadic* case, ICTY, Trial Chamber, para 610.

⁶⁹ See, Arts 7 and 8 of Rome Statute of the International Criminal Code (1998) (Note that Ethiopia is not a State party to the Rome Statute but the definitions of international crimes stipulated therein largely reflect the ones recognized in international customary law (see Rule 156 ICRC Customary Law Study). See, also Arts 269-273, 276, 279 of the Ethiopian Criminal Code (2004).

which identify themselves with a particular ethnic or religious affiliation, as is currently the case in Ethiopia. This makes the conflicts partly a function of identity-based emotions. The more members, real or perceived affiliates, of one party to a conflict are arbitrarily detained or subjected to inhuman and degrading treatments in detention, the higher the collective hostility and aversion to any path for peaceful co-existence.

In NIACs, at the end of hostilities, IHL encourages authorities “to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained”.⁷⁰ This is to promote “gestures of reconciliation which can contribute to re-establishing normal relations in the life of a nation which has been divided”.⁷¹ The objective is to create conditions for compromise and peace. Indeed, in one of its resolutions on Syria, the UN Security Council has recognized that the early release of arbitrarily detained persons is a critical trust-building measure to advance a peace process.⁷²

Unfortunately, the Pretoria Peace Agreement does not talk about release of persons detained by both the government and TPLF. Yet, one of the objectives of the Agreement is to “ensure a lasting settlement of the conflict”⁷³, and this allows the parties to consider various measures including the release of detainees as part of their confidence-building

⁷⁰ See, Article 6 (5) AP II.

⁷¹ Yves *et.al* (n 43), para 4618.

⁷² It called on all states to use their influence with the government of Syria and the Syrian opposition to advance the peace process, confidence building measures, including the early release of any arbitrarily detained persons, particularly women and children, and implementation of the cessation of hostilities; see UN Security Council Resolution, S/RES/2268 (2016), Adopted by the Security Council at its 7634th meeting, on 26 February 2016.

⁷³ See, Art 1 (5) of Pretoria Peace Agreement.

measures.⁷⁴ In fact, two weeks before the conclusion of the peace agreement, TPLF had announced that it released “thousands of Ethiopian and Eritrean troops” that it had captured during the war.⁷⁵ As far as civilian detainees and protection of detainees against mistreatment are concerned, in view of the parties’ agreement to “uphold applicable international humanitarian law instruments to which Ethiopia is a party” and that Ethiopia is a party to all the Four Geneva Conventions and the Additional Protocols, both the TPLF and the government will remain bound by, specifically, Common Article 3 and the provisions of AP II. In other words, both parties remain under obligation to protect detainees under their control from outrages against their human dignity. As part of the peace process, the government may also invoke Article 6 (5) of AP II and grant the broadest possible amnesty to the detainees and

⁷⁴ Art 7 of the Agreement lists an apparently exhaustive list of confidence-building measures that should be taken by both the TPLF and the government. This notwithstanding, there is still nothing preventing them from releasing individuals that they have detained, civilians or combatants.

⁷⁵ ‘TPLF claims to free ‘thousands’ of captured Ethiopian, Eritrean troops’, *The East African*, 22 October 2022 <<https://www.theeastafrikan.co.ke/tea/rest-of-africa/tplf-claims-it-freed-thousands-of-captured-troops-3994078> > accessed on 3 November 2022. In May 2022, TPLF had similarly said that it released 4,208 ‘prisoners of war’ in amnesty. See, ‘Ethiopia’s Tigray forces announce release of thousands of POWs’, *Al Jazeera*, 20 May 2022. <<https://www.aljazeera.com/news/2022/5/20/ethiopia-tigray-forces-announce-release-of-4000-prisoners>> accessed on 3 November 2022. Note that referring the detainees as Prisoners of War (PoWs) is technically and legally wrong. To be entitled to a prisoner-of-war status in IHL, captured persons must be lawful combatants entitled to combatant’s privilege—which offers them the right to fight and the immunity from punishment for crimes constituting lawful acts of war such as killing enemy combatants. Such status is only given to combatants in IACs. Art 4 of the GC III provides a definitive list of those who are entitled to have a POW status. Art 43 (2) of AP I clearly states that combatants which acquire a POW status ‘have the right to participate directly in hostilities. There is no corresponding provision in Common Art 3 to the Four Geneva Conventions or AP II. In other words, combatants in NIAC do not have a POW status, thus, do not enjoy the right to participate in hostilities or immunity from criminal charge for participating in hostilities.

release them. This will have an effect of promoting trust, accelerating reconciliation and ultimately building a durable peace.

5.2. Conduct of Hostilities

The second area where IHL or respect of it would play an instrumental role in facilitating the end of war and promoting peace is conduct of hostilities. Again, the reason partly lies in the direct correlation between emotions and conflicts and peace. Recent studies in the field of social psychology have confirmed that emotions and conflicts are correlated, one causing, aggravating or sustaining the other.⁷⁶ In multi-ethnic/racial and multi-religious societies, as in Ethiopia, emotions play a role both at the start and in the course of conflicts particularly in shaping attitudes and behaviors that will ultimately determine or, at least, influence subsequent peace efforts.

When war is conducted within the strictures of humanity and in accordance with humanized rules of engagement, its effects on civilians and civilian objects as well as incapacitated combatants will be limited. Quite the contrary, if wars are carried out through means and methods that are against the basic principles of humanity enshrined in the laws and customs of war, not only will they have a lasting effect on those who directly participate in the war but also on the vulnerable sections of the society such as women, children, the elderly and other members of the civilian population. In such instances, emotions run deep and the

⁷⁶ See, Cohen and Insko 'War and peace: Possible approaches to reducing intergroup conflict', (2008) 3 *Perspectives on Psychological Science* 87-93, Eran Halperin, Keren Sharvit, and James J. Gross, 'Emotion and Emotion Regulation in Intergroup Conflict: An Appraisal-Based Framework' *Psychology Press* (2010); D. Bar-Tal, E. Halperin, & J. de-Rivera, 'Collective emotions in conflict situations: Societal implications', (2007) 63 *Journal of Social Issues* 441-460; V. Cheung-Blunden, & B. Blunden, 'The emotional construal of war: Anger, fear and other negative emotions', (2008) 4 *Peace and Conflict – Journal of Peace Psychology* 123-150.

social fabrics that serve as a glue for the society would be torn apart, thereby, eventually creating a conducive environment for continued cycle of retaliation and violence.

Wars fought without consideration of the fundamental principles of humanity would also tend to engender inter-communal hostility, rendering almost every member of the society an actor in the conflict. Consequently, where wars involve indiscriminate attacks on civilians and civilian objects, destruction of cultural property, denial of humanitarian access to the civilian population and/or use of mass starvation as a means of warfare, etc., peace becomes an elusive and a complicated project. On the other hand, wars conducted with due compliance with basic moral rules of engagement limit disagreements and animosities to political elites and the overall impact of the war on the society becomes minimal. In other words, the ordinary people will be *relatively* insulated from the full brunt of emotional and physical vices of war. This allows the society to preserve its social fabrics and stand together for peace. In recognition of this, the rules of IHL regulating conduct of hostilities are meant to humanize warfare by maintaining a balance between military necessity and humanity. It is generally accepted that the primary objective of parties during war is “to weaken the military forces of the enemy”.⁷⁷ The rules of conduct of hostilities accordingly seek to ensure that parties do not engage in any action that is not necessary to achieve this objective. Most of these rules have achieved the status of

⁷⁷ “The only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy”; see, Saint Petersburg Declaration on Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, 29 November / 11 December 1868.

customary international law, and nearly all of them are deemed to be applicable to both IACs and NIACs.⁷⁸

The rules of conduct of hostilities have four major pillars: the principle of distinction, the precautionary principle, the principle of proportionality and the prohibition against the use of specific methods and means of warfare. Although none of these rules expressly mentions peace as their specific objective, the full compliance with the same sets the ground for peace.

i) *The Principle of Distinction*

The principle of distinction requires parties to a conflict to distinguish⁷⁹ between civilians⁸⁰ and combatants,⁸¹ between legitimate military objectives and civilian objects⁸² and to desist from engaging in indiscriminate

⁷⁸ Rules 1-86, ICRC Customary Law Study. See, also *Prosecutor v. Blaskic*, ICTY, Appeal Chamber, 29 July 2004, para 110; *Prosecutor v. Gali*, ICTY Trial Chamber, 5 December 2003, para 45 (relating to the principle of distinction).

⁷⁹ Arts 48, 51(2) and 52(2) of AP I; Art 13(2) AP II and Rule 1 of ICRC Customary Law Study.

⁸⁰ Rule 5 of the ICRC Customary Law Study defines civilians as 'persons who are not members of the armed forces and the civilian population comprises all persons who are civilians'.

⁸¹ Combatants are those who are members of the regular armed forces of a State in IAC (see, Arts 43 (1) and 50 (1) AP I) or in NIAC, those who directly participate in hostilities (see, Common Art 3, which refers to 'Persons taking no active part in the hostilities').

⁸² Military objectives are those 'objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage'. On the other hand, 'Civilian objects are all objects that are not military objectives' and enjoy protection against attack, 'unless and for such time as they are military objectives'. Rules 7-10, ICRC Customary Law Study. See, also F Kalshoven and L. Zegveld, *Constraints on the Waging of War* (ICRC, 2001) 99; Nils Melzer, *ICRC's Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (ICRC, 2009), See, also Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge University Press, 2004) 152.

attacks.⁸³ Indiscriminate attacks include those directed at non-military objectives, or that employ a method or means of combat which cannot be directed at or whose effects cannot be limited to a specific military objective.⁸⁴ In this vein, IHL offers a specific protection to a particular group of individuals, objects and places. Medical, religious, and humanitarian relief personnel as well as civilian journalists are among those persons who enjoy special protection against attacks.⁸⁵ Importantly, in both IACs and NIACs, IHL also forbids attacks against personnel involved in a peace-keeping mission, hence, directly contributing to efforts intended to bring about or maintain a sustainable peace in conflict areas.⁸⁶ Among those objects and places which are given special protection involve objects used for humanitarian relief operations, cultural property, the natural environment, works and installations containing dangerous forces, protected and militarized zones and non-defended localities.⁸⁷

ii) *The precautionary principle*

The precautionary principle complements the principle of distinction and demands that parties to a conflict take all feasible preventive measures to protect the civilian population and civilian objects under their control against the effects of attacks.⁸⁸ It requires that the military targets, the time and method of attacks are carefully chosen and must

⁸³ The International Court of Justice referred to distinction as one of the 'cardinal... intransgressible principles of international customary law' *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep 226, ICGJ 205 (ICJ 1996), 8th July 1996, para 434.

⁸⁴ Rules 11-12, *ibid*. The ICTY confirmed that the principle of distinction reflects customary international law. See, also Anicée Van Engeland, 'The Distinction between Civilians and Combatants' in *Civilian or Combatant? A Challenge for the 21st Century*, Terrorism and Global Justice Series (Oxford Academic, 2015)

⁸⁵ Rules 25-31, and Rule 34, ICRC Customary Law Study (2009).

⁸⁶ Rule 33, *ibid*.

⁸⁷ Rules 32, 35-42, *ibid*.

⁸⁸ Rules 15, 22, ICRC Customary Law Study (2009).

be designed to minimize risks of collateral damage to civilians and civilian objects. The precautionary principle entails that the commanders in charge of military operations (both attackers and defenders) must take “constant care” to spare civilians or civilian objects from attacks.⁸⁹ Accordingly, each time they decide to carry out a military attack, commanders have to verify that the targets are military objectives.⁹⁰ They must also carefully choose weapons and methods of warfare that inflict the least damage to the civilian population and civilian objects. Where circumstances allow, effective warnings must be given before each operation with a view to offering civilians the opportunity to protect themselves.⁹¹ The precautionary principle further prohibits using civilians as human shields.⁹²

iii) Principle of proportionality

The other cardinal principle governing conduct of hostilities is the test of proportionality. The principle of proportionality is encapsulated in Article 51(5) (b) AP I, which States that a military target cannot be attacked if the expected risk of damage to civilians or civilian property exceeds the military advantage to be obtained from the attack. As such, it requires those in charge of military operations to make a projected assessment of the collateral damage on civilians and civilian objects and compare such damage with the expected military advantage that a particular attack will bring about. Where the expected damage is excessive in relation to the anticipated military advantage, the military commanders should rescind the plan to launch the attack. Obviously, there

⁸⁹ See Article 57 (1) AP I. The reference to ‘constant care’ affirms that there must be a regular and continuous, not just a one-off or intermittent, assessment of the impact of intended military operations on civilians and civilian objects.

⁹⁰ *ibid.*

⁹¹ *ibid.*

⁹² Art 51(8), *ibid.*

is always a risk of miscalculation in such an exercise but parties to a conflict should always act in good faith and endeavor to minimize such risk.⁹³

It should be appreciated that the principles of precaution and distinction basically attempt to draw a line between military objectives and non-military objectives and require parties to a conflict to distinguish the two and spare non-military objectives from attacks. In comparison, the principle of proportionality goes beyond protecting unlawful targets (non-military objectives). It particularly tries to limit the effects of conduct of hostilities when they are directed against lawful targets. Accordingly, if the target attacked is not a lawful target, e.g., if it is a civilian or a civilian object, proportionality does not have to be assessed and, as indicated earlier, any intentional direct attack against a non-military objective, is a violation of IHL and likely to be a war crime.

iv) The prohibition of specific methods and means of warfare

A major part of the law of the conduct of hostilities is the regulation of the choice of means and methods of warfare. IHL outlaws some methods or means of warfare both in IACs and NIACs and thus, the discretion of parties to employ a particular means or method is not unbridled. Notably, it prohibits ordering or threatening that no quarter will be given,⁹⁴ the use of starvation of the civilian population as a method of warfare⁹⁵, uses of war against protected persons and objects⁹⁶, improper

⁹³ William J. Fenrick, 'Targeting and proportionality during the NATO bombing campaign against Yugoslavia' (2001) 12 *European Journal of International Law* 501.

⁹⁴ Rule 46, ICRC Customary Law Study, Art 40 AP I, Art 4 AP II.

⁹⁵ Rule 53, ICRC Customary Law Study, Art 54(1) of AP I, Art 14 AP II; also see Rule 54 of the Study and Article 4 (2) AP II.

⁹⁶ Rule 57, ICRC Customary Law Study (2009).

use of the white flag of truce or distinctive emblems of the Geneva Conventions or flags, military emblems, insignia and uniforms of the adversary and recourse to perfidy.⁹⁷ Furthermore, IHL prohibits the use of weapons that are of a nature to cause superfluous injury, unnecessary suffering or those which are by nature indiscriminate.⁹⁸

Two more related issues pertinent to the Ethiopian conflict are also prohibition of pillage and access to humanitarian aid both of which have been prominent and controversial. When it comes to pillage and humanitarian access, IHL has in fact relatively clearer provisions. It is generally accepted in international customary law that pillage is prohibited both in NIACs and IACs⁹⁹ and parties to a conflict “must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control”.¹⁰⁰ The Fourth Geneva Convention specifically requires that States must “allow the free passage of all consignments of medical and hospital stores” intended only for civilians and “the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases”.¹⁰¹ Similarly, Additional Protocol I expands this obligation to cover “rapid and unimpeded passage of all relief consignments, equipment and personnel”.¹⁰² Parties shall also not “divert relief consignments from the purpose for which they are intended or delay their forwarding, except in cases of

⁹⁷ Rules 58-65, *ibid*.

⁹⁸ Rules 70-71, *ibid*. See, the details of weapons the use of which is banned by IHL in Rules 72-86, *ibid*.

⁹⁹ Rule 52, ICRC Customary Law Study (2009), Article 4(2)(g) AP II.

¹⁰⁰ Rules 55-56, ICRC Customary Law Study.

¹⁰¹ Fourth Geneva Convention, Art 23

¹⁰² Art 70(2), AP I.

urgent necessity, in the interest of the civilian population concerned”.¹⁰³

As far as the contribution of all this to peace is concerned, the importance of the rules of IHL governing conduct of hostilities cannot be overemphasized. Indeed, one can see this in the Pretoria Peace Agreement and the Nairobi Declaration signed by the TPLF and the Ethiopian government. Both agreements prescribe that parties shall ensure the protection of civilian institutions, the civilian population, civilians, including vulnerable groups, from attacks, in accordance with the applicable rules of IHL and international human rights law.¹⁰⁴ The Pretoria Peace Agreement specifically requires Parties to condemn any act of sexual and gender-based violence, violence against children, girls, women and the elderly, including recruitment and conscription of child soldiers.¹⁰⁵ Additionally, the two agreements provide for unhindered humanitarian access to all persons in need of assistance and strictly limit the use of humanitarian aid exclusively for humanitarian purposes.¹⁰⁶ Parties are particularly directed to cooperate and facilitate the delivery of humanitarian reliefs, including by ensuring the unimpeded movement of humanitarian aid workers and organizations.¹⁰⁷ It is therefore evident from the declared commitment of both parties that

¹⁰³ Rule 55 ICRC Customary Law Study (2009), Art 23 (a) GC IV and Art 70 of the 1977 AP I.

¹⁰⁴ Art 2 (d), Pretoria Peace Agreement and Art 3 (3.1) (a), the Nairobi Declaration.

¹⁰⁵ Art 4 (2), Pretoria Peace Agreement. Note that IHL protects these vulnerable groups based on their specific needs. See, Rules 134-138, ICRC Customary Law Study (2009); see, also Art 78 of AP I, Art 77(2) and Art 4(3)(c) of AP II.

¹⁰⁶ Art 5(4) of the Pretoria Peace Agreement and Art 4 (a) of the Nairobi Declaration.

¹⁰⁷ Art 5 (1), *ibid*, Art 4 (f), *ibid*.

in the absence of unhindered humanitarian access and adequate protection of civilians and civilian objects from attacks, the journey towards peace will not go far.

5.3. Transitional Justice

The other area where IHL contributes to fostering peace in (post) conflict situations is in relation to transitional justice. It is generally accepted that IHL has a role in the achievement of the four pillars of transitional justice, namely, truth, justice, reparations, and institutional reform and ultimately, to bring about reconciliation.

Several rules of IHL have pertinence to facilitating the process of transitional justice by directing parties to take some measures that support the search for the truth. For instance, IHL requires parties to search for, collect, evacuate and make identification and keep records of captured, missing and dead persons.¹⁰⁸ It also contains rules protecting the dead against despoliation and mutilations, requiring proper disposal of the dead and whenever possible, the return of remains and personal effects of the dead.¹⁰⁹ These measures are very important to families in their search for the truth and their effort to close the chapter of grief that would naturally come from not knowing the fate of their beloved ones.

IHL also contributes to achieving justice, particularly, in connection with the prosecution of war crimes, most of which are identified as grave breaches in the Geneva Conventions and their Additional Protocols.¹¹⁰ Those acts recognized in IHL as grave breaches involve willful killing, torture or inhuman treatment, willfully causing great suffering

¹⁰⁸ Arts 15, 16, 17 GC I; Art 18, GC II; Art 122 GC III; Art 16 and 26 GC IV; Art 33 AP I; Art 8, AP II; Rules 112, ICRC Customary Law Study (2009).

¹⁰⁹ See, Rules 113-117, *ibid*.

¹¹⁰ Art 50 GC I; Art 51 GC II; Art 130 GC III; Art 147, GC IV.

or serious injury to body or health, compelling protected persons to serve in the forces of the hostile power, or willfully depriving protected persons of the rights of fair and regular trial, taking of hostages, making civilians and civilian objects the object of attack, perfidious use of the distinctive emblem of the red cross and red crescent, etc.¹¹¹ These acts also constitute war crimes in international criminal law the prosecution of which serves the interests of justice for victims and their families. It is partly for this reason that IHL obliges States to enact legislation to repress such acts by prosecuting and punishing the perpetrators or extraditing the latter to other States (*aut dedere aut judicare*).¹¹²

It is important to underscore that in a transitional justice setting, prosecution and sanctioning every crime and perpetrator may not be practically feasible or even desirable under the circumstances. Apart from the potential practical challenges such as lack of evidence and resources limitations to investigate, prosecute and punish all those who were involved in the commission of crimes, a narrow focus on accountability may also be an obstacle for peace and security. The fear of conviction and punishment among those who took part in active hostilities may likely have the undesired effect of producing entrenchment and obstinacy in peace negotiations. As a result, transitional justice often contains other mechanisms such as amnesty to address some questions of accountability. Importantly, as indicated earlier, in NIACs, AP II acknowledges this possibility by requiring States to endeavor to offer “the broadest possible amnesty to the detainees” arrested in relation to the conflict and this is considered to reflect a rule of customary international law.¹¹³ Amnesties are particularly useful to build confidence between warring factions, encouraging combatants to surrender arms,

¹¹¹ *Ibid.* See, also Art 83 AP I.

¹¹² See, Art 49 GC I; Art 50 GC II; Art 129 GC III; Art 146 GC IV; Article 86 (1) AP I.

¹¹³ Art 6(5) of AP II; Rule 159, ICRC Customary Law Study.

and providing incentives for offenders to participate in truth and reconciliation efforts.¹¹⁴ It is worthwhile to note however that the rule allowing States to grant amnesties is interpreted as excluding “persons suspected of, accused of or sentenced for war crimes”.¹¹⁵ Consequently, despite the fact that in reality some peace accords sought to offer a blanket amnesty to individuals involved in hostilities and commission of crimes¹¹⁶, this has often been objected to as incompatible with States’ obligation to prosecute international crimes.¹¹⁷

As regards the third pillar: reparation, it is generally accepted as a customary rule of international law that a State responsible for violations of IHL is required to make full reparation for the loss or injury caused.¹¹⁸ Unfortunately, none of the provisions of the Geneva Conventions and their Additional Protocols *explicitly* require parties to award reparations for victims of armed conflicts. However, the duty to make reparation for violations of international humanitarian law is expressly referred to in the Second Protocol to the Hague Convention for the Protection of Cultural Property.¹¹⁹ Furthermore, the Geneva Conventions declare that “No High Contracting Party shall be allowed to

¹¹⁴ See, Guideline 4, The Belfast Guidelines on Amnesty and Accountability (2013).

¹¹⁵ ICRC Customary Law Study (2009) 612-613.

¹¹⁶ See for example, Art IX of The Lomé Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (18 May 1999).

¹¹⁷ The UN for instance wrote a disclaimer to the Lomé Peace Agreement stating that ‘The United Nations holds the understanding that the amnesty and pardon in Article IX of the agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law’; *ibid.*

¹¹⁸ See, Rule 150 ICRC Customary Law Study (2009).

¹¹⁹ Art 38 of the Protocol declares that ‘No provision in this Protocol relating to individual criminal responsibility shall affect the responsibility of States under international law, including the duty to provide reparation’. 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. (Note that Ethiopia is not a State Party to this Protocol).

absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches".¹²⁰ It is held that the duty to make reparations is implicit in this rule.¹²¹ Consequently, victims of war should be given reparations in the form of restitution, compensation, or/and just satisfaction.¹²²

The last pillar of transitional justice, that is, institutional reform, basically addresses the transformation of public institutions that failed to prevent violations of human rights and perpetuated impunity. In the absence of institutional reform, peace agreements have little chance of success. In this regard, IHL plays its own part in institutional reform efforts in at least two ways. First, it requires States to disseminate knowledge of IHL both in peacetime and armed conflict situations to civilians as well as combatants.¹²³ States are under obligation to domesticate and translate rules of IHL into local languages and ensure through teaching and training that their military, judicial and executive organs possess adequate knowledge of IHL. Parties to a conflict shall also provide instruction in IHL to their armed forces.¹²⁴ Additional Protocol I specifically imposes an obligation on civilian authorities who, in time of armed conflict, assume responsibilities to oversee the implementation of IHL to have full acquaintance thereof.¹²⁵ In addition, commanders have the duty to ensure that members of the armed forces under their command know and understand their obligations

¹²⁰ Art 51 GC I; Art 52 GC II; Art 131 GC III; Art 148, GC IV.

¹²¹ See, ICRC Customary Law Study (2009) 534.

¹²² *Ibid*, 538-541

¹²³ See, Art 47 GC I; Art 48 GC II; Art 127 GC III; Art 144 GC IV.

¹²⁴ Rule 142 ICRC Customary Law Study (2009).

¹²⁵ Art 83 of AP I.

under IHL.¹²⁶ These rules aim at strengthening the institutional infrastructure of States to prevent violations of IHL norms and when they occur, rectify them using domestic capacity.

Secondly, IHL's contribution to institutional reform relates to the investigation, prosecution and punishment of war crimes. As noted above, IHL requires States to prosecute or extradite individuals who have committed grave breaches and this promotes the cause of justice. The prosecution and punishment of perpetrators, notably, top leaders, of war crimes and crimes against humanity serves as a deterrent and contribute to the prevention of future crimes. More crucially, it conveys the clear message that no one is above the law. In other words, it promotes the rule of law—the critical software for functioning institutions. Meaningful peace cannot be achieved even in the most well-organized community without the rule of law—let alone in a conflict-ridden society. Rule of law prevails only where transgressors of the law are held accountable. As such, peace and justice are not mutually exclusive but reciprocally reinforcing. When justice is ignored, the risk of resurgence of violence remains high and when justice is properly served, the likelihood of recurrence of conflict diminishes.

In line with the aforementioned rules of IHL, the drafters of the Ethiopian peace agreements were mindful of the need to incorporate the important building blocks of transitional justice. The Pretoria Peace Agreement stipulates “[a]ccountability and justice in accordance with the Constitution of [Federal Democratic Republic of Ethiopia] (FDRE)¹²⁷ and the AU Transitional Justice Policy Framework” as one of the principles underpinning the permanent cessation of hostilities.

¹²⁶ Art 87 (2) AP I.

¹²⁷ The Constitution of the Federal Democratic Republic of Ethiopia (1995).

Article 10 (3) of the Pretoria Peace Agreement further elucidates this by stating that the Ethiopian government “shall implement a comprehensive national transitional justice policy aimed at accountability, ascertaining the truth, redress for victims, reconciliation, and healing...”. The Agreement instructs that “the transitional justice policy shall be developed with inputs from all stakeholders, and civil society groups through public consultations and formal national policy-making processes”.¹²⁸

It is noteworthy that the FDRE Constitution guarantees access to justice to everyone at all times.¹²⁹ Also, the AU Transitional Justice Policy Framework frequently refers to international humanitarian law¹³⁰ and covers comprehensively all the major pillars of transitional justice. It further enshrines “African traditional justice mechanisms” which include acknowledgement of responsibility and the suffering of victims; showing remorse; asking for forgiveness; paying compensation or making reparation; and reconciliation.¹³¹ The Framework further gives particular attention to the most vulnerable who are affected by conflicts; women and girls, the elderly, children, persons with disabilities, internally displaced persons and refugees.¹³² In addition, it prescribes that amnesties should “create institutional, political and security conditions

¹²⁸ Art 10 (3), Pretoria Agreement.

¹²⁹ Art 37, the FDRE Constitution (1995).

¹³⁰ See, Principles 10 (iii) (objectives), 21 (definition of victims), 22 (definition of rule of law), 89 (amnesties), 112 (statelessness and displacement), AU Transitional Justice Policy (2019).

¹³¹ Principle 18, *ibid.*

¹³² Principle 21-24, *ibid.*

to ensure observance of the rule of law and human rights and humanitarian law”.¹³³ The Framework also proscribes blanket amnesties preventing investigation into serious crimes.¹³⁴ Besides, it requires that every amnesty initiative should be formulated with full participation and consent of victims, with adequate regard to “right of victims to remedy, particularly in the form of getting the truth and reparations”.¹³⁵

Finally, in both the Pretoria Agreement and the Nairobi Declaration, the parties also commendably undertook to “cooperate among themselves and with the relevant humanitarian agencies to assist in reuniting families”.¹³⁶ It should be recalled that in both NIACs and IACs, IHL imposes on the parties to a conflict the obligation to facilitate the reunion of families dispersed as a result of the conflict.¹³⁷

Conclusions

As a law of war, at first thought, there appears to exist no direct link or relationship between IHL and peace. However, the respect for and compliance with rules of IHL have a positive correlation with peace. The more parties to a conflict abide by and strictly adhere to the laws and customs of war, the higher the chance that peace initiatives will succeed. The reason is self-evident. IHL humanizes and minimizes the grim effects of war by prescribing rules that set a limit to conduct of hostilities and by providing normative protection to the most vulnerable; those who are *hors de combat*, women, children, the elderly and those civilians in the hands of the adversary as well as civilian objects.

¹³³ Principle 89, *ibid.*

¹³⁴ Principle 91, *ibid.*

¹³⁵ Principle 90, *ibid.*

¹³⁶ Art 5 (2) of the Pretoria Peace Agreement; Art 4 (2) AP II.

¹³⁷ See Art 26, GC IV; Art 74 AP I, and Art 4 (3) (b) AP II.

It also prohibits some means or methods of war that have the potential to inflict indiscriminate and disproportionate suffering on civilians and/or damage to civilian objectives. This, in turn, preserves the conditions for negotiations, reconciliations and peace.

Wars fought within the limits of humanity help preserve the economic and social conditions that make peace achievable. As has been discussed in this article, the peace Agreement between the Ethiopian government and TPLF, like most other similar peace accords, has also demonstrated the relevance of IHL in efforts to forge a lasting peace in conflict-affected societies, especially in situations of NIACs. In the Agreement, the parties have committed themselves to uphold the rules of IHL and ensure, *inter alia*, the protection of civilians from attacks, unhindered humanitarian access to those in need and cooperate to ensure accountability for serious violations of IHL and human rights. They have affirmed the importance of adhering to the laws and customs of war to keep the prospect of military engagement within the limits of humanity. More importantly, it will increase the success of the current agreement as well as make things easy to negotiate and implement any succeeding or, should the current not hold, new peace initiatives. On the contrary, a willful disregard of rules of IHL would have the opposite effect, making the prospect of negotiations and compromise more difficult and, thus, peace harder to achieve.
