The Ethiopian Law on the Right to Confrontation

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Abstract

This article examines the Ethiopian law on the protection of the accused person's right to confront prosecution witnesses. The accused is entitled to confront adverse witnesses so that not only the criminal justice process and its outcome become fair and reliable but also the accused enjoys a meaningful participation in the process. Yet, the right is not unbridled with the nature and scope of the restriction varying across jurisdictions depending on the interests and values pursued most. The most common restrictions are triggered by protection of vulnerable witnesses, the use of depositions of absent witnesses, trial in absentia and use of anonymous witnesses. This article argues that the administration of restrictions under the Ethiopian law suffers two general limitations. First, it raises issues of compatibility with the constitution. Second, the restrictions fall short of adequately counterbalancing the interests involved: that of the accused, the public, victims, and witnesses. Allowing witness statements made before the police and depositions of preliminary inquiry to be put in evidence at trial in the situation where the accused is not represented by legal counsel and is not entitled to cross-examine witnesses; allowing trial in absentia in broad range of crimes without adequate guarantees put in place; and use of hearsay evidence in the circumstances where it is not regulated, all threaten the right to confrontation.

Key terms: *The Right to Confrontation. Cross-examination. The right to be tried in person. Trial in absentia. Ethiopia.*

Introduction

The nature and scope of the right to confrontation has been subject to debate with some treating it narrowly while others conceiving it broadly. However, there seems a general consensus that the right to confrontation is part of the right to a fair trial and is not a single right as such; rather it comprises of "a bundle of

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related but separate rights."[1] Albeit with variations among the list of such underlying rights, the right to confrontation is generally believed to have the following three main components:[2] (a) the accused right to be tried in person, (b) the accused right to require witnesses testifying against him to appear in person while giving their testimony, and (c) the accused right to cross-examine adverse witnesses. In this sense, although many use them interchangeably, the right to confrontation is broader than the right to cross examine adverse witnesses.[3]

The basic principle that underlies the right to confrontation is that the testimony of prosecution witness may not be used against an accused unless it is given under oath or affirmation, in the presence of the accused and is cross-examined by the latter.[4] This right, further, requires prosecution witnesses to give their testimony at trial, or if necessary, at a pre-trial proceeding, where the accused is entitled to confront them[5] and the reliability of their testimony is checked through cross-examination.[6] This guarantees the accused the right to defend himself by facing prosecution witnesses and cross-examining them to test their veracity. Besides, it provides the judge with an opportunity to observe the demeanor and body languages of witnesses, which in turn helps him evaluate their credibility.[7] As such, it protects the accused against the risk of conviction based on untested evidence.

The European Court of Human Rights captures important aspects of the right in *Kostovski v. The Netherlands*[8]*:*

> *If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the*

[1] Ian Dennis, The Right to Confront Witnesses: Meanings, Myth and Human Rights, *Criminal Law Review*, Issue 4, (2010) p.270; Christine Holst, The Confrontation Clause and pretrial hearings: A due process solution, *University of Illinois Law Review*,Vol.2010(2010),p.1601;Christine C. Goodman, Confrontation's Convolutions*, Loyola University Chicago Law Journal,Vol.47 (2016), p.819..*

[2] *Ibid* (Ian Dennis) (Adding, among others the right to public trial and the right to know ones accuser to the list of the rights); *Ibid* (Christine C. Goodman).

[3] Ian Dennis, *Supra* note 1, p.260.

[4] *Friedman, Richard D.* `Face to Face': Rediscovering the Right to Confront Prosecution Witnesses. *Int'l J. Evidence & Proof, Vol.8 No.1, (2004), p.4.*

[5] Ibid.

[6] Christine C. Goodman, supra note 1.

[7] *Ibid*, Natalie.Kijurna, The Confrontation Clause and Hearsay, *DePaul Law Review*, Vol.50, (2001), p.1133.

[8] *Kostovski v The Netherlands*, European Court of Human Rights, Series A, Vol.166, Judgment of 20 November 1989, App No 11454/85, 12 EHHR 434.

> *defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility.*

The foregoing rationale reflects the instrumentalist conception of the right, which emphasizes on its value as a means to yield a reliable outcome by enabling the defense and the court to test evidence reliability. Jurisdictions that cherish this rationale most tolerate incursions into the right to confrontation as long as a piece of evidence is considered reliable even though it is not tested in cross-examination. This is true in some continental jurisdictions[9] as well in the USA prior to 2004 where in the latter case, the Supreme Court in *Crawford v. Washington* abrogated the mere instrumentalist conception of the right to confrontation, holding that: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."[10]

The right to confrontation is also viewed from a procedural perspective, serving process values of defense participation of its own right. Thus, the right is vindicated not because it serves some ends in testing the reliability of evidence but simply because it promotes defense participation.[11] As such, the right to confrontation promotes two fundamental values: procedural values expressed in terms of ensuring defense participation in the criminal process;[12] and substantive value of ensuring outcome reliability.[13] Further, the accused right to confrontation in criminal litigation is acknowledged as one of the fair trial rights meant to ensure equality of arms.[14] As such, it has found a place in many international and regional human rights instruments and Statutes of international criminal tribunals.

Finally, it is important to note that although the right to confrontation forms one of the fundamental fair trial rights of the accused, it is not absolute. In some exceptional circumstances, it can be limited to promote overriding interests; the

[9] See John D. Jackson and Sarah J. Summers, Internationalization *of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge University Press, New York, 2012), pp.332-34.
[10] *Id.,* p.330; U.S. Reports: Crawford v. Washington, 124 US Supreme Court 1354 (2004) available at:https://www.loc.gov, accessed on 23 Sep 2019.
[11] Massaro, The Dignity Value of Face-to face Confrontations, *Fla.L.Rev.*, Vol.40, (1989) p.863; Ian Dennis, *Supra* note 1, p.266.
[12] *Ibid.*
[13] Pamela R. Metzger, Confrontation as a Rule of Production, *William and Mary Bill of Rights Journal*, Vol.24, (2014), p.104.
[14] Sarah Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights*, (Oxford: Hart Publishing, 2007).

most common incursions into the right being trial in absentia, hearsay evidence and witness protection measures.

In Ethiopia, the FDRE Constitution (herein after the Constitution)[15]and the 1961 Criminal Procedure Code (herein after CPC)[16] recognize elements of the right to confrontation. On the other hand, the Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation [herein after Witnesses protection proclamation] limits the right to confrontation.[17] The extent to which the above legal frameworks protect the accused right to confrontation in criminal litigation remains unexplored. The FDRE constitution unconditionally entitles the accused to have access to evidence produced against him and to cross-examine adverse witnesses. Nonetheless, the Witness Protection Proclamation limits the right by extending several protection measures to witnesses, including withholding their identity.[18] Although this approach may be justified for practical considerations, its constitutionality is open to challenge, as the constitution accommodates no exception to the right.

It is also reported that the government of Ethiopia often denies criminal defendants from having access to evidence under its possession.[19] There are extensive grounds of trial in *absentia* prescribed under the CPC[20], albeit, no such clause exists under the constitution. Apparently, pursuant to the CPC, the prosecution is entitled to produce hearsay witnesses against the accused.[21] Nonetheless there are no specific provisions that prescribe when hearsay evidence shall be admissible and warrant conviction. Moreover, the 2011 Criminal Justice Policy of Ethiopia (herein after Criminal Justice Policy) has introduced broad exceptions in which the prosecution evidence shall not be disclosed to the accused.[22] The policy also demands the upcoming criminal procedure code, the draft of which is underway for many years, to emulate this.

What do all these mean to the right to confrontation? This article investigates the legal protection afforded to the right to confrontation and its challenges in

[15] The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Federal Negarit Gazeta, (1995), Art.20(4), (Herein after the FDRE Constitution).
[16] Criminal Procedure Code of Ethiopia, Negarit Gazeta, Extraordinary Issue No.1 of 1961, (1961), Articles 127 (1), 124(1), 125, and 137. (Herein after CPC).
[17] Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation No.699/2010, Federal Negarit Gazeta, (2010), Article 4 (Herein after Witnesses Protection Proclamation).
[18] Witness Protection Proclamation, supra note 17, Article 4, para.1 (h)-(k).
[19] United States Department of State, Bureau of Democracy, Human Rights and Labor, Country Reports on Human Rights Practices for 2014, Ethiopia Human Rights Report, (2014), p.8.
[20] CPC, *Supra* note 16, Article 161 (2).
[21] *Id.,* Article 137(1).
[22] የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ የወንጀል ፍትሕ ፖሊሲ. (ከዚህ በኋላ የወንጀልፍትህ ፖሊሲ. ይባላል) 2011ዓ/ም አንቀጽ 4(5) (2-3)::

Ethiopia having regard to the FDRE constitution and relevant international standards pledged by Ethiopia. The article, particularly, focuses on how the Ethiopian law fares on the three components of the right to confrontation: the accused right to be tried in person; the accused right to require witnesses testifying against him to appear in person; and the accused right to cross-examine adverse witnesses. To this end, it analyzes laws, international standards, and relevant literature on the subject matter. The article is organized as follows. The introduction part sets out the scene. The first section briefly outlines international standards on the right to confrontation. The second section critically examines the Ethiopian laws governing the right to confrontation and the accompanying challenges. This is followed by concluding remarks.

1. International Standards on the Accused Right to Confrontation

As discussed above, in criminal litigation, the accused right to confrontation encompasses the right of the accused to be tried in person; the right to compel prosecution witnesses to appear in person while giving testimony; and the right to cross-examine prosecution witnesses. This section attempts to outline the extent to which these components of the right to confrontation are acknowledged under international standards focusing on ICCPR and ACHPR.

1.1 The Accused Right to be tried in Person

The accused right to be tried in person is an important component of the right to a fair trial in general and the accused right to confrontation in particular. It enables the accused to have a meaningful participation in the trial by producing his own evidence and challenging adverse evidence — to face witnesses testifying against him, and defend himself through cross-examining them. As such, the accused right to be tried in person is recognized under several international instruments including the ICCPR.

The ICCPR guarantees the accused the right to be tried in his/her presence in the determination of any criminal charge[23] For the sake of clarity it is worth highlighting the scope of the right. Although some jurisdictions guarantee the

[23] International Covenant on Civil and Political Rights (adopted by UNGA Res 2200A (XXI) (16 December 1966), entered into force 23 March1976) 999 UNTS. (Herein after ICCPR), Art.14[3(d)]. It declares, "In the determination of any criminal charge against him, everyone shall be entitled, in full equality, to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing…"

right to be present in all stages of criminal proceedings,[24] international monitoring bodies such as the UNHRC and ECHR adopt a flexible approach. For instance, the UNHRC in *Gordon vs. Jamaica*[25] makes it clear that the hearing of an appeal in the absence of an appellant who is represented by a legal counsel does not constitute a violation of article 14(3) (d) of the ICCPR. Although the covenant does not prescribe an exception to this right, in its jurisprudence, the UNHRC acknowledged trial in absentia, noting that in the absence of due notice, trial *in absentia* violates the accused right to be tried in person and his right to cross-examine prosecution witnesses.[26] The Committee, particularly, observed[27]: "Judgment in absentia requires that all due notification has been made to inform [the accused] of the date and place of his trial and to request his attendance."

On the other hand, the accused right to be tried in person is not clearly acknowledged under the ACHPR. However, this instrument prescribes that the accused has the right to defense, including the right to be defended by counsel of his choice.[28] Here, it is logical to claim that the right to defense implies the right to be tried in person. Interestingly, the African Commission on Human and Peoples' Rights settles the dust by issuing Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (herein after PGRFTLA). The PGRFTLA not only prescribes that the accused has the right to defend himself in person or through legal assistance of his own choice[29] but also entitles him the right to be tried in his presence; and the right to appear in person before the judicial body.[30] The PGRFTLA, further, provides that the accused may not be tried in *absentia* in principle,[31] but he may "voluntarily waive the right to appear at a hearing, preferably in writing".[32] It also entitles the accused, who is tried in *absentia*, the right to petition for a reopening of the proceedings upon showing that the notice was not personally served on him, or he failed to

[24] Such is the case with the USA and Australia for example. In the USA, Rule 43(a) of the Federal Rules of procedure requires that the defendant shall be present from arraignment all the way to the imposition of sentence; albeit he may voluntarily waive it.

[25] Gordon vsJamaica, Communication No.237/1987, UNHRC, UN. Doc.CCPR/C/46/D/237/1987 (1992).

[26] *Mbenge vs. Zaire, UN HRC, Communication No. 16/1977, UNHRC, U.N. Doc. CCPR/C/OP/2 (1990) para.76. (Noting that without due notification, judgments in absentia violate Article 14(3) (e)); see also Antonaccio vs. Uruguay, Communication No. R.14/63, P.20, UNHRC, U.N. Doc. Supp. No. 40 (A/ 37/40) para 114 (1982).*

[27] *Ibid.*

[28] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU DocCAB/LEG/67/3 Rev. 5., Article7, Para. 1 (c) (herein after ACHPR).

[29] African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa [herein after PGRFTLA].DOC/OS (XXX), para N [22(a)].

[30] *Id.,* Para. N [6(c)].

[31] *Ibid.*

[32] *Ibid.*

appear for "exigent reasons beyond his/her control".[33] Consequently, "if such petition is granted, the accused is entitled to a fresh determination of the merits of the charge".[34]

In sum, the PGRFTLA guarantees the accused right to be present while witnesses give their testimony and limits the right only in the following exceptional circumstances: "when a witness reasonably fears reprisal by the defendant; or when the accused engages in a course of conduct seriously disruptive of the proceedings, or when the accused repeatedly fails to appear for trivial reasons after having been duly notified".[35] Further, where the accused is removed or if his presence cannot be ensured, he has the right to be represented by a legal counsel so that his right to cross-examine witnesses is preserved.[36]In so doing, the African Human Rights Commission has tried its best to fill in the gaps in the ACHPR through adopting the principles and guidelines discussed above (PGRFTLA). It also urges States parties to the ACHPR to incorporate and apply the principles.

1.2 The Accused Right to Demand Prosecution Witnesses to Appear in Person

The accused right to confrontation depends on the prosecution's duty of producing witnesses before trial. Implicit in the right thus lies the prosecution's obligation to discharge its burden of producing witnesses before trial, which is vital in the accurate determination of facts. Describing this component of the right as 'confrontation's rule of production', one writer cogently sees it as a guarantee of the defendant's right to confrontation.[37] This writer observes[38]:

> *Confrontation is ... a procedural rule that regulates the prosecution's presentation of evidence by requiring it to place its witnesses before a defendant and ... [the court].In turn, this mandate of production reinforces two important due process concepts: first, at a criminal trial, the prosecution bears the burdens of production and persuasion; second, a criminal defendant has the right to rely on the prosecution's failure of proof. Confrontation's production imperative is the threshold procedural demand of the Confrontation Clause. Confrontation's mandate*

[33] *Ibid.*
[34] *Ibid.*
[35] *Id.*, para N [6(f)].
[36] ACHPR, *Supra* note 28, Article7, para 1 (c).
[37] Pamela R. Metzger, *Supra* note 13.
[38] *Ibid.*

> *incorporates several underlying rules of production: the prosecution must produce its witnesses at a public trial and elicit their accusations under oath and in the presence of the defendant and the… [the court]. Each aspect of this production imperative advances the due process command that the prosecution bear the burden of production and persuasion and restrains the government from abuses of power and process.*

Under the ICCPR, the accused is entitled to demand the personal attendance of the prosecution witnesses before court.[39] This embraces the principle of immediacy and orality that are designed to furnish a fact finder with firsthand information. Although ICCPR prescribes no exception to this right, it does not mean that the right remains unlimited in scope. The accused right to demand the prosecution witnesses to appear in person and the security right of the witnesses may conflict. Thus, the interest of justice requires reconciling these interests.

The experience of international tribunals and ICC provides us with evidence on efforts of reconciling those interests by recognizing limitations to the right. For instance, the Rules of Procedure and Evidence of the ICTY acknowledges the use of remote testimony when the interest of justice demands.[40] Similarly, Rule 90(A) of the ICTR's Rules of Procedure and Evidence[41]acknowledges use of remote video-conferencing technology (VCT) where it is necessary to safeguard the witness's security or in the interest of justice.

In determining whether VCT witness testimony is in the interests of justice, the ICTR considers the following[42]: (1) "the importance of the witness's testimony," (2) "the witness's inability or unwillingness to attend," and (3) "whether a good reason has been adduced for that inability or unwillingness". Likewise, the Statute of ICC, while demanding prosecution witnesses to give their testimony at trial in person[43], provides exceptional circumstances where they may testify *viva voce* (oral) or their recorded testimony by means of video

[39] ICCPR, *Supra* note 23, Article 14, para 3 (e).
[40] Rules of Procedure and Evidence, U.N. Doc. IT/32 (Feb. 11, 1994) [hereinafter ICTY RPE], reprinted in 33 I.L.M. 484 (1994); see Rule 81that provides proceedings may be conducted by videoconference link if consistent with the interests of justice). Rule 81was adopted to replace Rule 71 on July 12, 2007, to allow for greater use of testimony by VCT.
[41] See Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Rule 90(A), U.N. Doc. ITR/3/REV.1 (June 29, 1995). It states that "witnesses shall, in principle, be heard directly by Chambers."
[42] Yvonne M. Dutton, Virtual Witness Confrontation in Criminal Cases: A Proposal to Use Videoconferencing Technology in Maritime Piracy Trials, *Vanderbilt Journal of Transnational Law*, Vol. 45, (2012), p.1296.
[43] Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force on 1 July 2002) 2187 UNTS (Hereinafter Rome Statute of the ICC), Article 67, Para.1 (e).

or audio technology or documents or written transcripts produced for the purpose of protecting them.[44] These experiences indicate that the exception to the rule that " the prosecution witness should testify in person at the trial" shall be construed very strictly. Therefore, the prosecution witnesses shall appear in person except when the interest of justice or the purpose of safeguarding witnesses' right to security require otherwise.

Under the ACHPR, there is no specific provision demanding the prosecution witnesses to appear in person. However, the PGRFTLA requires the prosecution to furnish to the defense the names of witnesses it intends to call at trial and entitles the latter to attend the hearing of witnesses.[45] It also provides that the testimony of anonymous witnesses can only be admitted under exceptional circumstances having regard to the nature of the offence, the security of witnesses and the interests of justice.[46]

1.3 The Accused Right to Cross-examine Witnesses

Witnesses are often considered as the eyes and ears of justice.[47] Yet, they could be problematic and distort outcome accuracy unless their presentation is duly regulated. One of such regulation is done through examination of witnesses in general and cross-examination, in particular. Indeed, albeit with exaggerations, cross-examination has been characterized as "the greatest legal engine ever invented for the discovery of the truth."[48]

The right to cross-examine prosecution witnesses forms fundamental fair trial rights of the accused and as such receives recognition in international human rights systems as well as national procedural systems. Under the ICCPR, the accused is entitled to examine witnesses against him.[49] On several occasions, the UNHRC has interpreted the right to cross examination. The Committee noted that Article14 (3)(e) of the ICCPR guarantees the accused the same legal right to compel the attendance of adverse witnesses and cross-examine any witnesses as are available to the prosecution. Also, it entitles this same party the right to be given a proper opportunity to question and challenge witnesses against them at some stage of the

[44] *Id.,* Article 68, para 2.
[45] PGRFTLA, *Supra note* 29, para N [6(f)].
[46] *Ibid.*
[47] P. Wall, *Eye-Witness Identification in Criminal Cases* (Springfield: Charles C. Thomas, 1965).
[48] John H. Wigmore, Evidence § 1367, p.32.
[49] ICCPR, *Supra* note 23, Art. 14. It states that "In the determination of any criminal charge against him, everyone shall be entitled to, in full equality, to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

proceedings.[50] Here, the phrase 'at some stage of the proceeding' refers to both the pre-trial stage, including preliminary inquiry, and the trial stage. Indeed, the Committee explicitly mentions that this right encompasses preliminary proceedings at which witness testimony is received when the witness is subsequently unavailable at trial.[51] The Committee further noted that the accused or his defense counsel shall be given the opportunity to interrogate the prosecution witnesses.[52] It, specifically, observed that to safeguard the rights enshrined under Article14 (3)(e) of the ICCPR, criminal proceedings must provide the accused the right to an oral hearing, at which he may appear in person or be represented by counsel, and may bring evidence and examine the witnesses against him.[53] The committee went further to require the participation of the defense counsel in the taking of depositions, suggesting that[54] "a magistrate should not proceed with the deposition of witnesses during a preliminary hearing without allowing the author an opportunity to ensure the presence of his lawyer."

It is important to note that the accused right to examine witnesses against him is also acknowledged under the statute of the ICTY,[55] ICTR[56] and ICC.[57] These statutes uphold the accused right to cross-examine any of those witnesses testifying against him. On the other hand, the accused right to cross-examine prosecution witnesses is not specifically recognized under the ACHPR. Yet, the PGRFTLA entitles the accused to examine adverse witnesses. It states that the accused shall examine only those witnesses "whose testimony is relevant and likely to assist in ascertaining the truth."[58] Nonetheless, what will be the parameter to determine those witnesses whose testimony is relevant, and the authority competent to determine them are open to dispute and uneven interpretation.

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[50] UNHRC, General Comment No. 32 on Right to equality before courts and tribunals and to a fair trial recognized under Article 14 of ICCPR, Ninetieth session, Geneva, 9 to 27 July 2007, see para 39. A similar approach has been adopted by the European Court of Human Rights. See Lucav. *Italy*, para. 40: "If the defendant has been given an adequate and proper opportunity to challenge the depositions either when they are made or at a later stage, their admission in evidence will not in itself contravene Article 6(1) and 6(3 of European Convention on Human Rights)."

[51] *Compass v. Jamaica, Communication No. 375/1989, P.10.3, UNHRC, U.N. Doc. CCPR/C/49/D/375/1989 (1993).*

[52] *Semey v. Spain, Communication No. 986/2001, 8.7, UNHRC, U.N. Doc. CCPR/C/78/D/986/2001 (2003).*

[53] *Rodriguez Orejuela v. Colombia, Communication No. 848/1999, P.7.3, UNHRC, U.N. Doc. Supp. 40 (A/57/40) para 172 (2002).*

[54] *Simpson* v. *Jamaica, Supra* note 51, para 7.3.

[55] Statute of the International Criminal Tribunal for the former Yugoslavia, UNSC Res 827 (25 May 1993) UN Doc S/RES/827 (herein after Statute of ICTY), Article 21, para 4 (d).

[56] Statute of the International Criminal Tribunal for Rwanda, UNSC Res 955 (8 November 1994) UN Doc S/RES/955, (Herein after Statute of ICTR), Article 20, para 4 (e).

[57] Rome Statute of ICC, *Supra* note 43, Article 67, para 1 (e).

[58] PGRFTLA, *Supra* note 29.

The PGRFTLA further provides that where national laws of member states to the ACHPR do not recognize the accused's right to examine witnesses during pre-trial investigations,[59] "the defendant shall have the opportunity, personally or through his/her counsel, to cross-examine those witness at trial."[60] Yet this does not in any way displace the right to cross-examine those witnesses at trial for the reason that he has examined them during pretrial investigation. Indeed, those jurisdictions, which permit pretrial examination of witnesses, do also allow rehearing of them during the trial stage.[61]

To recap, the right to confrontation is not without qualifications. Although the extent of restrictions vary across procedural systems, the following represent the most common restrictions on the right[62]: (1) Where witnesses are not available at trial due to valid grounds; (2) with a view to protect witnesses, including protection of anonymity and; (3) with a view to protect vulnerable victims and witness from re-traumazation. Such limitations are grounded on the value of protecting legitimate interests. For instance, if we consider the last restriction, it is established that cross examination of vulnerable witnesses and victims such as child or mentally handicapped witnesses may mislead or confuse them to yield in undesirable results.[63] This calls for measures tailored to their needs,[64] such as protection of anonymity, regulating the nature of questions put to them, and questioning through intermediaries.

2. Ethiopian Legal Framework on the Right to Confrontation

2.1 The Right to be Tried in Person

The accused right to be tried in his presence is not specifically recognized under the FDRE constitution that guarantees fair trials rights of the accused.[65] However, generally the right to confrontation implies the right to be present at

[59] This considers structural differences between procedural systems where some adversarial systems consider the trial stage as the primary forum for examination of witnesses; in many inquisitorial traditions examination of witnesses normally takes place at the preliminary proceedings. See also John D. Jackson and Sarah J. Summers, *Supra note 9*, p.343.

[60] *Ibid*.

[61] *Id.*, p.326.

[62] See Stefan Trechsel, *Human Rights in Criminal Proceedings*, (Oxford: Oxford University Press, 2005), p.312.

[63] Phoebe Powden *et al*, Balancing Fairness to Victims, Society and Defendants in the Cross examination of Vulnerable Witnesses: An impossible Triangulation?", *Melbourne University Law Review*,Vol.37, (2014),p.539 ; Adrian Keane, Cross-Examination of Vulnerable Witnesses: Towards a Blueprint for Re Professionalism *International Journal of Evidence and Proof Vol.16*, (2012), p.176–80; Schwikkard, "The Abused Child: A few Rules of Evidence Considered" *Acta Juridica* (1996), p.155.

[64] See for example UN *Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime*, ESC
Res 2005/20 (22 July 2005) [30]–[31], [40]–[42].

[65] FDRE Constitution, *Supra* note 15, Article 20.

trial. Interestingly, the CPC, as opposed to making it a right, requires the accused to appear personally at the trial to be informed of the charge and to defend himself.[66] This not only imposes on the court the duty to make sure that the accused attends the trial but also in principle precludes the accused from waving the right. On the contrary, in *Federal prosecutor vs. Dubai Auto-gallery and World International Free Zone Company*, [67] the Federal Supreme Court Cassation Division (herein after FSCCD) limits the requirement of personal attendance only to *accused natural persons,* thereby excluding legal persons, albeit with no explanation/reasoning available in the relevant volume. This amounts to amendment of the law, which is beyond the province of the court.

The CPC, under articles 127(1) and 123, also proclaims that trial shall be carried out in the presence of the accused so that not only he presents his own case but also exercises his right to confrontation, i.e., observes any adverse witness and challenges the adversary, which is essential to determine the reliability and accuracy of any evidence presented before the trial. To this end, the trial court is empowered to issue bench warrant[68] or arrest warrant where an accused person who has been dully summoned fails to appear[69] so that he is brought before court.

It is interesting to see whether the right to presence covers pretrial or post trial proceedings. Apparently, the language used in the CPC, which mentions "trial", seems to exclude pretrial proceedings. Nonetheless, it stands to reason that preliminary proceedings which involve the hearing or presentation of evidence trigger the right to presence and hence the right to confrontation. As such, the CPC seems to acknowledge the accused right to attend the preliminary inquiry when it requires the court to allow the prosecution open his case and call witnesses upon the appearance of the accused.[70]

On the other hand, the applicability of the right to post trial proceedings is controversial. The apparent reading of the law suggests that post trial proceedings such as appeal may not trigger the right to presence for the following reasons: (1) The CPC allows appeal to continue in the absence of the defendant where he is a respondent and the striking out of appeal where he is an

[66] CPC, *Supra* note 16, Article 127 (1).
[67] *ፌዴራል ዐቃቤሕግ vs. ዱባይ አዉቶጋሪ ኤልኤልሲ እና ወርልድ ኢንተርናሽናል ፍሪዞን ካምፓኒ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ቅጽ*:19 ሰ/መ/ቁ/120762 የካቲት 25 2008ዓ/ም ገጽ. 279::
[68] CPC, *Supra* note 16, Article 125.
[69] *Id*., Article 160 (2).
[70] *Id*., Article 84.

appellant[71]; (2) the appellant or respondent is no more an accused person within the meaning of the CPC, thus a condition for the invocation of the right is not met; (3) the right seems to attach to the trial stage and not post trial proceedings. However, such an approach has adverse implications on the right of the defense, especially where the prosecution challenges an acquittal or punishment.

That said the requirement to be present at trial is not absolute. The CPC prescribes exceptional circumstances where trial in the absence of the accused is permissible. It is only when either the bench warrant or arrest warrant cannot be executed that the court may consider trial in the absence of the accused.[72] This is permissible on condition that the alleged offence entails rigorous imprisonment not less than 12 years or it relates to crimes against the fiscal and economic interests of the state entailing rigorous imprisonment or fine exceeding five thousand dollars.[73] The nature of offences eligible for trial in absentia —the meaning of offences that attract "not less than 12 years of rigorous imprisonment" — is open to diverse interpretations. Apparently, it can be understood to refer to the minimum punishment or simply as falling within the range of a specific rigorous punishment prescribed under the law. While the first interpretation is difficult to apply since virtually no crime has 12 years as its lower range of punishment; the second interpretation risks shirking of the right to be present before trial to the extent that trial in absentia becomes the rule. The FSCCD is yet to rule on this. Still we suggest for the amendment of this provision so that trial in absentia is unequivocally reserved only to exceptionally serious crimes.

Where the court establishes that grounds to conduct trial in *absentia* are satisfied, it orders the publication of summons to the accused with a warning that failure to appear triggers in absentia trial.[74] Although the English version is not clear regarding the manner of such publication, the Amharic version makes it clear that summons should be published in a newspaper or in other more effective methods so that it is duly served. The FSCCD echoes this in one case,[75] observing that posting a notice in a fleeing accused residence and kebele administration does not comply with the law since it is not more accessible and effective than publication in a newspaper. The court suggests that the minimum modality of summons is publication in a newspaper, the effectiveness of which

[71] *Id.*, Article 193.
[72] *Id.*, Article 160(3).
[73] *Id.,* Article 161 (2) and Articles 343 through 354 of the criminal code.
[74] *Id.*, Article 162.
[75] አቶ ዘውዱ ተስፋይ እና የትግራይ ክልል ፍትህ ቢሮ የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት የሰ/መ/ቁ. 93577 ህዳር 22 ቀን 2007 ዓ.ም. ገጽ. 198።

is contested in Ethiopia context. Where it is established that summons is duly served and the accused fails to appear thereafter, the hearing continues as in ordinary cases.[76] The court will conduct the hearing of prosecution witness and may call additional witnesses if it thinks fit to dispose of the case.

The CPC guarantees the accused the right to seek setting aside of a judgment rendered in his absence within 30 days from the date on which he became aware of such judgment[77] by establishing that he has not received a summons or he was prevented by *force majeure* from appearing in person or by an advocate.[78] After hearing both sides, the court may order either the retrial or dismissal of his petition. If the court dismisses such petition, the decision is final and non-appealable.[79] However, the accused is entitled to appeal against the sentence within 15 days from the date of the decision that dismisses the petition.[80]

Here, one may question the fairness of denying appeal against dismissal of application of retrial. This would in effect leave the absent defendant in dilemma whether to simply challenge the judgment via direct appeal instead of losing his right to appeal on convictions following unsuccessful attempt for retrial. At any rate, he can still avail himself of cassation review upon establishing fundamental error of law.

The CPC is silent on whether and how trial should proceed where the accused fails to appear after the trial begins. Although the effect depends on the stage at which the defendant fails to appear and the grounds of absence, anecdotal evidence shows that the approach of Ethiopian courts is uneven. Some courts allow trial in absentia only where the defendant fails to appear before the hearing of his defense provided that the offence qualifies for trial in absentia. Thus, if the accused absented himself after the hearing of his defense, the trial continues like ordinary trials, denying the defense the right to seek the setting aside of the judgment. The FSCCD takes this further to make it applicable to any offence horizontally, regardless of whether it can be tried in absentia. The Court sanctions this in *W/ro Fetia Awol vs Federal public prosecutor* by rejecting the appellant's motion to cancel a judgment and sentence imposed in her absence — absence apparently supported by good cause.[81] The court held

[76] CPC, *Supra* note 16, Article 163.
[77] *Id.*, Articles 164 and 197-198.
[78] *Id.,* Articles 198 -199.
[79] *Id.*, Article 202(3).
[80] *Ibid.*
[81] ወ/ሮ ፊት.ያ አወል *Vs* ፌዴራል ዐቃቤሕግ, የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ቅጽ 13 ሰ/መ/ቁ/76909 ግንቦት 10 ቀን 2004ዓ/ም ገጽ. 305::

that where an accused person, who has already examined prosecution witnesses and presented his own defense, failed to appear on the day fixed to pronounce a final judgment, the proceedings cannot be taken as default hearing/judgment and hence no retrial is warranted.[82]

This wholesale approach of the court undermines the right to confrontation and the fairness of the trial in many senses. First, the court erroneously limits the scope of the right simply to the stage of hearing of prosecution and defense witnesses. Yet, the right covers the entire trial proceeding including sentencing hearing. This denies the accused his opportunity to present favorable sentencing facts and challenge unfavorable ones. Second, it overlooks the distinction between total in absentia (absence from the outset) and partial in absentia (absence at some stages of the trial). Although not apparent from the law, the court refuses to recognize the latter version of absence and takes the entire trial as though it was held in the presence of the accused thereby blocking any chance of rehearing of the sentencing part. Third, the court seems reluctant to appreciate the necessary counterbalancing measures to the detriment of the accused right to confrontation. This could be done for instance by determining, based on the appellant's claim, whether the defendant was prevented from attending the latter stages of the trial owing to a good cause. Rather than pronouncing judgment and imposing a sentence in absentia, it would have been fair if the court ordered the bail bond to be *forfeited,* issued bench warrant and adjourned the case since the accused might have been hindered by conditions beyond her control as she claims. Further, her own lawyer whom she claimed to have been prevented while she was absent could have represented the appellant. From the available records, it is not clear whether these measures have been exhausted.

Similarly, the FSCCD in *Andualem Genanaw vs Amhara Regional State public prosecutor*[83] reversed a decision by a lower court, which, on grounds of offence illegibility, rejected the prosecution's motion for trial in absentia involving a defendant who failed to appear on a date fixed to hear his defense. Thus, trial in absentia (in this case offence eligibility) may not be invoked where a defendant who utilized his right to challenge prosecution witnesses and was allowed to call his defense, becomes absent. In effect, the court seems to cancel the requirement of the law, which limits the scope of trial in absentia to offences punishable with not less than 12 years of imprisonment. This approach undermines the right of the accused to be present by subjecting any offence to trial in absentia so long as

[82] *Ibid.*

[83] *አንዱአለም ጉናናው vs አማራ ክልል ዐቃቤሕግ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ቅጽ 22 ሰ/መ/ቁ/127313 22/01/2010 ዓ/ም::*

similar factual circumstances unfold. It also refuses to recognize partial in absentia trials to which the facts of the case under consideration squarely fit in.

Furthermore, the CPC does not regulate whether a trial should continue or a retrial should be conducted and whether an accused should be allowed to join the trial when he has shown up amid a trial pending in his absence. Nor is there any jurisprudence established by the FSCCD on the matter. The way each court handles such legal gaps might adversely implicate the right of the defense in general and the right to confrontation, in particular. So long as it doesn't prejudice the defendant's right, in principle, he should be allowed to join in; otherwise a retrial can be considered.

Before winding up this part, it is intriguing to note that grounds of trial in absentia are not limited to waivers by the accused. The most commonly acknowledged grounds also include absence due to health problems and removal of a disruptive defendant. In many jurisdictions, courts are mandated to limit the right to presence and thus the right to confrontation by removing a defendant from a trial for his disruptive conduct.[84] However, in Ethiopia there is no procedure that permits the court to remove a disruptive defendant. Absent such procedure means courts simply adjourn a trial after holding a disruptive defendant in contempt. Likewise, the absence of a defendant due to health problems may not trigger trial in absentia; nor is there any deferral mechanism under the law thereby leaving the court simply to rely on adjournments until the accused recovers.

To sum up, the CPC acknowledges the accused right to be tried in person in principle and prescribes exceptional circumstances where trial in *absentia* can be conducted. However, apart from the elusiveness of offences eligible to trial in absentia, such specific guarantees /counterbalancing measures are missing: mandatory legal representation during trial in *absentia;* and the state's duty to establish that the accused is effectively served with advance notice and warning.

2.2 The Accused Right to Demand Prosecution Witnesses to Appear in Person

The Constitution guarantees the accused the right to a public trial, the right to have full access to any evidence presented against him, and the right to examine witnesses testifying against him.[85] The effective exercise of these rights depends

[84] See generally Sarah Podmaniczy, Order in the court: Decorum, Rambunctious Defendants and the Right to be Present at Trial, *Journal of constitutional law*, Vol.14, No.5 (2012), p.1283.
[85] FDRE Constitution, *Supra* note 15, Articles 20(1) and (4).

on the appearance of witnesses before a court. The CPC acknowledges this by providing for stringent rules designed to ensure the appearance of prosecution witnesses before trial. Among such rules, one finds the rules governing trial and preliminary inquiry. The CPC demands all witnesses who have given their testimony against the accused during preliminary inquiry to execute bonds binding themselves to appear before the trial court.[86] Albeit its propriety is assailable, it also empowers the court to put them in custody until the trial or they execute the required bail bond.[87] It is only where it is impossible to bring such witnesses for justified grounds that their depositions taken at preliminary inquiry may be read and put in evidence in trial.[88]

Once the date for trial is determined, the CPC requires the prosecution to furnish the register with a list of its witnesses to be summoned by the latter.[89] The trial court is empowered to issue bench warrant to arrest prosecution witnesses if they failed to appear before the court after they have been duly summoned and there is proof of service of such summons.[90] However, no other remedy is provided under the CPC where it is impossible to execute such bench warrant. The practice, which appears to have been endorsed by the FSCCD [91], indicates that if all or sufficient number of the prosecution witnesses failed to appear after dully summoned, and the police failed to execute the bench warrant after giving some adjournments, the court, by its own motion, orders to terminate the proceedings with the prosecution retaining the power to activate it. Whether such order temporarily suspends the period of limitation from running[92] or interrupts the period of limitation[93] remains controversial. From the foregoing, one can conclude that the prosecution witnesses are necessarily required to appear in person while giving their testimony at trial.

Even though the Constitution unconditionally entitles the accused the right to have full access to any evidence produced against him, there are several instances where the testimony of an unavailable witness may be put in evidence under the law, thereby prompting intrusion into the right to confrontation. The problem has two dimensions. First, the constitution accommodates no exception

[86] CPC, *Supra* note 16, Article 90 (1).
[87] *Id.*, Article 90(2).
[88] *Id.*, Article 144.
[89] *Id.*, Article 124 (1).
[90] *Id.*, Article 125.
[91] ወ/ሮ *ዘነበች ሽብሩ vs ፌደራል ዐቃቤሕግ የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ቅጽ 10 ሰ/መ/ቁ/45572* የካቲት 26 ቀን 2002 ዓ.ም ገጽ.195::
[92] Criminal Code of Federal Democratic Republic of Ethiopia, Proclamation 414/2004, Federal Negarit Gazeta (2004) Article 220 (1).
[93] *Id.*, Article 221 (1).

to the right. Thus, any qualification to the right *per se* gives rise to constitutionality issues. Second, even accepting the qualification is vindicated as a matter of practicability, the balance between competing interests appears to have not properly configured. Below are some of the manifestations of these problems.

i) Hearsay

The CPC allows a prosecution witness to give testimony with regard to facts he has direct or an indirect knowledge.[94] The phrase "indirect knowledge" can be construed to refer to hearsay, albeit some understood it to connote simply circumstantial evidence as opposed to hearsay. Practice supports both lines of interpretation with some courts rejecting hearsay evidence altogether, while others simply endorsing it.[95] The FSCCD seems to uphold hearsay in a couple of cases.[96] For instance, in *Feyisa Mamo vs. Federal Prosecutor,* the court admitted the testimony of two hearsay witnesses. The first witness claimed to have confirmed from a mute victim who later died as a result of an attack that the defendant had attacked him, and the second witness testified to have learned this very fact from the first witness. The court held that although the testimony of the witness, which is hearsay, is admissible pursuant to article 137(1), it failed short of establishing the guilt of the appellant to the required degree.[97]

The practice of using hearsay evidence in criminal cases exhibits two limitations. First, the hearsay declarant who cannot appear in person before trial court while giving his statement is not subject to cross-examination. This compromises the accused's constitutional right to confront adverse witnesses, which is recognized unconditionally. Further, in relying on hearsay, neither lower courts nor the FSCCD articulated detailed admissibility standards, apparently suggesting unqualified use of hearsay. There are no legal rules under the CPC to regulate hearsay evidence particularly on its admissibility and weight requirements. Nor are justified grounds of unavailability of the declarant, other admissibility and weight requirements regulated. Therefore, uneven and unregulated reliance on hearsay evidence to warrant conviction seriously undermines the accused right to confrontation. Interestingly, the draft criminal

[94] CPC, *Supra* note 16, Article 137 (1). Accordingly, the prosecution witnesses may testify against the accused facts which he/she has indirect knowledge.

[95] See Tesfaye Abate, "Yesemi semi masreja (Hearsay Evidence)", *Mizan Law Review*, Vol.6, No.1, (2012), p.116.

[96] ፈይሳማሞ vs ፌደራል ዐቃቤሕግ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ቅጽ 19 ሰ/መ/ቁ/109441 ጥሪ 17 2008 ዓ.ም ገጽ. 250:: ዘሪሁን ታደሰ vs ኦሮሚያ ዐቃቤሕግ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ቅጽ 7 ሰ/መ/ቁ/31731 የካቲት 2000ዓ.ም ገጽ.279::

[97] ፈይሳማሞ vs ፌደራል ዐቃቤሕግ ቅጽ 19 ገጽ.256-57 (Id.)

procedure code puts this problem straight by requiring a witness to testify only on matters he possesses direct knowledge.[98]

ii) Depositions

As shown elsewhere, the prosecution assumes the responsibility to ensure that witnesses attend the trial so that the defense exercises its right to cross-examination. It is only under exceptional circumstances that are beyond its control that the prosecution may be dispensed with this obligation. Under Ethiopian law, the depositions of a prosecution witness[99] taken at preliminary inquiry may be read and put in evidence by the trial court where such witness is dead or insane, cannot be found, is so ill as not to be able to attend the trial or is absence from the country.[100] This qualification to the right to confrontation raises several legal and practical questions. In what follows we will address the prominent ones.

To start with, there are issues on whether the list of grounds of unavailability is exhaustive. Apparently, it seems exhaustive. Yet, this leaves out some instances of practical necessity and thus giving rise to problems in balancing competing interests. For instance, witnesses may not be available to testify on grounds of self incrimination or privileged communications or for any other valid reasons. It is not clear whether such grounds justify the admission of out-of-court statement of such witnesses without hearing them at trial, thereby limiting the right to confrontation. This could be the case for example with incriminating statements made at the police station against a spouse but later recanted at trial on grounds of spousal privilege, albeit not clearly recognized by law for now. [101]

Secondly, some of the grounds of unavailability that warrant incursion into the right are vague. For example, it is not clear how much effort is needed to secure the witness's presence at trial before he is declared "cannot be found". As it stands now, the law does not require any standard to determine this. Perhaps it would be up to the court to distill the matter, which is not the case so far. Here, experience from other jurisdictions could be illuminating. While the US experience suggests, among others, the standard of good faith requirement, i.e., the prosecution [police] must make a good-faith effort to produce at trial

[98] See article 239(1) the draft criminal procedure code as was valid in November 2019.
[99] The procedure of preliminary inquiry works to preserve the prosecution evidence only; the defense lacking similar advantage. This is in clear contrast with the principle of equality of arms.
[100] CPC, *Supra* note 16, Article 144.
[101] It is important to note that this problem would arise once the draft criminal procedure code which recognizes spousal privilege comes into force.

witnesses against the defendant;[102] UK law demands steps reasonably practicable to be taken to find the witness.[103] Thus, it is not enough to simply make phone calls or issue summons. Rather, a series of effort including visits of the witness's residence are required.[104]

The same can be said of the ground: "absent from the country". Apparently, establishing a mere absence of a witness within the Ethiopian territory is enough to undercut the right to conformation and admit depositions given at the preliminary inquiry. Indeed, in practice, it is suffice to produce evidence of the witnesses' departure to a foreign jurisdiction regardless of any effort to bring them back. Apart from establishing absence, some reasonable effort to secure the presence of a witness should be required so that a right balance is struck between the interests of the defense and that of the public.

Thirdly, it is not clearly articulated whether such disposition should be subject to an oath and cross examination. An affirmative conclusion can only be made through an implied reading of articles 88 and 147 of the code which regulate the recording of evidence to include the fact that witnesses have sworn in and that their testimony is divided into evidence-in-chief, cross-examination and re-examination.[105]

Fourthly and most profoundly, although both the constitution and the ICCPR entitle the accused the right to be represented by legal counsel of his choice, he is often unrepresented during preliminary inquiry. The CPC does not explicitly require legal representation during preliminary inquiry, either. Nor is there free legal service available to the accused at the pretrial stage, preliminary inquiry included.[106] This is inconsistent with the FDRE Constitution and the requirements of ICCPR, as held by the UNHRC in *Simpson v Jamaica*.[107]In the circumstances, no meaningful participation of the accused and effective cross-

[102] Brian J. Hurley, Confrontation and the Unavailable Witness: Searching for a Standard, *Valparaiso University Law Review*, Vol.18, No.1, (1983), p. 207.

[103] John D. Jackson and Sarah J. Summers, *supra note 9, p.*329.

[104] Ibid.

[105] CPC, *Supra* note 16, Article 147(1) reads "the evidence of every witness shall start with his name, address, occupation and age and an indication that he has been sworn or affirmed." Article 147(3) reads: "the evidence shall be divided into evidence-in-chief, cross-examination and re-examination with a note as to where the cross-examination and re-examination begin and end.".

[106] Federal Democratic Republic of Ethiopia, Five Years National Human Rights Action Plan (2013 – 2015), p.37. Available at www.absinialaw.com. Accessed on 6 March, 2019.

[107] *Simpson* v. *Jamaica*, *Supra* note 51, para 7.3 (noting that: "a magistrate should not proceed with the deposition of witnesses during a preliminary hearing without allowing the author an opportunity to ensure the presence of his lawyer").

examination can be imagined thereby leaving the reliability of witnesses go unchecked which in turn impinges on the fairness and accuracy of the trial.

Finally, it is interesting to see whether such depositions alone can be sufficient grounds for a conviction. In general, absence of clear requirement of corroboration under Ethiopian law means depositions alone can sustain a valid conviction. However, concerns on the reliability of such convictions may abound unless at least the defense is afforded with sufficient opportunities to test such evidence, pretrial or at the trial stage.

In conclusion, the writers hold that considering the depositions of prosecution witnesses taken at preliminary inquiry as evidence would threaten the right to confrontation unless: (i) witnesses are unavailable due to justified grounds (ii) the accused is guaranteed with the chance to cross examine witnesses either at or prior to the trial; and (iii) the accused is represented by legal counsel. The right to confrontation may not be effectively exercised in the circumstances where defendants are not represented by legal counsel; a phenomenon common to Ethiopia.

iii) Witness Statements made at police stations

Article 145 of the CPC allows the testimony of witnesses taken during police investigation to be put in evidence. Albeit variations on the interpretation of this provision – For example, some limiting its use only to impeaching the credit of witness's statements tendered at trial for perjury purposes — there is broad leeway for courts to render a judgment based on such evidence both directly or indirectly. Indeed, practice also supports this.[108] Nonetheless, the law does not entitle the suspect to appear in person and to be represented by legal counsel of his choice particularly when the investigative police officer takes the testimony of adverse witnesses. There is also no legal requirement for such witnesses to be examined by the suspect during police investigation. Reliance on such statements to ground a conviction, when witnesses are unavailable, contradicts and undermines the right to confrontation, and hence the fairness of the trial.

iv) Witnesses protection measures

The rights of witnesses and that of the accused person are linked so inextricably that a complete understanding of one of these rights is impossible without a close examination of stipulations regulating the other. The Witness and Whistle-

[108] Yosef Fenta, *The Admissibility of Absent Witnesses in the Criminal Proceedings of Ethiopia: Examination of the practice in Bahirdar and surrounding High court,* LLM thesis, (2019), p.32. (Unpublished).

blowers Protection Proclamation lays down several protective measures for witnesses. Among others, the following protection measures may be employed separately or in combination, as the case may be: (a) withholding the identity of a witness until the trial process begins and the witness testifies; (b) hearing testimony in camera; (c) hearing testimony behind screen or by disguising identity; (d) producing evidence by electronic devices or any other method.[109] These measures of protections are available to protected persons on three cumulative conditions[110]:

1) When the alleged offence is punishable with rigorous imprisonment for ten or more years or death;
2) Where the offence may not be revealed or established by another means otherwise than by the testimony of the witness; and
(3) Where it is believed that a threat of serious danger exists to the life, physical security, freedom or property of the witness or a family member of the witness.

The above approach on witness protection raises at least two concerns. In the first place, the limitations to the right to cross examination may not fall within the bounds of the constitution which unconditionally guarantees the accused's right to examine adverse witnesses; thus calling for harmonization of the law with the constitution or amendment of the latter. An aspect of this limitation was tested in a terrorism case, though unsuccessfully. In one case before the Council of Constitutional Inquiry,[111]defendants challenged the constitutionality of a provision of the anti-terrorism proclamation, which permits the use of anonymous witnesses. However, the Council rejected the motion reasoning that Art 20(4) of the Constitution doesn't recognize the right to have the identity of witnesses disclosed, nor does it impose a duty on the prosecution to disclose same.[112] The Council held that the relevant provisions of the Anti-terrorism and Witnesses Protection proclamations, which permit the use of anonymous witnesses, are constitutional.[113] The Council's decision is controvertible at least on two fronts. First it unduly restricts the right to cross-examination by overlooking the right to know one's accuser — a well-established dimension of

[109] Witness Protection Proclamation, supra note 17, Article 4, para.1 (h)-(k).
[110] *Id.*, Article 3.
[111] Mahdi, Alyi and others, File no 2356/2009, Council of Constitutional Inquiry, (2009 EC), as cited in Taddese Melaku, The Right to Cross-examination and Witness Protection in Ethiopia: Comparative Overview, *Mizan law Review,* Vol.12, No.2, (2018), pp.322-23.
[112] *Ibid.*
[113] *Ibid.*

the right to confrontation.[114] Second, it involves a misconception of the duty/right of disclosure and its scope under the constitution where the defense is unequivocally entitled to have "*full access* to any evidence presented against it", witnesses and their identity included so that the defense mounts its defense and examines adverse witnesses effectively.[115] Practice also supports this where accused persons receive a copy of the charge with a list of evidence including the name of witnesses.

However, this is not to suggest that the right to confrontation should remain unbridled. Leaving the constitutionality issue aside, one may still justify the above limitations on the right to confrontation on grounds of necessity triggered by the desire to make a balance between the rights of the defense and that of victims and witnesses.

Yet, one challenge remains unresolved which takes us to the second concern: the configuration of those interests made by the Ethiopian lawmaker lacks systematization and cogency. Two illustrations seem suffice here. First, the second test on the value of the testimony which implies that witnesses with decisive testimony may qualify for protection, including protection of anonymity, gives rise to questions of fairness. While it is essential to ensure that limitations to the right to confrontation notably through witness protection measures are strictly necessary, this does not in any way imply that convictions grounded solely on untested/anonymous evidence are justified. Thus, the second precondition for witness protection, which could possibly lead one to the conclusion that untested evidence alone, can sustain a valid conviction needs attention. Second, the power to determine the applicable witness protection measures including the use of anonymous witnesses is reserved to the Attorney General, a party to the proceedings and whose decision is not subject to judicial review;[116] thereby missing out important counterbalancing judicial safeguards for the accused's right to confrontation.

On the other hand, it is intriguing to see that in clear contrast to many jurisdictions, competent child witnesses and other vulnerable witnesses such as witnesses with intellectual disability and victims of sexual offences are not "protected persons" *per se* under the definition of the witness protection proclamation. Such witnesses can only receive protections upon fulfilling the

[114] Ian Dennis,*Supra* note 1, p.255-56. (Noting that the right to know the identity ones accuses forms part of the right to confrontation). For more critics on the council`s decision see Taddese Melaku, *Supra* note 111.

[115] FDRE Constitution, *Supra* note 15, See Article 20(4).

[116] See the Witness Protection Proclamation, *Supra* note 17, Article 25.

above three cumulative conditions. Thus, a child witness or sexual offence victim witness in crimes that attract less than ten years of rigorous imprisonment may be subject to rigorous cross examination by the defense without any limit. Apart from leaving them in distress and anxiety, such unregulated cross examination would compromise the reliability and fairness of the trial, fundamental values pursued by the right to confrontation itself.[117] That is why many jurisdictions limit the right to confrontation by extending such witnesses various protections measures including protection of anonymity, regulating the nature of questions, and questioning through intermediaries.[118] Indeed in Ethiopia, it would be unfair not to mention the commendable practice of establishing child friendly benches in some quarters, which could address some of the concerns raised above. Still, the interests of child and other vulnerable witnesses need to be protected by law having regard to other competing interests.

v) Expert Opinion Reports

Where the prosecution or the court relies on expert evidence, the defense has a constitutional right to challenge it, including by countering it with own expert witnesses. The CPC recognizes the party's right to call and examine witnesses, including experts; leaving the manner of presentation of expert opinion largely unregulated.[119] Partly due to laxity of the law particularly on whether preparation of a report is needed[120] and mainly due to the aberration of the practice, many expert opinion reports are considered as documentary evidence,[121] thereby dispensing the prosecution with the production of experts who prepared them to testify before trial. In principle, this severely limits the rights of the defense to cross examine such experts.

2.3 The Accused Right to Cross-examine Witnesses

The constitution, under Article 20(4), states that accused persons have the right to examine witnesses testifying against them[122], but without prescribing any

[117] Adrian Keane, *Supra* note 63.

[118] *Ibid.*; Schwikkard,, *Supra* note 63; Bala, Child witnesses in the Canadian Criminal Courts, *Psychology, Public Policy and Law,Vol.5 (1999),* p.323. This is the case for example in several jurisdictions as diverse as South Africa, Norway, USA, UK, Canada, and Australia.

[119] CPC, *Supra* note 16, Article 136(2-3).

[120] See Semeneh Kiros and Chernet Hordofa, When the expert turns into a witch: Use of expert Opinion evidence in the Ethiopian Justice System, *Journal of Ethiopian Law*, Vol.27, No.1, (2015), pp.120 and 121 (suggesting contents of a standard expert opinion report).

[121] *Id*, p.103.

[122] The full text of Article 20(4) of the FDRE constitution reads: "Accused persons have the right to have full access to any evidence presented against them, *to examine witnesses testifying against them*, to

exception to this right. The phrases: "right to examine" and "witnesses testifying against them" are crucial elements of the right. Broadly speaking, the right to "examine" is a general term and includes the right to cross-examine prosecution witness. And specifically, the distinct use of the phrases "…examine witnesses testifying against them" and "…examination of witnesses on their behalf" under the constitution makes it clear that the former refers to cross-examination.

Nonetheless, the expression "witnesses testifying against" the accused within the meaning of the constitution is vague and requires interpretation. The scope of the right to confrontation depends on how broad or narrow the term "witness" is construed. Some limit witnesses only to those who provide testimonial statements,[123] thereby rendering the right to confrontation inapplicable to non-testimonial statements.[124] Others understood the word liberally to include any person with personal knowledge of something relevant to a case.[125]The European Court of Human Rights has rejected the narrower conception of witnesses and observed that the term needs to be conceived autonomously to include not only those who testify at trial but those who give pre-trial statements that are used in evidence at the trial.[126] In our case, the term "witness" has not been defined in the context of the right to confrontation thereby leaving those who qualify as "witnesses testifying against the accused" indeterminate. [127] The literal dictionary meaning of the term reflects its liberal conception. If one relies on this definition, the following out-of-court statements may fall under the category of witnesses testifying against the accused: (a) a medical doctor who gives a report about the seriousness or extent of the injury of the crime victim; (b) a traffic police reporting about whether the driver has committed professional fault or not before and during an accident; and (c) an expert witness testing DNA and blood-alcohol content of the accused. Nonetheless, in practice,

adduce or to have evidence produced in their own defense, and to obtain the attendance of and *examination of witnesses on their behalf* before the court."

[123] Obviously, there is some fuzziness in the term 'testimonial', but a practical definition is that if a reasonable person in the position of the maker of the statement would realize that the statement would likely be used in a criminal prosecution against the accused then the statement is testimonial. Here, the intention of the maker of the statement and the purpose of it should be taken into account to judge whether the statement is testimonial or not. In any case under this conception, a statement that is 'testimonial' in nature may not be used against an accused unless he/she has had an adequate opportunity to examine the maker of the statement. See Richard D. Friedman, *Supra* note 4, p.5.

[124] See Jeffery Bellin, The Incredible Shrinking Confrontation Clause, *Boston University Law Review*, Vol.92 (2012), p. 1882.

[125] *Id.*, p.1886.

[126] *Kostovski v. Netherlands* (1990) 12 E.H.R.R. 434 cited in William O'Brian, The Right to confrontation: European and US Perspectives, LQR Vol.121(2005), p.481-510.

[127] The term is defined for witness protection purposes as "a person who has acted or agrees to act as a witness in the investigation or trial of an offence against the accused". See Witness Protection Proclamation, *Supra* note 17, Article 2(1).

all expert opinion evidence is treated as documentary evidence dispensing the expert from appearing before court for testimony[128], thus seriously undermining the accused's constitutional right to confrontation.

Besides, the CPC under Articles 87 and 143 empowers the court to call additional witnesses on its own motion at the preliminary inquiry and trial stages respectively. However, whether and when additional witnesses called by court can be considered, as "witnesses testifying against the accused" is unclear, consequently leaving uncertain the right of the accused to confront such witnesses. No jurisprudence is established to crystallize this, either. Indeed, as much as one argues that the accused retains his right to cross examine adverse witnesses, regardless of who calls such witnesses; there are also counter arguments that witnesses called by the court are not witnesses of the parties as such and hence are not subject to structured examination by the parties. This needs to settle with clear statement of the law or jurisprudence.

On the other hand, the constitution does not entitle the suspect to cross-examine witnesses giving testimony against him during police investigation. There is no legal requirement that the suspect appears in person before the police during the taking of the testimony of witnesses against the former. Yet, pursuant to the CPC, the statements of the witnesses made before police in the course of investigation may be put in evidence during trial.[129] To the extent this provision is construed to refer to evidence used against the accused, using the testimony of such witness — without giving the accused an opportunity to cross examine it — infringes his right to confrontation.

The provisions of the CPC dealing with preliminary inquiry do not unequivocally guarantee the accused the right to cross-examine prosecution witness[130]while allowing the depositions of a witness taken at preliminary inquiry to be read and put in evidence.[131] One can only arrive at a conclusion through inference: the cumulative reading of Article 88 and 147(3) of the CPC suggests that the accused is entitled to cross-examine prosecution witness during preliminary inquiry.

The accused has the right to cross-examine those witnesses and experts produced by the prosecution before trial court. Pursuant to the CPC, the main purpose of questions put in cross-examination is to show to the court what is

[128] Semeneh Kiros and Chernet Hordofa, *Supra* note 120, p.103.
[129] CPC, *Supra* note 16, Article 145(1).
[130] *Id.*, Articles 80-93.
[131] *Id.,* Article 144.

erroneous, doubtful or untrue in the testimony of witness during examination in chief.[132]Yet, the CPC is silent on whether the accused is entitled to cross-examine additional wittiness called by court during both the preliminary inquiry and trial stages.[133] If additional witnesses called by court are considered as witness testifying against the accused according to the constitution, then one can arguably claim that the accused shall be entitled to cross-examine them.

Article 137(1) of the CPC authorizes prosecution witnesses to give testimony concerning facts of which they have an indirect knowledge. Here, the phrase "indirect knowledge" can be interpreted to mean the prosecution can produce hearsay witnesses. Indeed as shown above the Federal Cassation Bench has already endorsed such interpretation. Yet, neither the law nor the court prescribes how hearsay evidence should be administered in general, what types of hearsay evidences shall be produced and to what extent hearsay witnesses warrant conviction of an accused. This creates a broad leeway to resort to hearsay evidence without significant restraint to the detriment of the accused right to confrontation and thus the fairness and reliability of the trial.

Conclusion

Ethiopia has ratified both the ICCPR and UDHR and acceded to the ACHPR. However, neither of them is translated to the national working language, and published in official Federal *Negarit Gazeta*. This hinders their enhanced domestic implementation. PGRFTLA in Africa, adopted by the African Commission on Human and Peoples' Rights pursuant to the power vested to it under Article 45(c) of the ACHPR, has acknowledged the accused right to confrontation. The African Commission on Human and Peoples' Rights urges State parties to the ACHPR to adopt the PGRFTLA or to reform their national legislations in order to incorporate its principles. Ethiopia has not heeded to this call either by adopting the PGRFTLA or modifying national legislations to incorporate its principles.

As shown elsewhere, the accused right to cross-examine an adverse witness has received constitutional protection in Ethiopia. However, the language used in the constitution poses one challenge. The constitution leaves the right unqualified; thereby putting in question the propriety of restrictions made by other laws. Although not clearly mandated by the constitution, some laws put restrictions to

[132] *Id.,* Article 137(3).

[133] Under the Criminal Procedure Code of Ethiopia, Courts are empowered to call additional witnesses upon their discretion. Such witnesses are sometimes known as "court witnesses".

the right with a view to protect other overriding interests. Such laws exhibit several blemishes in terms of counterbalancing the interests involved in the criminal process, notably the rights of the accused on the one hand; and that of victims and witnesses, on the other. While allowing incursions into the right of the accused to cross examine prosecution witnesses, the protections extended to him are by and large precarious. To a certain extent this also applies to witnesses and victims. Some of the manifestations of these defects include the following: -

First, although the constitution is silent regarding trial in the absence of the accused, the CPC allows trial in *absentia* in crimes entailing not less than 12 years of rigorous imprisonment, albeit without providing for adequate safeguards for the accused.[134] Some of such inadequacies relate to the fact that: given the broad range of criminal punishment under Ethiopia law, it could cover a wide range of crimes; that the accused is not entitled to a mandatory legal representation; that the prosecution does not assume the burden of establishing the fact that effective notice and warning has been served to the absent accused.

Second, the suspect is not entitled to question witnesses during police investigation, nor is this unequivocally guaranteed in the preliminary inquiry. Furthermore, no law demands the testimony of the witness to be taken in the presence of the suspect during police investigation, nor is the accused entitled to a mandatory legal representation during the preliminary inquiry. Irrespective of these realities underlying the law the CPC allows the testimony of a witness taken during police investigation and preliminary inquiry be put in evidence at trial to the detriment of the accused right to confrontation.

Third, the CPC indirectly allows the prosecution to produce hearsay witnesses, which is also sanctioned by the Cassation bench. However, there are no rules on hearsay evidence governing the types and conditions under which it can be admitted and the weight attached to it; arguably warranting an unqualified use of hearsay. This is against the accused right to confrontation in particular and principles of fair trial in general.

Fourth, although the constitution unconditionally guarantees the accused the right to cross examines adverse witnesses, the Witness Protection Proclamation prescribes circumstances under which witnesses can give their testimony anonymously in which case such protection measures may apply: hearing testimony behind screen or by disguising the identity of the prosecution witnesses or producing evidence by electronic devices or any other methods.

[134] CPC, *Supra* note 16, Article 161(2) (a).

Yet, it is difficult to align such protection measures with the constitution, as it accommodates no exceptions for anonymous witnesses. Even accepting the restrictions justified as a matter of necessity, the conditions to invoke the protections fall short of striking a proper balance between the rights of the defense and that of victims and witnesses. This is so in two senses: there is no adequate protection for the defendant as a counterbalancing measure; and some overriding interests and values, which can be captured in terms of shielding vulnerable victims and witnesses such as child witnesses and victims of sexual offenses, are left unprotected.