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## **About the Law School**

The Law School commenced its academic work on the 19<sup>th</sup> of December 2002 as the Faculty of Law of Jimma University. Later, the Faculty of Law and the Faculty of Humanities and Social Sciences were merged to form the College of Social Sciences and Law in 2009. As of 2014, it has been restructured as College of Law and Governance and it is joined by Department of Governance and Development Studies and Department of Civic and Ethics Studies.

The Law School has been producing high-caliber and responsible graduates since its inception in 2002. For the first year, it accepted 158 advanced diploma students who graduated three years later. Then, the School has been accepting and teaching students in four first degree programs, namely, in the regular, evening, summer, and distance programs. Thus far, it has graduated thousands of students in these programs. Moreover, the Law School is currently offering **LL.M in Commercial and Investment Law** and **LL.M in Human Rights and Criminal Law**. These are two years programs. Indeed, the School will open new postgraduate programs in the future.

In addition to its teaching jobs, the Law School has been publishing its law journal, **Jimma University Journal of Law** since 2007/2008. It is a journal published at least once a year.

Finally, the Law School is making its presence felt in the community through rendering legal services by its Legal Aid Centre to the indigent and the vulnerable parts of the society (such as children, women, persons with disabilities, persons living with HIV/AIDS and old persons) in Jimma town, Jimma Zone and the surroundings. Currently, the Centre has ten branches and they are all doing great jobs to facilitate the enjoyment of the right of access to justice for the indigent and the vulnerable groups. Of course, this also helps equip our students with practical legal skill before they graduate.

At the Moment, the School has the following full-time staff for its undergraduate and postgraduate programs.

**Full-time Staff Profile:**

<b>S.N</b>	<b>Name</b>	<b>Qualification</b>	<b>Specialization and/or area of interest</b>
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2	Abay Addis	LLB, LLM	Constitutional and Public laws
3	Azeb Belachew	LLB, LLM	Human rights and criminal law
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# IMPLICATIONS OF THE ETHIOPIAN COMPUTER CRIME PROCLAMATION ON FREEDOM OF EXPRESSION

Dagne Jembere \*and Alemu Meheretu \*\*

## ABSTRACT

Freedom of expression is a fundamental right recognized under the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution, hereafter) and international human rights instruments. The enjoyment of such right has been expanded through the advancement of the internet. Indeed, the internet has become a global mass medium of communication and expression of all kinds. The internet has also given rise to new challenges. In order to address these challenges, States have enacted various pieces of legislations such as computer crime law, data protection law and digital signature law. Like many other countries, Ethiopia enacted Computer Crime Proclamation in 2016 in order to protect the national economic and political stability of the country. However, the proclamation establishes serious offenses that are likely to adversely impact on enjoyment of freedom of expression. This article examines the implications of the Ethiopian Computer Crime Proclamation on the exercise of the right to freedom of expression and argues that the proclamation impinges on freedom of expression.

*Key words: freedom of expression, internet, computer crime, limitation, human rights, Ethiopia*

## 1. INTRODUCTION

A number of human rights instruments such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples' Rights (ACHPR) and the FDRE Constitution have recognized the right to freedom of expression. Introduction of internet has boosted the exercise of freedom of expression. Various states and human rights bodies have taken steps to enhance internet access and protect human rights of internet users. However, some states, including Ethiopia, insisted on limiting internet access and online freedom of expression through imposing strict criminal sanctions on internet users and service providers. Though legislation of computer crime law is

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important as the very openness of the internet with the capacity to promote technical innovation renders it open to exploitation by unscrupulous profit-minded criminals,<sup>1</sup> such law should not impair freedom of expression of the internet users.

Ethiopian cyber crime regime seems under-developed because of the country's short history of computer and internet penetration.<sup>2</sup> There are about less than 5% internet users in Ethiopia out of the country's total population.<sup>3</sup> The pace of regulation of cyber activities in the country has not been as quick as the development of computer systems in the country.<sup>4</sup> The 1957 penal code had no computer specific provisions to deal with computer crimes. Although, the 2004 FDRE criminal code stipulates some provisions on computer crimes; they are short of regulating the complicated cybercrime. Given their nature, type, impact, and targets of cyber crimes and criminals, computer abuses were not sufficiently criminalized under the 2004 criminal code.<sup>5</sup> Furthermore, the existing Ethiopian Criminal Procedure Code does not provide for rules which guide justice actors in the investigation and prosecution of cyber crimes.

In response to the under-regulation of cyber activities, Ethiopia has been taking some policy and legislative measures including the National Information and Communication Technology Policy and Strategy in 2009 (ICT Policy) and Criminal Justice Policy of 2011. The relevant sections of the policies aim preventing computer crimes and taking remedial measures.<sup>6</sup> Recently, the Ethiopian parliament has promulgated computer specific law, Computer Crime Proclamation No. 958/2016 (the Proclamation). The proclamation repealed the computer crime provisions of the criminal code and, provided for conditions of liability, procedural and evidence rules.

Computer crime laws are often justified on the basis of protecting individuals' reputations, national security or countering terrorism. But in practice, they have been used by some governments to censor content that the government and other powerful entities do not like or

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<sup>1</sup> Johanna Granville, *Dot.Con: The Dangers of Cyber Crime and a Call for Proactive Solutions*, 49 *Australian Journal of Politics and History* 102, 109 (2003).

<sup>2</sup> KinfeMicheal, *Development in Cybercrime law and practice in Ethiopia*, 30 *Computer Law and Security Review* 720 (2014).

<sup>3</sup> <http://www.internetlivestats.com/internet-users-by-country/> accessed on January 21, 2018.

<sup>4</sup> KinfeMicheal & HalefomHailu, *The Internet and Regulatory Responses in Ethiopia: Telecoms, Cybercrimes, Privacy, E-commerce, and the New Media*, 9 *MLR* 108, 129 (2015).

<sup>5</sup> MolalignAsmare, *Computer Crimes in Ethiopia: An Appraisal of the Legal Framework*, 3 *International Journal of Social Science and Humanities Research* 92, 103 (2015). See also HalefomHailu, *The State of Cybercrime Governance In Ethiopia*, (2015) available at <http://www.global.asc.upenn.edu/the-state-of-cybercrime-governance-in-ethiopia/> accessed on March 31, 2017

<sup>6</sup> *Ibid* at 98.

agree with.<sup>7</sup>Criminal law has to come to picture as a last resort due to its strong impact on human rights.<sup>8</sup>Hence, all misbehaviors in cyber activities will not always require the use of intrusive criminal law measures, minor infringements can be regulated under civil law.<sup>9</sup>Yet, with a view to regulate illicit cyber activities, the Proclamation created new computer crimes such as criminalization of online defamation and criminal liability of internet service providers.This article examines the possible impacts of such criminalization on freedom of expression. The article is organized into four sections. The first section lays background by briefly highlighting the nature, scope and normative contents of the right to freedom of expression. The second section explains the standards for limiting the right. The third section explores regulation of internet in Ethiopia and its impact on the right to freedom of expression. The fourth section concludes the discussions.

## 2. FREEDOM OF EXPRESSION ON THE INTERNET

The term ‘freedom of expression’ has existed since ancient times and has been widely used and conceptualized by various groups, including scholars, politicians, activists, and laypersons.<sup>10</sup>However, there have been controversies among authors on whether the term ‘freedom of expression’ includes sign language, pictographs, pictures, movies, plays, and so forth.<sup>11</sup>It is clear that all expression requires conduct of some sort, and any conduct can be communicative. Accordingly, freedom of expression should be considered as freedom of communication, and that there are no limits on the media of communication that such freedom encompasses.<sup>12</sup> In cognizance of this view, the United Nations Human Rights Committee (UNHRC hereafter) considered that electronic and internet-based modes of expressions are protected like freedom of expression offline.<sup>13</sup> Accordingly, it called upon states to adopt all necessary steps to ensure every individual’s access to the internet. The UN rapporteur on

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<sup>7</sup>UNHRC, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Frank La Rue A/HRC/17/27, (2011).Para. 34.

<sup>8</sup> Nils Jareborg, *Criminalization as Last Resort (Ultima Ratio)*, 2 Ohio St. J. Crim. L. 521 (2005)

<sup>9</sup>United Nations Office on Drugs and Crime, *Comprehensive Study on Cybercrime* 52 (2013).

<sup>10</sup> UNESCO, *Privacy, free expression and transparency: Redefining their new boundaries in the digital age*, 47 (2016)

<sup>11</sup> Larry Alexander, *Is There a Right of Freedom of Expression?*, 8 (Cambridge University Press 2005).

<sup>12</sup>*Ibid.*

<sup>13</sup>UNHRC, *General comment Number 34*, adopted on 102<sup>nd</sup> session Geneva, 11-29 July 2011at para. 12.

freedom of expression has been consistently urging states to promote universal internet access and be cautious against rules limiting data content on internet.<sup>14</sup>

Under Article 19 of the ICCPR, Article 9 of the ACHPR and Article 29 of the FDRE Constitution, two elements of freedom of expression are expressly recognized. The first element, the right to seek and receive information, is a key component of democratic governance as the promotion of participatory decision-making processes is unattainable without adequate access to information. Ensuring access to information can serve to promote justice. The UNHRC has emphasized that the public and individuals are entitled to have access, to the fullest extent practicable, to information regarding the actions and decision-making processes of their governments.<sup>15</sup> The internet and digital technologies have expanded the possibilities of individuals and media to exercise the right to freedom of expression and freely access online information.

Freedom of expression also includes the right to dispatch information or idea a person has through any media he/she wants. Information or ideas that may be regarded as critical or controversial by the authorities or by a majority of the population, including ideas or views that may shock, offend or disturb, are also covered under this element of freedom of expression.<sup>16</sup> The scope of information protected under this right covers information from political discourse,<sup>17</sup> and commentary on one's own<sup>18</sup> or on public affairs,<sup>19</sup> canvassing,<sup>20</sup> discussion on human rights,<sup>21</sup> journalism,<sup>22</sup> scientific research, expression of ethnic, cultural artistic expression,<sup>23</sup> teaching,<sup>24</sup> linguistic and religious identity and, advertising.

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<sup>14</sup>UNHRC, *UN Special Rapporteur's Report on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, by Abid Hussain, E/CN 4/2002/75, 30 January (2002) at para. 6.

<sup>15</sup> General Comment Number 34, *supra* note 13.

<sup>16</sup> Council of European Union, EU Human Rights Guidelines on Freedom of Expression Online and Offline, Foreign Affairs Council meeting, Brussels, 12 May 2014.

<sup>17</sup>UNHRC, *Mika Miha v. Equatorial Guinea*, Communication No. 414/1990,

<sup>18</sup>UNHRC, *Fernando v. Sri Lanka*, Communication No. 1189/2003, Views adopted on 31 March 2005.

<sup>19</sup>UNHRC, *Coleman v. Australia*, Communication No. 1157/2003, Views adopted on 17 July 2006

<sup>20</sup>UNHRC, *Concluding observations on Japan*, (CCPR/C/JPN/CO/5).

<sup>21</sup> UNHRC, *Velichkin v. Belarus*, Communication No. 1022/2001, , Views adopted on 20 October 2005.

<sup>22</sup> UNHRC, *Mavlonov and Sa'di v. Uzbekistan*, Communication No. 1334/2004, , Views adopted on 19 March 2009.

<sup>23</sup> UNHRC, *Shin v. Republic of Korea*, Communication No. 926/2000, , Views adopted on 16 March 2004.

<sup>24</sup>UNHRC, *Ross v. Canada*, Communication No. 736/97, , Views adopted on 18 October 2000.

Freedom of expression has many contributions to overall development of human beings. It helps for fulfillment of individual's dignity by enforcing self-regulation.<sup>25</sup> As it enhances political participation and search for truth, it contributes to development of democracy, rule of law, peace, stability and inclusive development.<sup>26</sup> In other words, freedom of expression is important for two main reasons : (1) it is essential to express ourselves in words, music, dance or any other form of expression for the realization of our humanity, and (2) freedom of expression is the foundation of other human rights and social goods ranging from democracy to human, social and economic development.<sup>27</sup>

On the other side, internet has created new opportunities by which individuals disseminate information to a mass audience and that have an important impact on the participation and contribution of citizens in decision-making processes. In the contemporary world, internet is becoming the preferred mode for political participation, education, employment, commerce or personal activities. It empowers citizens to speak up in a networked public sphere. Particularly, social media has changed the nature of political campaigning and will continue to play an important role in future elections and political campaigns around the world.<sup>28</sup> For instance, social media played important role in Arab Spring,<sup>29</sup> in shaping political debates,<sup>30</sup> by which societies struggled to knock down repressive governments.<sup>31</sup> Hence, for a state that subscribes to democracy, it would be a grave mistake to discount the voices of the internet as something that has no connection to freedom of expression. But, in some instances, technologies on internet can also be misused to inflame conflicts and malicious agitation by populists that do not believe in a healthy democratic discourse.<sup>32</sup> In such cases, internet can play extraordinary role in intensifying violence and chaos in the society. These issues necessitate cyber laws; criminal law being one of them.

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<sup>25</sup> UNHRC, *General comment Number 34*, supra note 13

<sup>26</sup> Wojciech Sadurski, *Freedom of Speech and Its Limits*, 8-35 (Kluwer Academic Publishers 1999).

<sup>27</sup> Andrew Puddephatt, *Freedom of expression and the internet*, UNESCO 2016, p.19

<sup>28</sup> Vyacheslav Polonski, *The biggest threat to democracy? Your social media feed*, 2016 available at <https://www.weforum.org/agenda/2016/08/> accessed on April 5, 2017.

<sup>29</sup> Tara Vassefi, *An Arab Winter: Threats to the Right to Protest in Transitional Societies, Such as Post-Arab Spring Egypt*, 29 *American University International Law Review* 1097, 1128 (2014).

<sup>30</sup> *Ibid*

<sup>31</sup> Sabiha Gire, *The Role of Social Media in the Arab Spring*, available at <https://sites.stedwards.edu/pangaea/the-role-of-social-media-in-the-arab-spring/>

<sup>32</sup> *Ibid*.

### 3. STANDARDS ON LIMITATION OF FREEDOM OF EXPRESSION: AN OVERVIEW

#### 3.1. Limitation on Freedom of Expression under the ICCPR

Freedom of expression is one of the most frequently violated rights in the world.<sup>33</sup> It has always been the object of tension, struggle and contest between the state and the citizens and within society itself.<sup>34</sup> Whilst freedom expression is the extension of our humanity and essential for the realization of other human rights and social goods, it is not an absolute right. It is subject to certain restrictions. From the reading of Article 19 (3) of the ICCPR and jurisprudence of human rights bodies, the International Commission of Jurists has drawn principles of limitation of a right called ‘Siracusa Principles’ that are applicable to freedom of expression.<sup>35</sup> These principles, through providing the limitation clauses, elaborate on the contents of the provisions of the Covenant. According to the principles, any limitation of freedom of expression has to fulfill the following three-part-test:

Firstly, the limitation must be prescribed by law. Arbitrary limitation of freedom of expression is impermissible. Any limitation of freedom of expression must be preceded by a written and clear law. The UNHRC defined the concept of ‘law’ set out in Article 19 (2) of the ICCPR. In the Committee’s view, to be considered as law, norms have to be drafted with sufficient clarity to enable an individual to adapt his behavior to the rules and made accessible to the public.<sup>36</sup> Clarity of the law is strictly required especially when the legislation is criminal law.<sup>37</sup> It is not acceptable to take away human rights by unclear, vague and irrational laws. The law or regulation must meet standards of clarity and precision so that people can foresee the consequences of their actions. Vaguely worded edicts whose scope is unclear will not meet this standard and are therefore illegitimate.<sup>38</sup>

Secondly, the limitation should aim at legitimate purpose. The covenant provides that the objective of the prescription consists of respecting the rights and reputation of others or the

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<sup>33</sup> Michael O’Flaherty, *Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee’s General Comment Number 34*, 12 HRLR 627,632 (2012),

<sup>34</sup> *Ibid.* at 633.

<sup>35</sup> American Association for the International Commission of Jurists, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (1985).

<sup>36</sup> UNHRC, *Keun-Tae Kim v. The Republic of Korea*, Communication No. 574/1994, CCPR/C/64/D/574/1994, 4 January 1999, para 25

<sup>37</sup> Gary Slapper, *Clarity and the Criminal Law*, 71 *The Journal of Criminal Law*, 475, 477 (2016).

<sup>38</sup> UNHRC, *Keun-Tae Kim v. The Republic of Korea*, *supra* note 36.



protection of national security, public order, public health or public morality.<sup>39</sup>These are the only legitimate grounds to limit a speech and states may not add another ground.<sup>40</sup>UNHRC in its general comment number 34 stated that any restriction should not put the right to freedom of expression in jeopardy and the relation between right and restriction and between norm and exception must not be reversed.<sup>41</sup>

Thirdly, the limitation must be necessary in a democratic society. This standard requires that the conditions, restrictions and penalties imposed on the exercise of the right have to be proportional with the legitimate aim to be pursued. Hence, if less restrictive alternative is available, the state has to use it. It also necessitates balancing the benefit of the limitation with the harm that it imposes on the exercise of the right. Freedom of expression is a building block of democratic society; thus democracy cannot exist or survive without true implementation of the right. Therefore, freedom of expression is a right that must be upheld as much as possible; restrictions should be applied only when it is really necessary in a democratic society.

In sum, limitations to freedom expression are not permissible unless they are provided for by clear and precise laws (the test of legality), serve one of the legitimate interests listed under the Covenant (the test of legitimacy), and are strictly necessary to meet the intended purpose (the test of proportionality).

### **3.2. Limitations on Freedom of Expression under the FDRE Constitution**

The FDRE Constitution has guaranteed freedom of expression.<sup>42</sup>The Constitution stipulates that freedom of expression, in principle, cannot be limited on account of the content or effect of the point of view expressed.<sup>43</sup>However, it also states that limitation to freedom of expression can exceptionally be made in order to protect the well-being of the youth, and the honor and reputation of individuals, and to prohibit propaganda for war as well as the public expression of opinion which is intended to injure human dignity.<sup>44</sup>The Constitution further requires that any limitation to freedom of expression for the intended purposes should be made through laws.

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<sup>39</sup>ICCPR, General Assembly Resolution 2200A (XXI) of 16 December 1966, Article 19(3).

<sup>40</sup> General Comment Number 34 *supra* note 13, Para. 21.

<sup>41</sup>*Ibid.*

<sup>42</sup> Constitution of the Federal Democratic Republic of Ethiopia, Federal *Negarit Gazeta*, Proclamation No. 1/1995 Article 29 (2).

<sup>43</sup>*Ibid.*, Article 29 (6).

<sup>44</sup>*Ibid.*

From the constitutional provision of limitation to freedom of expression, we can vividly discern the two-part-tests i.e. the tests of legality and legitimacy.

However, the constitutional provision of limitation to freedom of expression is problematic to some extent for two reasons. Firstly, the clause “public expression of opinion which is intended to injure human dignity” listed as a ground of limitation lacks clarity. The clause may be open to uneven application. Secondly, the Constitution does not provide explicit provision that require the necessity of the limitation to be imposed on the right. In short, the test of proportionality is not explicitly indicated. However, the latter problem could be addressed by virtue of Article 13(2) of the Constitution which requires the human rights provisions in it to be interpreted in conformity with international human rights instruments. Accordingly, Article 29 of the Constitution should be interpreted in conformity with Article 19(3) of the ICCPR.

As noted above, the Constitution under Article 29(6) prohibits the imposition of limitation on the effect of the content of the speech. This shows that deceitful laws intended to smash dissents by the government are not permissible. It also shows that the limitation of the right should be narrowly designed to make sure that the exception will not swallow the rule.

Other subsidiary laws which could in principle protect freedom of expression have been enacted. For instance, Proclamation on Freedom of Mass Media and Access to Information was promulgated in 2008 aiming at the realization of the right to access to information by requiring establishment of free media.<sup>45</sup> This proclamation has contribution in enhancing the right to access to information. But, in actual terms, the proclamation eroded freedom of expression by inviting actions like implicit political intervention that increases self-censorship.<sup>46</sup>

#### **4. REGULATION OF INTERNET IN ETHIOPIA AND ITS IMPACT ON FREEDOM OF EXPRESSION**

The computer crime proclamation limits freedom of expression online by providing, inter alia, provisions that prohibit computer data which contains contents that affect liberty and reputation of persons<sup>47</sup> and disturb the public.<sup>48</sup> It also provides criminal liabilities of internet service

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<sup>45</sup> Freedom of Mass Media and Access to Information Proclamation, Federal *Negarit Gazeta* Proclamation No.590/2008, preamble.

<sup>46</sup>Getaneh Mekuanint, *An Examination of Freedom of the Mass Media and Information Proclamation (590/2008) Vis-à-vis its Practices*, A Thesis Presented to Addis Ababa University (2013) (*unpublished*).

<sup>47</sup>Computer Crime Proclamation, Federal *Negarit Gazeta*, Proclamation No. 958/2016Article 13.

providers for the illegal contents produced by their users.<sup>49</sup> Limitation to online freedom of expression by itself is not wrong for computer networks provide ample opportunity for the propagation of scurrilous material about others. Some online conducts are hazardous for the wellbeing of the society and disturb peace and security of the public. But, such limitation has to be assessed in light of the three-part-test noted above.

#### **4.1. Regulation of Content Data and Criminal Liability of Internet Service Providers**

Internet may be abused to stalk or harass an individual, group or organization.<sup>50</sup> Cyber stalking is a wrongful act in which a person harasses a victim using electronic communication, such as e-mail or instant messaging or messages posted to a website or a discussion group. Although merely having the ability to do something does not necessarily motivate a person to carry out that action, the fact that cyberspace can support such behavior on pretext of anonymity and a false sense of power cannot be underestimated.<sup>51</sup> Thus, the response of a state through crafting anti-cyber stalking laws or amending traditional anti-stalking laws to account for technological advances in the internet and electronic communications is appropriate. Nevertheless, anytime speech is regulated, there exists the possibility that the law may infringe it. Therefore, an anti-cyber stalking law should be flexible enough to account for technological advances in the use of the internet and carefully crafted to ensure consistency with protections of freedom of expression.<sup>52</sup>

Some jurisdictions including ours criminalized online defamation.<sup>53</sup> Defamation can be defined as the wrongful, intentional publication or communication of words or behavior concerning another person which has the tendency to undermine his status, good name or reputation.<sup>54</sup> For a statement to be considered as defamation, the words complained of to be defamatory should refer to specific person and be published or communicated to at least one person other than the defamed person.<sup>55</sup> Some authors argue that due to availability of self-help mechanism on internet

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<sup>48</sup>*Ibid* Article 14.

<sup>49</sup>*Ibid* Article 16.

<sup>50</sup>Michael Newton, *The Encyclopedia of High-Tech Crime and Crime-Fighting*, 74 (2002)

<sup>51</sup>Basu, S. and Jones, R.P., *Regulating Cyber stalking*, 2 JILT 1, 16 (2007).

<sup>52</sup>*Ibid*.

<sup>53</sup> Computer Crime Proclamation, *supra* note 47 Article 13 (3).

<sup>54</sup>SanetteNel, *Defamation on the Internet and other computer networks*, 30 The Comparative and International Law Journal of Southern Africa, 154, 155 (1997).

<sup>55</sup>TerKahLeng, *Internet defamation and the online intermediary*, 31 Computer Law and Security Reviews 68 (2015).

for individuals who allege that their reputation is affected by statements of others to give counter speeches; online defamation should not be legally treated equally with its offline counterpart.<sup>56</sup> This argument was developed before invention of social networking platforms that came up with suitable systems to reply to any statement of users instantaneously. This shows that the argument holds water better in the current online communications. However, this argument gets some credence as long as there is reasonable expectation that the plaintiff is able to respond to the defamatory statement. But, the undeniable fact is that the ability to remedy the defamation by counter speech allows the person defamed on internet to keep his or her name intact than any other legal remedy.<sup>57</sup>

The other controversial issue in the regulation of cyber activities is about the responsibilities of Internet Service Providers (hereafter ISPs) with regard to the content data that are originally provided by the users and are made available on internet passing through services of ISP. ISPs provide complex technological infrastructure, consisting of different physical and logical elements that help communication on internet. ISPs are a broad range of actors, mainly private ones, who act as intermediaries by providing a range of internet services.<sup>58</sup> Nowadays, the networked society has stepped into the era of the internet platform, which is built by the ISP where the massive network services are provided and users are given with the authority to control their data online while the ISP plays only passive role.

There are various kinds of ISPs depending on the services they provide. An ISP may be access provider that connects an end user's computer to the internet, using cables or wireless technology, or also facilitating the equipment to access the internet. An internet access provider is a type of ISP that provides individuals and other ISP companies access to the internet.<sup>59</sup> Access providers are structured hierarchically to control the physical infrastructure needed to access the internet and make the infrastructure available to individual subscribers in return for payment.<sup>60</sup> They may or may not control content of the data that passes through their service depending on their purpose and terms of service. An ISP may also be a transit provider that allows interaction

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<sup>56</sup> Jeremy Stone Weber, *Defining Cyber libel: A First Amendment Limit for Libel Suits against Individuals Arising from Computer Bulletin Board Speech*, 46 Cas. W. Res. L. Rev. 235,261 (1995).

<sup>57</sup>*Ibid* at 265.

<sup>58</sup> Bradley Mitchell, *ISP-Internet Service Providers*, October17,2016, available at <https://www.lifewire.com/internet-service-providers-817781> accessed on May 11, 2017.

<sup>59</sup><http://searchmicroservices.techtarget.com/definition/IAP-Internet-access-provider> accessed on March 27, 2017.

<sup>60</sup>Hossein Bidgoli, *The Internet Encyclopedia*, California State University Bakersfield, California, 199 (2004).

between a computer and the access provider, and hosting providers, and whose function is merely transmission of data, mere conduit role.<sup>61</sup> Internet transit is the business relationship whereby an ISP provides access to the global internet. Internet transit can be imagined as a pipe in the wall that says "internet this way".

Other types of ISPs are hosting providers. They are bodies, typically companies that rent web server space to enable their customers to set up their own websites. It may be any person or company who controls a website or a webpage which allows third parties to upload or post materials. Social media platforms like *facebook* and *twitter*, blog owners, and video and photo sharing services are usually referred to as hosts. A hosting provider has one or several computers with available space or servers, with access to transit providers, which may be used for its own purposes or for use by third parties, who make content available from other computers connected to access and transit providers. A hosting provider will offer technologies to feature content on the web, to send, receive and administer emails, store files, etc.

There have been two opposing positions regarding the role of ISP on the contents provided by their users. Proponents of network neutrality contend that ISPs should act as passive conduits rather than managing their networks actively and differentiate traffic, because such network management could negatively affect competition and freedom of expression.<sup>62</sup> Differently, skeptics of network neutrality tend to see more active network management as meeting a consumers' demand<sup>63</sup> and traffic differentiation as the only way for ISPs to safeguard a return of investment into next-generation internet architecture.<sup>64</sup>

In the modern world, regulation of cyber activities is important to achieve social, political and economic ends. Regulating internet without the involvement of ISP is unthinkable. But, gate keeping ISPs would have a negative effect on receiving and imparting information.<sup>65</sup> Concerning the regulation of cyber activities through ISPs, the UNHRC stated that any restriction on the

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<sup>61</sup>*Ibid*

<sup>62</sup>Barbara Van Schewick, *Towards an Economic Framework for Network Neutrality Regulation*, 5 Journal on Telecommunications and High Technology Law 329, 392 (2007).

<sup>63</sup> Christopher S. Yoo, *Would Mandating Broadband Network Neutrality Help or Hurt Competition? A Comment on the End-to-End Debate*, 3 Journal on Telecommunications and High Technology Law 23, 68 (2004)

<sup>64</sup> Robert E. Litan & Hal J. Singer, *Unintended Consequences of Net Neutrality Regulation* 5 Journal on Telecommunications and High Technology Law 533, 596 (2007).

<sup>65</sup> Jasper P. Sluijs, *From Competition to Freedom of Expression: Introducing Article 10 ECHR in the European Network Neutrality Debate*, 12 HRLR 509, 554 (2012).

operation of ISPs is only permissible to the extent that it is compatible with the three-part-test.<sup>66</sup> Therefore, imposing blanket criminal responsibility on ISP is impermissible. No ISP that simply provides technical internet services such as providing access, or searching for, or transmission or caching of information should be liable for content generated by others disseminated using those services as long as it does not specifically intervene in that content or refuse to obey a court order to remove that content where it has the capacity to do so.<sup>67</sup> Here, it is noteworthy to mention that according to the general theory of criminal liability, anyone who participates in a crime in the capacity of author, accomplice and accessory after the fact may be held liable. Though all ISP may participate in some way in the transmission or diffusion of the information; it would be unfair to hold them all responsible for an offence. Therefore, cybercrime law should limit liability principally and sometimes solely to the person(s) directly involved in the infraction or damage.

The grounds for ISP's liability shall be subject to the role they played in producing the content. This is so because the unlawfulness may result from the communicative acts performed by individuals or businesses as originators of content. In most of the cases, intermediaries do not have the operational or technical capacity to review contents produced by third parties. Neither they have, and nor are required to have, the legal knowledge necessary to identify the cases in which specific content could effectively produce an unlawful harm that must be prevented. Even if they have the required number of operators and attorneys to perform such an undertaking, as private actors, intermediaries are not necessarily going to measure the value of freedom of expression when making decisions about third-party produced contents for which they might be held liable. If blanket liability is imposed on the ISP for the third party's content data that passes through their service, in view of their liability, they can be expected to end up suppressing all of the information they think, from any point of view, could potentially result in a judgment against them. A system of this kind would seriously affect small and medium-sized ISP, as well as those who operate under authoritarian or repressive regimes.

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<sup>66</sup> General Comment Number 34 *supra* note 13, para. 43.

<sup>67</sup> Inter-American Commission on Human Rights, Office of the Special Rapporteur for Freedom of Expression, *Freedom of Expression and the Internet*, OEA/Ser.L/V/II CIDH/RELE/INF.11/13, 31 December 2013. para.97

There is an international consensus appeared to develop around the notion that holding ISP liable for third party's content of which they lack knowledge or control over is prejudicial to the functioning of electronic commerce and the exercise of freedom of expression.<sup>68</sup> If liability is assigned to ISP from the wrongful act of their users, this shows that the primary concern is not so much with guilt but with preventing or compensating for these negative consequences.<sup>69</sup> This kind of attributive liability introduces strict liability in regulation of cyber activities. Doing so affects the broadly shared and deeply felt intuitions regarding the individuality of responsibility and the relationship between responsibility and guilt, requirement of blameworthiness.<sup>70</sup> Even though strict criminal liability can be justified under criminal law when we see the whole activities done to commit the crime, it has chilling effect on freedom of expression.<sup>71</sup> If ISPs are made liable for the contents provided by the third parties, they will employ strict systems by which they check against prohibited contents.

International and regional human rights bodies established that online intermediaries should not be liable for third party's content as long as they do not specifically intervene in that content.<sup>72</sup> Subsequent reports of the UN Special Rapporteur on Freedom of Expression and regional human rights systems repeat this point emphasizing that the authors of unlawful speech should face the legal consequences of publishing it.<sup>73</sup> For these experts, requiring online intermediaries to monitor content hosted on their sites results in greater censorship and is inconsistent with the right to freedom of expression.<sup>74</sup> A group of international civil society organizations consolidated the ideas of aforementioned instruments into the "Manila Principles on Intermediary Liability," which also advocates a broad approach to protect ISPs from

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<sup>68</sup>Lisl Brunner, *The Watchdog Becomes the Monitor: Intermediary Liability after Delfi v Estonia*, 16, Human Rights Law Review, 163, 174 (2016).

<sup>69</sup> Anton Vedder, *Accountability of Internet access and service providers – strict liability entering ethics?*, 3 Ethics and Information Technology 67, 73 (2001).

<sup>70</sup>*Ibid.*

<sup>71</sup>Kenneth W. Simons, *when is Strict Criminal Liability Just*, 87 J. Crim. L. & Criminology 1075, 1137 (1997).

<sup>72</sup> General Comment Number 34 *supra* note 13, para. 43. See also the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration On Freedom Of Expression And The Internet, (2011) at para 2.

<sup>73</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *supra* note 7 at para 102.

<sup>74</sup> Joint Declaration on Freedom of Expression and the Internet *Supra* note 72 at para 2(b);

liability.<sup>75</sup> Generally, there is international consensus on the fact that holding ISP liable for the content produced by third parties severely undermines the enjoyment of the right to freedom of expression, because it leads to self-protective and over-broad private censorship.<sup>76</sup>

However, if an ISP involves in editing of content data, this presupposes that the ISP not only has knowledge but also contributes to the illegal content. For instance, there are some webpages that provide access to some resources and take the role of editing the contents posted in the webpage. Therefore, such ISP could be considered as content provider hence, liable. Similarly, some ISP have terms of agreements to control the content of data which is passing through their services hence, have some duties on content data posted on their web. Such duties of the webmaster may include ensuring that the web servers, hardware and software are operating correctly, designing the website, generating and revising web pages, replying to user comments, and examining traffic through the site. In such cases, if they are made responsible for the third parties' data on their website, they can take measure against it. Likewise, social media hosts like Facebook page or group creators can control what are posted on their pages. In such cases, Facebook page can be compared to a noticeboard where third parties can post comments but the host has ultimate power to control postings and block users. Such hosts cannot be passive instruments or mere conduits of information. They can prohibit postage of illegal content. Accordingly, such hosts can be made responsible for they know about the illegality of the statement and can take measures against the data unless they thought to take responsibility for the statement.

#### **4.2. Impacts of Internet Regulation on Freedom of Expression in Ethiopia**

The Computer Crimes Proclamation comprises of six parts: i. General provisions dealing with definition of terms, ii. Provisions on computer crimes, iii. Preventive and investigative measures, iv. Evidentiary and procedural rules, v. Institutions playing a role in the prevention, detections and investigations of computer crimes, and vi. Miscellaneous provisions. The Proclamation touches a range of issues and creates a number of new criminal offenses that are likely to negatively impact on the exercise of freedom of expression. This section discusses the provisions of the proclamation that have negative repercussions on the enjoyment of freedom expression.

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<sup>75</sup> Manila Principles on Intermediary Liability, Best Practices Guidelines for Limiting Intermediary Liability for Content to Promote Freedom of Expression and Innovation (24 March 2015), See also The Manila Principles on Intermediary Liability Background Paper, 30 May 2015, at 6–8: 20–1.

<sup>76</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *supra* note 7 at Para. 40.



As discussed above, according to the Constitution, freedom of expression cannot be limited on account of the content or effect of the point view expressed. As against this principle, the proclamation creates a number of offenses related to content under the caption of ‘obscene or indecent crimes against minors’, ‘crimes against liberty and the reputation of persons’, ‘crimes against public security’, and ‘dissemination of spam’.<sup>77</sup> For instance, Article 13 establishes a series of offenses criminalizing ‘intimidation’ by disseminating any content; ‘causing fear, threat, or psychological strain’ by sending or repeatedly transmitting information about someone or by keeping their computer communication under surveillance; and disseminating any defamatory writing. The provisions are very general to capture as many conducts as possible. There is neither legal nor practical definition of “intimidation,” “threatening” or “causing fear.” Lack of clarity of these provisions has negative repercussions on free speech. Because, in normal course of things, people make rash comments in the heat of emotion with no intention of causing a harm but may be, he/she is simply exasperated by certain conditions.<sup>78</sup> It is unfair to label, for instance, comments made in such cases on internet as a crime and such criminalization may lead individuals to refrain from posting their ideas on other person under the pain of punishment.

Article 14 of the proclamation is affected by similar problems. It prohibits dissemination of content data that incites violence, chaos or conflict among people. But, as the phrases “incites violence,” “incite chaos” or “incite conflict” are fluid, they can be interpreted to trample political discourses, critics directed towards corruption, dissents and debates among the people. As criminal categories provided under the provisions are directly related with freedom of expression, government authorities may interpret these provisions malevolently to deny discussions on matters of public concern.<sup>79</sup> Ethiopian civil societies have been voicing their concern that the law would be used to crackdown critical comment and political opposition.<sup>80</sup>

Practically, Ethiopian government has been claiming that social media platforms are disturbing security of the country. This accusation is primarily pointed to Facebook which seems almost

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<sup>77</sup>Computer Crime Proclamation, *supra* note 46, Article 12-15

<sup>78</sup>Chuck Easttom & Det. Jeff Taylor, *Computer Crime, Investigation, and the Law*, 415 (Stacy L. Hiquet 2011).

<sup>79</sup>Halefom *supra* note 5.

<sup>80</sup> Kimberly Carlson, *Ethiopia’s new Cybercrime Law allows for more efficient and systematic prosecution of online speech*, Electronic Frontier Foundation, June 9, 2016, available at <https://www.eff.org/deeplinks/2016/06/ethiopia-s-new-cybercrime-law-allows-more-efficient-and-systematic-prosecution-online>; accessed on April 2, 2017, Tinishu Soloman, *New Ethiopian law targets online crime*, The Africa Report, June 9, 2016, <http://www.theafricareport.com/East-Horn-Africa/new-ethiopian-law-targets-online-crime.html> accessed on April 2, 2017.

synonymous to internet.<sup>81</sup> Ethiopia ranks 7<sup>th</sup> out of the top ten African countries with the most Facebook users.<sup>82</sup> Facebook has played an invaluable role in facilitating the 2015 Ethiopian election being the forum of political debates and discussions between the electorate and political parties' leaders and members.<sup>83</sup> It has also heightened protests in Oromia and Amhara states that forced the government of Ethiopia to declare state of emergency in 2017.<sup>84</sup> Exasperated by these challenges at home, the former Prime Minister of Ethiopia, Hailemariam Dessalegn, claimed before the UN General Assembly that social media has empowered populists and other extremists to exploit people's genuine concerns and spread their message of hate and bigotry without any inhibition.<sup>85</sup> Likewise, some also argued that social media have despoiled civility in Ethiopia.<sup>86</sup> But, these assertions were debunked by the empirical research conducted as there is practically insignificant number of hate speech communicated between Ethiopians through Facebook.<sup>87</sup>

Despite the fact that the words of Article 13 and 14 are vague, the drafters of the proclamation claimed that they have adopted a technology-neutral approach in drafting the substantive provisions asserting that such language allows the provisions to be applied to both current and future technologies in regulation of cybercrime.<sup>88</sup> Nevertheless, as the words of Articles 13 (1) and (2) and 14 are vague, they give no clear notice to individuals. Therefore, they fail the test of clarity and precision required from the law that limits freedom of expression.

Criminalization of defamation on internet by the proclamation has also a chilling effect on freedom of expression. It can lead to the imposition of harsh sanctions, such as a prison sentence, suspension of the right to practice journalism or a heavy fine. Even if it is applied with moderation like made punishable upon complaint and punishable by simple punishments, it still casts a long shadow to freedom of expression because, the possibility of being arrested by the police, held in detention and subjected to a criminal trial will be in the back of the mind of a

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<sup>81</sup>Gagliardone, I. et al. *Mechachal: Online debates and elections in Ethiopia. From hate speech to engagement in social media* 16 (2016). and See Leo Mirani, *Millions of Facebook Users Have No Idea They're Using the Internet*, available at <http://qz.com/333313/millions-of-facebook-users-have-no-idea-theyre-using-the-internet> accessed April 4, 2017.

<sup>82</sup><http://www.ethiocyberlaws.com> accessed on April 4, 2017.

<sup>83</sup>Gagliardone, I. et al, *supra* note 81.

<sup>84</sup>Ezana Sehay, *How Social Media Is Despoiling Civility In Ethiopia*, available at <http://www.ethiocyberlaws.com/>

<sup>85</sup><http://www.un.org/apps/news/story.asp?NewsID=55022#.WN0vDmldDIW> accessed on April 5, 2017.

<sup>86</sup>Ezana Sehay *supra* note 84.

<sup>87</sup>Gagliardone, I. et al *supra* note 81.

<sup>88</sup>The Explanatory note of Computer Crime Proclamation, page 5.

person when he or she is deciding whether to expose, for example, a case of high-level corruption. Therefore, criminal law is not appropriate measure that a state has to take against online defamation as it has the capacity to enmesh free online expressions.

UNHRC has recognized the threat posed by criminal defamation laws on freedom of expression and recommended that defamation should be decriminalized.<sup>89</sup> Similarly, the African Commission on Human and Peoples' Rights adopted "Declaration of Principles on Freedom of Expression in Africa" that clearly and fully affirmed the three-part-test.<sup>90</sup> In deciding on communication brought before it, the Commission stated that the fact that a state can limit freedom of speech by laws does not mean that national law can set aside the right to express and disseminate one's opinions guaranteed at the international level.<sup>91</sup> By the similar understanding, the Commission adopted a resolution that called up on all African states to decriminalize defamation stating that criminal defamation laws constitute a serious interference with freedom of expression and impedes the role of the media as a watchdog, prevent journalists and media practitioners to practice their profession without fear and in good faith.<sup>92</sup> It is vivid that criminal defamation laws impose similar threat on bloggers, whistle blowers and human rights defenders on internet. African Court of Human and People's Rights has also ruled out criminalization of defamation in *Konate V. Burkina Faso case*.<sup>93</sup> Reasoning that the restriction of a right shouldn't destroy the essence of the rights guaranteed by the Charter, the court ruled that the Burkina Faso's law that provided sentence of imprisonment and fine for defamation violates freedom of expression.<sup>94</sup>

One may argue that the regulation of online defamation under the computer crime proclamation is right because internet has high capacity to disseminate defamatory statements to every corner of the world in fraction of seconds. But, such an argument is not compelling because of the following reasons. *First*, as much as internet facilitates swift dissemination of defamatory statement, it also affords a self-help mechanism for a person in similar capacity to do battle with

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<sup>89</sup> General Comment Number 34 *supra* note 13, para 47

<sup>90</sup> *Declaration of Principles on Freedom of Expression in Africa*, African Commission on Human and Peoples' Rights, 32<sup>nd</sup> Session, 17-23 October 2002: Banjul, The Gambia.

<sup>91</sup> ACHPR, *Civil Liberties Organization and Media Rights Agenda v. Nigeria*, Comm. Nos. 140/94, 141/94, 145/95 (1999), para. 40.

<sup>92</sup> ACHPR, *Resolution on Repealing Criminal Defamation Laws in Africa*, Res 169(XLVIII) (2010).

<sup>93</sup> ACHPR, *Lohéïssa Konaté v. The Republic of Burkina Faso*, App. No. 004/2013, 5 December (2014).

<sup>94</sup> *Ibid.*

the statement made against him or her. *Second*, as argued by the human rights bodies, criminalization of defamation may terrify individuals thereby making them refrain from giving their valuable comments and suggestions about others. This undermines the essence of online freedom of expression. For instance, the works and behaviors of individuals, especially, of government officials may not be scrutinized by members of the public. This renders criminalization of online defamation too excessive measure in comparison to its adverse effects on the essence of freedom of expression. *Thirdly*, online defamation can be effectively controlled by tort law or administrative measures which have less threat to free speech. Accordingly, criminalization of online defamation doesn't pass the test of proportionality of limitation of freedom of expression. Hence, both the positive and the negative justifications for criminalization of online defamation are missing.

The proclamation also provides for criminal liability of ISP. However, assigning criminal liability to ISP for content created by third parties has adverse effect on freedom of expression. The proclamation provides broader definition for ISP. It defines service provider as a person who provides technical data processing or communication service or alternative infrastructure to users by means of computer system.<sup>95</sup> In Ethiopia, Ethio-Telecom is the sole ISP that controls everything regarding internet in the country; private sectors like internet cafes,<sup>96</sup>web hosts and blog owners can provide value added services or act as a reseller by obtaining a license.<sup>97</sup> Oversea ISPs like Facebook, Google, and Twitter are also subjected to the law.<sup>98</sup>

In many national laws and international human rights law, it is a well-established principle that ISPs are not required to review, monitor or classify the content that they host, and are therefore not held liable for the transmission of prohibited content unless they have specific knowledge of the illegal content or fail to take corrective action.<sup>99</sup>Thus, technical ISP should not be held criminally responsible in the event that it unknowingly distributes or hosts unlawful content created or uploaded by third party users. Despite this well-established principle of immunity of

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<sup>95</sup> Computer Crime Proclamation *supra* 47 Article 2(14)

<sup>96</sup>Ministry of Communication and Information Technology of the Federal Democratic Republic of Ethiopia, 1 Communication and Information Technology Statistical Bulletin 4 (2014).

<sup>97</sup>Ministry of Communications and Information Technology, *License Directive for Resale and Tele center in Telecommunication Services Directive*, Directive No. 1/2002.

<sup>98</sup> Computer Crime Proclamation *supra* note 47, Article 42. This provision adopted principle of internationality that helps to regulate cybercrimes from every corner of the world.

<sup>99</sup>Kinfe Micheal and Halefom Hailu, *The Internet and Ethiopia's IP Law, Internet Governance and Legal Education: An Overview*, 9MLR 154, 161 (2015).

the ISP for third party contents, the Computer Crime Proclamation made them criminally liable under various conditions. The first statement of Article 16 (1) of the proclamation makes an ISP liable if it is directly involved in the dissemination of the illegal content. The proclamation failed to define “direct involvement.” It may mean direct participation in the dissemination of ready-made content data. But from the general theory of criminal liability,<sup>100</sup>one can learn that ISPs which play a role in providing access to third party content without knowing the content of that data shall not be considered as content publishers and made liable. For instance, Web hosts which facilitate publication of internet blogs and comments, though they are involved in the dissemination of the information, cannot be treated as publishers of the blogs.<sup>101</sup> This is because they are not involved in the postings of the blogs or comments which are made by independent parties from the web host.

In normal course of things, ISPs which are mere passive conduits of a data do not seek to exercise prior control over it nor do they have effective control over its content. Therefore, there is no moral ground to make a person involved only in dissemination of a data responsible unless that person knew or ought to know that the information disseminated is illegal.<sup>102</sup>Nevertheless, Article 16(1) of the proclamation deviates from this by making ISP criminally responsible for ‘directly’ involving in the dissemination of some illegal content data without having knowledge of its content. Applying this rule to the internet access providers, hosts and transits, which by their very nature do not contribute to the content or do not know or expected to know the content of data, is simply preposterous. Yet, the broad definition of the ISP under the proclamation makes dissemination of the illegal content data by ISP with no prior knowledge of the content produced by third party punishable. This entails contradiction with the basic theory of criminal liability and tramples on the essence of freedom of expression and right to privacy as ISP would desist providing internet service in Ethiopia or simply try to censor each content of the users’ data that pass through. This makes the provision short of passing the three-part-testas criminalization of ISP without cognizance of its content is not necessary in the democratic society.

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<sup>100</sup>George P. Fletcher, *The Theory of Criminal Liability and International Criminal Law*, 10 JICJ 1029, 1044 (2012).

<sup>101</sup>Ter Kah Leng, *Internet defamation and the online intermediary*, 31 computer law & security review, 68,77 (2015).

<sup>102</sup>*Ibid.*

Article 16 (2) of the proclamation makes an ISP criminally liable if it had actual knowledge as to illegality of a content data passed through its service and failed to take measures to remove or disable access to the data. “Actual knowledge,” provided here as a condition to assign criminal liability, is not clear. Where the ISP have actual knowledge of the illegality of the data, whatever it means, it is unnecessary to make it liable for the crime. Because, this puts private ISPs in the position to make decisions about the lawfulness or otherwise of the content and to protect themselves from liability and apply their maximum effort to censor data of their users. The strategic position they occupy in the communication networks prompts ISPs to employ a range of software solutions to reduce offending online data by using robust security systems.<sup>103</sup> Under such regime, in addition to being wary of their potential legal liabilities, ISPs are also fearful of any negative publicity that might arise from their failing to be seen to act responsibly.<sup>104</sup>

Article 16 (3) of the proclamation alike provides problematic provision that undermines freedom of expression and right to data privacy. It tries to adopt mechanism of notice and take down to prevent computer crime. According to mechanism of “notice and take down,” in exchange for protection from liability, ISP are required to take down content data that a third party alleges to be unlawful. This procedure normally requires authorization from a qualified judicial organ to determine the legality of the content data. Nonetheless, the proclamation simply mandates administrative authorities to rule on legality issues and order the ISP to remove or disable access to the data where illegality is established. This usurps the courts’ inherent judicial power conferred by the constitution.<sup>105</sup> Furthermore, administrative authorities cannot be fair and impartial in determining the legality of the contents of the data. Nor are they competent to handle the matter. Thus, contents which are legal may be simply removed due to erroneous decisions or for political motives. The fact that proclamation fails to provide for the right to appeal against such administrative decision exacerbates the problem. In the circumstances, the procedure of ‘notice and take down’ envisaged in the proclamation is likely to invite arbitrary encroachment of freedom of expression.

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<sup>103</sup> Wall, D.S. *Policing Cybercrimes: Situating the Public Police in Networks of Security within Cyberspace* (Revised May 2011), 8 *Police Practice & Research: An International Journal*, 183 (2007/11).

<sup>104</sup> *Ibid.*

<sup>105</sup> FDRE Constitution *Supra* note 43 Article 78.

That said, mechanism of notice and take down itself has also its own pitfalls. Even assuming that the order to take down after the appropriate judicial organ decides the illegality of the content is in line with freedom of expression, it is unfair to take down one's data without providing fair hearing. The individual must be given fair notice to appear and explain the legality of his/her data before taking it down. To do away with the problem of mechanism of notice and take down, some states, typically, Canada, developed a human rights friendly system called "Notice and Notice" which dictates that the ISP shall not take down what users uploaded. Rather, after being notified by the competent judicial organ, ISPs are duty bound to notify the person that uploaded the content to do so.<sup>106</sup>This system is also buttressed under Manila Principles.<sup>107</sup> Nevertheless, the proclamation failed to provide the minimum guarantee that the mechanism of notice and take down provides.

Article 27 of the proclamation imposes the duty to report the commission of cybercrime on ISPs when they come to know certain cybercrime is committed through their services.<sup>108</sup> Accordingly, ISPs are required to report to the investigative authority when they come to know commission of cybercrimes on their computer systems. Actually, this provision was drafted on the assumption that every ISP has the knowledge of content data that passes through its service.<sup>109</sup>However, as it is discussed somewhere in this article, most of the internet service providers are not in a position to know the content of the data through their services. The repercussion that such obligation can bring is that it has the potential to prompt service providers to preemptively monitor communications on their networks under the pain of facing penalties for non-cooperation.<sup>110</sup>

## 5. CONCLUSION

Considering its openness to be easily abused, Ethiopia has been trying to regulate internet since 2004, the computer crimes proclamation being the leading cyber law. Nonetheless, this proclamation has some provisions that have negative impacts on freedom of expression. Provisions of the proclamation that are sought to protect individuals' and the public rights provide vague words and surreptitious phrases that can be abused by government authorities.

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<sup>106</sup> <http://www.entertainmentmedialawsignal.com/online-infringement-canadian-notice-and-notice-vs-us-notice-and-takedown> accessed on March 27, 2017.

<sup>107</sup> Manila Principles on Intermediary Liability *supra* note 75.

<sup>108</sup> Computer Crime Proclamation, *supra* 47 Article 27.

<sup>109</sup> The Explanatory Notes of Computer crime Proclamation at 37.

<sup>110</sup> Kinfé Micheal, *Some Remarks on Ethiopia's New Cybercrime Legislation*, 10 MLR 448, 453 (2016).

This indicates that they fail to fulfill standard of limitation of freedom of expression which requires clear and precise law.

The proclamation has criminalized online defamation. However, given the silencing effects of the criminal sanctions on freedom of expression, criminal law is not appropriate tool to regulate online defamation. Basically, internet has provided a self-help mechanism through which defamed persons can sustain their reputation. If that is not enough to correct the wrong behavior, civil remedies can be sought. Therefore, the sanctions of criminal law on internet defamation constitute unnecessary and disproportionate measures on the exercise of freedom of expression with regard to matters of public interest.

The proclamation also makes ISP criminally liable in principal capacity when certain illegal content data is transmitted through their services. Nevertheless, such regulation would compel ISPs to limit free speech subjectively under the pain of prosecution. It also allows administrative authorities to rule over legality of content data and order their removal. This may enhance arbitrary obstruction of political sensitive speeches. Such blanket criminalization attracts arbitrary blocks of individual's data by ISPs and unnecessarily limits freedom of expression.



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# **REGISTRATION OF VALUE ADDED TAX IN ETHIOPIA: AN APPRAISAL OF THE PRACTICE IN *DEBRE MARKOS, FINOTE SELAM* AND *MOTTA* TOWNS**

Alemu Taye Enyew\* and Haile Andargie\*\*

## **ABSTRACT**

*VAT (Value Added Tax) registration is the primary concern in VAT administration system for any country in the world. An appropriate registration of traders who fulfilled the legal requirements is a crucial point for the implementation of VAT laws. The justification for the researcher to conduct this research was, on one hand, existences of many unlawful VAT registered persons in the study area. On the other hand, there are larger numbers of VAT unregistered traders while they should have been registered which in turn results unfair competition among traders. Besides, high compliant cost of VAT registration coupled with lack of awareness on the benefits of VAT registration results complicated problems of VAT registration. The principal objectives of this research were to examine reasons for refusals of traders for VAT registration and to explore the factors that contribute for the weak enforcement of VAT laws. In doing this, the study employed qualitative research approaches so that it was devoted in-depth analysis of laws and practical examination. The research relied on both primary and secondary data to gather the necessary information. Interviews, FGD (Focus Group Discussion) and legal analysis were part of primary data gathering tools. The finding of the research revealed that there are so many reasons for refusal of VAT registration. Among other things, the high compliance cost and the complexity of the input VAT refunding system are the basic reasons for traders to be reluctant to get registered as VAT collector. On top of that, there is always fear of administrative and criminal liability on the side of traders. The study area is full of corruption so that there are enormous traders who failed to register for VAT though*

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actually, they fulfilled the legal requirements. Conversely, there are also enormous traders who registered without qualifying the requirements set under VAT laws. Moreover, the research found that the threshold requirement is fair, but the rate is unfair for traders. The gap between ToT (Turn over Tax) and VAT rate is quite different so that it affects competition. Finally, the study ends by providing possible solutions that may serve as inputs for tax authority and policymakers to re-design the VAT laws and its enforcement framework in Ethiopia. Inter alia, the researchers recommend, reduction of the VAT rate from fifteen percent, easing the compliance cost of VAT administration, creation of awareness about the benefit of VAT and staffing offices of revenue with disciplined and skilled personals.

**Key Words:** Compliance Cost, Ethiopia, Traders, VAT Registration

## 1. INTRODUCTION

### 1.1. Background of the Study

All countries in the world require finance in order to cover their cost of expenditures. Starting from the earlier society, to provide social services expenditures and infrastructure, governments are financing their capital either from tax sources or from non-tax sources. It is unthinkable for governments to perform their tasks and cover their expenditures unless they collect taxes.<sup>1</sup>

In the modern time, taxes are not only sources of revenue for governments but also it has various purposes like creating employment opportunities, encouraging investments, discouraging harmful products, and creating one economic community. Even though, governments were collecting taxes to achieve its objectives starting from the earlier time in all over the world, there were no diversified tax sources as modern time. Governments did not collect taxes from each chain value of goods and services until the mid-19<sup>th</sup> century.<sup>2</sup>The concept of VAT is a recent phenomenon which was introduced as a national tax for the first time in France on April 10, 1954.<sup>3</sup>Since then, it has become the main source of indirect tax in many countries of the world having different stages of economic development. Despite the fact that, VAT is the recent

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<sup>1</sup>Okoye, E. *Effective Value Added Tax: an Imperative for Wealth Creation in Nigeria*, Global Journal of Management and Business Research, 2013, p 91

<sup>2</sup>MisganawGashaw, *Tax Reform Discourse and Its Implication on Development: Evidence from the VAT Introduction in Ethiopia*, Mekelle University Law Journal Vol.3 No. 1 (2015), p 22(hereinafter Misganaw)

<sup>3</sup> Ibid

phenomenon, it has become very vital sources of revenue for governments almost for all countries in this contemporary world.<sup>4</sup>Now a day, because of its effectiveness, efficiency, simplicity, and ability to raise public revenues compared to other public revenue sources, VAT has become the most widely used forms of consumption taxes in the world.<sup>5</sup>

Despite the fact that modern tax system introduces in Ethiopia after the end of Italians occupation, the value added tax had become one of the most recent and tax systems in Ethiopia which is introduced in 2002.<sup>6</sup> Ethiopia launches VAT based on the IMF (International Monetary Fund) recommendations. After the introduction of VAT in 2002 (effective January 2003), the federal government generates significant revenue.<sup>7</sup>Taxes were collected from the final consumers from the sales of goods and services. Taxes levied on consumptions of goods and services were not based on each chain additional value of goods and services.

Notwithstanding its significance revenue generation for Ethiopian government, there is a serious problem of VAT administration by tax authorities.<sup>8</sup> Inter alia, the existences of many unqualified VAT registered persons and the existences of larger number of VAT unregistered traders while they should have been registered are the principal problems in VAT administration.<sup>9</sup>To assess the prevalence of those problems, to examine the reasons for refusal of VAT registration, and finally to identify the factors that contribute for the weak enforcement of VAT laws, the study was conducted in Debre Markos, FinoteSealm and Motta towns Administrations.

## 2. RESEARCH METHODOLOGY

### 2.1. Data collection and Sampling

Combination of doctrinal and empirical research methods has been employed to achieve the research objectives. The qualitative data were collected from Amhara National Regional State

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<sup>4</sup> Ibid

<sup>5</sup>A. Giesecke, Tran Hoang Nhi. ‘*a General Framework for Measuring VAT Compliance Rates*, Centre of Policy Studies and the Impact of Project G-206, 2010, p 10

<sup>6</sup> Taddese Lencho, *Towards Legislative History of Modern Taxes in Ethiopia (1941 -2008)*, Journal of Ethiopian Law, 2012, p12

<sup>7</sup>DasalegnMosissaJalata, *Value Added Tax as a Tool for National Development in Ethiopia*, Research Journal of Finance and Accounting, 2014, p188.

<sup>8</sup>WollelaAbehodieYesegat, *Value Added Tax Administration in Ethiopia: a Reflection of Problems*, EJournal of Tax Research, 2008, p 2

<sup>9</sup>Ibid

(ANRS) tax revenue bureau, Debre Markos, FinotSelam and Motta towns administration which are part of East and West Gojjam zone. The city administrations have selected based on the presence of enormous traders which are part of the research domain area of Debre Markos University. The researchers used semi-structured interviews with Revenue Authorities at Woreda and zone levels and focus group discussions to collect data from VAT registered and non-VAT registered traders in the study area. Hereunder, it's explained in detail the data collection methods used for the research.

## **2.2. Focus group discussions**

The researchers conducted three different focus group discussion with VAT registered traders and revenue officials in *Debre Markos, Motta and Finot Selam* towns. Eight persons (five VAT registered traders and three revenue officers) were part of the focus group discussion in each town that was guided and facilitated by the researchers. The focus group discussions have provided important insights on the issue and it has helped us to refine more specific research objectives and to structure our interview guidelines to make them clear and specific to the issues this research aims to investigate.

## **2.3. Semi-Structured Interviews**

The researchers conducted interviews with VAT registered traders, non-VAT registered traders and various tax accountants at different capacity based on purposive sampling method. The participants have selected purposively based on their experience, position, expertise, education, and other attributes to acquire profound information in order to achieve the research objectives. Since the research was qualitative, we conducted interviews until the data matured. The interviews were also conducted at the regional level to scrutinize the status quo of VAT in ANRS. The interviews and the focus group discussions were entirely conducted by the researchers in person to enable generating relevant data, keeping the research objective in mind. Scholarly written literature, report and policy documents from concerned organs were also source of secondary data.

## **2.4. Data Analysis Method**

As stated above, the researchers employed a qualitative research approach. Accordingly, first, the researchers were identified the theme and organization the themes into categories. Following the identification of thematic and core categories, the data are coded to determine category members.

After careful identification of the thematic unit and categories, the researchers used the descriptive and narrative method of data analysis.

### **3. REGISTRATION OF VALUE ADDED TAX UNDER ETHIOPIA'S LAW: AN APPRAISAL OF THE PRACTICE IN *DEBRE MARKOS, FINOTE SEALM AND MOTTA TOWNS***

#### **3.1. Power of Levying VAT under the FDRE Constitution**

The fundamental power to levy VAT emanates from the FDRE Constitution of 1995 which, following the federal structure, shares tax powers between the Federal Government and the Regional States.<sup>10</sup>The Ethiopian Constitution allotted the taxation powers between the Federal Government and the Regional States. It classifies taxation powers as taxes exclusive to the Federal Government, taxes exclusive to the Regional States, taxes concurrent with both the Federal Government and the Regional States, and taxes undesignated. The FDRE Constitution follows what might be described as the principle of residually, in the assignment of expenditure powers that are specified in Article 52 of the Constitution. The positive elucidation seems all expenditure powers that are not expressly stated as federal powers or concurrent powers of the Federal Government and the Regional States are assumed to be reserved as the powers of the Regional States. However, this is not the case for taxation powers and taxes not designated as “federal exclusive,” “state exclusive” or “concurrent to both” should be referred to the joint session of the HoF (House of Federation) and HPR (House of People Representatives), which shall determine by a two-thirds majority vote on the exercise of powers of taxation. The FDRE constitution under Article 99 plainly stipulated that “*The House of the Federation and the House of Peoples' Representatives shall, in a joint session, determine by a two-thirds majority vote on the exercise of powers of taxation which have not been specifically provided in the Constitution.*”

As per the FDRE constitution the joint session of the HoF and the HPR in April 2002, designated the power to levy VAT to the Federal Government.<sup>11</sup>Therefore, regional states do not have the power to levy VAT in Ethiopia although they can collect such tax on behalf of the Federal Government by delegation. Moreover, the two houses and also determined the VAT revenue

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<sup>10</sup>FDRE Constitution, 1995, Article 95-99, Proc. No 1, Neg. Gaze, Year 1, No. 1.

<sup>11</sup>Berhanu Assefa, *Undesignated Powers of Taxation in the Distribution of Fiscal Powers between the Central and State Governments under the FDRE Constitution*, Addis Ababa University, 2006, P 16.



distribution between the federal government and the regional governments.<sup>12</sup>Accordingly, VAT that is collected from sole traders goes totally to the regional governments.<sup>13</sup>On the other hand, VAT that is collected from federal government's public enterprises directly goes to the federal government.<sup>14</sup>Finally, VAT that is collected from entities (body), like companies, is distributed seventy percent to the federal government and thirty percent to state governments.

### 3.2. Purpose of VAT Registration

Almost 150 countries including many African countries nascence VAT currently to raise government revenue with less administration and economic costs than other broadly based taxes.<sup>15</sup>Needless to say VAT plays a pivotal role in generating massive revenue for the governments. As a part of the global development agenda, VAT was introduced in Ethiopia in the heart of "*developing countries notion of VAT as money machine*' and *developed worlds understanding of VAT as the only layout of development.*"<sup>16</sup>The 2002 Ethiopian tax reform culminated with the introduction of VAT that achieved significant transformation especially in increasing the revenue of the federal government. The percentage of VAT revenue contribution to total government income is tremendously rising from time to time in Ethiopia.<sup>17</sup>

Though the palpable objective of VAT is generating income for the government, it also plays as an instrument to equitable development.<sup>18</sup>The government uses the proceeds of VAT to different poverty reduction programs such as building infrastructures-road, health, education, safety net programs etc.<sup>19</sup>Since it's nascent, VAT has been more revenue productive than other forms of indirect tax to Ethiopian government so that it served as a mainstay for the country development. Thus, the primary purpose of VAT is to raise revenue to the government that can contribute to cover the cost of huge public expenditure.

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<sup>12</sup>TaddeseLencho, *The Ethiopian Tax System: Excesses and Gaps*, Michigan State International Law Review, Vol. 20:2, p 333

<sup>13</sup> Ibid

<sup>14</sup> Ibid

<sup>15</sup>Bizualem Belete, Practices and Challenges of Value Added Tax Implementation in Ethiopia Post January 2003 Assessment, Addis Ababa, February 2015, p 11.

<sup>16</sup>Richard M. Bird, *Value-Added Taxes in Developing and Transitional Countries: Lessons and Questions*, (Unpublished), 2005, p. 24

<sup>17</sup>DakitoAlemu, Empirical Analysis of The Contribution of VAT for Economic Development and Social Spending in Ethiopia, Addis Ababa, June 2011, P 93

<sup>18</sup>Misganaw, p 33

<sup>19</sup> Ibid

### 3.3. Prerequisites of VAT Registrations under the Ethiopian Tax Laws Regime

VAT is among the indirect and multiple stage sales taxes systems. The introduction of VAT in Ethiopia was in large part helped by the involvement of the IMF.<sup>20</sup>The IMF sent its technical staff back in 2000 who recommended among other things that Ethiopia introduce VAT by January 2003. The recommendations of the technical team were based on their prediction that Ethiopia would experience significant shortfalls of revenues from customs tariffs (due to tariff reductions).<sup>21</sup>The team also mentioned some of the superior qualities of VAT in light of Ethiopian context.

Accordingly, at the time, Ethiopia has been recommended to introduce VAT with a standard rate of fifteen percent, a single VAT rate, initial registration threshold of 250, 000 ETB (Ethiopian Birr), limit exemptions to few transactions, and introduce the ToT as an equalizing/supplementary/ tax on small taxpayers. Ethiopia declined only one advice that is introducing VAT with initial registration threshold of 250,000 ETB and the government fixed the threshold at 500,000 ETB. In December 2017, the ministry of finance and economic cooperation informed the minister of revenue to raising the VAT threshold to one million Birr.<sup>22</sup> Consequently, the minister of revenue by circular letter makes the VAT threshold one million ETB as of February 08/2018.<sup>23</sup>

Ethiopia launches VAT as a federal tax in spite of the possible constitutional hurdles although the Federal Government later agreed (since 2004) to share the proceeds of VAT with the regions. In Ethiopian tax system, registration of taxpayers (as used in the VAT laws) does have a conspicuous place under the laws. However, registered persons are not the only persons who/which collect VAT from consumers and account same to the Government. This is because Article 3(1(b)) states, “*A person carrying out taxable import of goods to Ethiopia, with respect to such import are duty bound to collect VAT.*”

Under the Ethiopian VAT regimes someone to be registered for VAT two things ought to be cumulatively consummated. To start with, the individual must be one who/which supplies

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<sup>20</sup>.Id, p 5

<sup>21</sup>Misganaw Gashaw, p 11

<sup>22</sup>Ministry of Finance and Economic cooperation, Letter to Ethiopian Revenues and Customs Authority, December 05/2017

<sup>23</sup>Ethiopian Revenues and Customs Authority, circular letter to revenue authorities, December 13/2017

taxable transaction by engaging in taxable activities that peruses "A person who carries on taxable activity."<sup>24</sup> The second thing that has to be cumulatively fulfilled in addition to the first requirement is that the annual turnover of the supplier should meet the threshold provided in the law. It provides under Article 16 (1) and (2) of VAT proclamation that reads;

A person who carries on taxable activity and is not registered is required to file an application for VAT registration with the Authority if (a) at the end of any period of 12 calendar months the person made, during that period, taxable transactions the total value of which exceeded 500,000 ETB; or (b) at the beginning of any period of 12 calendar months there are reasonable grounds to expect that the total value of taxable transactions to be made by the person during that period will exceed 500,000 ETB.

As stated in the VAT proclamation under article 16, a person who [which] carries on taxable activity and is not registered is required to apply for registration for VAT if in any period of calendar 12 months the person made, during that period, taxable transactions the total value of which exceeded 1000,000.00 ETB.<sup>25</sup>In this case, the value of the person's taxable transaction is determined as per Article 12 of the VAT proclamation by taking in to account the amount the person receives or is entitled to receive in return for the supply of goods or rendering of services, whether from the customer or any other person. On top of that, a person is required to register for VAT if at the beginning of any period of 12 calendar months if there are reasonable grounds to expect that the total value of the taxable transactions to be made by the person during that period will exceed a million ETB. These two requirements are, in fact, applicable to compulsory registration not for voluntary type of registration. Notwithstanding those people gave in article 16 of the VAT Proclamation, directive number 25/2001 has given the lists of people who are obliged to register for VAT. These people include: traders engaged in sale of gold, electronics business, plastic business, shoe factories, sale and preparation of leather products, contractors from level 1-9 and traders engaged in sale of computers and computer accessories.<sup>26</sup> Nevertheless, the Ministry of Finance and Economic cooperation by circular letter avoided the

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<sup>24</sup> The Value Added Tax Proclamations, 2002, Art. 16 (1), Proc. No. 285, Neg. Gaz., Year 8, No 33. Taxable Activity is defined in Article 6 of the VAT proclamation and Article 4 of VAT regulation. Accordingly, a taxable activity is an activity carried on continuously or regularly by any person in Ethiopia or partly in Ethiopia whether or not for pecuniary profit, in whole or in part, the supply of goods or services to another person for consideration.

<sup>25</sup>The Ministry of Finance and Economic cooperation, Letter to Ethiopian Revenues and Customs Authority, December 05/2017, in Amharic, unpublished and Ethiopian Revenues and Customs Authority, circular letter to all revenue authorities, December 13/2017, in Amharic, unpublished

<sup>26</sup> *Supra* note 17

above lists of traders from the ambit of VAT registration unless they met the base yearly turnover exchange requirement.

For the voluntary registration, the primary component that implies carries on taxable activities ought to be fulfilled however not the minimum threshold prerequisite according to article 17 of the VAT proclamation. Rather than the base limit prerequisite, the proclamation puts another requirement requiring the regularly supplying or rendering at least 75% of his goods and services to registered persons.

As far as the registration procedure is concerned, the proclamation under Article 18 and the VAT regulation under Article 8 clearly stated that the person should file a form as is established by the implementation directives issued by the minister of revenue to register for VAT. After registrations, the authority shall issue registrations certificate that incorporates the full name and other relevant details of the registered person, the date of issuance of the certificate, the date from which the registration takes effect and the registered person's taxpayer identification number. A registered person who conducts taxable activity in a branch or division shall be registered only in the name of the registered person. Under the proclamation Article, 16(4) registrations for branches were not possible as a rule. The directive issued by the minister of revenue allows and gives a guideline how it could be effective and what condition should be fulfilled to register branches independently from head offices.<sup>27</sup> The Proclamation, as usual, has contained general provisions and the regulation has provided some detail provisions that are instrumental for proper implementation of the Proclamation.

Generally, in addition to mandatory registration, voluntary registration is possible if person regularly supplying at least 75% of his goods or services to registered persons. However, the Authority may deny the application for registration if the person has no fixed place of abode or business or the Authority has reasonable grounds to believe the person will not keep proper records or will not submit regular and reliable tax returns as required under the VAT proclamation particularly under article 18(8(a and b)). Some traders are interested to register for VAT for different reasons. According to the tax authority in Debre Markos Town, persons aspire

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<sup>27</sup>The VAT registration Directive, 2007, Art. 6(2), Direc. No. 25, No. 25

for voluntary registration to get tax credits for them and to enable the ones who purchase goods or services from them (the former) to get input tax credit.<sup>28</sup>

Another point worthy of mentioning in relation to registration is deregistration (cancellation of registration). For a number of reasons, a person may not remain registered perpetually. This means that there are circumstances whereby a registered person changed into non-registered.<sup>29</sup>As per Article 19(1) of the proclamation, a registered person is allowed to apply for cancellation of VAT registration only where either of the following conditions is happened. First, a VAT registered person can apply for cancellation where he/she/ it has already ceased to make taxable transactions. Secondly, a VAT registered person can apply for deregistration at any time after a period of three years of the date of his/her/ its most recent registration for VAT if his/her/its total taxable transaction annual turnover in the period of 12 calendar months are expected to be not more than 1,000,000.00 ETB.<sup>30</sup>If any one of the above grounds surfaces out, deregistration can take place.

### **3.3.1. Reasons for Reluctance of VAT Registration**

FGD participants and the interviewee respondents stated so many consequences of being VAT collectors. Those consequences make other traders to hesitate for VAT registration though obliged to register.<sup>31</sup>There are so many civil and criminal liabilities stipulated under the VAT proclamation so that VAT registered traders be continuously in concern of liability. All of the FGD participants unanimously agreed that there are so many traders who are criminally punished in addition to administrative measures. VAT registered traders do not operate with certainty since they suspect that one of the customers may give falsified information to the revenue offices to harm them. According to the informants, the revenue offices in the study areas are welcoming every whistle-blower. The authority is taking measures without any verification so that traders are in fear of liabilities. One of the participants revealed that;

Even revenue workers are spaying each VAT registered traders to make them criminalizing due to his/her failures to issue VAT invoice to customers. Mainly, they act

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<sup>28</sup>Interviewer with Mr. GetahunAnmaw, on 28 February 2017,Debre Markos Town Revenu office head

<sup>29</sup>The Value Added Tax Proclamations, 2002, Art. 19, Proc. No. 285, Neg. Gaz., Year 8, No 33. and the Value Added Tax regulations, 2002, Article 10, Reg. No. 79, Neg. Gaz., Year 9, No. 19

<sup>30</sup>The Value Added Tax Proclamations, 2002, Art. 19, Proc. No. 285, Neg. Gaz., Year 8, No 33.

<sup>31</sup>Interviewer with MrAschalewKebede, on 12 January 2017, prosecutor of FinoteSelam revenue office

as a client and by any means try to escape from receiving VAT invoice. Then right away make traders criminally responsible. Subsequently, VAT registered traders do not operate with complete confidence and certainty, unlike non-VAT registered traders. Because of worry of liability, other traders are not cooperative enough for VAT registration although they are qualified to be registered.<sup>32</sup>

Therefore, the criminal as well as civil liability attached with VAT makes VAT registered traders uncertain on their business.<sup>33</sup> Absence of conducting business with certainty and full confidence causes others to urge loopholes not to be registered as VAT collectors.

The other reason for refusal of traders for VAT registration is its nature on moving ability of traders to create competition. The FGD participants clearly expressed that the consumers preferred to consume from non-VAT registered traders since they need an opportunity to urge a similar products or services by fifteen percent cheaper price. One of the interview respondents revealed that “*VAT registered traders are requiring the tax authority to deregistration claiming that consumers do not interested to consuming their products and/or services.*”<sup>34</sup> Besides, FGD participants publicized that:

Giant traders from Addis Ababa would not be willing to sell their products if they asked VAT invoices. In this scenario, we are not only act as a VAT collector but also as VAT payers too. Without producing evidence as to our VAT payment when we bought, it is unthinkable to get refund. In this scenario, VAT is not only a tax on consumption per se but also a tax on business per se. Either the government implements VAT laws properly across the country, or the revenue office in our town should tolerate us depending on our scenario.<sup>35</sup>

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<sup>32</sup> FGD conducted in FinoteSelam town with VAT registered traders and revenue officers, December 2016

<sup>33</sup> As per articles 45, 46 and 47 of the VAT proclamation, VAT non-compliance like failure to register for VAT, failure to issue a tax invoice, failure to maintain record such as original tax invoices received and a copy of tax invoices issued and failure to file timely return shall be liable to administrative penalties ranging from a fine 100 percent of the amount of tax payable and a fine of up to 50,000 Birr. Besides, VAT noncompliance also attracts criminal liability as per article 48 of the alluded proclamation above. Accordingly, tax fraud - making false or misleading statements is punishable with a fine ranging from 1,000 Birr to 100,000 Birr and an imprisonment ranging from 3 years to five years where the making of false or misleading statement is made knowingly or recklessly such an offence is punishable by a fine of up to 200,000 Birr of an imprisonment of up to 15 years. Sentenced for 15 years makes the business terminated. There are traders who are sentenced for 15 years so that their business is either relegating or terminating due to they are imprisoned.

<sup>34</sup> Interviewer with Mr. FentahunLakew, on 11 March 2017, head of East Gojjam Zone Revenue office

<sup>35</sup> FGD conducted in Motta town with VAT registred traders and revenue officers, December 2016

As stated above, the VAT laws do not yet properly implemented across the country and it has an impact on traders who established business in the study areas. Due to the failure of the merchants situated in Addis Ababa to issue VAT invoice, small traders in other areas are losing their refunding rights.<sup>36</sup>These things have an impact on their ability to compete with those non-VAT registered traders.

High VAT rate made goods and services expensive that lead to unfair competition between VAT registered and non VAT registered traders that supply the same product or services.<sup>37</sup>The dominance of VAT unregistered businesses, while they should have been registered in the study areas results unfair market competition according to the research participants.

Moreover, according to the participant's view, the compliance cost for VAT is high. For instance, there is VAT declaration every month, use cash registration machines and other related duties imposed on VAT-registered person as indicated under Sales Register Machines Directive No. 46/2007. On top of that, in ANRS only Ambasel Trading PLC (Private Limited Company) supplies the cash register machines and accessories.

It is hard to get machines and accessories easily unlike other materials which are imperative to run business. The cost of the machine is high since it is only supplied by single trader, Ambasel PLC. Hence, it is another reason that discourages other non-VAT registered traders to be registered for VAT. Generally, the FGD participants and the interview respondents stated various reasons for refusal of traders to get registered for VAT in the study areas. Those reasons are factors that contribute other non-registered traders not cooperative to be registered for VAT though they fulfilled the requirements. The FGD participants clearly indicated, *“fear of compliance costs and other factors make traders to be reluctant to register for VAT and ultimately make the tax authority task much hard to enforce VAT laws.”*

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<sup>36</sup>Interview with Mr. YtayahFentie, on 11 January 2017, Tax Education Officer at Amhara Region Revenue Authority

<sup>37</sup>BirhanMesfin, Value Added Tax Revenue Performance And Administration Problems in Case of ERCA in Gondar, Addis Ababa, February, 2014, p 55

On the other hand, non-VAT registered traders, and the tax authority in the study areas point out some of the advantages of VAT registration. The data found in interview with -VAT registered traders and revenue authority officers revealed that non-VAT registered persons are ToT collectors and by its nature ToT is not only a tax on consumption per se but also a tax on business per se. This means, ToT affects both the consumer and traders' pocket, unlike VAT which only touches consumer. Traders do not have any idea about the good quality of VAT over ToT.<sup>38</sup> Because there is no refunding system by deducting the input ToT from output ToT unlike VAT. Due to this reason, ToT affects traders' pocket unlike VAT and non-VAT registered traders are ToT collectors and payer for the government. The researchers believe that if traders had known the advantages of VAT, they would have been interested to be registered for VAT even voluntarily without qualifying the threshold requirement. Besides, the tax authority is not doing enough to aware the good quality of VAT over ToT for traders.<sup>39</sup>

The tax authority and non-VAT registered traders admitted that government supports VAT registered traders in every situation like auctions.<sup>40</sup> Furthermore, the tax authority most of the time accepts business income tax declaration of VAT-registered traders without rejection.<sup>41</sup> Hence, government supports VAT registered traders in different scenarios considered as advantage of VAT registration. However, this support is not capable to attract other non-VAT registered traders to be registered enthusiastically.

### **3.4. Factors Contribute for the Weak Enforcement of VAT Laws**

According to the research participants, there are so many factors that contributed for the weak enforcement of VAT laws. There are enormous VAT unregistered traders while they should have been registered and the vice versa is true according to the informants. The dominance of VAT unregistered businesses, while they should have been registered results unfair market competition.<sup>42</sup> This is undeniable fact and it is an indication for the improper enforcement of VAT laws.

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<sup>38</sup>Interview with AtoMulugeta Belay, on 16 January 2017, legal prosecutor at Amhara Region Revenue Authority

<sup>39</sup>Interviewer with Mr. Getenet Hassen, on 24 December 2016, Prosecutor of Motta Town Revenue office

<sup>40</sup>Interviewer with Mr. Kitachew Atnafu, on 06 April 2017, head of FinoteSelam Town revenue office

<sup>41</sup> Ibid

<sup>42</sup>Competition is a competitive rivalry that takes place between and among firms/traders through price, quantity, service quality, or a combination of these and other factors that consumer may value. To secure fair competition, the playing field, should be the same to all traders who/which are producing or providing similar production or services.



The FGD participants clearly stated that; *“One of the reasons for the registration of traders for VAT without fulfilling the legal requirements by the tax authority is due to the tax authority strong ambition to realize their extensive plan.”* The tax officers also admit their extensive plan but denied an allegation as to the registration of traders for VAT without fulfilling the legal requirements.<sup>43</sup>The tax authority extensive ambition to generate high revenue for the government triggers the registration of traders for VAT without qualifying the minimum annual threshold.

The other factor that has contributed for the weak enforcement of VAT laws according to the participants is low awareness about VAT laws by the revenue officers.<sup>44</sup> Traders are wondering the revenue workers knowledge to enforce VAT laws properly due to their low academic status. They believe that most of the revenue offices workers step up their career standing from low position.

According to FGD participants, the corrupt practices of rich traders and politicians have an adverse impact on the proper enforcement of VAT laws. Particularly political influence makes the revenue officers weak, and it is the main factor for failures to register all traders who qualified for VAT registration. One of the interview respondents revealed that; there are higher officials at zonal, regional and federal level who give protection to their affiliated traders not to register for VAT. Those who have an influential official informed to make their shop vacant while the revenue workers are assessing and evaluating the qualification of traders to register for VAT. Conversely, others who do not have any idea about the surprise visit of revenue officers will be registered for VAT. Sometimes zonal and regional revenue officers improperly give direction to revenue workers not to register some selected traders.

Moreover, the government believes that mandatory registration for VAT triggers the existence of political disturbance in Ethiopia.<sup>45</sup>The current political turmoil that happened in Ethiopia makes the government weak to enforce laws. Though traders are fulfilled the requirements for registration for VAT, they may oppose the registration and the tax authority may leave them not to aggravate the current violence.

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If the government imposes VAT to one of a trader and exempts to the other that produced or supplied the same products or services with the same capital size, it will trigger for the existence of unfair competition.

<sup>43</sup>Interviewer with Miss FirehiwotAsmare, on 18 April 2017, Debre Markos Town revenue authority accountant

<sup>44</sup> Ibid

<sup>45</sup>Interviewer with Miss TigistFetene, on 28 April 2017, Debre Markos Town revenue authority head

Poor records keeping of book of account of the traders make the revenue office workers task burdensome.<sup>46</sup> Traders are not willing to give their annual transaction to determine whether they qualify for VAT registration or not. Most of the traders in the towns are trading in primordial ways without making analysis of their income and expense. On top of that, there are illiterate traders who are unable to make standard records of book of account.<sup>47</sup> The revenue officers are not capable of verifying trader's status in the absence of any evidence from traders themselves or other third parties.<sup>48</sup> Besides, to escape from VAT registration, traders are changing their trade name repeatedly so that they are always taking new trade licenses.<sup>49</sup> Due to these reasons, revenue officers consider those traders as a new trader so that failed to register for VAT.

Absence of full workforce from the revenue office is also hampering the enforcement of VAT laws.<sup>50</sup> For instance, when the study was conducted the revenue offices did not have its own police force that makes the default traders forced to complying VAT duties. FGD participants and interview respondents revealed that the declining the confidence of the society in general and traders in particular upon the ruling party, failures to conduct full-fledged researchers on the daily income of traders by the tax authority are other pooling factors that have direct role in the weak enforcement of VAT laws.<sup>51</sup>

## **4. CONCLUSION AND RECOMMENDATIONS**

### **4.1. Conclusion**

The study has tried to investigate and identify reasons for reluctance of VAT registration and factors for the failure to enforce VAT laws properly in Debre Markos, FinotSelam and Motta town administrations. It has examined the legal requirements that have to be fulfilled to be registered for VAT under the VAT laws. Moreover, it revealed the factors that hinder for the proper registration of traders for VAT such as lack of skilled human resources, absence of honesty, rent seeking, and inability to convince traders about the good quality of VAT to traders are some of them on the side of the tax authority. On the other hand, poor record keeping and

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<sup>46</sup> Supra note 28

<sup>47</sup> Supra note 44

<sup>48</sup> Interviewer with Miss Firehiwot Asmare, on 28 April 2017, Debre Markos Town revenue authority accountant

<sup>49</sup> Supra note 29

<sup>50</sup> Supra note 45

<sup>51</sup> Supra note 48

canceling trade license and requesting new license are the factors that triggered by the trader themselves.

Furthermore, the study appreciated some of the reasons for the reluctance of traders to get registered for VAT. Among the reasons, fear of competition, fear of criminal liability, hard to get refund by reducing the input VAT from output VAT, and high compliance costs in administering VAT are the principal reasons for traders to be reluctant in registering for VAT.

#### **4.2. Recommendations**

Based on the findings of this research, the researchers would like to recommend the followings:

- i. One of the unique features of VAT in Ethiopia is the high compliance cost that is imposed as a duty of VAT collectors. The findings of this research revealed that declaration with generally accepted accounting standards in each month; use of cash register machine; keeping book of account to get refund and sever criminal liability attached with VAT are some of the factors that discourage others to be enthusiastic for VAT registration. Hence, as much as possible the ministry of revenue shall make the VAT declaration in every three months instead of every month. Besides, most of the research participants revealed that the cash register machine exclusively supplied by *Ambasel* Trading PLC, which is owned by *Tiret* corporate. However, the register machine must be accessible like any material for the sake of the VAT collector's interest.
- ii. In terms of liability, the office of revenue should focus on civil liability since the criminal liability may cease the business and ultimately may have an impact on the country economic performance at large. The criminal liability should be imposed selectively to those who repeatedly failed to comply the VAT laws and should be applied as a last resort. The stringent criminal liability should be mitigated and better to make the civil liability tough instead.
- iii. Lack of awareness creation by the tax authority to taxpayers is one of the finding of this research. Awareness creation about Ethiopia's tax laws in general and VAT laws in particular to the taxpayers and tax withholders is an elemental duty of the ministry of revenue. An indication of lack of awareness is that VAT registered traders do not have any idea about the difference between the impact VAT and ToT. The tax authority in each level should

convince the VAT registered traders about the advantage of VAT over ToT. Therefore, the office of revenue should provide an intense awareness to traders on the duties and rights of the VAT-registered person, and the criminal and civil liability of failure to comply with their duties before taking measures.

- iv. Traders who are obliged to collect VAT in the study areas believe that VAT affects competition since other non- VAT registered traders have an advantage of supplying their products or services at fifteen percent lower price to their customers. This makes other not to be cooperative to get registered for VAT. They are always changing a trade name to escape from registration despite the fact that they qualified to register. The researchers believe that this comes from the high difference rate applied for VAT and ToT. Thus, better to make the VAT rate lower from fifteen percent to make equalization with ToT payers and ultimately to attract traders for voluntary registration.
- v. Finally, the ministry of revenue should take appropriate measures on its staff when they fail to be honest for their duties. There are still workers in the revenue office who do not believe taxpayers are the milestone of the government revenue and fail to give much respect for them. They are abusing their power to get special benefit from VAT collectors. Besides, the ministry of revenue should update the knowledge of its workers in various ways for the proper enforcement of tax laws in general and VAT laws in particular. Hence, the ministry of revenue should staff its office in all level with necessary workforces that have the required knowledge and skill in the implementation of tax laws in general and VAT laws in particular.

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Interviewer with Mr. GetahunAnmaw, on 28 February 2017, Debre Markos Town Revenue office head

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# COMPLEMENTARITY AND SELF-REFERRAL AT THE INTERNATIONAL CRIMINAL COURT AND THE AFRICAN STATES: THE MYSTERY BEHIND THE ANOMALIES

Anbesie Fura Gurmessa\*

*“African leaders have come to a consensus that the (ICC) process that has been conducted in Africa has a flaw. The intention was to avoid any kind of impunity ... but now the process has degenerated to some kind of race hunting.”<sup>1</sup>*

## ABSTRACT

*Complementarity principle is one of the founding principles of the ICC. The establishment of the Court itself is partly attributed to the deliberate incorporation of this principle. It was designed by way of balancing the interests of member states to retain some leverage over crimes that are committed on their territory or by their nationals to have the first-hand right to investigate and prosecute. As can be seen, the principle by balancing the jurisdictions of states and the ICC was there to play the role of ameliorating the unnecessary frictions over the right to prosecute. It seems that this principle has not been properly appreciated by the majority of the African States. This is because, by engaging in self-referral, they have derailed the purpose of the principle. In the process, these states have also undermined their own sovereign right of investigation and prosecution. This is because the practice of self-referral has given the Court a free ticket to pursue as many cases as can be seen from the record of the Court so far. These self-referrals and the unabated and ambitious involvement of the Court in criminal process of the referring states have challenged the credibility of the Court since the voluntary surrender of jurisdictional right by these states has painted a politicized picture on the operation of the Court. So, it is the position of this paper that the African states failed in applying the principle and by unwittingly*

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<sup>1</sup> Hailemariam Desalegn, Ethiopia's Prime Minister and the then AU Chair, was speaking at the conclusion of the 50<sup>th</sup>-anniversary summit of the AU, *The Telegraph*, 27 May 2013, available at <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/10082819/International-Criminal-Court-is-hunting-Africans.html> , visited August 17, 2019.

*inviting the Court, finally could not protect their sovereignty on criminal matters. As a logical consequence these decisions, therefore, they cannot blame the Court alone for bias towards the Continent.*

**Key Words:** *complementarity, self-referral, state sovereignty, African States, politicization of prosecution,*

## 1. INTRODUCTION

When the international criminal tribunals and the criminal court were to be established at the international level, one of the major issues was how to determine the relationship that might exist between these courts and tribunals on the one hand and national courts on the other. The Tribunals that were established to address criminal issues committed in the former Yugoslavia and Rwanda were given the power to entertain cases in these specific areas with the primacy principle i.e. having a prevailing jurisdictional power in case of contested jurisdiction.

The principle followed in the establishment of the ICC, however, is different. The Statute of the ICC opted for the regulation of this relationship based on the principle of complementarity. This way of entertaining criminal cases allows domestic courts and for that matter, other courts to assume jurisdiction, so long as the courts are able and willing to adjudicate the case with the view of serving justice and preventing impunity. In many parts of the world, states have strictly followed this principle and have managed to ward-off the unwarranted presence of the Court in their domestic jurisdictions. The same approach should have been followed in Africa. The African member states that are under consideration in this article, nonetheless, have failed to live up to this commitment. The States whose cases or situations are under consideration have principally engaged in a self-referral rather than investigating and prosecuting criminal cases committed in their jurisdiction or by their nationals.

What are the consequences of this inappropriate appreciation of the principle of complementarity by these states? What has forced these states to engage in the practice of unwarranted self-referral? What are the ramifications of self-referral on the sovereignty of the states and the number of cases the Court has entertained on the African continent? How have these states responded to the frequent visitation of the ICC prosecutors to the Continent for investigation and prosecution? In this article, I will raise these issues and discuss by relating them to the principle



of complementarity in juxtaposition with the practice of self-referral and try to show some of the potential anomalies in the ICC and African states disgruntled relationship. To accomplish this purpose, the article uses close scrutiny of the cases and situations referred to the ICC and the responses of these states relating them to the subject matter of complementarity and self-referral.

Accordingly, the article is divided into three parts. The second part of the paper deals briefly with the ways of determining the relationship between domestic courts and international ones. In this part, the article addresses the procedure that has been followed in the two Criminal Tribunals and discusses the principle of complementarity with the view of elucidating the way it was envisaged by the Rome Statute. The third part analyzes how the African states have approached the principle of complementarity and try to situate the practice of self-referral with regard to the legal and political consequences of the approach that has been adopted by these states. And finally, in the fourth part, the article ends with some concluding remarks.

## 2. GENERAL BACKGROUND

The establishment of the international court or tribunal requires the determination of the sphere of their jurisdictions since naturally domestic courts also tend to exercise competence on the same subject matter. However, there seems to be no general principle of international law or customary international law rules that address this question.<sup>2</sup> As such, the regulation of this matter was considered by the Resolution establishing the Tribunals and the Statute of International Criminal Court (ICC hereinafter). Accordingly, the Resolutions of the International Tribunal for Former Yugoslavia (ICTY) & the International Tribunal for Rwanda (ICTR) have established that the Tribunals exercise concurrent jurisdictions with national courts.<sup>3</sup> However, the Tribunals were given primacy over all the national courts in the exercise of their jurisdictions with the power to request national courts to defer the cases in their favor “at any stage of the procedure.”<sup>4</sup> But it was not an absolute primacy that the Tribunals used since they referred a case to national courts when an appropriate trial was expected as such.<sup>5</sup> Because of the above preference for national courts, the ICTY established three procedural guidelines in its Rules of Procedure & Evidence to exercise this primacy. The Tribunal can only exert its primacy when

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<sup>2</sup> Antonio Cassese, *International Criminal Law*, (2<sup>nd</sup> ed, Oxford University Press, 2008), p. 348.

<sup>3</sup> Statute of the Tribunal for Former Yugoslavia, Security Council Resolution 827/1993, Art. 9(1) & Statute of the Tribunal for Rwanda, Security Council Resolution 955/1994, Art. 8(1)

<sup>4</sup> *Ibid.*, Art. 8(2)& 9(2).

<sup>5</sup> Antonio Cassese, *International Criminal Law*, *fn* 2, p. 340.

the case is tried as ordinary crime without the seriousness it requires or when the trial is conducted in domestic courts in an unreliable fashion because of impartiality or any other matter and finally when the case is relevant for the trial of other cases under consideration at the Tribunal.<sup>6</sup> The same procedure was followed by the ICTR.<sup>7</sup>

## 2.1. The Principle of Complementarity<sup>8</sup>

Unlike the primacy principle adopted for the ICTY & ICTR, the ICC Statute adopts a complementarity principle. According to this principle, the Court plays a “subsidiary role and supplements the domestic investigation and prosecution” of crimes under its jurisdiction.<sup>9</sup> As such, the Preamble<sup>10</sup> and Article 1 of the Statute clearly provide that the Court exercises jurisdiction complementing the national legal systems that have the primary right and responsibility to investigate and prosecute the crimes.<sup>11</sup> The complementarity principle was in the International Law Commission’s Draft, “but was substantially remodeled during the negotiation,”<sup>12</sup> showing the importance attached to this principle by the state-parties negotiating the Statute. Complementarity is considered to be one of the most important subjects in the

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<sup>6</sup> Ibid

<sup>7</sup> Ibid

<sup>8</sup> There is a wide range of scholarly material on the subject of complementarity. For further and elaborated consideration of the subject matter, the following writings can be of indispensable guidance. Tom Ruys, ‘Justiciability, Complementarity and Immunity: Reflections on the crime of aggression’, *13 Utrecht Law Review (2017)*; Mohamed M. El Zeidy, ‘The Principle of Complementarity: A New Machinery to Implement International Criminal Law’, *23 Michigan Journal of International Law (2002)*; Thomas M. Dunn, ‘The ICC and Africa: Complementarity, Transitional Justice, and the Rule of Law’ available at <https://www.e-ir.info/2014/07/12/the-icc-and-africa-complementarity-transitional-justice-and-the-rule-of-law/>. Accessed on August 20, 2019; David Tolbert & Laura A. Smith, Complementarity and the Investigation and Prosecution of Slavery Crimes, *14 Journal International Criminal Justice, (2016)*; Cedric Ryngaert, ‘Applying The Rome Statutes Complementarity Principle: Drawing Lessons From The Prosecution Of Core Crimes By States Acting Under The Universality Principle’, *19 Criminal Law Forum (2008)*:153–180; William A. Schabas, Carsten Stahn And Mohamed M. El Zeidy, ‘The International Criminal Court And Complementarity: Five Years On’, *19 Criminal Law Forum (2008)*:1–3; Carsten Stahn, Complementarity: A Tale Of Two Notions’, *19 Criminal Law Forum, 87–113*; HJ van der Merwe and Gerhard Kemp (eds) *International Criminal Justice In Africa, 2017*, (Konrad Adenauer Stiftung, 2017)

<sup>9</sup> Marcus Benzing, “The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity”, *7 Max Planck Yearbook of United Nations Law, (2003)* p.592.

<sup>10</sup> Rome Statute of the International Criminal Court of 1998, Preamble Para 10

<sup>11</sup> Ibid., Preamble para. 6.

<sup>12</sup> Robert Cryer & et al, *An Introduction to International Criminal Law & Procedure*, (2<sup>nd</sup> ed, Cambridge University Press, 2009), P. 153

Statute leading to its acceptance at the end of the negotiation.<sup>13</sup> Nouwen considers this principle as the “cornerstone of the Statute”, that even enabled the realization of the Court itself.<sup>14</sup>

## 2.2. The Purpose of Complementarity

The importance attached to the complementarity principle is observable from the negotiating history that states wanting to retain some level of control over the exercise of criminal jurisdiction. As such, Cryer underlines that “for the success of the negotiation,” agreement on the complementarity principle was considered a precondition making sure that states are not stripped of all their competence in criminal matters.<sup>15</sup> In line with this, there were even proposals to make the jurisdiction of the Court based on state consent rather than an automatic.<sup>16</sup> Accordingly, Countries like the US argued to the fullest to make the jurisdiction of the Court on the basis of consent, which was not accepted, leading to its renunciation of the membership of the Rome Statute eventually.<sup>17</sup>

Coming to the purpose of the principle, one of the major purposes of the principle is the protection of state sovereignty to investigate and prosecute crimes of national interest. In this relation, it has been argued that the exercise of criminal jurisdiction can indeed be said to be a central aspect of sovereignty itself.<sup>18</sup> As such, it can be argued that one of the aims of the principle is recognizing state competence so far as they are willing and able to investigate and prosecute the crimes under the jurisdiction of the Court. In this relation, it is believed that the existence of complementarity not only allows the states to investigate and prosecute the perpetrators but also encourages them to do so, for the failure to do so leads to the stepping in of the Court.<sup>19</sup> This is believed to lead to compliance of the states with their primary responsibility

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<sup>13</sup> M. Bergsmo, O. Bekou and A. Jones, ‘Capacity Building and the ICC’s Legal Tools’, 2 *Goettingen Journal of International Law* (2010), p. 830

<sup>14</sup> S.M.H. Nouwen, *Complementarity in the Line of Fire: The Catalyzing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press, 2013), p. 133

<sup>15</sup> Robert Cryer & et al, *An Introduction to International Law*, fn 12, p. 154.

<sup>16</sup> Ruth P. Philips, “The International Criminal Court Statute: Jurisdiction and Admissibility”, 10 *Criminal Law Forum*, (1999), P. 69.

<sup>17</sup> *Ibid*.

<sup>18</sup> Ian Brownlie, *Principles of Public International Law*, (6<sup>th</sup> ed Oxford University Press 2003), p. 301

<sup>19</sup> John M. Czarnetzky and Ronald J. Rychlak, ‘An Empire of Law? Legalism and the International Criminal Court’ 79 *Notre Dame Law Review*, (2003) p. 96

to investigate and prosecute core crimes without the need to involve the Court.<sup>20</sup> Seen from this point of view, the Court can be said to have a prospective jurisdiction, based on the decision and action of the home state.

The second purpose of the principle relates to practical issues. As an international institution, the Court can only entertain a few cases given the resources at its disposal.<sup>21</sup> Accordingly, the Court can only address matters that could not be dealt with at a domestic level due to various reasons; otherwise, it will be “flooded with cases from all over the world.”<sup>22</sup> Besides, the proximity of states to the accused and the crime scene make them best positioned for carrying out the investigation and prosecution.<sup>23</sup> Accordingly, states are in a much better position to carry out the investigation and prosecution in an “efficient and effective way” than the Court.<sup>24</sup>

In sum, the complementarity principle allows states to exercise criminal jurisdiction appropriately.<sup>25</sup> However, the principle does not leave the exercise of the jurisdiction entirely to the discretion of the states since there is also an international community interest in fighting impunity.<sup>26</sup> As such, to balance these two interests, the Statute has devised a way that the complementarity principle can be put in action when the state claiming jurisdiction, in fact, is unable or unwilling to genuinely carry out the investigation and prosecution. The next sections will raise issues relating to the operation of the complementarity principle. However, before moving on to the discussion of these issues, a few words about the nature of the complementarity principle seem warranted.

### 2.3. Nature of Complementarity

The nature of complementarity principle is more of admissibility issue than jurisdictional.<sup>27</sup> This is because, the jurisdiction of the Court is determined by Article 5, which enumerates the core crimes under the jurisdiction of the Court and other Articles that establishes the conditions for

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<sup>20</sup> Ibid, p.97. Czarnetzky and Rychlak argued in this relation that since the Court determine the willingness and ability “---in order to convince the ICC that it is willing and able to prosecute those crimes that are defined in the Rome Statute; a state may need to adopt its own laws prohibiting those crimes.”

<sup>21</sup> Marcus Benzing, “*The Complementarity Regime of the International Criminal Court*, fn 9, p. 599.

<sup>22</sup> Antonio Cassese, *International Criminal Law*, fn 2 p. 351.

<sup>23</sup> *Informal expert paper*, fn 19, p.3.

<sup>24</sup> Ibid., see also Robert Cryer & et al, *An Introduction to International*, fn 12, p. 153.

<sup>25</sup> Antonio Cassese, *International Criminal Law*, fn 2 p.351.

<sup>26</sup> John M. Czarnetzky and Ronald J. Rychlak, *An Empire of Law?*, fn 19, p. 95

<sup>27</sup> Marcus Benzing, “*The Complementarity Regime of the International Criminal Court*, fn 9, p. 595.

that trigger the exercise of the jurisdiction of the Court.<sup>28</sup> Accordingly, when a state is a party to the Statute or a non-party state declares that it accepts the jurisdiction of the Court, the Court is considered to have jurisdiction.<sup>29</sup> Therefore, once the core crimes under Article 5 are committed in a situation provided under Article 12, the Court has jurisdiction.<sup>30</sup> Then, what is the role of the principle concerning the jurisdiction of the Court? The role of the principle is to regulate the exercise of this jurisdiction. Accordingly, when we consider the relationship between the two, Article 12 determines the existence of the jurisdiction while Article 17 establishes situations in which the existing jurisdiction can be exercised. The Rules of Procedure and Evidence of the Court also supports this understanding by stating that the Court first determines the existence of jurisdiction after which it addresses the issues of admissibility.<sup>31</sup>

#### **2.4. Substantive Issues of Complementarity**

As has been discussed in the preceding parts, the principle is the best compromise between the respect for national sovereignty allowing domestic courts to entertain criminal cases of international concern and fighting impunity in the face of the commission of heinous crimes. And in the event that the national courts cannot properly carry out the investigation and prosecution, the system allows the ICC to step in. Accordingly, Article 17 regulates this procedure based on certain grounds which have to be evaluated and determined before the case is admissible if it is already before the national court. As such, admissibility before the Court is determined on the basis of three grounds. These are the unwillingness and inability on the one hand and inaction being the third one on the other. The next section sheds light on these criteria starting with inaction.

##### **2.4.1. Inaction**

This criterion is added based on the logical understanding flowing from the purpose of complementarity.<sup>32</sup> As has been stated above, one of the main reasons for having the principle is

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<sup>28</sup> For the Court to exercise jurisdiction, it has to convince itself of the existence of all the required elements under the Statute dealing with the personal, temporal and territorial jurisdictions, as laid down under articles 11 and 12 of the Statute. See generally instance for Morten Bergsmo, "The Jurisdictional Regime of the International Criminal Court, Part II, Articles 11-19", *6 European Journal Crime Criminal Law & Criminal Justice, No.4, (1998)*.

<sup>29</sup> Rome Statute, Art.12, See also Ruth P. Philips, *The International Criminal Court Statute, fn 16, p.66*.

<sup>30</sup> Ruth P. Philips, *The International Criminal Court Statute, fn 16, p.68*. As such, the Court has jurisdiction when the crime is committed by the national or on the territory of a state-party or consent is granted by the non-party state or referral by the Security Council.

<sup>31</sup> Rules of Procedure and Evidence, ICC-ASP/1/3, (2002), Rule 58(4).

<sup>32</sup> See Mahnouch H. Arsanjani and W. Michael Reisman, 'The Law-In-Action of the International Criminal Court', *99 American Journal of International Law, (2005)*, p. 390, see also W. Schabas, 'Prosecutorial Discretion v.

to allow states to exercise their criminal jurisdiction on the crimes under the Statute with the first-hand opportunity. However, if there is no state claiming sovereign right to exercise this jurisdiction, then there is no impediment to the admissibility of the case.<sup>33</sup> This is true even though some writers argue that the exercise of jurisdiction by the Court in case of inaction is not covered under the wording Article 17<sup>34</sup>, others have specifically refuted this position claiming that the wording of Article 17 clearly covers the role of the Court in case of inaction.<sup>35</sup> The determination of the veracity of either of the position requires an independent research, at least for academic purpose. This is because the ICC seems to have a concurring opinion with the latter group of writers and as such this ground is still used for the purpose of admitting situation for consideration.<sup>36</sup>

#### 2.4.2. Unwillingness

This is one of the most important complementarity grounds that the Statute recognizes, allowing the Court to exercise jurisdiction when a state is unwilling to genuinely conduct the investigation and proceedings on the basis of the investigation.<sup>37</sup> According to the Statute, a state is considered ‘unwilling’ when the investigation or prosecution is conducted for the purpose of “shielding” the perpetrator or when the “proceeding is unjustifiably delayed” or when the proceeding is not conducted in an “independent or impartial way”.<sup>38</sup> In comparison to the other grounds of admissibility, the proof of unwillingness is considered to be very difficult for it requires

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Activism’, 6 *Journal of International Criminal Justice*, (2008), p. 731. The writer stated that “in relation to the charges faced by an accused, the Court has been more active, and has even been willing to add the criterion of ‘inactive’ to Article 17 ICC Statute.”

<sup>33</sup> Darryl Robinson, ‘The ‘Inaction’ Controversy: Neglected Words and New Opportunities,’ in Carsten Stahn and Mohamed El Zeidy, (ed), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, 2011) p. 463

<sup>34</sup> William A. Schabas, *Prosecutorial Discretion v. Judicial Activism*, fn 32, p. 757. Schabas argued that “in Lubanga, the Pre-Trial Chamber invented a third prong, ‘inactivity’”. And by doing that the Court has solved some of the challenge to the admissibility issue yet. There was only one problem: it is not in the ICC Statute. See also William A. Schabas, “First Prosecution at the International Criminal Court”, 27 *Human Rights Law Journal*, (2006), p.32

<sup>35</sup> Darryl Robinson, *The ‘Inaction’ Controversy*, fn 33, p. 463. The writer contrasted this position by writing that “a case is admissible before the ICC where there is not and has not been any national proceeding in relation to that case (the ‘inaction’ scenario); this proposition flows, not from any creative interpretation, but rather from straightforward application of the black-and-white words of the Statute”

<sup>36</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 Decision on the Prosecutor’s Application for a Warrant of Arrest 10.2.2006, para.29; *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Al Abd-Al-Rahman*, Decision on the Prosecution Application under Art. 58(7) of the Statute, ICC-02/05-01/07, 27 April 2007, paras. 19-25;

<sup>37</sup> Rome Statute Art. 17(2)

<sup>38</sup> *Ibid.*, Art.17(2 a-c).

“assessing the motives of the national authorities...”<sup>39</sup> Thus, “inferences” should be made based on the “objective factors”<sup>40</sup> to establish whether the state is conducting the proceedings in “good faith”,<sup>41</sup> with the view to punishing the perpetrators. However, this interference on the basis of unwillingness is regarded as “politically sensitive”, since it has the tendency of accusing the authorities for not conducting the proceedings genuinely or for not having good faith.<sup>42</sup>

Be that as it may, it has been established that there are indicators that might help in the establishment of unwillingness on the part of the state that contends that it is undertaking a genuine investigation and prosecution. As such, it is said that the “direct or indirect political interferences...” by the national authorities or “general institutional deficiencies-subordination of the proceedings” or “procedural irregularities showing an unwillingness to investigate or prosecute” can be used as an indicator of the absence of willingness on the part of a state.<sup>43</sup> Something that needed to be underlined in this context, however, is the fact that unwillingness is not determined by the outcome of the case, rather by the “procedural and institutional factors.”<sup>44</sup> If the outcome is considered as the basis for admissibility, it amounts to the assumption that the accused deserves punishment or severe punishment, which violates his right to be presumed innocent until proven guilty.<sup>45</sup>

### 2.4.3. Inability

The third ground of admissibility is the inability of a state to genuinely carry out investigation and prosecution. This is linked to the absence of a central government or the existence of civil disorder or natural disaster or any other similar situation affecting the state’s capability to conduct a genuine proceeding.<sup>46</sup> Proving inability seems somehow easier compared to unwillingness since it depends on certain objective factors.<sup>47</sup> Besides, the Statute provides clear criteria to determine inability stating that a “total or substantial collapse or unavailability of the

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<sup>39</sup> Robert Cryer & et al, *An Introduction to International, fn 12*, p.128.

<sup>40</sup> Ibid.

<sup>41</sup> Frank Meyer, “Complementing Complementarity”, *6 International Criminal Law Review*, (2006), p. 565

<sup>42</sup> *Informal expert paper, fn 19*, p. 14

<sup>43</sup> Ibid.

<sup>44</sup> Robert Cryer & et al, *An Introduction to International, fn 12*, p. 128, see also *Informal expert paper, fn 19*, p. 14.

<sup>45</sup> *Informal expert paper, fn 19*, p. 14.

<sup>46</sup> See Nidal Nabil Jurdi, “The Complementarity Regime of the International Criminal Court in Practice: Is it Truly Serving the Purpose? Some Lessons from Libya,” *30 Leiden Journal of International Law* (2017), pp. 199–220

<sup>47</sup> Robert Cryer & et al., *An Introduction to International, fn 12*, p.129.

national judicial system...,” which can be determined objectively.<sup>48</sup> Accordingly, the Court can exercise jurisdiction when the state could not obtain the suspect or the evidence and testimony or could not carry out the proceeding in general caused by the total or substantial collapse or unavailability of the judicial system.<sup>49</sup>

The Independent Expert Group commenting on this principle has also put in place certain indicative factors that can lead to the conclusion that there exists an inability on the part of the state. Accordingly, factors like, “lack of necessary personnel- judges, investigators, & prosecutors” or absence of the normal “judicial infrastructure” or the “absence of substantive or procedural penal legislations” can be used to establish inability.<sup>50</sup> The determination of the level of devastation or the absence of these resources is very controversial as will be demonstrated in the preceding parts. Following this, it has been argued that a state is considered to be unable to prosecute a perpetrator if its penal legislation only allows proceedings for “ordinary crimes” without appreciating the grave nature of the crimes as provided under the Statute.<sup>51</sup> In this last regard, it should be admitted that the experts were drawing parallel experience from the ICTY/ICTR in the exercise of jurisdiction when the state can only conduct investigation and prosecution for ordinary crimes.<sup>52</sup> The consideration of the relevance of this ground for the admissibility of cases with regard to the ICC is beyond the scope of this article. And hence, it suffices for now to outline some of the possible grounds used for the purpose of determining inability

The above part of the article has dealt with the concept and operation of the principle of complementarity, very briefly I should admit though, and tried to shed light on its core contents. If this is the way the jurisdiction of the Court operates and what is the international community has accepted and applied, how have the African States applied the principle of complementarity? Where does the practice of self-referral fit in the components of the principle? In the following parts, the paper tries to examine the application of the principle of complementarity in juxtaposition with self-referral to elucidate how the relationship between the African States and

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<sup>48</sup> Rome Statute art. 17(3).

<sup>49</sup> Marcus Benzing, *The Complementarity Regime of the International Criminal Court*, fn 9, p.613.

<sup>50</sup> *Informal expert paper*, fn 19, p. 15.

<sup>51</sup> Marcus Benzing, *The Complementarity Regime of the International Criminal Court*, fn 9, pp. 614-617.

<sup>52</sup> Antonio Cassese, *International Criminal Law*, fn, 2, p. 340.



the ICC has gone awry causing so much trouble- whereby some of the States even threatening to withdraw individually or in an *en masse* fashion.

### 3. ICC AND THE AFRICAN STATES

After a very long reluctance and misunderstanding among the major players on international plane regarding the status and role of international criminal law, the turning point seemed to have emerged with the consensus to establish the two criminal tribunals for Yugoslavia and Rwanda. This development has contributed significantly towards the realization of the Rome Statute that has given birth to the ICC. Following the establishment, although the heavyweights on the negotiating table like the USA, China and Russia have withheld their membership citing various claims, the African bloc has shown an impressive track record in signing and ratifying the Statute and in the process becoming members of the ICC in a remarkable number. Today, out of the 122 members of the ICC, 33 are the African States.<sup>53</sup> In terms of regional setting, Africa has the biggest number of memberships compared to all other regions contributing to the ICC.

What was the motive behind this impressive ratification? As a matter of fact, some tend to believe that countries with weak legal and political institutions are the ones who try their best to circumvent the scrutiny of international institutions into their actions and decisions.<sup>54</sup> With this logic as a springboard, Dutton has examined the number of ratifications and the nature of the states that have engaged in the process and argued that “states with good human rights practices are quite likely to join the ICC”.<sup>55</sup> The defiant pattern followed by the majority of African States, particularly those in the Sub-Saharan, however, has been an ill-fitted exercise to common sense. That is why Chapman & Chaudoin argued that “the ratification patterns in Sub-Saharan Africa are an exception to the trends described above.”<sup>56</sup>

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<sup>53</sup> The States Parties to the Rome Statute, available at [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx)

<sup>54</sup> See for instance, Yvonne M. Dutton, ‘Explaining State Commitment to the International Criminal Court: Strong Enforcement Mechanisms as a Credible Threat’, *10 Washington University Global Studies Law Review* (2011), pp. 520-1, see also Terrence L. Chapman & Stephen Chaudoin, ‘Ratification Patterns and the International Criminal Court,’ *57 International Studies Quarterly*, (2013), p. 405

<sup>55</sup> Dutton, *Explaining State Commitment to the International Criminal Court*, fn 54, p. 520

<sup>56</sup> Chapman & Chaudoin, *Ratification Patterns*, fn 54, p. 404

A closer scrutiny, nonetheless, shows that there are various reasons justifying the record number of ratification that the Rome Statute has received from the African States.<sup>57</sup> In the interest of space and time, it seems imperative to concentrate on a few of the following. One of the major contributing factors for the overwhelming support of the African States is the Rwandan genocide where a million innocent civilians have been the victim of a horrendous crime and the States wanted to have a lasting solution in avoiding this kind of catastrophe from happening in Africa ever again.<sup>58</sup>

Although not of the same magnitude, similar patterns of atrocities have been witnessed in many parts of Africa. In concurring with the above desire of minimizing the violation of human rights, Jalloh writes that “---fresh memories of the tragic and preventable Rwandan genocide in 1994, [---] strengthened Africa’s resolve to support the idea of an independent and effective international penal court that would punish, and hopefully deter, perpetrators of such heinous crimes in the future.”<sup>59</sup> Similar willingness on the part of African States in deterring the violation of the rights of their citizens has been captured by Rodman & Booth while writing that “therefore, ICC membership is likely to coincide with progress in peace processes as well as improvement in the accountability practices of the security forces.”<sup>60</sup> So, following the bad record that the States have shown and the unprecedented human rights violations that the Continent in entirety has endured over the years,<sup>61</sup> the enthusiasm that has been shown by the African States towards the ICC, at least in the beginning, seemed genuine.

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<sup>57</sup> See for instance, H. Jalloh and F. Bensouda, ‘International Criminal Law in an African Context’, in M. du Plessis (ed.), *African Guide to International Criminal Justice* (Pretoria: Institute for Security Studies, 2008), see also Phakiso Mochochoko, ‘Africa and the International Criminal Court’, In E Ankumah and E Kwakwa (eds), *African perspectives on international criminal justice*, (Ghana: Africa Legal Aid, 2005), Charles Chernor Jalloh, *Africa and the International Criminal Court: Collision Course or Cooperation?*, *34 North Carolina Central Law Review* 203 (2012). Available at: [http://ecollections.law.fiu.edu/faculty\\_publications/253](http://ecollections.law.fiu.edu/faculty_publications/253)

<sup>58</sup> Philipp Kastner, *Africa- A Fertile Soil for the International Criminal Court?*, *Die Friedens-Warte*, Vol. 85, No. 1/2, *Konfliktregion Afrika* (2010), p. 133

<sup>59</sup> Charles Chernor Jalloh, *Regionalizing International Criminal Law?*, *International Criminal Law Review* 9 (2009), pp. 446-7

<sup>60</sup> Kenneth A. Rodman & Petie Booth, ‘Manipulated Commitments: The International Criminal Court in Uganda’ *36 Human Rights Quarterly*, (2013), p. 273

<sup>61</sup> First, Representatives from twenty-five African States have met in Senegal Dakar and passed their support of the establishment of an independent international criminal court. See *the Dakar Declaration for the Establishment of the International Criminal Court*, Feb. 2, 1998, <http://www.iccnw.org/documents/DakarDeclaration- Feb98Eng.pdf>. Following that the Organization of Africa Unity (now the AU), during its 36th ordinary session of the Assembly of Heads of State and Government, held in Lome, Togo, had shown its full support for the establishment of the Court. *Declaration and Decisions Adopted by the 36th Ordinary Session of the Assembly of Heads of State and Government of the OAU held in Lome, Togo* (2000),

The second reason put forward by some writers to outline the ambitious acceptance of the ICC is the state of play that the African criminal justice has been in. Following similar pattern that the African justice system in general exhibits, the criminal justice system of the continent, if not worse, harbors the weakest infrastructure and as such, it has been incumbent upon the African leader to seek assistance from every source possible to deal with the commission of heinous human rights violations that it has been known for a long period of time now.<sup>62</sup> And the ICC has come at a very right time where the OAU was trying to remodel itself into the African Union to sort out its negative image at home and abroad.<sup>63</sup> Using the ICC for the purpose of saving face has been a convenient solution. Jalloh has succinctly described the situation in African writing that “it is perhaps better captured by the reality that African states are likely to be the frequent users, or “repeated customers”, for the Court because of a relatively higher prevalence of conflicts and serious human rights violations and a general lack of credible legal systems to address them.”<sup>64</sup>

There is also one final reason that needs to be mentioned that served as a factor in the massive ratification of the Statute. This is the potential pressure from the aid providing countries on the African States to show commitment with regard to the implementation of human rights.<sup>65</sup> Meernik & Shairick argued that “---democracies use a variety of tools to promote human rights throughout the world, including diplomatic pressure, foreign aid---”<sup>66</sup>. And this pressure must have also played its role in the process in addition to the factors that have been discussed-contributing to the number of ratification by the African States.<sup>67</sup> It seems that the above reasons

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[https://au.int/sites/default/files/decisions/9545-2000\\_ahg\\_dec\\_143-159\\_xxxvi\\_e.pdf](https://au.int/sites/default/files/decisions/9545-2000_ahg_dec_143-159_xxxvi_e.pdf)

<sup>62</sup> Francois-Xavier Bangamwabo, “International Criminal Justice and the Protection of Human Rights in Africa”, in Anton Bösl and Joseph Diescho (ed), *Human Rights: in Africa Legal Perspectives on their Protection and Promotion*, (Konrad Adenauer Foundation 2009), p. 128

<sup>63</sup> The African Union was established based on the Constitutive Act Adopted in Lome Togo (2000) following a successive discussion conducted in Sirte 1999. *AU in a Nutshell*, available at <https://au.int/en/history/oaau-and-au> accessed on September 26, 2018

<sup>64</sup> Charles Chernor Jalloh, *Regionalizing International Criminal Law*, fn 59, p. 447

<sup>65</sup> For an excellent discussion of the correlation between foreign aid and economic pressure by the proving states to ratify and implement human rights and humanitarian principles, including the ratification of the ICC Statute, see generally, James Meernik & Jamie Shairick, ‘Promoting International Humanitarian Law: Strong States and the Ratification of the ICC Treaty,’ *14 International Area Studies Review*, (2011)

<sup>66</sup> Ibid, p. 32

<sup>67</sup> Ibid, see also Jay Goodliffe & Darren G. Hawkins, “Explaining Commitment: States and the Convention against Torture”, *68 Journal of Politics* (2006), p. 361

and many others have influenced the decisions of the African States to engage in massive ratification of the Rome Statute which was started by Senegal and followed by many.<sup>68</sup>

Emboldened by the success of ratification of the sister countries, some of the African countries did not want to limit themselves to the ratification. This practice of prompt implementation is uncommon for the many African States when seen with regard to the multitudes of international instruments, particularly the human bills being the case in point here, where the States generally forget conveniently the fact that they even have ratified a treaty. Uncharacteristically of them in this regard, however, some of the members wanted to test its relevance by referring situations that have been bothering them over the years.

The flirtation with the ICC jurisdiction has been carried out by three African Countries in succession in the form of referral of the situations that they thought merits the consideration of the ICC prosecutorial endeavors. Uganda has been the front-runner in this respect, referring the situation in Northern Uganda<sup>69</sup> followed by the Democratic Republic of Congo<sup>70</sup> and the Central African Republic followed the same pattern.<sup>71</sup> In the following years, the Court has received additional referral cases from Mali, Côte d'Ivoire and, the CAR II.<sup>72</sup> Legally speaking, all the cases merit investigation and prosecution but the issue is how this process has unfolded.<sup>73</sup>

In addition to the self-referral situations that are being entertained by the ICC, we have four cases that have received the attention of the court. The Al-Bashir and Libyan cases referred to

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<sup>68</sup> Sanji Mmasenono Monageng, "Africa and the International Criminal Court: Then and Now", in Gerhard Werle, et al ed., *Africa and the International Criminal Court*, (Asser Press, 2014) p. 15

<sup>69</sup> Situation referred to the ICC by the Government of Uganda: January 2004, available at <https://www.icc-cpi.int/uganda>

<sup>70</sup> Situation referred to the ICC by the DRC Government: April 2004, available at <https://www.icc-cpi.int/drc>

<sup>71</sup> Situation referred to the ICC by the CAR Government: December 2004, available at <https://www.icc-cpi.int/car>

<sup>72</sup> Situations under investigation, available at <https://www.icc-cpi.int/pages/situation.aspx>. Mali referred the situation in 2012 while Côte d'Ivoire accepted the jurisdiction of the Court in 2003 before ratifying the Rome Statute in 2013. And compounding the complex relationship the African States have with the ICC, CAR referred additional case to the ICC, authorizing the Court to investigate all cases committed with regard to the renewed violence in the Country.

<sup>73</sup> Payam Akhavan, 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court,' *99 The American Journal of International Law*, 2 (2005), p. 404. The writer argues rightly that "there is little doubt that as a purely legal matter, the LRA atrocities qualify as crimes within the Court's subject-matter jurisdiction."

the Court by the Security Council under Article 13 (b)<sup>74</sup> and the Kenyan post-election violence that was initiated by the ICC Prosecutor after the “failure”<sup>75</sup> of the Government in Kenya to deal with the situation and the last one being the case from Burundi following the wide-spread violence in the Country.<sup>76</sup> I will come back to the other situations and how they have seized the attention of the Court in a little while.

As can be seen from the foregoing discussions, the relationship between the ICC and the African states started with high hopes to bring justice to the Continent that has been plagued by serious violations of human rights<sup>77</sup> and rampant impunity<sup>78</sup> on the part of the actors that have committed heinous crimes that human history has witnessed. In the beginning, the feeling of righteousness among the African leaders was so high because they thought that they have found the lasting solution to the problem they felt is in the African air for a long period of time.<sup>79</sup> Yet, in time less than a decade, the majority of these African States have found themselves at odds with the ICC and calling for a group withdrawal at the Union level because they believe that they have been wrongly targeted by the prosecutor of the ICC.<sup>80</sup> How? The following sections will try to address how the African States have turned from the staunchest supporters of the ICC at the beginning into formidable enemies that the Court has to deal with ever since its establishment. In this regard, the disgruntled relation can be the byproduct of various political, economic and

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<sup>74</sup> UN Security Council Resolution 1593 (2005) para. 1 and 2, See also UN Security Council Resolution 1970/2011, article 4.

<sup>75</sup> A Commission of Inquiry in the Post-Election violence was established in Kenya to deal with the post-election violence in that Country and although the Commission produced reports that showed the perpetration of crimes of serious nature, the government in Nairobi failed to take action following which the Commission was forced to submit the Report to the ICC prosecutor, triggering the investigation. See Philipp Kastner, *Africa- A Fertile Soil for the International*, fn 58, p. 150

<sup>76</sup> ICC Prosecutor opens *proprio motu* investigation: March 2010, available at <https://www.icc-cpi.int/kenya>, see also The Guardian, *Burundi Becomes First Nation To Leave International Criminal Court*, Sat 28 Oct 2017, available at <https://www.theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court>, retrieved on September 20, 2018.

<sup>77</sup> Chikeziri Sam Igwe, *The ICC's Favorite Customer: Africa and International Criminal Law*, 41 *The Comparative and International Law Journal of Southern Africa*, 2 (2008), p. 294. Igwe emphasizing the prevalence of violence against the rights of African people wrote that “every part of Africa has experienced internecine conflicts that destroyed millions of lives.”

<sup>78</sup> *Ibid*, p. 297. On the rampancy of impunity in Africa, Igwe wrote that “---impunity continues to migrate from country to country.”

<sup>79</sup> Professor T. Maluwa, Legal Adviser, OAU Secretariat, Statement at 6<sup>th</sup> Plenary, 17 June 1998. See Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN doc. A/CONF.183/13 (Vol. II), available at [http://legal.un.org/diplomaticconferences/1998\\_icc/docs/english/vol\\_2.pdf](http://legal.un.org/diplomaticconferences/1998_icc/docs/english/vol_2.pdf), p. 104, para. 116

<sup>80</sup> Philomena Apiko & Faten Aggad, “The International Criminal Court, Africa and the African Union: What way Forward?”, *European Center for Policy Development*, (November 2016), available at <http://ecdpm.org/wp-content/uploads/DP201-ICC-Africa-AU-Apiko-Aggad-November-2016.pdf> accessed on September 26, 2018, p. 10

diplomatic circumstances. And as such, it seems quite reasonable to delimit the grounds of contention to the concept of complementarity that has been discussed in the first part of the paper.

Before the discussion of this subject starts, it seems imperative that I have to make two things clear from the very beginning. These are the concern over the concentration of the Court on African situations and the politicized nature of the UN Security Council referral. On the face of it, the assertion that the African States have been wrongfully targeted seems quite valid considering the fact that the cases and situations that the ICC has considered so far and is still considering are principally from Africa. Currently, the ICC has 11 situations under investigation and all, but the one from Georgia, are from African Countries.<sup>81</sup> That has led some commentators like the former AU Commissioner to claim that “we are not against international justice. It seems that Africa has become a laboratory to test the new international law.”<sup>82</sup> Many African leaders have also shared the same sentiment against the Court claiming that the Court is another form of colonial apparatus.<sup>83</sup> For instance, Yoweri Museveni, the first to refer a situation to the ICC and later surrender a suspect<sup>84</sup>, has been the “front-man”<sup>85</sup> in criticizing and delegitimizing the function of the Court by running the ill-founded conspiracy that the Court is blackmailing the African States.<sup>86</sup>

The writer believes that although the African states have failed to understand and probably implement other principles of the Court, their major setback comes from the misinformed and ill-handled appreciation of the principle of complementarity and the practice of self-referral. Two impactful decisions of the members would elucidate the concern, the issue of self-referral and the

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<sup>81</sup> Situations under investigation, available <https://www.icc-cpi.int/pages/situation.aspx>

<sup>82</sup> His Excellency Jean Ping, Chairperson, African Union Commission, Interview with the BBC *on Vow to pursue Sudan over 'crimes'*, available at <http://news.bbc.co.uk/2/hi/africa/7639046.stm>

<sup>83</sup> Manisuli Ssenyonjo, ‘The International Criminal Court and the Warrant of Arrest for Sudan’s President Al-Bashir: A Crucial Step Towards Challenging Impunity or a Political Decision’, *78 Nordic Journal of International Law* (2009), p. 397

<sup>84</sup> Uganda captured and cooperatively transferred Dominic Ongwen, the suspect against whom an arrest warrant has been issued on January 16, 2015, and provided all the evidentiary materials. See Lino Owor Ogora, “Uganda’s Ambiguous Relationship with the ICC Amidst Ongwen’s Trial,” *International Justice Monitor*, December 11, 2017, available at <https://www.ijmonitor.org/2017/12/ugandas-ambiguous-relationship-with-the-icc-amidst-ongwens-trial/> retrieved on September 18, 2018

<sup>85</sup> Mark Kersten, “Between Disdain and Dependency — Uganda’s Controversial Place in the ICC-Africa Relationship”, *Justice In conflict*, March 29, 2017, available at <https://justiceinconflict.org/2017/03/29/between-disdain-and-dependency-ugandas-controversial-place-in-the-icc-africa-relationship/> retrieved on September 14, 2018

<sup>86</sup> Ibid

consequent failure of taking care of criminal activities under their jurisdiction following the Statute's requirement of "*---that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes*" (emphasis added).<sup>87</sup> As will be shown in the following parts of the article, the decision of the self-referring states, in addition to other consequences, has tremendously increased the number of cases that the Court has to consider from Africa. This is because, except for the two of the situations that have been referred by the Security Council, the rest of the Situations have their ways into the Court following this practice.

Coming to the Sudan and the Libyan situations that have been referred to the Court by the UN Security Council, since the Council, based on the Reports available,<sup>88</sup> believed that there are reasonable grounds to believe that heinous crimes have been committed in these Countries with the help of the incumbent governments or at least, the governments are implicated in the commission of the crimes. The Sudan referral was substantial for multitudes of factors. To start with, Sudan was and still is not a party to the Rome Statute. This could come as surprise for many readers, but "*---Sudan signed the Rome Statute on 8 September 2000, but has not yet deposited its ratification.*"<sup>89</sup> And for another, the Arrest Warrant was issued not against low-level military officers or a rebellion as it used to be. It was against a sitting head of state of the Sudanese, Omar Hassan Ahmad Al Bashir.<sup>90</sup> That has created a serious fissure in the relationship between the African States and the ICC, since they felt that the UN Security Council might target authoritarian leaders in Africa.<sup>91</sup> The tension has been compounded considering the fact that many of them are known for their serious violations of the rights of their citizens,<sup>92</sup> either because they could not protect the citizenry or, in the majority of the cases, the leaders are also

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<sup>87</sup> Rome Statute, Preamble para. 6

<sup>88</sup> *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, Geneva, 25 January 2005, available at [http://www.un.org/news/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf), retrieved on September 23, 2018, p. 4. The Commission determined that although the crimes of genocide were not committed by the Sudanese Government in Darfur, "international offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide."

<sup>89</sup> Manisuli Ssenyonjo, *The International Criminal Court*, fn 83, p. 403

<sup>90</sup> Situation in Darfur, Sudan, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, available at, <https://www.icc-cpi.int/darfur/albashir/Documents/albashirEng.pdf>, retrieved on September 23, 2018.

<sup>91</sup> Manisuli Ssenyonjo, *The International Criminal Court*, fn 83, p. 399. In this regard, Ssenyonjo wrote that if the Arrest Warrant is applied as intended it "*---is an important signal that everyone including a president can be held accountable for international crimes within the jurisdiction of the ICC*"

<sup>92</sup> See generally, Bruce Baker, 'Twilight of Impunity for Africa's Presidential Criminals' *25 Third World Quarterly*, (2004). In describing the situation most African authoritarian leaders have found themselves in relation to the ICC, Baker wrote that because of temporal jurisdiction, "therefore old tyrants may be safe---. It is the present tyrants who should be most worried", p. 1497

implicated in the crimes committed.<sup>93</sup> This relationship is particularly problematized when the veto power of the members represented in the Security Council is at issue. While all the East and West are protected by their proxy veto power holders, Africa has been the only Continent without a representative who can protect them by blocking the Council from referring cases targeting the African States and their leaders.<sup>94</sup>

With regard to the concern over the politicized nature of the UN Security Council, it can safely be said that the procedure of referral of the situation can be selective and political in nature.<sup>95</sup> The Council has shown so far in its practice that some of its decisions are driven by political goals rather than strict legal ones.<sup>96</sup> The Sudanese representative has clearly articulated this politicized and selective nature of the referral by stating that “---this Criminal Court was originally intended for developing and weak States and that it is a tool for the exercise of the culture of superiority and to impose cultural superiority.”<sup>97</sup> The concern of this article is in overemphasizing this politicized nature; we have lost sight of the contribution of the African States themselves. The African States, by engaging in self-referral and in the process, undermining the principle of complementarity, have contributed to the problems that we witness in the deterioration of the relationship they have with the Court. The contribution of the self-referral states becomes lucid when we see the situations that the Security Council has referred so far. There are only two situations- Sudan and Libya- that the Court has entertained based on this triggering mechanism compared to the substantial number that has been self-referred from Sub-Saharan Africa. But,

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<sup>93</sup> Everisto Benyerastate, “*Is the International Criminal Court Targeting Africa?*” available at [http://paperroom.ipsa.org/papers/paper\\_46399.pdf](http://paperroom.ipsa.org/papers/paper_46399.pdf), retrieved on September 23, 2018. The writer enlists the consideration of some thought regarding Africa to be in state “---of nature in which life is brutal, barbaric, short and nasty” p. 3

<sup>94</sup> Philipp Kastner, *Africa- A Fertile Soil for the International*, fn 58, p. 133

<sup>95</sup> See generally, Goran Sluiter, ‘Obtaining Cooperation from Sudan – Where is the Law’, 6: *Journal of International Criminal Justice* 1 (2008). See also Manisuli Ssenyonjo, *The International Criminal Court*, fn 83, p. 403. Ssenyonjo contends that on the insistence of the US Representative, nationality exclusion has been included in the Resolution. He stated that the provision of the resolution is discriminatory by underscoring that “clearly, nationals of other states are excluded from the jurisdiction of the ICC, which is discriminatory.”

<sup>96</sup> For a politicized discussion on the UN Security Council’s referral, see generally, F. Berman, ‘The Relationship between the International Criminal Court and the Security Council’, in H.A.M. von Hebel, J.G. Lammers and J. Schukking (eds), *Reflections on the International Criminal Court: Essays in Honor of Adriaan Bos* (The Hague: Asser, 1999), 173-180; Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press, 2005); See Luigi Condorelli and Annalisa Ciampi, ‘Comments on the Security Council Referral of the Situation in Darfur to the ICC’, 3 *Journal of International Criminal Justice* (2005)

<sup>97</sup> UN Doc. S/PV.5158, p. 12 (Mr Erwa). Mr Erwa continued denouncing the Resolution enunciating that “---this Court is simply a stick used for weak States and that it is an extension of this Council of yours, which has always adopted resolutions and sanctions only against weak countries---”



through all these processes, nobody has refuted the horrendous crimes committed on the African Continent and the need for a prosecutorial approach towards the evils behind the crimes.<sup>98</sup>

As will be elaborated in the following sections of the paper, from legal point of view, the activities of the ICC are legitimate considering the situation of many African countries that are marred by violence and serious human rights abuses and given the fact that the governments are either implicated in the perpetration of the crimes or they did not undertake their responsibilities of protecting the victims and worst of all, they have not brought the perpetrators of the crimes to justice. If we consider the rest of the situations that are under consideration by the ICC coming from Africa, the same outcome is expected. Rather than wasting unnecessary time on each case, after understanding the backgrounds of some of the cases, the appropriate thing to do next is to see how the African States have congested the jurisdiction of the Court by the infamous procedure of self-referral and the attendant discordant ensued from this procedure.

### **3.1. Self-Referral by the African States**

To the complete disbelief and probably shock of the international criminal lawyers, the Ugandan government engaged in a self-referral of its internal conflict with the notorious group called the Lord Resistance Army (LRA).<sup>99</sup> The decision was received by international criminal lawyers half-heartedly because of various reasons.<sup>100</sup> For one thing, this is against the stipulation of the Rome Statute that required states parties to bear the primary responsibility in terms of investigating and prosecuting perpetrators of international crime.<sup>101</sup> And, by so doing, the Statute has made the jurisdiction of the Court on the basis of complementarity principle; yet, the

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<sup>98</sup> See *Report of the International Commission of Inquiry on Darfur*, fn 78, p. 158. The Commission in concluding the Report to the UN SC underscored that “thousands were killed, women were raped, villages were burned, homes destroyed, and belongings looted. About 1.8 million were forcibly displaced and became refugees or internally-displaced persons.”

<sup>99</sup> *President Of Uganda Refers Situation Concerning Lord's Resistance Army (LRA) To International Criminal Court*, Press release, 29 January 2004, available at <https://www.un.org/press/en/2004/afr821.doc.htm> retrieved on 18 September 2018

<sup>100</sup> For an excellently captured account of the responses of the community of international criminal lawyers see generally, Mohamed M. El Zeidy, “The Ugandan Government Triggers the First Test Complementarity Principle: An Assessment of the First State’s Party Referral to the ICC,” *5 International Criminal Law Review*, 2005, pp. 83-119

<sup>101</sup> Rome Statute, Preamble paragraph 6 stating that “--- it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”

decision has made the Court the primary destination<sup>102</sup> for crimes that are committed in the domestic jurisdiction of Uganda. Keller in this regard argued that “the appearance of ICC supremacy may be enhanced, or perhaps explained if not justified, by the unexpected practice of state self-referrals.”<sup>103</sup> That is why it can be argued that the practice of self-referral has affected the delicate balance that the Statute wanted to create between the domestic courts and the ICC.

For another thing, because of the wrong relationship that this mutual agreement of referral creates, the Court would be forced to regard the referring authority as a customer. I will elaborate on these concerns in the following parts, first, by situating the practice of self-referral in the principle of complementarity.

### **3.1.1. Complementarity Principle and the Issue of Self-Referral**

The Rome Statute is pretty clear about the complementarity role the Court has to play in relation to fighting impunity. As we have discussed in the preceding parts, the role of the Court comes into play when the member state is unable or unwilling to shoulder the responsibilities of investigating and prosecuting the perpetrators. Although almost all the states have claimed that the reason behind their referral is their inability to undertake the criminal process,<sup>104</sup> this is blatantly against the purpose of the complementarity principle and has also created more confusion in the practice of the ICC. We will come back to the problems that have been created by voluntary self-referral and how it fares in the application of the principle of complementarity later on, but how was the state referral envisaged in the beginning, if it was in the mind of the drafters at all?

State referral as a triggering mechanism of the ICC investigation and prosecution was considered to have the least effect in bringing situations before the Court.<sup>105</sup> This can be because of many reasons but the experience from the state complaint procedure from other human instruments has been the instructing practice for expecting the least in this regard, where states have not used this

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<sup>102</sup> Linda M. Keller, “The Practice of the International Criminal Court: “The Complementarity Conundrum”, 8 *Santa Clara Journal Of International Law* 1 (2010), p. 221

<sup>103</sup> Ibid

<sup>104</sup> Philipp Kastner, *Africa- A Fertile Soil for the International*, fn 58,145. The writer underscores that by citing the press releases that DRC and the CAR submitted in these cases “--- arguing that [they] lacked the capacity to investigate and prosecute the crimes being committed.”

<sup>105</sup> Andreas Th. Muller and Ignaz Stegmiller ‘Self-referral on Trial: From Panacea to Patient’, 8 *Journal of International Criminal Justice* (2010), p. 1269

approach principally for political reasons.<sup>106</sup> However, the practice of self-referral has arrived at the door of the Court almost out of nowhere.<sup>107</sup> The state referral that was supposed to play a very limited role was conceived to have that minimal role to play against another state, not a referral of one's own situation. Muller and Stegmiller capitalizing on this idea wrote that "the self-referral mechanism as it has turned out was, to a large extent, not anticipated by the framers of the Rome Statute."<sup>108</sup> What was on the mind of the framers, as it is logically expected, is that the national governments will selfishly guard the sovereign power of investigation and prosecution. Arsanjani and Reisman emphasizing the above argument wrote that "there is no indication that the drafters ever contemplated that the Statute would include voluntary state referrals to the Court of difficult cases arising in their own territory."<sup>109</sup> In conclusion, the practice of self-referral is a strange introduction into the activities of the Court by the African States, to say the least.

That being said, the next issue is the consideration of the problems that are created by the practice of self-referral. For that purpose, the common-sense starting point is how the complementarity principle has been envisaged and how it has been applied by the African States. The Rome Statute, as we have indicated in the first part of the Article, elaborates when the unwillingness or inability of a member state can be invoked. Since the states, by referring the matter to the ICC for investigation and prosecution, have shown their willingness<sup>110</sup> to have the situation considered by the Court for prosecutorial purposes, the problem of willingness is irrelevant here.<sup>111</sup> So the next important issue is inability. When is it that a state can be

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<sup>106</sup> Payan Akhavan, 'Enforcement of the Genocide Convention: A Challenge to Civilization' 8 *Harvard Human Rights Journal*, (1995) p. 237. Akhavan argued that "----inter-state human rights mechanisms are generally effective only to the extent that geopolitical or other interests are at stake." see also Caus Kress, "'Self-Referrals'" and "'Waivers of Complementarity'", 2 *Journal of International Criminal Justice*, (2004), p. 944,

<sup>107</sup> Andreas Th. Muller and Ignaz Stegmiller *Self-referral on Trial*, fn 105, p. 1269

<sup>108</sup> Ibid

<sup>109</sup> Mahnouch H. Arsanjani and W. Michael Reisman, *The Law-In-Action of the International Criminal Court*, fn 32, p. 386

<sup>110</sup> Sascha Dominik Dov Bachmann and Eda Luke Nwibo, 'Pull and Push'- Implementing the Complementarity Principle of the Rome Statute of the ICC within the AU: Opportunities and Challenges,' 43 *Brooklyn Journal of International Law*, (2018), p. 489, the writers underscored in establishing the willingness on the Part of Uganda stated that "from the facts and circumstances of the case, it appears that while State self-referrals may indicate their willingness to uphold justice---"

<sup>111</sup> Nidal Nabil Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship*, (*International and Comparative Criminal Justice*) (1<sup>st</sup> ed, Routledge, 2011), pp. 169-170

considered to be unable to investigate and prosecute a situation in her jurisdiction? The Rome Statute has succinctly underlined the ground when the state can be considered unable.<sup>112</sup>

The Statute establishes that the jurisdiction of the Court can be activated when the state is unable to live up to what is expected of her under the obligation of the membership. This is true when there is “--- a *total or substantial collapse or unavailability* of its national judicial system---” (emphasis mine).<sup>113</sup> And the claims of the African States to be unable to carry out their duty of bringing the suspects to justice has not been corroborated with the requirement of *a total or substantial collapse of their judicial systems*. Despite the problem of weakness that the African judicial system has been affected by,<sup>114</sup> none of the countries that have participated in the self-referrals have suspended the operation of maintaining law and order in their respective jurisdictions.<sup>115</sup> In determining the inability of the referral states Cryer argued that “---the Chambers of the Court have been willing to accept at face value statements by states that they are unable to act on the relevant cases or are not doing so.”<sup>116</sup>

In explaining the level of devastation that the national judicial system has to be subjected to, writers compare the situation of a state to the post genocidal state of Rwanda where the judicial system was completely wiped out.<sup>117</sup> In a post-conflict situation of the Rwandan magnitude, Bachmann and Nwibo wrote that “in such extreme circumstances, national courts will invariably fall short of ideal expectations of expeditious and fair trials.”<sup>118</sup> While there is a serious challenge to many of the African states, however, the majority of the self-referring states, at least, have not experienced the decimation that the Rwandan judicial system has been subjected to.

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<sup>112</sup> An elaborated discussion on the substantive issue on this subject can be found in section 2.4.3.

<sup>113</sup> Rome Statute, art. 17 (3)

<sup>114</sup> Several writers on international criminal law have underlined that the simple weakness of the judiciary of a state cannot be a reason for the involvement of the Court. See for instance, Rolf Einar Fife, “The International Criminal Court Whence It Came, Where It Goes,” 69 *Nordic Journal of International Law*, (87–113, 2000), the writer correctly underscores that “with the proviso that *bona fide* investigations and prosecutions are carried out by States, the basic message of the Statute is a confirmation of the key role of States in international criminal law.” P.72, see also Charles Chernor Jalloh, *Regionalizing International Criminal Law*, fn 59, pp 446-7, see also Francois-Xavier Bangamwabo, *International criminal justice and the protection of human*, fn 62, p. 128

<sup>115</sup> Robert Cryer, ‘Darfur; complementarity as the Drafters Intended?’ in Carsten Stahn and Mohamed El Zeidy, (ed), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, 2011), p. 1106

<sup>116</sup> Ibid

<sup>117</sup> See for instance, Payam Akhavan, “Complementarity Conundrums Debate, The ICC Clock in Transitional Times,” 14 *Journal International Criminal Justice*, (2016), p. 1051, see also Sascha Dominik Dov Bachmann and Eda Luke Nwibo, *Pull and Push* fn 110, p. 487

<sup>118</sup> Sascha Dominik Dov Bachmann and Eda Luke Nwibo, *Pull and Push* fn 110, p. 487

And as we have stated in the preceding parts, the strength of a legal system does not serve as a ground for the purpose of referring a situation to the ICC.<sup>119</sup> Accordingly, the African states, by referring cases that they can entertain using their own domestic courts have gone against the principle of complementarity. And in the process, they have significantly prejudiced the *raison d'être* of the principle which are protecting the sovereignty of state jurisdiction over criminal matters<sup>120</sup> and reasonably limiting the cases that can be brought before the ICC.<sup>121</sup> Burke-White captured the above relevant concerns in the creation of the international criminal legal system in stating that it is, “neither the legal mandate of the ICC nor the resources available to it are sufficient to allow the Court to fulfill the world’s high expectations.”<sup>122</sup> Akhavan shares the same worrisome practice of self-referral writing that “---the reality is that [national Courts] must eventually become involved and share the burden of accountability because of the scarce resources of international criminal jurisdictions.”<sup>123</sup> That truth of self-referral has rendered the principle of complementarity practically irrelevant, in this sense. This is the case since the Court now involves in the criminal process of a state so long as the state has asked for the involvement without the need to determine whether the states are capable of dealing with a criminal matter by the use of their own institutions. Schabas summarizes this fact stating that “the complementarity assessment has not proven to be very significant in the work of the Court to date.”<sup>124</sup>

The serious discussion that was taking place in Rome during the adoption of the Statute, making sure that the Court would not take over the role of the national courts in the investigation and

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<sup>119</sup> See, for instance, Kevin J. Heller, “The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process”, *17 Criminal Law Forum*, (2006), p. 260. See also Philipp Kastner, *Africa- A Fertile Soil for the International*, fn 58, p. 136, and *Informal expert paper*, fn 19, p. 8. The Paper emphasizing on the consideration of the level of criminal proceeding underscored that “it was extremely important to many States that proceedings cannot be found “non-genuine” simply because of a comparative lack of resources or because of a lack of full compliance with all human rights standards.”

<sup>120</sup> Morten Bergsmo, “Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court, and Their Possible Implications for the Relationship between the Court and the Security Council,” *69 Nordic Journal of International Law*, (2000), p. 99, Outlining the importance attached to the principle Bergsmo wrote that “complementarity adds no new element of compulsion; rather, it was a necessary concession to the prevailing doctrine of State sovereignty”

<sup>121</sup> William W. Burke-White, “Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice”, *Harvard International Law Journal*, (Vol. 49 No.1, 2008). p.56

<sup>122</sup> *Ibid*

<sup>123</sup> Payam Akhavan, *Complementarity Conundrums Debate*, fn 117, pp. 1046-47

<sup>124</sup> William A. Schabas, *An Introduction To The International Criminal Court*, (4<sup>th</sup> edition, Cambridge University Press, Cambridge 2011), p. 192

prosecution<sup>125</sup> has no role now in playing its intended purpose, thanks to the practice of self-referral. The assumption that the “states would resist the Court’s involvement, arguing the merit of their own justice system,”<sup>126</sup> has not worked in the African context, where more than 60% of the Court’s work has been contributed voluntarily by the States themselves. In the presence of these facts, it is against any logic, to say the least, to accuse the Court of selective justice and racism without the necessary inward-looking by the Africa states.

### **3.1.2. Dependency Relationship between the Referral State and the OTP**

The second important consideration that needs elaboration with regard to the referral of African States is the unnecessary dependency relationship that the referral has created between the African states and the OTP.<sup>127</sup> As it is well recognized, the effective operation of the ICC and by a logical extension, the OTP depends on the willingness and positive collaboration of the state in whose territory the investigation is to be conducted.<sup>128</sup> Because of this fact, although the OTP has a legitimate jurisdictional authority to investigate and prosecute cases in a member state due to membership, the Office is advised to maintain a collaborative relationship with these states.<sup>129</sup>

This collaborative relationship, nevertheless, should not be at the expense of the impartiality of the Office in terms of prosecuting the suspects on both sides of the aisles, i. e. the crimes that are committed by both the rebellions and the government militias should be brought before the

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<sup>125</sup> Mahnoush H. Arsanjani and W. Michael Reisman, *The Law-In-Action of the International Criminal Court*, fn 32, p. 386. Arsanjani and Reisman wrote that “if any of the crimes listed in the Statute were committed in their respective territories or by any of their citizens, governments were presumed to prefer to prosecute the perpetrators themselves and, by effectively applying their police powers, demonstrate to their constituents (and their opponents) their ability to defend their citizens.”

<sup>126</sup> William A. Schabas, *An Introduction To The International Criminal Court*, fn 124, p.192

<sup>127</sup> Sarah M. H. Nouwen & Wouter G. Werner, ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan’, *21 European Journal of International Law*, No. 4, (2010), p. 943.

<sup>128</sup> The OTP has made it clear this logistical or the otherwise dependency on the domestic apparatus in its policy document by stating that “where the Prosecutor receives a referral from the State in which a crime has been committed, the Prosecutor has the advantage of knowing that the State has the political will to provide his Office with all the cooperation within the country that it is required to give under the Statute.” ICC-OTP, *Annex to the “Paper on some policy issues before the Office of the Prosecutor”: Referrals and Communications*, (Policy Paper, September 2003), available at [https://www.icc-cpi.int/NR/rdonlyres/278614ED.../policy\\_annex\\_final\\_210404.pdf](https://www.icc-cpi.int/NR/rdonlyres/278614ED.../policy_annex_final_210404.pdf). Accessed on 05 of August 2019, p. 5

<sup>129</sup> David Bosco, “Discretion and State Influence at the International Criminal Court: The Prosecutor’s Preliminary Examinations,” *111 The American Society of International Law*, 2 (2017), P. 407. The writer states the factors forcing the OTP writing that “practical and procedural factors may also run together; if the OTP cannot secure cooperation from key states during a preliminary examination, it may lack the information necessary to satisfy the pretrial chamber’s standards for a full investigation. Absent state support for an investigation, the prosecutor faces a difficult choice.”

Court. However, because of the self-referral and the concomitant client-like relationship<sup>130</sup> between the governments and the ICC, so far, it is only the crimes that are committed by the parties the referral has been lodged against has been investigated, an arrest warrant has been issued for<sup>131</sup> and the prosecution has been conducted.<sup>132</sup>

The referral has put the Court squarely in the hands of the referring states like Uganda, politically and logistically for its dependence on the goodwill and material support of the government.<sup>133</sup> This has significantly affected the impartiality of the Court as an independent umpire in investigating and prosecuting international criminal activities of a very serious nature.<sup>134</sup> In an indirect way, the Court has also been used for the purpose of boosting the international standing of the states “politicizing”<sup>135</sup> the role they are playing in bringing the perpetrators of crimes of international nature to the Court and in so doing, upholding international law.<sup>136</sup> The same act has also played an intimidating role on their opponents.<sup>137</sup> This

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<sup>130</sup> Linda M. Keller, *The Practice of the International Criminal Court*, fn 102, p. 219. Keller wrote explaining this undesirable relationship stated that “the Prosecutor was criticized for appearing to endorse Ugandan wishes that the ICC investigate the LRA, but not Ugandan forces.”

<sup>131</sup> Rod Rastan, ‘Testing Co-Operation: The International Criminal Court and National Authorities’, 21 *Leiden Journal of International Law* (2008), p. 431

<sup>132</sup> Human Rights Watch, 2008, “*Courting History The Landmark International Criminal Court’s First Years*”, available at <https://www.hrw.org/sites/default/files/reports/icc0708webwcover.pdf> retrieved on September 22, 2018, pp. 40-42, the Report underscores the perception on the ground in Rwanda in a contemporaneous manner stating that “---the prosecutor’s work in Uganda is perceived by many of those in affected communities as one-sided and biased.”, see also Philipp Kastner, *Africa- A Fertile Soil for the International*, fn 58, pp. 141-142, see also Mark Kersten, *Between Disdain and Dependency*, fn 85, who wrote that “every investigation that has been opened following a self-referral has resulted in only government adversaries being targeted by the ICC.”

<sup>133</sup> Tim Allen, *Trial Justice: The International Criminal Court and the Lord’s Resistance Army*, (David Philip Press, South Africa 2006), P. 97. The writer criticizes the decision of the Court to concentrate on one party writing that “while there is widespread acceptance that these people are responsible for appalling acts, several commentators take the view that to focus on them alone cannot lead to a just outcome.” P.98

<sup>134</sup> Kenneth A. Rodman, ‘Justice as a Dialogue Between Law and Politics Embedding the International Criminal Court within Conflict Management and Peace-building,’ 12 *Journal of International Criminal Justice* (2014), p. 452. Rodman, in this relation writes that “controversies surrounding instrumentalization have been most acute in the ICC’s first investigation when Ugandan President Yoweri Museveni asked the Court to investigate crimes committed in northern Uganda by the Lord’s Resistance Army (LRA)---” see also Parvathi Menon, ‘Self-Referring to the International Criminal Court: A Continuation of War by Other Means, 109, *American Journal International Law*, (2016), p. 260

<sup>135</sup> See, Sarah M. H, Nouwen & Wouter G. Werner, ‘*Doing Justice to the Political: fn 127*, pp. 951-953

<sup>136</sup> Parvathi Menon, *Self-Referring to the International Criminal Court*, fn, 134, p. 260-261. The writer captures the phenomenon by stating that the Countries “---in Sub-Saharan Africa have used the triggering mechanism of “self-referral” to the ICC to induce judicial recourse against their “enemies” –opposition/leader groups-in an effort to increase the state’s international reputation and the legitimacy of its military operation.” Quotations are in the original text.

<sup>137</sup> See Mark Kersten, *Between Disdain and Dependency*, fn 85. The writer correctly identified the consequences of self-referral in stating that “by helping to demonize their adversaries and boosting their legitimacy, self-referrals are remarkably beneficial to referring governments.” See also Sarah M. H, Nouwen & Wouter G. Werner, *Doing Justice*

is because, in the new normal, the final fate of anyone seriously challenging the office of the African leaders is to face The Hague, according to Yoweri Museveni.<sup>138</sup>

What are the consequences of all these? Meaning, the fact that the African States have failed to undertake what is expected of them under the Rome Statute, to investigate and prosecute crimes committed in their jurisdiction. This, as has been stated above, is the primary right and duty of any state party to the Rome Statute. The consequence, as we have seen in the foregoing discussion, is that the number of cases that the ICC has to consider from Africa is quite substantial compared to any other region in the globe.<sup>139</sup> Is that the only the fault of the Court? The answer to this question is, despite the appearance on the face of it, is an emphatic no. It is the position of this writer that although the Court has contributed partly towards the worsening of the relationship it has with Africa, the overwhelming proportion of the problem is created by the African states themselves. We will now consider the role of each party and determine how the two parties have played their fair share in the deterioration of their optimistically started relationship.

### **3.1.3. The ICC's Misguided Relationship with Africa**

The ICC, to prove its vitality, has to in a big way turn to Africa, for case referral and cooperation in the investigation and prosecution of cases.<sup>140</sup> With this purpose in view, Muller and Stegmiller have argued that the Prosecutor has co-sponsored the creation of the practice of self-referral because “---he favored voluntary referrals by states and expressly endorsed the sovereignty-friendly policy of encouraging self-referrals in the first phase of the Court's existence.”<sup>141</sup> In the same vein of encouragement on the part of the Prosecutor, Happold also argued that “it appears that the Prosecutor has pursued a policy of encouraging states to self-refer situations.”<sup>142</sup> This

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*to the Political fn 127*, arguing that “while branding the LRA as humanity's enemy, the referral portrayed the Ugandan government as a defender and friend of mankind. The Ugandan government calculated that as a result of the ICC's investigations into the LRA, ICC supporters would no longer treat the LRA and the government as equals.” P. 950

<sup>138</sup> See, for instance, Reuters, *Uganda's President Hopes Rebels Choose Soft Landing*, (2007), available at <https://www.reuters.com/article/idUSL04425927>. Accessed on September 22, 2018

<sup>139</sup> Rowland J V Cole, ‘Africa's Relationship with the International Criminal Court: More Political than Legal,’ *14 Melbourne Journal of International Law*, 2013, P. 679. Cole emphasizing this point wrote that “first, only Africans and situations in Africa have been referred to and brought before the ICC. All persons brought before the Court are Africans.” With a very limited change, the reality is still the same at the Court.

<sup>140</sup> Andreas Th. Muller and Ignaz Stegmiller, *Self-referral on Trial*, fn 105, p. 1270,

<sup>141</sup> *Ibid*

<sup>142</sup> see also Matthew Happold, *The International Criminal Court and The Lord's Resistance Army*, *8 Melbourne Journal of International Law*, (2007), p. 8



was done at the backdrop of the US persistent opposition to the ICC following what had transpired in Iraq, where various reports surfaced implicating the US and its allies in the invasion of Iraq.<sup>143</sup> Because of this pressure, the Court has been totally under the control of some African States for case referral which, as we have seen above, is against the principal purpose of the Court. The blinded desire of survival has forced the Court to wash aside the principle of complementarity in favor of a vague and repetitive concept of the gravity of crimes.<sup>144</sup> The gravity of crimes is repetitive because the Statute, from the very beginning, deals only with serious crimes of international nature.<sup>145</sup> This gravity issue has also been the most contentious subject matter because it is based on this principle that the Court rejected the consideration of the crimes that were committed in Iraq during the US invasion by the UK nationals.<sup>146</sup>

This, as we have seen in the preceding part, has created a politicized picture among many observers and African leaders, who use the Court as a means of creating legitimacy and intimidating their opponents. It has, in turn, crippled the role of the Court in terms of claiming that states undertake their responsibilities under the Statute because of their membership not because of the client relationship we have discussed above. And following this relationship, what has happened in Africa is what some term as an association of mutual benefit,<sup>147</sup> the states cooperating with the Court when it is in their interest and turning their back to the Court once it

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<sup>143</sup> Adam Branch, "The ICC Can't Live With Africa, But It Can't Live Without It Either," *The Conversation*, March 14, 2017, available at <http://theconversation.com/the-icc-cant-live-with-africa-but-it-cant-live-without-it-either-74210>, retrieved on September 18, 2018

<sup>144</sup> *Prosecutor v. Lubanga* (ICC-01/04-01/06-8), *Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006*, paras. 29. The Court considered that admissibility should be seen on two separate tracks, as has been laid down under article 17 and in addition as "a second part the test refers to the gravity threshold which any case must meet to be admissible before the Court." And as such, the court created gravity requirement out of nowhere.

<sup>145</sup> See Rome Statute article 17 (1), (d), which states in a clear manner that a case is inadmissible when "the case is not of sufficient gravity to justify further action by the Court."

<sup>146</sup> *Letter of Prosecutor* dated 9 February 2006 (Iraq), p. 8. OTP argued in this relation that since the number of victims is not more than 20, the gravity requirement is not fulfilled, available at [https://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](https://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf). The Iraq/UK situation has been reopened now, and it is under preliminary investigation since 3 May 2014 upon receipt of new information, available at <https://www.icc-cpi.int/iraq>

<sup>147</sup> See for the discussion of beneficial arrangement the referral states have expected for the intervention of the ICC in their domestic criminal investigation, William W. Burke-White, "Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo," *18 Leiden Journal of International Law*, (2005), p. 559.

starts to prosecute their elite or when the Court could not stop investigating cases when they want to.<sup>148</sup>

### 3.1.4. The African States Flip-Flop Position on ICC

The African States as we have seen in the foregoing parts had a cozy relationship with a lot of optimistic future engagements. Because of this optimism on the parts of the States, an unparalleled number of African States have become members of the ICC after ratifying the Rome Statute in a span of a very short period of time. But their relationship has been bruised and battered as time marches on. The same leaders, who have hailed the very existence and performance of the Court,<sup>149</sup> now regard it as a neocolonialist,<sup>150</sup> a “bunch of useless people”<sup>151</sup>, giving it all sort of negative characterizations.

The African States in search of legitimacy and international acceptance have *en masse* signed and ratified the Rome Statute.<sup>152</sup> They, as has been extensively discussed in the preceding parts, have politicized the investigation and prosecution of the Court by the use of self-referral.<sup>153</sup> In support of the above politicization and the unexpected nature of states invitation of the Court to their domestic jurisdiction, Bocchese writes that there is a wide difference between the theory how the ICC was conceive to operate and the actual practice where “the Statute has actually been *co-opted* by national governments since it began its operations” (emphasis added).<sup>154</sup> Nouwen and Werner also argue in this relation that the intervention of the Court on the invitation of state parties would inevitably create an “ally” between the inviting state and the Court, rendering the practice political in nature not only legal.<sup>155</sup> And, in characterizing this relationship, they wrote

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<sup>148</sup> Adam Branch, *The ICC can't live with Africa*, fn 143. The writer argued that “for their part, while many African states were happy to cooperate with the ICC when it served their interests, when the Court turned against them, accusations of neocolonialism were soon heard.”

<sup>149</sup> See *Dakar Declaration*, fn 61

<sup>150</sup> Paul Kagame has joined Yuwiri Museveni in similar characterization of the Court by describing “the ICC as a fraudulent institution created for poor African states as a form of colonialism and imperialism aimed at control.”

Rowland J V Cole, *Africa's Relationship with the International Criminal Court*, fn 139, P. 684.

<sup>151</sup> Yuwiri Museveni addressing the crowd in his fifth term presidency inaugural speech, *New Vision*, May 2016, available at [https://www.newvision.co.ug/new\\_vision/news/1424384/icc-bunch-useless-people-museveni](https://www.newvision.co.ug/new_vision/news/1424384/icc-bunch-useless-people-museveni), accessed on September 24, 2018

<sup>152</sup> Dutton, *Explaining State Commitment to the International Criminal Court*, fn 54, p. 449

<sup>153</sup> Marco Bocchese, ‘Odd Friends: Rethinking the Relationship between the ICC and State Sovereignty,’ *40 International Law and Politics* (2017), p. 340.

<sup>154</sup> *Ibid*,

<sup>155</sup> Sarah M. H. Nouwen & Wouter G. Werner, ‘*Doing Justice to the Political*: fn 104, p. 945, see also Kenneth A. Rodman & Petie Booth, *Manipulated Commitments*, fn 60, p. 272. Rodman & Booth concurring with the

that “the ally is important because he can provide not merely material support but also recognition and legitimacy.<sup>156</sup> This is exactly what has happened concerning self-referral.

Self-referral, by isolating the other parties in the conflict,<sup>157</sup> has boosted their international standing<sup>158</sup> and intimidated their opponents and the rebellions.<sup>159</sup> Self-referral was not made to vindicate the rights of the victims but with the view of silencing dissidents at home and abroad.<sup>160</sup> But once these purposes have been served and the move of the Court has started to have a semblance of balancing the crimes that are committed by the government militias,<sup>161</sup> now the Court is a neocolonialist.<sup>162</sup> The governments in Africa are equally blameworthy in terms of violating the rights of their citizens, for not preventing the commission of the crimes in the first place and principally for failing to prosecute the perpetrators, whoever that might be, on equal footing. By surrendering the right and the corollary duty freely to the Court, they have undermined the complementarity principle of the ICC and their inherent sovereignty<sup>163</sup> over crimes that are committed in their jurisdictions or by their nationals.<sup>164</sup>

Finally, the African States have also placed unwarranted hope on the Court in terms of bringing peace into the violence badgered Continent. With that hope in mind, Countries like Uganda have referred their cases to the ICC, but when the Court failed to do so, they wanted to engage in traditional rules of conflict resolutions.<sup>165</sup> After a decision of that type has been reached, the

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politicization of self-referral wrote that “---the ICC has been co-opted by a rights-abusive government as a means of criminalizing its enemies without improving its own human rights and accountability practices.”

<sup>156</sup> Marco Bocchese, *Odd Friends*, fn 153, p.340

<sup>157</sup> Sascha Dominik Dov Bachmann and Eda Luke Nwibo, *Pull and Push* fn 110, p. 521. The writers in support of this idea wrote that “The ICC’s intervention, with active support from the Ugandan government, along with the blacklisting of the LRA rebels as enemies of not only the Ugandan government, but also the international community, will favor Museveni’s bloc.” For the same political goal that has been pursued in Democratic Republic of Congo see for instance William W. Burke- White, *Complementarity in Practice*, fn 147, p. 559

<sup>158</sup> Marco Bocchese, *Odd Friends*, fn 153, p. 352

<sup>159</sup> William W. Burke- White, *Complementarity in Practice*, fn 147, p. 559

<sup>160</sup> Valerie Freeland, ‘Rebranding the State: Uganda’s Strategic Use of the International Criminal Court’, 46 *Development and Change* (2) (2015), p. 293

<sup>161</sup> Caus Kress, *Self-Referrals*, fn 106, P.946

<sup>162</sup> Manisuli Ssenyonjo, *The International Criminal Court*, fn 83, p. 397

<sup>163</sup> Valerie Freeland, *Rebranding the State*, fn 160, p. 294, See also Ian Brownlie, *Principles of Public International Law*, fn 18, p. 301

<sup>164</sup> Dov Jacobs, “Puzzling Over Amnesties: Defragmenting the Debate for International Criminal Tribunals” (2010), *Electronic copy available at <http://ssrn.com/abstract=1562088>*, p. 20

<sup>165</sup> See for instance, M. Cherif Bassiouni, *The ICC-Quo Vadis?*, 4 *Journal of International Criminal Justice* (2006), p. 424, see also Amnesty International, “Uganda: Government cannot prevent the International Criminal Court from investigating crimes,” available at <https://reliefweb.int/report/uganda/uganda-government-cannot-prevent-international-criminal-court-investigating-crimes>. Accessed on 11 August 2019

logical follow up for them will be to request the ICC to drop the case in favor of domestic processes<sup>166</sup> which, considering the independent nature of the Court is totally absurd and unacceptable.<sup>167</sup> This is because withdrawal is supposed to be requested on the assumption that maintenance of peace and stability should be the priority- sacrificing justice in the process.<sup>168</sup> The debate over peace-or-justice first has been raging over a long period of time without a sensible solution in sight;<sup>169</sup> hence dragging the Court into this debate is not prudent, to say the least. Besides, if the states want to honestly deal with the crisis in their domestic jurisdictions through their amnesty laws, they could have done it without the need for referral to the Court.<sup>170</sup> But, once the situation has been referred and the jurisdiction is triggered, there seems on legal ground in the Statute or otherwise, allowing the referral state to withdraw the referral.<sup>171</sup>

To sum up, the argument that amnesty issues are domestic, Ssenyonjo wrote that “from an international law perspective, domestic amnesties are strictly a matter for national authorities and do not act as a bar to an investigation by the ICC.”<sup>172</sup> As such, the decision of the Ugandan Government to grant amnesty in favor of the surrender of the notorious rebel leader Joseph Kony<sup>173</sup> is completely out of the concern of the Court and the refusal by the Court to shelf the arrest warrant is within the legal authority of the OTP. The OTP has clearly addressed this issue of its inability to concern itself with broader ranges of principles of international justice in its policy paper underscoring that this is out of its mandate.<sup>174</sup>

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<sup>166</sup> Michael P. Scharf and Patrick Dowd, ‘No Way Out? The Question of Unilateral Withdrawals or Referrals to the ICC and Other Human Rights Courts’, *9 Chicago Journal of International Law*, 2 (2009), P. 575. Scharf and Dowd reiterate that “Museveni unexpectedly announced in November 2004 that Uganda might “withdraw its case” from the ICC, having recently negotiated a partial ceasefire and the framework for a peace settlement with the LRA leaders.”

<sup>167</sup> Rowland J V Cole, *Africa’s Relationship with the International Criminal Court*, fn 139, P. 682

<sup>168</sup> Ibid

<sup>169</sup> Mark Kersten, *Justice in Conflict: The ICC in Libya and Northern Uganda*, (A Doctor thesis submitted to the London School of Economics, London, 2014.) p. 44

<sup>170</sup> Ibid

<sup>171</sup> Michael Cherif Bassiouni, *The ICC-Quo Vadis*, fn 165, p. 424. Bassiouni wrote in this relation that since the comment of withdrawal has been made “--- it engendered much concern since the *Rome Statute does not contemplate the retraction of a referral to the Court*” (emphasis added).

<sup>172</sup> M anisuli Ssenyonjo, ‘Accountability of Non-State Actors in Uganda for War Crimes And Human Rights Violations: Between Amnesty and The International Criminal Court’, *Journal Of Conflict & Security Law* (Vol. 10, No. 3, 2005), P. 426

<sup>173</sup> Michael Cherif Bassiouni, *The ICC-Quo Vadis*, fn 165, p. 424. Bassiouni wrote in this regard that “in November 2004, President Yoweri Museveni proposed that fighters in the Lord’s Resistance Army (LRA) who chose to cease fighting could engage in internal reconciliation mechanisms as an alternative to any future investigations and prosecutions by the ICC.”

<sup>174</sup> Office of the Prosecutor, *Policy Paper on the Interests of Justice*, September 2007, available at (<http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIInterestsOfJustice.pdf>), p. 8

#### 4. CONCLUSION

Complementarity principle is the cornerstone of the ICC even helping the realization of the Court itself. It allows the balancing of state sovereignty to exercise criminal jurisdiction as the manifestation of its sovereignty and the fight against impunity that the international community has been concerned with for centuries. As such, states are always welcomed to exercise criminal jurisdictions to genuinely investigate and prosecute crimes under the Statute. However, if that cannot be achieved, due to principally unwillingness or inability, the Court steps in to investigate and prosecute individuals who have committed heinous crimes of international nature. Hence, eventually, the room for impunity can be reduced.

This is the nature of the principle and if it is applied properly, it avoids conflict of jurisdictions and case congests at the Court. The African States, nevertheless, by ignoring the application of the principle and engaging in self-referral, have rendered the principle irrelevant. And the consequences of this have been so discomfoting because the Court's field exercise has exclusively focused on the Continent, putting the referral states themselves under a lot of pressure and criticism. The African States, with the available resource and legal infrastructure, should have investigated and prosecuted the crimes that have been committed on their jurisdiction to circumvent the overarching presence of the Court that was trying to assert the very purpose of its own existence, and maintain their inherent sovereignty over the crimes and the individual behind these crimes.

The States chose, however, the easy way out. They embarked on a self-referral, feeding the Court case after case, all the evidentiary materials and logistics that allowed the Court to flex its muscle on the African Continent without any inhibitions. The misguided flirtation with self-referral also allowed the African States to have some leverage with regard to the Court's focus on the opponents of the referring government. It, ultimately though, is the States that have portrayed themselves to be the victims ending up being one of the loudest voices against the Court as a bloc. The States, as has been elaborated in this paper, cannot have that easy way out of the discordant. First, they did not undertake the usual responsibility of the Statute, investigation and prosecution. Following that they created this mess by referring the cases, cooperating with the Court in the endeavor of persecuting what they believed to be the enemy of the states and finally when the jurisdiction of the Court somehow start to bite, they cannot have

the chance to blame the Court for the problems they have with it. So, it is incumbent upon the States to understand the responsibilities they undertake by becoming members to international obligations, above and beyond the show of solidarity to one another in international diplomacy. Then act upon the responsibilities, meaning keep your house in order, denying access to the ever-present self-preserving desire of the Court.

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# THE PRACTICE OF FEMALE GENITAL MUTILATION AND THE LIMITS OF CRIMINALIZATION UNDER ETHIOPIAN LAWS

Behaylu Girma\*

## ABSTRACT

The practice of Female Genital Mutilation (FGM) is a cultural practice that is carried out by more than 30 African and Middle East Countries. It is labeled as one of the harmful traditional practices and crime against women and girls. FGM is highly prevalent in Ethiopia. In order to address the problem, the government has criminalized the practice under the 2004 Criminal Code. Instead of using words that indicate the gravity of the practice such as female genital cutting or mutilation, the law, however, has used ‘circumcision’ which is a less condemning word. Besides, the law has not criminalized the full scale of FGM. These shortcomings have undermined the effectiveness of the law to criminalize and deter the practice. Consequently, the practice is unabated to date and continued to be practiced in different parts of the country with different magnitude and justifications. Through reviewing and analyzing the pertinent international human rights instruments and literature, this study has identified the limits of criminalization of FGM in Ethiopia.

**Key words:** Female Genital Mutilation; Criminalization; Culture; Justification

## I. INTRODUCTION

Culture is the system of shared beliefs, traditions, values, behaviors and artifacts that the society practices and transfers from generation to generation.<sup>1</sup> Every social group in the world has a specific cultural traditions and beliefs.<sup>2</sup> In order to advance and protect these cultural traditions, the government has a responsibility to enact different laws to enable the society to exercise and

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<sup>1</sup> Mark Goodale, “*An anthropology of human rights surrendering to utopia*”, Stanford University Press, 2009, p.63

<sup>2</sup> Fact Sheet No.23, Harmful Traditional Practices Affecting the Health of Women and Children based on convention on the elimination of all forms of discrimination against women (art. 5 (a)), adopted by General Assembly resolution 34/180 of 18 December 1979

promote such traditions. Historically, culture precedes law; however, on the relationship between law and culture, there are different views.

The historical school is one of the jurisprudence that arose in the first half of the nineteenth century in Germany.<sup>3</sup> This approach considered law as the product of a nation's culture embedded in the daily practice of its people.<sup>4</sup> The laws of governments are a reflection and mirror of the existing socio-cultural practices of the society. The government enacts laws to advance and protect the existing cultural norms and traditions of the society.<sup>5</sup> Thus, despite the cultures of the society have harmful traditional practices and ritual activities, the statute of the government recognizes and protects these cultural practices.<sup>6</sup>

The second is the constitutive approach which was developed from the American jurisprudence in the 1980's.<sup>7</sup> This approach views law as an instrument the government uses to define the societal culture.<sup>8</sup> Different from the historical school, this approach affirmed that government enacts laws in order to change people's minds, practices, social relations and to create new culture and practices. Particularly, the government will use laws as an instrument to change the harmful and discriminatory traditions of the society.<sup>9</sup> To realize this, it will enact different laws that criminalize harmful traditional practices and redefine the culture of the society.

The third approach is related to the common law legal system of Anglo-American jurisprudence. According to this approach, the relationship between law and culture is dependent on the thinking, argument and justification of the legal practitioners.<sup>10</sup> It is the legal practitioner such as a lawyer and judge who will determine the nexus between law and societal culture. Depending on the interpretation, law can be used as a promotion and protection or denunciation and modification of the existing cultural practices of the society. .<sup>11</sup>

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<sup>3</sup> Menachem Mautner, "*Three Approaches to Law and Culture*", 96CornellL.Rev. 839 (2011) Available at: <http://scholarship.law.cornell.edu/clr/vol96/iss4/25> , p. 841

<sup>4</sup> Ibid

<sup>5</sup> Post, Robert C., "*Law and Cultural Conflict*" (2003).Faculty Scholarship Series. 180. Available at: [https://digitalcommons.law.yale.edu/fss\\_papers/180](https://digitalcommons.law.yale.edu/fss_papers/180) , p.484

<sup>6</sup> Supra note 3

<sup>7</sup> Ibid

<sup>8</sup> Supra note 5, p.488

<sup>9</sup> Supra note 3,p.841

<sup>10</sup>Naomi Mezey, "*Law As Culture*" (2001). Georgetown University Law Center Georgetown University Law Center Scholarship @ Georgetown Law, p.55

<sup>11</sup>Supra note 3, p.841

Throughout this writing, the writer will rely on the third approach and argue that laws can be an instrument used to advance and protect the existing cultural traditions and/or it can be used as an instrument to revise and shape the existing culture.

Globally there are different international treaties and declarations that dealt with the protection and development of cultural tradition of the society.<sup>12</sup> The instruments denounce some cultural traditions as harmful practices. FGM is one of the cultural traditions that different international, regional and national laws recognized as a harmful traditional practice that violates the rights of women and children.<sup>13</sup> At the national level, different countries, including Ethiopia have criminalized FGM as a crime against women and children. Irrespective of this measure, however, FGM has continued to be practiced in the different parts of the country and the society considers it as one of the ritual traditions which transfers from generation to generation.<sup>14</sup> This study attempts to examine the limits of criminalization of FGM under Ethiopian laws.

## II. GENERAL OVERVIEW OF FEMALE GENITAL MUTILATION

Female circumcision, female genital mutilation or cutting (FGM/C) is a commonly used terminology for harmful traditional practices committed against women and children.<sup>15</sup> Until recent years, the term ‘female circumcision’ was used in medical literatures, including the World Health Organization.<sup>16</sup> However, the term was considered as less descriptive of the severity of the act and associated with male circumcision, which is considered as normal.<sup>17</sup> Later, different organizations, including the UN began to use the term FGM/C instead of circumcision.<sup>18</sup> The

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<sup>12</sup> See Article 15 of International Covenant on Economic, Social and Cultural Rights, Article 27 of International Covenant on Civil and Political Rights, Article 12 and 13 of the American Convention on Human Rights, Article 29 of African Charter on Human and Peoples Rights, Article 2 of International Labor Organization Convention, Article 22 and 27 of Universal Declaration of Human Rights, Convention Concerning the Protection of the World Cultural and Natural Heritage, Universal Declaration on Cultural Diversity

<sup>13</sup> Convention on the Elimination of all Form of Discrimination Against Women, Convention on the Rights of Child, Protocol to the African Charter on Human and Peoples’ Rights the Rights of Women in Africa are some of the documents that has prohibited harmful traditional practice against women and child

<sup>14</sup> Dani waldada Nabudere, “*Human right and cultural diversity in Africa*”, available at [http://www.justice.gov.za/alraesa/conferences/2005uganda/ent\\_s4\\_nabudere.pdf](http://www.justice.gov.za/alraesa/conferences/2005uganda/ent_s4_nabudere.pdf), 2005, p.6

<sup>15</sup> Masresha Yazew Andarge, “*The difficulty of ending female genital mutilation; the case of Afar Pastoralist communities in Ethiopia*”, 2014, p. 24

<sup>16</sup> Objajulu Nnamuchi, “*Circumcision or Mutilation - Voluntary or Forced Excision - Extricating the Ethical and Legal Issues in Female Genital Ritual*”, 25 J.L. & Health 85 (2012) available at <http://engagedscholarship.csuohio.edu/jlh/vol25/iss1/5>, p.90

<sup>17</sup> Ibid

<sup>18</sup> World Health Organization, *Eliminating Female Genital Mutilation : An interagency statement*, 2008

usage of this word was chosen aptly to describe the gravity, harmful nature and inhuman treatment of the practice.<sup>19</sup> FGM/C is defined as a harmful traditional practice that deals with the removal of all or parts of the female genitalia, not for medical reasons, that would result in a devastating short and long term impact on the lives of girls and women.<sup>20</sup>

On the historical background, there is no clear and precise reference on when and how FGM began, but the practice most likely dates back thousands of years.<sup>21</sup> Besides, there is inadequate literature that reveals the tradition of FGM. The practice of FGM was observed in ancient Egypt during the fifth century B.C. The Romans and Arabs also adopted the practice.<sup>22</sup>

Today, despite the global efforts to abandon it, FGM is widespread and continues in some countries. Every year, around 3 million girls and women are victim of FGM and an approximate 200 million have already undergone the practice.<sup>23</sup> Statistics show that most women and girls who are at risk of FGM live in 30 countries in Africa, the Middle East and Asia.<sup>24</sup> These countries conduct different types of practices and generally there are four types of FGM.<sup>25</sup> The first type is known as *Clitoridectomy*. It is an excision of the prepuce with or without excision of part of or the entire clitoris.<sup>26</sup> The second type is excision of the clitoris with partial or total excision of the labia minora and normally known as *Excision*.<sup>27</sup> The third type is known by its severity which excises part or all of the external genitalia and the stitching/narrowing of the vaginal opening commonly referred as *Infibulations*.<sup>28</sup> All other harmful practices to the female genitalia for non-medical purposes are categorized as type four FGM.. This includes, for example: pricking, piercing, incising, scraping and cauterization.<sup>29</sup>

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<sup>19</sup> Ibid

<sup>20</sup> World Health Organization Information on Female Genital Mutilation, 31 January 2018 available at <http://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation> retrieved 7/6/2018

<sup>21</sup> Angela Wasunna, "Towards Redirecting the Female Circumcision Debate: Legal, Ethical and Cultural Considerations", Crossroad: where medicine and the humanities meet, vol. 5, no. 2, 2000, p. 104

<sup>22</sup> Ibid

<sup>23</sup> Supra note 21

<sup>24</sup> Ibid

<sup>25</sup> Pan African Parliament Women's Caucus, Abandoning Female Genital Mutilation/Cutting, A Guide for Parliamentarian, 2006 Nairobi Kenya

<sup>26</sup> Supra not 21

<sup>27</sup> Ibid

<sup>28</sup> Ibid

<sup>29</sup> Types four of FGM are any harmful tradition practices that are conducted on the sexual organ of girls and women's. These practices includes, pricking, piercing, incising, scraping and cauterization

### III. THE CAUSES OF FEMALE GENITAL MUTILATION

Law plays dual role in the promotion and protection of the culture of the society and it is an instrument to redefine the cultural traditions which are harmful and discriminatory to a specific group of individuals. The cultural practices that are harmful and undermine the human flourishing of women and girls cannot be preserved; rather, challenged as a violation of women's human rights.<sup>30</sup> .

However, there is no consensus on what harmful traditional practices are and international and regional human right instruments fail to define it.<sup>31</sup> Some harmful traditional practices considered as a blessed tradition by the community who practiced it and the international community failed to give a precise definition of such practices.<sup>32</sup> Instead of defining it, the UN has also preferred to mention a list of harmful traditional practices.<sup>33</sup> Exceptionally, it is the African Women's Protocol that has clearly defined it.<sup>34</sup>

The protocol defined harmful traditional practices as all behaviors, attitudes and/or practices that negatively affect the fundamental rights of women. FGM is one of the harmful traditional practices prohibited by the protocol.<sup>35</sup> However, Africa is one of the continents where FGM is high prevalent. FGM has continued to be practiced for different reasons some of which are myths and oral traditions.

Sociological justification is one reason which is commonly raised by different societies.<sup>36</sup> This justification explains FGM as the practice and process of transformation from girlhood into womanhood and it is a way of social integration and the maintenance of social cohesion.<sup>37</sup> Besides, it is considered as one developmental stage that makes girls ready for marriage and motherhood.

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<sup>30</sup> Lisa Fishbayn, "*Recent thinking and practical strategies*", Gender and human right in common wealth, p. 40

<sup>31</sup> Camilla Yusuf and Yonatan Fissha, "*Female Genital Mutilation as a Human Right issue: Examining the effectiveness of law against female genital mutilation in Tanzania*", African Human Right Law Journal, vol. 13, no.2, 2013, p.367

<sup>32</sup> Ibid

<sup>33</sup> Supra note 21

<sup>34</sup> Article 4(g) definition of harmful traditional practices, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003, adopted by the 2nd ordinary session, CAB/LEG/66.6 (2003), Maputo, Mozambique

<sup>35</sup> Ibid article 5(b)

<sup>36</sup> Supra note 21, p. 106

<sup>37</sup> Ibid

The practice is supported by different ritual activities and carried out during teenage. Those girls and women who did not pass through these traditional practices are considered as incapable to be a mother and FGM is considered as a prerequisite for marriage and motherhood.<sup>38</sup>

Different societies raised sexual control and reduction or psychosexual factor as another justification of FGM.<sup>39</sup> Those societies who raise this justification explain that the clitoris is the focus of sexual desire. They believe that FGM is vital to protect the woman against her over-sexed nature.<sup>40</sup> It is also a way of saving her from temptation, suspicion and disgrace while preserving her chastity.<sup>41</sup> Sometimes this justification is supported by different myths.<sup>42</sup>

Protection of hygiene and aesthetics are another explanation for FGM.<sup>43</sup> Female genitalia are considered as unpleasant to sight and touch. Mutilation would result aesthetic and beauty.<sup>44</sup> The practice of FGM is considered as a means to protect the hygiene of the girl and the women.<sup>45</sup> Health is another justification and FGM considered as enhancing fertility and child survival.<sup>46</sup>

In western countries FGM began as a means to cure the vexing mental disorders of women.<sup>47</sup> Accordingly, the treatment of clitoral excision was given in a mental hospital and it was supposed to cure lesbian practices, hyper-sexuality and hysteria problem.<sup>48</sup>

Religious belief also considered as another justification to practice FGM.<sup>49</sup> Religious justification mostly raised by Muslim communities.<sup>50</sup> However, there is no clear evidence that shows FGM is

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<sup>38</sup> Ibid

<sup>39</sup> Ibid, p.105

<sup>40</sup> Ibid

<sup>41</sup> Ibid

<sup>42</sup> According to the Maasai community who live in Kenya, FGM began to be used a long time ago as a 'cure' and punishment to Napei, a Maasai girl accused of having sexual relations with a man who was considered an enemy of her family. The society perceived that it was her clitoris that has derived her to have sexual relation to the enemy and she was subjected to FGM.

<sup>43</sup> Patricia A. Broussard, "*Female genital mutilation: Exploring strategies for ending ritualized torture: shaming, blaming and utilizing the convention against torture*", Duke journal of gender law and policy, vol.15:19,2008 p.34

<sup>44</sup> Ibid

<sup>45</sup> Ibid

<sup>46</sup> Evidence to end Female genital mutilation/cutting, Female genital mutilation/cutting in Nigeria, A scoping Review, 2017, p.22

<sup>47</sup> Vanessa Ortiz, "*Culture Shock: Expanding the Current Federal Law Against Female Genital Mutilation*", 3 FIU L. Rev. 423 (2008), Available at: <http://ecollections.law.fiu.edu/lawreview/vol3/iss2/10>, p. 433

<sup>48</sup> Ibid

<sup>49</sup> Supra note 21, p. 105

<sup>50</sup> Beth A. Gillia, "*Female Genital Mutilation: A Form of Persecution*", 27 N.M. L. Rev. 579 (1997), available at: <http://digitalrepository.unm.edu/nmlr/vol27/iss3/6>, p. 825



a Muslim traditional practice; rather, it is a means to control the girl and women's sexual desires.<sup>51</sup> Besides, neither the Christian nor the Islamic faith requires FGM.<sup>52</sup>

Therefore, all the above different justifications and myths perceived FGM as healthy blessed cultural and religious rituals. Even, women who know the harmful nature of such traditions become unwilling to give up the practice and they assume responsibility to transfer it from generation to generation.<sup>53</sup>

Ethiopia is one of the three African States where there is high prevalence of FGM.<sup>54</sup> The practice has deeply entered the society and is supported by different cultural practices and religious justifications.<sup>55</sup>

Psychosexual factor is one justification for FGM. The society expresses FGM as a means to control or reduces the female sexual behavior.<sup>56</sup> For example, in Tigray, Amhara and some parts of a southern nation circumcised girls were thought of as humble, obedient and decent.<sup>57</sup> Accordingly, the tradition of FGM believed to prevent bad behavior like being emotional, out of control, restless and developing sexual need at an early age.<sup>58</sup> As a result the society encourages such traditional practices by using different proverbs like *yaltegarezech lej kil tisebralech, gulcka tisebralech, eka tisebralech, koma tikeralech* which implied that women who have not undergone the procedure are reckless and clumsy in the home that will break different things.<sup>59</sup> Thus, in most cases the society carried out type one and type two FGM which are clitoris dichotomy and excision and the practice conducted at early stage soon after birth.<sup>60</sup>

In the Oromia region and some parts of Southern Ethiopia, FGM has sociological justification and it is a process of transformation of womanhood which is accompanied by different

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<sup>51</sup> Supra note 47, p. 432

<sup>52</sup> Ibid

<sup>53</sup> Dani waldada Nabudere, "*Human right and cultural diversity in Africa*", available at [http://www.justice.gov.za/alraesa/conferences/2005uganda/ent\\_s4\\_nabudere.pdf](http://www.justice.gov.za/alraesa/conferences/2005uganda/ent_s4_nabudere.pdf), 2005, p.6

<sup>54</sup> Supra note 15, p. 15

<sup>55</sup> Supra note 21, p. 106

<sup>56</sup> Ibid

<sup>57</sup> Jo Boyden, "*Why are current efforts to eliminate female circumcision in Ethiopia misplaced?*", Culture, Health & Sexuality, 2012, p.10

<sup>58</sup> Ibid

<sup>59</sup> Ibid, p.11

<sup>60</sup> Ibid

ceremonies.<sup>61</sup> This practice carried out when the girls were deemed old enough for betrothal or marriage. A feast would be held on the day, attended by relatives, neighbors, and friends and the girl would be given different gifts.<sup>62</sup>

Religious justification is mostly raised by the Muslim society and highly practiced in Afar, Somali and Hariri.<sup>63</sup> In this area the sever type of FGM, infibulations, is carried out.<sup>64</sup> The main reason for such type of mutilation is to protect the girl not to have any sexual relation before marriage and to increase men's sexual pleasure during marriage through creating narrower genital organ ignoring the feelings of the women.<sup>65</sup> Surprisingly, elders who conduct this practice honored by making the infibulations narrower and difficult for men to penetrate, which will have pain for women.<sup>66</sup>

Therefore, in Ethiopia the practice of FGM conducted having diverse justifications and reasons. The source of these justifications can be cultural or religious, but international, regional and national laws considered such practices as contrary to the human rights of women and children.

#### **IV. FEMALE GENITAL MUTILATION AS A HUMAN RIGHTS VIOLATION**

Different international and regional human right instruments denounced FGM as one of harmful traditional practice that violates the human rights of girls and women.<sup>67</sup> The United Nations and different UN agency considered such practices as harmful cultural tradition and it is a threat to the health and human rights of women and children.<sup>68</sup>

The practice of FGM raises a number of human rights issues, like the right to physical and mental integrity, the right to the highest attainable standard of health, freedom from discrimination on the basis of sex, violence against women, rights of the child, freedom from

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<sup>61</sup> Ibid, p.15

<sup>62</sup> Ibid, p.8

<sup>63</sup> Supra note 15, p.31

<sup>64</sup> Ibid

<sup>65</sup> Ibid, p. 33

<sup>66</sup> Ibid

<sup>67</sup> UNFPA, Driving force in outlawing the practice of female genital mutilation/cutting in Kenya, Uganda and Guinea Bissau, available at <https://www.unfpa.org/sites/default/files/resource-pdf/Legislation%20and%20FGMC.pdf> retrieved 7/6/2018

<sup>68</sup> World Health Organization Africa, <http://www.afro.who.int/news/ethiopia-bans-medicalization-female-genital-mutilation-fgm> retrieved on 7/3/2018

torture, cruel, inhuman and degrading treatments and when the practice result in death it violates the right to life of the victims.<sup>69</sup>

Thus, different international and regional human right instruments prohibit the practice of FGM. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Right of the Child (CRC) are the main documents that have clearly condemned social and cultural practices that discriminate women and children.<sup>70</sup> Besides, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the United Nations General Assembly Declaration on the Elimination of Violence against Women prohibits harmful tradition practices against women and girls.<sup>71</sup>

At the regional level, the African Charter on Human and Peoples' Rights is known by giving protection for positive African culture.<sup>72</sup> The charter does not tolerate harmful traditional practices.<sup>73</sup> The charter specifically prohibited torture, cruel, inhuman and degrading treatment and calls for nondiscrimination against women and children.<sup>74</sup> In addition, the Nairobi world conference for the first time addressed violence against women as a human rights issue and recognized protection of women sexual desires, bodily autonomy, and individuality as a means to eradicate FGM.<sup>75</sup>

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) is the most important document that has clearly defined harmful

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<sup>69</sup> A Strategy for the European Union Institutions, ending female genital mutilation, available at [http://www.endfgm.eu/editor/files/2016/04/END\\_FGM\\_Strategy\\_EN.pdf](http://www.endfgm.eu/editor/files/2016/04/END_FGM_Strategy_EN.pdf), accessed 7/6/2018

<sup>70</sup> See Article 5 of Convention on the Rights of Child, it deals with the best interest of the child and article 3 recognized FGM as a violation of the best interest principle and violation of children rights. Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women also requires states to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”.

<sup>71</sup> Sudan Working Paper, Weak law forbidding female genital mutilation in Red Sea State Sudan, no.1 2017, p.5

<sup>72</sup> Article 29 of the African Charter on Human and Peoples' Rights, 27 June 1981, Nairobi

<sup>73</sup> Ibid, article 18

<sup>74</sup> Ibid, article 2 and the preamble

<sup>75</sup> World Conference to review and appraise the achievements of the United Nations Decade for Women: Equality, Development and Peace Nairobi (15 to 26 July 1985)

traditional practices and advances the elimination of such practices including FGM.<sup>76</sup> Furthermore, the African Charter on the Rights and Welfare of the Child prohibits the practice of custom, tradition, culture or religion that violates the rights of Children.<sup>77</sup>

In 2011, the AU called on the UN General Assembly to adopt a resolution at its sixty-sixth session to eliminate the practice of FGM. As a result, the UN General Assembly in 2012 adopted a ground breaking resolution calling for universal elimination of the practice of FGM.<sup>78</sup>

## **V. THE LIMITS OF CRIMINALIZATION OF FEMALE GENITAL MUTILATION UNDER ETHIOPIAN LAWS**

In Ethiopia there is no clear law that precisely defines harmful traditional practices; however, the Ethiopian National Harmful Traditional Practices strategy has tried to define it as ‘traditional practices which violets and affects the physical, sexual or psychological well-being, human rights and socio-economic participation of a human being in a society’.<sup>79</sup>

The government criminalized harmful traditional practices and denounced FGM as a violation of the health and human right of girls and women.<sup>80</sup> It has given special attention and refreshed its commitments to end FGM and child marriage by 2025.<sup>81</sup> Statically the prevalence of FGM has decreased over the past 16 years, dropping from 80% in 2000 to 74% in 2005 and to 65% in the 2016.<sup>82</sup> The statistics has revealed that women in rural areas are more likely to be mutilated than women in urban areas and the prevalence is highest and severe in Somali at 99% followed by Afar 91%.<sup>83</sup> On the other hand Tigray has the lowest prevalence 24% and Gambela 33%.<sup>84</sup>

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<sup>76</sup> Supra note 31

<sup>77</sup> Supra note 16, p.113

<sup>78</sup> UNFPA, Driving force in outlawing the practice of female genital mutilation/cutting in Kenya, Uganda and Guinea Bissau, available at <https://www.unfpa.org/sites/default/files/resource-pdf/Legislation%20and%20FGMC.pdf> retrieved 7/6/2018, p.7

<sup>79</sup> Federal Democratic Republic of Ethiopia Ministry of Women, Children and Youth Affairs, National Strategy and Action Plan on Harmful Traditional Practices (HTPs) against Women and Children in Ethiopia retrieved 12/24/2019 from [https://www.africanchildinfo.net/clr/policy%20per%20country/2015%20Update/Ethiopia/ethiopia\\_htp\\_2013\\_en.pdf](https://www.africanchildinfo.net/clr/policy%20per%20country/2015%20Update/Ethiopia/ethiopia_htp_2013_en.pdf)

<sup>80</sup> Federal Democratic Republic of Ethiopia, Demographic and Health Survey, Central Statistics Agency, Addis Ababa, Ethiopia, 2016, p. 315

<sup>81</sup> Ibid

<sup>82</sup> Ibid, p.317

<sup>83</sup> Ibid

<sup>84</sup> Ibid

## **A. The 1995 Ethiopian Constitution and Female Genital Mutilation**

Constitutional provisions are a base for the enactment of the subsequent legislations. These provisions need to be enacted in a manner that promote gender equality and prohibit harmful traditional practices.<sup>85</sup>

Chapter three of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution) deals with fundamental human rights and freedoms.<sup>86</sup> Accordingly, article 15 and 16 specified the right to life and security of a person. Every person has the right to life and protection against bodily harm.<sup>87</sup> FGM is one of harmful traditional practice that has short and long term impacts on the physical and mental integrity of women and girls.<sup>88</sup> When the practice results in the death of the victim, it violates the right to life of individuals. Article 18 of the constitution clearly prohibits inhuman and degrading treatment and the process of FGM is harmful, inhuman and degrading. Moreover, the practice is against the right to equality and the principle of non-discrimination.<sup>89</sup>

Article 35 of the constitution deals with the rights of women and it has clearly stated that women have equal rights with men. The government has a responsibility to protect girls and women against those laws, customs and practices that oppress or cause bodily or mental harm on to them. Article 36 of the constitution also specified that children have the right not to be subjected to cruel and inhuman treatment. Furthermore, article 9 of the constitution has specified that all international instruments ratified by Ethiopia considered as an integral part of the law of the land. Hence, Ethiopia is bound by the ratified international and regional human rights instrument that condemned FGM.

A number of international and regional human right instruments including the CEDAW, the CRC and the Protocol to the African Charter on Human and People's Rights (Maputo Protocol)

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<sup>85</sup> Supra note 31, p.370

<sup>86</sup> From article 13 to article 44 of the Ethiopian Constitution deals with human and democratic rights and freedoms

<sup>87</sup> Article 15 and 16 of Federal Democratic Republic of Ethiopia Constitution, 1995

<sup>88</sup> Supra note 57, p. 6

<sup>89</sup> Article 25 of the Federal Democratic Republic of Ethiopia Constitution, 1995

have application in Ethiopia.<sup>90</sup> Besides, article 13 (2) of the FDRE constitution has clearly specified that in case of interpretation of chapter three of the constitution, it must be in conformity with international human right instruments. This indicates that the constitution advocates the universal application of human rights and has tried to redefine and shape harmful traditional practices of the society.

The FDRE constitution also clearly articulated in article 92 that the government has a duty to support those cultures and traditions that are compatible with the fundamental rights, human dignity and democratic norm and ideals of the society. Therefore, the constitution gives emphasis for human and democratic rights and simultaneously protects and preserves those historical and cultural traditions which are friendly to human rights.

## **B. The 2004 Criminal Code**

More than twenty-six countries in Africa and Middle East have criminalized FGM by law and constitutional decree.<sup>91</sup> The legislations vary in scope and the penalties ranging from a minimum of three months to life imprisonment. Most of these countries used the word FGM/C which is recommended by the WHO and the UN. Because ‘Mutilation’ emphasizes the gravity of the act and ‘Cutting’ reflects the practice of non-judgmental and non-medical reasons.<sup>92</sup>

The 1957 Ethiopian first penal code does not have any provision that deals with harmful traditional practices and that criminalize female circumcision. It is the 2004 Ethiopian Criminal Code that has clearly criminalized female circumcision for the first time.<sup>93</sup> Chapter three of the Criminal Code deals with harmful traditional practice against life, person and health of individuals. Specifically, article 565 of the code criminalizes female circumcision as a crime

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<sup>90</sup> See the United Nations Human Rights Office of the High Commissioner, UN Treaty Bodies Database available at [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=59&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=59&Lang=EN) and List of Countries which have Signed, Ratified/Accessed to Maputo Protocol available at <https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf>

<sup>91</sup> United Nation Children Fund (UNICEF), Female genital mutilation/ cutting, A statistical overview and exploration of the dynamics of change, 2013, available at [https://www.unicef.org/cbcs/files/UNICEF\\_FGM\\_report\\_July\\_2013\\_Hi\\_res.pdf](https://www.unicef.org/cbcs/files/UNICEF_FGM_report_July_2013_Hi_res.pdf) retrieved 7/28/2018

<sup>92</sup> Fatouma Idrissa, “*Female genital mutilation: A matter that must be stopped!*”, 2015, Honors project 407, Grand Valley state university

<sup>93</sup> የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ የተሻሻለው የወንጀል ህግ ሀተታ ዘምክንያት፣ ገፅ፣271

against the rights of women and girls. The law intentionally or negligently preferred the word circumcision rather than mutilation or cutting.<sup>94</sup> The word circumcision refers less condemning practice and sometimes associated with male circumcision.<sup>95</sup> It did not amplify the gravity, nonjudgmental and nonmedical reason of the act.

Further, the code failed to define and illustrate different types of female circumcision. The Ugandan law defines FGM.<sup>96</sup> Besides, the Kenyan law and Eritrean proclamation 158/2007, a proclamation to abolish Female Circumcision, define it and list out different types of FGM.<sup>97</sup> Contrary to these laws, the Ethiopian Criminal Code is more general and failed to define and list out different types of FGM.<sup>98</sup> This seems that the code is loath to deeply engage in the cultural practices of the society and define female circumcision.

On the other hand, article 566 of the code has tried to specify infibulation as one type of female circumcision and imposed a rigorous imprisonment from three years to five years. This implies that the punishment will increase based on the severity of the practice. However, the code has failed to define infibulation and specify different types of circumcisions.

Article 565 of the code begins with the provision of “whoever circumcises a woman of any age...” But what if the girl or a woman circumcised herself? Who will be criminally liable? The code is silent and there is no clear provision on the liability of such women. Besides, the code has criminalized female circumcision at any age.

It should be noted that women who are above majority may circumcise themselves or give consent to be circumcised. For example, *Fuambai S. Ahmadu* a Sierra Leonean-American anthropologist performed this traditional practice in Sierra Leon for research purpose.<sup>99</sup> Differently, *Maimouna* because of peer pressure and her parent’s refusal traveled in a remote

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<sup>94</sup> There is no any justification on የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ የተሻሻለው የወንጀል ህግ ሀተታ ዘምክንያት, why the legislature preferred Circumcision than Mutilation or Cutting

<sup>95</sup> Jewel Llamas, Female Circumcision: The History, the Current Prevalence and the Approach to a Patient, retrieved 12/24/2019 from <https://med.virginia.edu/family-medicine/wp-content/uploads/sites/285/2017/01/Llamas-Paper.pdf>

<sup>96</sup> Supra note 31, p. 375

<sup>97</sup> Ibid

<sup>98</sup> See article 565 of the 2004 Ethiopian Revised Criminal Code

<sup>99</sup> Richard A. Shwhas Eder, Disputing The Myth of the Sexual Dysfunction of Circumcised Women, An interview conducted with Fuambai S. Ahmadu, *Anthropology today*, vol.25, No.6, 2009

village of her home country, Mali, and carried out such practice.<sup>100</sup> In these cases, it is difficult to punish them and make them criminally liable because, they have performed the practice intentionally and imposing punishment is against their right to freedom of choice, liberty and bodily integrity.<sup>101</sup> However, the 2004 Ethiopian Criminal Code specified a total ban of female circumcision at any age and with/out consent. Thus, age and consent are not a justification and a defense for female circumcision in Ethiopia.

In the degree of participation and criminal liability, the code has specified the same type of punishment. Article 569 imposed the same punishment for parents, relatives and co offenders without considering the degree of their participation. Additionally, the code does not specify different penalties if the circumciser is a health officer. Though on 4 January 2017, the Ethiopian Ministry of Health has passed circular that bans medicalization of FGM, it failed to clearly specify the punishment.<sup>102</sup> In countries like Burkina Faso, the government imposes strict punishment on health official and the practitioners are also suspended from medical practices.<sup>103</sup> The 2004 Criminal Code of Ethiopia does not have any provision in this regard. What if the circumciser is a health officer and the victim dies as a result of the circumcision? Article 566 (2) of the code merely deals with injury to body or health and article 568 deals with cases when the victim has contracted a communicable disease, in which case the punishment will increase.

It is, however, possible to note that as opposed to the earlier Penal Law, the 2004 Criminal Code has attempted to address the issue of harmful traditional practices and criminalizes female circumcision as crimes against women. However; the code has failed to fully criminalize FGM.

## VI. CONCLUSION

The FDRE constitution and the Ethiopian national harmful traditional strategy have prohibited and denounced harmful traditional practices. The Criminal Code is the first document that has clearly specified female circumcision as crimes against women and girls. The law has imposed different types of punishments to the practice depending on the gravity of the circumcision.

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<sup>100</sup> Supra note 94, p. 11

<sup>101</sup> Ibid

<sup>102</sup> World Health Organization Africa, <http://www.afro.who.int/news/ethiopia-bans-medicalization-female-genital-mutilation-fgm> retrieved on 7/3/2018

<sup>103</sup> Supra note 31, p.380



However, the code has different limitations. At the beginning, it failed to define female circumcision and list out the different types of circumcisions. Besides, it criminalized female circumcision without age restriction. Furthermore, there is no clear provision on self-harm and the consent of mature women. All these gaps would imply that the code has failed to deeply enter in the cultural traditions of the societies and criminalize female circumcision in a comprehensive manner. This has created challenge for law enforcement officials.

Adopting a clear provision that criminalizes FGM will have a deterrent effect. Nonetheless, criminalization is not enough to end female circumcision in Ethiopia. The practice is deeply entrenched in to the society and carried out by close relatives of the victims for different reasons. Thus, beyond criminalizing FGM, the government must use other alternatives like education and awareness raising campaigns. The government should also establish institutions that give support for victims of the practice. This will reduce the FGM and enable the government to achieve its objectives of eliminating it by 2025.

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# JIMMA UNIVERSITY SCHOOL OF LAW LEGAL AID CENTER 2018/2019 REPORT: THE SUCCESS STORIES AND CHALLENGES

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## I. INTRODUCTION

It is believed that ensuring human rights in general and the right to fair trial should not depend on individual's pocket power. On the other hand, justice has never been equal for the rich minority and the poor majority as they are unable to hire a lawyer for their case. What makes the problem worse is that it is the most vulnerable groups: women, children, prisoners, HIV/AIDS victims, refugees and migrant returnees who are unable to seek and enforce their basic constitutional and human rights.

Jimma University School of Law Legal Aid Center (here in after 'JUSL-LAC') was established to nut out the gap between access to justice and indigence as its main objective among others. Although it is a long aged experience in the developed world to help the poor by establishing such kind of centers, JUSL-LAC is the first of its kind in South, Southwest and West Ethiopia, and is one of a handful number of pioneers in the nation.

JUSL-LAC runs its daily business by utilizing the generous support of the clinical students and volunteer law students in addition to the academic staff of the School of Law and the full time employed lawyers of the centers located outside Jimma town. Each volunteer and clinical student is expected to contribute four hours per week and academic staff members are expected to handle and supervise clients' cases.

Currently, JUSL-LAC is rendering legal services at ten centers in Jimma Zone: namely, *Jimma main office, Jimma Woreda Court, Jimma High Court, Jimma Zone prison administration, Agaro, Gera, Shabe, Dedo, Serbo and Omo Nada* and is keen to keep up the already started good work. JUSL-LAC is also on the verge of opening three new centers at *Manna and Limu Seka woredas of Jimma Zone and Dima Woreda of Gambella National Regional State*.

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\* Director of JUSL-LAC

## II. PROVISION OF LEGAL AID SERVICE: OVERVIEW

Jimma zone is one of the largest zonal administrations in Oromia regional state with an estimated total population of three million. Half of the total populations are women. Jimma University (here in after 'JU') is a public higher educational institution established in December 1999 by the amalgamation of Jimma College of Agriculture (founded in 1952) and Jimma Institute of Health Sciences (established in 1983) to contribute its best to the academia world and serve the population of the zonal administration in many spheres. The two campuses are located in Jimma city 335 km southwest of Addis Ababa with an area of 167 hectares.

Jimma University is Ethiopia's first innovative Community Oriented Education Institution of higher learning. In line with this philosophy, JUSL-LAC was established based on the unanimous decision of the Academic Commission of the then Law Faculty (now School of Law) on Dec 25, 2008 primarily with the vision of providing free legal services to indigents and vulnerable groups like the poor, women, veterans, HIV/AIDS victims and children in and around Jimma town on one hand, and to expose students of the Law School to the practical aspect of law on the other hand.

Justice is the major concern of our democracy that we cannot take for granted. Our laws guarantee basic rights and protection for all of us – not just for those who can afford to hire a lawyer only. The Constitution also requires that justice should be available without unnecessary delay. By contrast, we usually find family cases in which women's rights are violated, children abused by trafficking and domestic ill-treatments, and other classes of the society adversely affected by the system. To the contrary, the people have failed to defend the injustice and even when they want to do so, they face many tackles. These problems resulted because of the deep rooted financial problem the society is entrenched in. Indeed, vulnerable people who have the means to pay for a lawyer also face a problem of getting access to justice. Providing free legal service to these vulnerable groups means the difference between food on the table and hunger, life and death penalty, shelter and homelessness, economic stability and insolvency, productive work and unemployment.

The initiative to establish JUSL-LAC came up because of this apparent growing need of our society to have access to justice. The Civil Procedure Code and FDRE Constitution have made

an attempt to help the poor to have access to justice by allowing suit by pauper and bestowing the right to get appointed counsel respectively. But this attempt alone does not suffice to watch justice in motion. First, allowing suit by pauper in civil matter by itself alone is not a guarantee to have access to justice. It simply means that one can bring his/her claim to courts without paying court fees. Although, it is one step in creating access to justice, it is way far from creating access to justice in its full sense. The person should be able to effectively defend his/her rights upon initiating a civil suit. This can be done if the person gets legal support even after s/he institutes her claim. In civil matters, our laws (like the laws of other nations) do not provide a duty that the government shall appoint a counsel for a needy person in civil matters. Therefore, the attempt to create access to justice for the needy in civil matters is very limited.

Secondly, the Constitutional guarantee that accused persons have the right to be represented by a state appointed counsel if they do not have financial means and thereby a miscarriage of justice may happen is hampered by the government's limited resource. Besides, the law provides legal assistance when the accused has no sufficient financial means – it does not address other vulnerable groups such as women, children, HIV/AIDS victims, veterans, and disabilities who are usually underserved. Therefore, the constitutional guarantee to create access to justice in criminal matters is hampered by lack of resource and lack of comprehensive focus on all types of vulnerability. It is with the aim of achieving these objectives that the JUSL-LAC is established.

Apart from helping the society, the JUSL-LAC would help the students to know how law is being practiced. Law students should be able to acquire practical knowledge to be able to serve the society in the future and be able to cope up with the dynamic world under tornado of change. Traditionally, law students were not exposed to the practice of law. This had been making the students unable to live up to what is expected from them. The Justice and Legal Systems Reform Institute of Ethiopia (which is renamed the Federal Justice and Legal Research and Training Institute in 2018) has also noticed this problem, and has spearheaded the inclusion of practical courses in Ethiopian Law School Curriculum.

For prospective law graduates, trying to serve the society without having a glimpse of the legal practice could be like trying to walk while you do not have one leg. Providing free legal service to the society without equipping graduates of law with practical legal knowledge would not solve

the legal problems of the society in the long run. Doing so would be like ‘*hitting a snake on the tail – not on the head*’.

Indeed, creating access to justice for the needy should be coupled with producing competent legal professionals who work in the justice system. The last decades practice in legal education in Ethiopia shows that law students were being taught merely based on theory. In this type of legal education, it is difficult to produce law graduates who understand legal problems of the society and who put their effort into solving those problems rather than watching as a passerby. When graduates are theory based, they will have a reduced capacity to create access to justice and play a role in the democratization process of the nation. In fact, this is why the vision of JUSL-LAC should be both creating access to justice for the needy and equipping law graduates with practical legal knowledge. The experience law students acquire by working at JUSL-LAC would make them agents of change in Ethiopian legal system, and would give them the exposure to see legal problems of the society ahead and makes them aspire to solve the problems upon their graduation.

In order to remedy the problems stated in the above paragraphs, and reach out to the ardent hope and fervent desire of the society, a further justice for all initiative is still required. The best, actually the prominent initiative is to employ the ripe and talented skill of the junior lawyers, law school instructors and students in order to cast this prevailing problem aside. Thus, organizing to make use of this skilled man power by sustaining the existing centers and opening new legal aid centers has paramount importance in the lives of hundreds of thousands of people JUSL-LAC aspires to serve.

So far, JUSL-LAC has rendered its multifaceted and cherished legal service at ten centers including the one at the head office. Initially, service delivery was started by opening two centers at Jimma Zone High Court and Jimma Woreda Court. However, the number of centers was increased to six in the year 2003 E.C by opening new centers in *Agaro, Dedo, Serbo* and Jimma Zone Prison Administration. In 2008 EC, new centers have been opened at *Gera, Omo Nada, and Shabe Woreda* courts. Currently, the center has a total of ten (10) centers



### **III. ORGANIZATIONAL STRUCTURE OF THE CENTER**

To enable the center, attain its objective and contribute effectively in the furtherance of access to justice, the organizational structure of JUSL-LAC was framed to different structures. On the top of the organizational structure is the director who is empowered to supervise the day-to-day activities and operation of the Center. Under the director, there are two vice directors: one vice director for service provision and quality management with the power and the duty to manage and coordinate the different activities of the Centers and the other vice director for research and capacity building with the power and duty to direct and conduct capacity building activities for service providers, beneficiaries and organs involved in the administration of justice; to direct and conduct researches related to the vision and mission of the Center; and to conduct promotions about the availability of free legal service and build the public image of the Center.

### **IV. PARTNERS**

JUSL-LAC is currently working with Addis Ababa University Center for Human Rights, Ethiopian Human Rights Commission, United Nation Development Programme (UNDP), Oromia Supreme Court and Oromia Justice Bureau as its partners. Addis Ababa University Center for Human Rights is working in Joint Project with the center as a funder on Human Rights Protection and Promotion, while UNDP funds the establishment legal aid center and its implementation at *Dima* Woreda of Gambella Regional State. The Ethiopian Human Rights Commission has also been the main funder of the center. In similar stand, the Oromia Supreme Court supports the center with service delivering offices while Oromia Regional State Attorney General supports the center by giving and renewing of advocacy license.

### **V. LINKAGES WITH THE STAKEHOLDERS**

To be effective, legal aid service requires the cooperation and coordination of various stakeholders. JUSL-LAC has many stakeholders with which their cooperation are vital in the accomplishment of the center's objectives. Accordingly, Jimma zone high court, different woreda courts, Jimma zone Justice office, different woreda justice offices, Jimma zone prison administration, police offices, woreda labor and social affair offices, women and children affairs

offices, Ethiopian human rights commission Oromia branch office and kebele administrations are among the main stakeholders with which JUSL-LAC has a linkage.

## **VI. THE SERVICES PROVIDED BY THE CENTER**

There are three main activities that JULAC provides. These are legal services, legal education and research and capacity building.

### **A. Legal Services**

These services are those services which in one way or other connected with justice sectors and administrative government organ. Through its legal services the Center provides the following major services to its clients:

- ❖ Free Legal Counsel
- ❖ Writing Statement of Claim
- ❖ Writing Statement of Defense
- ❖ Writing different applications to the court and other organs
- ❖ Advocacy (Representation before the court)
- ❖ Mediation (with the view to reach on amicable solutions)

The Center is offering these legal services to the population in its ten (10) service centers located in seven towns (*Dedo, Serbo, Agaro, Shebe, Gera, Omo Nada and Jimma*). In six of the service centers, at *Dedo, Serbo, Shebe, Gera, Omo, Nada and Agaro*, the Center has managed to employ junior lawyer to run the services. The Center however relies on the Law students to run the services at Jimma University (Main Center), *Jimma Woreda Court, Jimma zone High Court and Jimma Zone prison Administration*. The students are assisted by the academic staffs of the School. The office of the Center located in the JU Main campus functions as a coordinating center for all the services and functions.

### **B. Legal Education (Awareness Raising Program)**

The Center understands that majority of abuses and human rights violations suffered by the vulnerable parts of the population are the result of lack of awareness especially of the rights of these groups. Accordingly, it strongly believes that ensuring respect for their rights can better be realized through effective and broad-based community legal education programs. Thus far the

Center has relied on the Jimma University Community Radio in which it has been able to run four hours-long awareness raising program per week in two languages (Amharic and Afan Oromo).

Accordingly, different laws related to Prisoners' Rights, Child and Woman's Right, Human Rights Laws, Procedural law and Self-Advocacy skill, Oromia Land Law, Family Law, Law of Property and Succession, Employment and Labor Law, Tort Law, Anti-Corruption Law, Administrative law and good governance, Law of Contracts and Commercial Laws have been broadcasted through the community radio so as to enhance the society's basic knowledge on those subject matters. But still there are critical limitations both in terms of the structure, breadth, effectiveness and sustainability of running the program through this medium.

The Center however, aims to run the program effectively by utilizing various available means and media such as community organizations, centers and other channels with broad audiences but this requires the availability of adequate financial and infrastructure (including transportation) supports.

### **C. Research and Capacity Building**

It is crucial that legal service and legal education programs at the Center be supported by appropriate evidence. Research is therefore a critical part of its strategic approach as it helps to identify the need and areas of focus for its services. In addition, it also helps engage with the community and stakeholders in addressing the problems in a more effective and sustainable manner. Research also plays a crucial role in empowering and building the capacity of the community, stakeholders and the Center itself in dealing with the root causes of the problem of human rights violations and lack of access to justice to the vulnerable members.

Thus far, the Center has not conducted a baseline study on the state of need for legal aid service due to multiple factors such as the scarcity of resource. Perhaps, no study has also been conducted so far at the national level as well. What is more, no standard has been developed in relation to the provision of the service. It should be born in mind, in fact, that the level of awareness of the idea of free legal aid and its role is at a critically low level in the Country. The Center aims to address these problems by using research and capacity building as its strategic

approach. To this end the following are areas in which the Center needs strong support for its areas of activities

- ❖ organizing thematic and generic conferences and workshops and training programs
- ❖ publication
- ❖ conducting baseline survey for legal aid service need in Jimma Zone
- ❖ developing standards and guidelines for the provision of services

In this regard, amongst the listed activities, the center unable to conduct baseline survey in Jimma Zone due to high budgetary constraints.

#### VII. SERVICE DELIVERY MODE AND SERVICE QUALITY MANAGEMENT SYSTEM

JUSL-LAC employs different modes of service delivery. The service delivery model varies purposely to attain the objectives of the center, which are community services and equipping law students with practical skills. For centers found in Jimma city, JUSL-LAC uses fourth and fifth year law students to deliver the services and in those centers outside of Jimma town, the center uses junior lawyers as they are at a distance place from the university.

Besides, the center also uses volunteer law school staff and licensed lawyers. The center does not compromise the service quality and employs different service quality controlling mechanisms to these ends. Accordingly, the center has a daily and weekly meeting with the students and it has also developed a strict reporting.

#### VIII. SUMMARY OF OVERALL ACTIVITIES

The JUSL-LAC service shows tremendous progress from time to time in quality and accessibility and currently thousands are benefiting from the service of the center annually. Resisting all the challenges it faced, the center has managed to reach six thousand eight hundred forty seven (6847). The service distributions were counseling 3338, ADR/ mediation 301, document preparation 2650 and representation 558. Out of the total cases it represented and disposed by the court, the center won 94 and lost only three. The cases the center won were represented and litigated by fifth year law students. The service fee the center provided is estimated to 13,694,000 birr. The winning rate of the center is 99.5%. This is mainly due to the fact that clients who come before the center have strong cases but lack only the financial capacity

to litigate before the court. An estimated 450,000 peoples have benefited from the Radio program and over 5,000 brochures were distributed on various legal issues. The types of the services rendered and the beneficiaries together with the centers that have provided the legal service are summarized as follows.

Table 8.1. Subject matters on which legal awareness education has been delivered through JUFM

Type of legal Service	JimmaWor eda Court	Jimma Zone High	Head Office	Jimm Zone Prison	Agaro	Serbo	Dedo	Gera	Shebe	Omo Nada	Total
Counseling	560	410	288	760	210	221	253	183	219	234	3338
ADR	72	26	45	-	59	24	17	25	13	20	301
Documents	452	310	178	642	208	284	131	149	179	117	2650
Representation	190	74	56	32	81	29	17	28	18	33	558
<b>Total</b>	1274	820	567	1434	558	58	418	385	429	404	6847

Based on the assumption that at least 10% of the population the FM Radio reaches would listen to the broadcast, the total number of beneficiaries is estimated to be about 460,000.

Table 8.2. Some of the Cases the Center Represented and Won in 2018/19

Airing Time and Broad Cast Language	Subject matters on which the radio legal awareness creation education is delivered											Total
	Prisoner's Right	Child and Women's Right	Tort Law	Famil y law	Lab or Law	Illegal Human Trafficking	Land Laws	Oromi a Land Law	Procedu ral and Self Advocac y skill	Hum an Right s Laws	Suc cess ion Law	
Afan Oromo	3 hours	4 hours	2 hours	3 hours	5 hours	2 hours	2 hours	3 hours	2 hours	6 hours	3 hours	35 hours
Amharic	3 hours	4 hours	2 hours	3 hours	5 hours	2 hours	2 hours	3 hours	2 hours	6 hours	3 hours	35 hours
<b>Total</b>	6	8	4	6	10	4	4	6	4	12	6	70 hours

Our center, in its different centers, has represented hundreds of cases on behalf its clients some of which are disposed while the rest are still pending. The numbers of cases have been increasing year to year and this year too. In the year 2018/2019 alone, until the time of the report about 80 cases have been decided in our favor. These cases were those whom our fifth year law students and lawyers in different centers have represented the clients and won at Jimma Woreda Court, Jimma Zone High Court, Agaro Woreda Court, Serbo Woreda Court, Shabe Woreda Court and Omonada Woreda Court. The following are the details of the sample cases entertained by the center:

S.N	Name of the client and story of his case	Sex	Type of the case	Court entertained	File no.	Judgment/award
1	<p><b>Junedin Emam</b></p> <ul style="list-style-type: none"> <li>✓ Our client was an employee of Ethiopian Road Construction Corporation (the defendant)</li> <li>✓ The defendant terminated the contract unlawfully</li> <li>✓ Our Center represented him in the litigation claiming different payments against the employer (defendant)</li> </ul>	M	Labor	Jimma Town Woreda Court	53624	22000 birr award for the damage
2	<p><b>Tafara Abraham</b></p> <ul style="list-style-type: none"> <li>✓ Tafarra was a worker of Gindebarat Construction (the defendant) for more than two years</li> <li>✓ Later the defendant company unlawfully terminated his employment contract and even without paying the employee even his six month salary</li> <li>✓ Our center prepared pleadings and</li> </ul>	M	Labor	Jimma Town Woreda Court	51972	Disposed totally in our favor and the client is entitled to an award of 16824.00 birr

	represented Tafarra on the litigation					
3	<b>Yibeltal Getahun</b> <ul style="list-style-type: none"> <li>✓ Yibeltal is a minor of 14 years of age</li> <li>✓ He was charged with a crime of sexual outrage which is punishable from 13 yrs to 25 yrs</li> <li>✓ The public prosecutor disregarded his age and prosecuted him as an adult</li> <li>✓ Jimma Zone High Court sentenced him to 3 years of imprisonment with adults</li> <li>✓ Our Center represented him and appealed to Oromia Supreme Court</li> </ul>	M	Crim e	Oromia Suprem e Court		The court dismissed the decision of lower court and ordered him to be educated for 3 years under the supervision of his parents.
4	<b>Fatuma Siraj</b> <ul style="list-style-type: none"> <li>✓ Fatuma's marriage was dissolved by Manna Woreda court</li> <li>✓ The lower denied her division of a common property including a house estimated to 200,000 birr and other movable properties</li> <li>✓ Our center takes an appeal on her behalf</li> </ul>	F	Famil y/Div orce/ Partiti on of Prope rty	Jimma Zone High Court	43431	A house which is estimated to 200,000 birr and other properties are decided to common and then she shared it.
4	<b>Zakira Abdela</b> <ul style="list-style-type: none"> <li>✓ She bore a child to the defendant who has later denied his paternity to the child</li> <li>✓ The claim was to prove paternity and then to claim maintenance</li> </ul>	F	Famil y/ Pater nity and Maint enanc e	Jimma Town W/Cour t	48100	<ul style="list-style-type: none"> <li>✓ Paternity of the child is proved and</li> <li>✓ Award of payment of 600</li> </ul>

						birr maintena nce per month
5	<p><b>Almaz A/Gojjam</b></p> <ul style="list-style-type: none"> <li>✓ she appeared at the center to write an application for divorce and partition of common property</li> <li>✓ her husband was not volunteer to share the properties and wants to deny it was a common one</li> <li>✓ the center represented her in court and succeeded</li> </ul>	F	Famil y/ Divor ce/Pr opert y	Jimma Town Woreda Court	60050	Divorced and Entitled to equally share the common property
6	<p><b>Abdella Ahimed</b></p> <ul style="list-style-type: none"> <li>✓ Abdella was a waiter at the defendant's Hotel</li> <li>✓ The defendant terminated the contract unlawfully</li> <li>✓ Our Center represented him in the litigation claiming different payments against the employer (defendant)</li> </ul>	M	Labor	Jimma Town Woreda Court	49728	Disposed totally in our favor and the client is entitled to an award of 21012 Birr.
7	<p><b>Biranu Lama, Xilahu Sirna, Awal Abdo Siraj A/Chabsa Fikadu Abera and Abdela A/Nanno</b></p> <ul style="list-style-type: none"> <li>✓ The plaintiffs were all serving as employees of the defendant for about two years</li> </ul>	M	Labor	Jimma Town W/Cour t	60221	Each of the plaintiffs represented by our center are entitled to payment of 126,774 each, as a



	<ul style="list-style-type: none"> <li>✓ The defendant terminates their contract claiming it to be it for definite period</li> <li>✓ As they approached our center, our center represented them in a litigation claiming different payments against the employer (defendant)</li> </ul>					compensation.
8	<p><b>Biya A/Garo</b></p> <ul style="list-style-type: none"> <li>✓ Our client, Biya was serving as an employee of the defendant</li> <li>✓ The defendant then terminated his contract owing to the fact that it ceases operation, and without due compensations.</li> <li>✓ Our center represented him in a litigation claiming amount of compensation due to him and succeeded</li> </ul>	M	Labor	Jimma Town/W/Court	50564	Disposed totally in our favor and the client is entitled to an award of 8214.00 birr.
9	<p><b>Zenebech Bekele</b></p> <ul style="list-style-type: none"> <li>✓ The defendant's cow has caused a bodily injury to Zenebech/our client/</li> <li>✓ She approached us so that we represent her before court claiming compensation on her behalf</li> <li>✓ Our center accordingly prepared a pleading and actively engaged in the litigation and won the case.</li> </ul>	F	Tort	Jimma Town Woreda Court	49898	The court decided that the defendant surrender the cow as compensation to the victim together with one thousand as a moral damages.

10	<p><b>Hassan Mohammed</b></p> <ul style="list-style-type: none"> <li>✓ The issue arises when the defendant claims a succession to property to be his personal estate.</li> <li>✓ Hassan approached our center after which we have brought the case before court and won the case on his behalf.</li> </ul>	M	Succession	Jimma Town W/Court	17042	Entitlement to partition of the property from succession equally with the defendant.
11	<p><b>Roza Kelil</b></p> <ul style="list-style-type: none"> <li>✓ The defendant (government organ) closed Roza's micro enterprise shade and terminated her lease contract.</li> <li>✓ As soon as Roza approached our center, we have then instituted a suit against the office claiming Roza's contract be in action and compensation for the damages that she sustained due to the unlawful termination.</li> <li>✓ Finally, our center become successful as usual</li> </ul>	F	Property	Jimma Zone High Court	218435	<p>The court decides that,</p> <ul style="list-style-type: none"> <li>✓ Termination of the contract was illegal/unlawful</li> <li>✓ The shades be opened and returned to Roza</li> </ul>
12	<p><b>Fadila A/Zinab</b></p> <p>The client approached as to have a divorce petition written and then to get representation on issues of maintenance of her children</p>	F	Family/Divorce/Maintenance	Jimma Town Woreda Court	_____	Divorce is allowed and the court also ordered the claimed father to pay

							maintenance of 400 per month
13	<b>Asrat Dosha</b> <ul style="list-style-type: none"> <li>✓ The case comes to our center on appeal stage</li> <li>✓ Considering the case, our center takes the appeal claiming the termination is wrongful and therefore Asrat be reinstated back to his office</li> </ul>	M	Labor	Jimma Z/H/Court	43746		The court has decided that the contract is not lawfully terminated and hence, the employer should reinstate Asrat as his job.
14	<b>Eshetu Seyoum and Feleka Zeleka</b> <ul style="list-style-type: none"> <li>✓ Their employment contract was unlawfully terminated by their employer/the defendant.</li> <li>✓ As they approached our center, our center represented them in a litigation claiming different payments against the employer (defendant)</li> </ul>	M	Labor	Jimma T/Woreda Court and Jimma Zone High Court	50648 and 44061		The lower court awarded a payment of 26486.80 as compensation and the same is sustained by the appellate court.
15	<b>Yodit Katama</b> <p>✓The client approached as to have a divorce petition written and then to get representation on issue of partition of common property</p>	F	Family/Partition of Common Property	Jimma woreda court	50566		Divorced and Entitled to equally share the common property
16	<b>1. Basha Seboka Regasa</b> <b>2. Basha Wubishet Bogale</b>	M	Labor	Jimma Town	53706		The court gives it verdict that

	<p><b>3. Legese Tefera</b></p> <p><b>4. Basha Mekonnen Marsha</b></p> <p><b>5. Abera Mekonnen</b></p> <ul style="list-style-type: none"> <li>✓ The plaintiffs were all serving as employees of the defendant for seven (p. 1,2,3) and five (p. 4 and 5) years</li> <li>✓ The defendant (Commercial Nominees PLC) terminates their contract claiming it to be it for definite period</li> <li>✓ As they approached our center, our center represented them in a litigation claiming different payments against the defendant.</li> </ul>			W/Court		<p>termination was unlawful and accordingly entitled the plaintiffs with the following awards:</p> <p>P.1-3= <b>39012</b> Birr each</p> <p>P. 4-5 =<b>38205</b> Birr each</p>
17	<p><b>Almaz Abebe</b></p> <p>Almaz was an employee of Oromia Forest and Animals Authority at Jimma for about 11 years.</p> <p>The office has later terminated her contract and she approached or office to get representation on her litigation</p> <p>Then we have prepared a pleading and proceeded accordingly.</p>	F	Labor	Jimma Town Woreda Court	52804	She is entitled to payment 23805 birr.
18	<p><b>Keneni Assefa</b></p> <ul style="list-style-type: none"> <li>✓ Keneni was a migrant returnee.</li> <li>✓ She started a business with the defendant and his spouse in Small Micro Enterprises</li> <li>✓ The defendant and his wife begun to manipulate their business income and even fail to pay the amount which is due to keneni</li> </ul>	F	Property	Jimma/ T/W/ Court	50351	The court has after making the Small Micro Enterprises office audit total profit of their business; it orders that

	✓ Later Keneni approached our center demanded us to file a suit on her behalf					Keneni be paid 83,901 as her share of profit in the business.
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## IX. CHALLENGES

Despite the challenges that surround it, JUSL-LAC is rendering an exemplary community service and equipping law students with practical skills. There are a number of challenges which hinder the center’s service delivery. The followings are the major challenges, among others.

- ❖ **Financial Constraints** - the existing finance is not sufficient, timely and is not sustainable
- ❖ **High turnover**- there is high turnover of center lawyers due to very low salary paid by the center
- ❖ **Transportation** – lack of adequate transportation for students and supervisors
- ❖ **Lack of phone service**- particularly for center lawyers in order to communicate with their clients
- ❖ **Absence of secretaries**- specifically outside Jimma city where lawyers are carrying out the legal service and other jobs (particularly typing and reporting) without the support of secretaries.
- ❖ **Busy schedule**- from the coordinators of the center and the service providers, comparing to the increasing number of service seekers

## X. SUMMARY

JUSL-LAC is providing legal services such as counseling, preparation of pleadings and representation on litigations for children, women who are victims of domestic violence, peoples living with HIV, people living with disabilities, etc. In addition, the center admits students for clinical courses and externship program and they acquire basic knowledge of the practical world. Moreover, the center is providing basic legal education to hundreds of thousands of residents of Jimma Zone via Jimma Community FM Radio. Capacity building through training is also one of the core functions of the center which it carries out to enhance the knowledge of the lawyers working in the center.