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Legal Analysis of Potential Threats to the Sovereign Independence and Territorial Integrity of the State of Eritrea

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Executive Summary

The Eritrean Law Society (ELS) has conducted a study that seeks to address major issues of concern widely felt by Eritreans from all walks of life about potential threats posed to the sovereign independence and territorial integrity of Eritrea. These concerns have been on the rise particularly since the two countries officially declared an end to the state of war and moved towards the restoration of bilateral relations.

This Executive Summary by the ELS, therefore, provides a digestible and advocacy-oriented outline of the major findings and conclusions made in the study. As the only organised professional association of Eritrean lawyers and jurists, ELS has received persistent requests from many Eritrean groups and individuals seeking clarification and a legal opinion about the concerns, prompting the production of this study.

In the process of preparing this report, ELS ascertained that while some of the expressed concerns are seemingly speculative, others required a weighed-up consideration. Eritrea has a long history of troubled relationship, including repeated instances of devastating armed conflicts with Ethiopia, and this means that any concern felt by a growing number of Eritreans cannot be simply ignored.

Since the signature of the *Asmara Declaration* (the new rapprochement agreement between Eritrea and Ethiopia) on 9 July 2018, all meetings conducted between senior government officials of the two countries to date have been shrouded in worrying levels of secrecy. Over and above the apparent problem of institutionalisation of the entire rapprochement process, on the part of Eritrea there has never been any form of democratic consultation and dialogue about the process. The people of Eritrea have been left to guess what might become of the country whose fate solely rests in the hands of the State President and a handful of his confidants, accountable only to him. Inevitably, this triggers a number of legitimate concerns, including fears and speculations about potential behind-the-scene acts of subterfuge that may seriously jeopardise (in whole or in part) the sovereign independence of the State of Eritrea.

There are also additional factors for the concern of Eritreans. One such factor is related to an increasing and troubling surge in Ethiopia, which involves a lingering expansionist sentiment questioning the very sovereign independence of Eritrea. Part of this worrying development includes propagation of an unlawful Ethiopian claim over the Port City of Assab, advanced by several Ethiopian entities in different forms and shapes. ELS observes that this problem was partly aggravated by a reckless stance of the Eritrean Government, especially the State President, in particular through controversial public statements he made on various occasions during official visits to Ethiopia.

ELS observes that in spite of the good intention pronounced by the *Asmara* and the *Jeddah Declarations*, both in the signature of these agreements and the follow-up process, the Eritrean State President has acted in a classic example of an *ultra virus* government action, a manner that goes beyond legally permissible parameters of authority and delegation of the executive branch in Eritrea. This conclusion is based on a sound legal analysis of the relevant provisions of Eritrean laws, notably: Proclamation No. 37/1993 (so-called *Foundational Law* of Eritrea), the 1997 Constitution and the Penal Code of Eritrea.

ELS also observes that whatever unlawful actions the State President may have committed in relation to the rapprochement process with Ethiopia needs to be seen in the context of his

irreparably unlawful behaviour, the origins of which, in purely legal terms, are traced at least to May 1997. Over the past twenty-two years, the State President is suspected of committing grave government misconducts summarised briefly as follows.

Based on a thorough legal analysis of a cumulative account of several irresponsible actions perpetrated by the State President, in the period between May 1997 up to the present time, ELS concludes that there are reasonable grounds to believe that the State President may have committed some of the most serious criminal acts envisaged under the entire Penal Code of Eritrea, in particular Articles 250 and 251 of the same Code. Such actions include: a deliberate obstruction or destruction of a duly constituted government organ (the National Parliament or the Parliament of Eritrea), as well as obstinate refusal to implement the duly ratified Constitution of 1997. There are additional potential criminal activities discussed in the main body of this study.

By perpetrating the above alleged crimes, including violating core provisions of Proclamation No. 37/1993, related to the signature of bilateral or international agreements, the State President has acted in contravention to what has been stipulated in Article 41(6) of the 1997 Constitution. He also conducted himself in "a manner which brings the authority or honour of the office of the President into ridicule, contempt and disrepute." Coupled with the perpetration of other alleged criminal activities, this inevitably entails a process of impeachment envisaged under the same provision of the 1997 Constitution. In an ideal judicial setting, portraying conventional attributes of independence and impartiality, operational Eritrean laws (with or without the 1997 Constitution) would be more than enough to initiate a criminal docket named: *The State v. Isaias Afwerki* (to be heard at the High Court of Asmara).

From the above, it is also evidently clear that the *Asmara* and *Jeddah Declarations* were signed by the State President in a manner that flouts formal requirements of adoption of treaties stipulated by operational Eritrean laws. While it is true that the said agreements do not contain explicit language that is inherently against the sovereign independence of Eritrea, in the event there were other discreet agreements or future dealings that jeopardise the national interest of Eritrea, such agreements can be defeated by launching a legal action based on the evolving jurisprudence of Article 46 of the *Vienna Convention on the Law Treaties* and the case law of the International Court of Justice (IJC). The basis for this argument is that any treaty signed by the current government in Eritrea, and which is found to be manifestly against the national interest of Eritrea can be defeated in the future if it can be shown that it was signed by a government that acted in an *ultra virus* manner and contrary to the requirements of *good faith*.

Finally, ELS underscores that in principle as a professional body it is supportive of a peaceful settlement of any dispute between Eritrea and Ethiopia. However, it also notes that as far as Eritrea's national interest is concerned, there is a need to install, as a matter of urgency, fundamental and structural political change in Eritrea, in order for the new peace process to have a lasting effect. In relation to the potential criminal charges that may be pressed against the State President of Eritrea, ELS also notes that whatever findings made in this study cannot be taken as a replacement for a verdict that should be given by a competent court of law, operating within the parameters of conventional requirements of a fair trial. Moreover, the implementation of accountability options indicated in this study may not be immediately possible due to the prevailing political situation in the country. However, the proposal can serve as a basis for future accountability options that can be implemented in Eritrea or elsewhere. It is hoped that this document may help in launching a coordinated legal, political and diplomatic campaign engaging all concerned Eritreans and international friends of Eritrea with a view to helping address the most pressing issues of national concern for Eritrea.

Executive Summary in Tigrinya (ሓጺር ጸብጻብ)

ማሕበር ሰብ ሞያ ሕጊ ኤርትራውያን፡ ካብ ብዙሓት ኤርትራውያን ብዝቐረበሉ ጠለብ መሰረት፡ ኣብ ሃገራዊ ልኡላውነትን ግዝኣታዊ ሓድነትን ኤርትራ ኣንጸላልዩ ክህሉ ይኽእል'ዩ ንዝተባህለሉ ስግኣታት ዝድህስስ ኣገዳሲ መጽናዕቲ ይዝርግሕ ኣሎ። እቲ ስግኣታት፡ ምስዚ ካብ ሓምለ 2018 ጀሚሩ ዝኸይድ ዘሎ ሓድሽ መስርሕ ዕርቂ ናይ ኤርትራን ኢትዮጵያን ብዝተተሓሓዘ መገዲ ዝማዕበለ ኮይኑ፡ እንዳገደደ ዝኸይድ ዘሎ ሻቕሎት'ዩ።

እዚ ሓጺር ጸብጻብ'ዚ፡ ነቲ ዝተኻየደ መጽናዕቲ ጸሚቑ ዘቕርብ፡ ክግበር ንዝግብኦ ጎሳጓሳት ድማ ክሕግዝ ብዝኽእል ኣቀራርባ ዝተዳለወ እዩ። ማሕበርና፡ እቲ እንኮ ማሕበር ናይ ኤርትራውያን ሰብ ሞያ ሕጊ ከም ምኻኑ መጠን፡ ሕጋዊ ርእይቶ ክብህ ብተደጋጋሚ ብዝቐረበሉ ሕቶታት መሰረት ዝተዳለወ መጽናዕቲ'ዩ። ኣብዚ መጽናዕቲ'ዚ ነቲ ተጋሂዱ ዘሎ ስክፍታታት መብርህን ሕጋዊ ትንተናን ተዋሂብዎ ኣሎ።

እዚ መጽናዕቲ ኣብ ዝተኻየዶሉ መስርሕ፡ ገለ ካብቶም ዝተፈተሹ ስክፍታት ግምታዉያን ጥራይ ምንባሮም ተጋሂዱ፤ ገሊኣቶም ግን ዕትብ ዝብለ ኣትሓሕዛ ዘድልዮም ምኻኑ ማሕበርና መዚኑ። ኤርትራን ኢትዮጵያን ኣብ ነንሕድሕደን፡ ቀጻሊ ናይ ዘይምትእምማንን ነዊሕ ዝጸንሐ ናይ ውግእን ወረ ውግእን ታሪኽ ዘለወን ሃገራት ከም ምኻንን መጠን፡ እቲ ብገለ ኤርትራውያን ዝቐርብ ስክፍታታት ሸለል ኢልካ ዝሕልፍ ክኸውን ኣይክእልን።

ኣብ 9 ሓምለ 2018 ኣብ ኣስመራ ዝተኸተመ ሓድሽ ናይ ዕርቂ ውዕል ካብ ዝተኣወጀሉ ግዜ ጀሚሩ፡ ነቲ ጉዳይ ዕርቂ ብዝምልከት ዝግበር ዘሎ ዝርርባት ኩሉ ብዕበጦ-ዓባብጦ ይኸይድ ምህላዉ ዘለክፍ ነገር'ዩ። ነቲ መስርሕ ትካላዊ መልክዕ ኣብ ምትሓዙ ዘሎ ርኡይ ጸገማት ከም ዘለዎ ኮይኑ፡ ንኤርትራ ብዝምልከት ዝኾነ ይኹን ምስ ህዝቢ ኤርትራ ዝተገብረ ዲሞክራስያዊ ወኸላ ወይ ዝርርብ የለን። ህዝቢ ኤርትራ፡ ብዛዕባ መጻኢ ሃገሩ ብግምት እንተዘይኮኑ ኣረጋጊጹ ዝፈልጦ ነገር የብሉን። እቲ ጉዳይ፡ ምሉእ ብምሉእ ኣብ ቁጽጽር መራሒ ሃገረ-ኤርትራን ንዕኡ ጥራይ እሙናት ኣብ ዝኾኑ ኣዝዮም ውሑዳት ናይ ቀረባ መማኽርቱን'ዩ ተሓጺሩ ተሪፉ ዘሎ። ስለ ዝኾነ፡ ምኽኑይ ስግኣታትን ግምታዊ ስክፍታታትን ከለዓዕል ግድነት ይኸውን። ብድሕሪ መጋረጃ ክግበር ዝኽእል ናይ ውዲት ስራሓት ከይህሉ እሞ፡ ናይ ኤርትራ ሃገራዊ ልኡላውነት (ብምሉኡ ወይ ብኸፊል) ንሓደጋ ከይሳጣሕ ዝብል ስግኣት ተኸሲቱ ኣሎ።

ነቲ ስግኣት ዘጋድዱ ተወሰኽቲ ረቓሕታት 'ውን ኣለዉ። ብወገን ኢትዮጵያ፡ ጠፊኡ ዝነበረ እምበራጦርያዊ ናይ ምስፍሕፋሕ ሕልምታትን ንሃገራዊ ልኡላውነት ኤርትራ ኣብ ምልክት ሕቶ ዘእቱ ዝንባለታትን መሊሱ ይላባዕ ኣሎ። ገለ ክፋል ናይዚ ዝንባለታት'ዚ፡ ብገለ-ገለ ኢትዮጵያውያን ባእታት ዝጥስነሰሉ፡ ኢትዮጵያ ኣብ ልዕሊ ወደብ ዓሰብ ናይ ዋንነት መሰል ኣለዋ ዝብል ካብ ስነ-ሞንቅ ሕጊ ዝረሓቐ ኣተሓሳሳቢ ዝኾነ ዘረባታት'ዩ። እዚ ጸገም'ዚ ብገለ መልክዑ፡ ሓላፍነቱ ብዝዘንግዐ ሽለልተነታዊ ኣካይዳ ናይ መንግስቲ ኤርትራ ዝጋደድ ዘሎ ጸግማት ምኽኑ ማሕበርና መዚኑ። ብፍላይ ድማ፡ መራሒ ሃገረ-ኤርትራ ንኢትዮጵያ ኣብ ዝበጽሓሉ ኣብ ዝተፈላለየ እዋናትን ካልእ ኣጋጣምታትን ዝተዛረቦ ኣሻማዊ መደረታት፡ ነቲ ዘሎ ስግኣታት ከም ዝጋደድ ገርዎ።

እቲ ኣብ ኣስመራን ጅዳን ዝተኸተመ ክልተ ቀንዲ ውዕላት ዝኣወጆ ቅኑዕ ዕላማታት ከም ዘለዎ ኮይኑ፡ ኣብ ኣፈራርማ ናይቲ ውዕላትን ድሒሩ ዝሰዓበ መስርሕን፡ መራሒ ሃገረ-ኤርትራ ብኢደ-ወነናዊ ኣካይዳ'ዩ ሒዝዎ ዘሎ። ብሕጋዊ ኣዘራርባ *ultra virus* (ኣልትራ ቫይረስ) ዝበሃል ቀይዲ-በተኸዊ ኣካይዳ ኮይኑ፡ ዝኾነ መንግስቲ፡ ብሕጊ ዝተቐመጠሉ ስልጣንን ውክልና ህዝብን ጥሒሱ ዝኸዶ ዘሰክፍ ናይ ሕጋውነት ጸገም የመልክት። እዚ ትዕዝብቲ'ዚ ኣብቲ መሰረታዊ ሕጊ ኤርትራ ተባሂሉ ዝፍለጥ ኣዋጅ ቁጽሪ 37 ናይ 1993፣ ናይ 1997 ቅዋም፣ ከምኡ 'ውን ኣብ ገበናዊ ሕጊ ኤርትራ ተደንጊጉ ዘሎ መትከላት መሰረት ዝገበረ'ዩ።

ምስዚ ዝኸይድ ዘሎ ሓድሽ ናይ ዕርቂ መስርሕ ብዝተተሓሓዘ መገዲ፡ ፕረዚደንት ሃገረ-ኤርትራ ፊጺምዎ ዝበሃል በደላት፡ ብውሑዱ ምስቲ ካብ ግንቦት 1997 ኣትሒዙ ክርኢ ዝጸንሐ ክዕረ ዘይክእል ናይ ቀይዲ-በተኸነት ባህራያትን ከበድቲ በደላትን ተተሓሒዙ ዝርኢ ናይ ዘይሕጋውነት ጸገም ምኽኑ እቲ መጽናዕቲ ኣረዲኡ። ኣብዚ ዝሓለፈ ዕስራ ዓመታት፡ ፕረዚደንት ሃገረ-ኤርትራ ፊጺምዎ ካብ ዝበሃል ከበድቲ ገበናት ብሕጽር ዝበለ እዚ ዝስዕብ ኣብነታት ምጥቃስ ይከኣል።

ማሕበርና ብዝገበሮ ጽጹይ መጽናዕቲ መሰረት፡ ካብ ግንቦት 1997 ክሳብ'ዚ ሕጂ እዋን ኣብ ዘሎ ግዜ ጥራይ፡ ፕረዚደንት ሃገረ-ኤርትራ፡ ኣብ ዓንቀጽ 250ን 251ን ናይ ገበናዊ ሕጊ ኤርትራ ተደንጊጉ ዘሎ ከበደቲ ገበናት ፈጺሙ'ዩ ዝብል ምኽኑይ እምነት ኣሎ። እዚ ገበናት'ዚ ኣብ ገበናዊ ሕጊ ኤርትራ ተደንጊጉ ካብ ዘሎ ዝኸበደ ካብ ዝበሃል ገበናት ዝጠቓልል'ዩ። ገለ ካብዚ ገበናት'ዚ፡- ኮነ ኢልካ ብወግዒ ንዝቐመ ትካላት መንግስቲ ብፍላይ ድማ ንሃገራዊ ባይቶ ኤርትራ ምዕናው፣ ብወግዒ ንዝጸደቐ ናይ 1997 ቅዋም ምትግባሩ ምሕንጋድ ዝብል ይርከቦ። ካልኣ ተወሳኺ ገበናት 'ውን ኣብቲ መጽናዕቲ ተዘርዚሩ ኣሎ።

ፕረዚደንት ሃገረ-ኤርትራ፡ እዚ ኣብ ላዕሊ ዝተገለጸ ገበናት ብምፍጻምን ካልኣ ኣብ ኣዋጅ ቁጽሪ 37 ናይ 1993 ዝተኣወጀ፡ ንምኽታም ኣህጉራዊ ውዕላት ዝምልከት ድንጋገታት ብምጥሓን፡ ካብ ሕጊ ወጻኢ ብዝኾነ ኣካይዳ ሰሪሑ። ኣብ ዓንቀጽ 41(6) ናይ 1997 ቅዋም ሰፊሩ ዘሎ ድንጋገ ጥሒሱ። ብተወሳኺ፡ ንክብርን ርዝነትን ቤት-ጽሕፈት ፕረዚደንት ብምርኻሱ፡ ምስቲ ኩሉ ካልኣ ዝተጠቐሰ ገበናት ተደማሚሩ ካብ ስልጣን ንኽእለ እኹል ሕጋዊ ምኽኒት ይኸውን። ኣብ ኤርትራ፡ ናጻን ዘይሻራውን ኣብያተ ፍርዲ እንተዝህሉ፡ ብኣዋጅ ዝተኣወጀ ሕግታት ጥራይ ተወኪስካ (ናይ 1997 ቅዋም ከይወሰኽካ)፡ "ሃገረ-ኤርትራ ኣንጻር ኢሳያስ ኣፍወርቂ" ዝብል ናይ ገበን ፋይል ኣብ ላዕለዋይ ቤት-ፍርዲ ኣስመራ ከኽፈት ምተኻእለ።

ክሳብ ሕጂ ተገሊጹ ብዘሎ መሰረት፡ ናይ ኣስመራን ናይ ጅዳን ናይ ዕርቂ ውዕላት፡ ብኣዋጅ ዝተኣወጀ ሕግታት ኤርትራ፡ ብዛዕባ ምጽዳቕ ኣህጉራዊ ሕግታት ዘቕመጦ መምዘንታት ብዘጠሓሰ ኣካይዳ ዝተፈረመ ውዕላት'ዩ። ቋንቋ ናይዚ ክልተ ውዕላት ንሃገራዊ ልኡላውነት ኤርትራ ዝጻረር ቀጥታዊ ስግኣት ከም ዘይብሉ ርዱእ'ኳ እንተኾነ፡ ብስቱር ዝተገብረ ወይ ብሕጂ ዝግበር፡ ንሃገራዊ ረብሓ ኤርትራ ዝጻባእ ተወሳኺ ውዕላት ምስ ዝርከብ ግን፡ ኣህጉራዊ ሕጊ ዝፈቕዶ ተኽእሎታት ተጠቂምካ ምብርዓኑ ከም ዝከኣል እቲ መጽናዕቲ ደምዲሙ። መሰረት ናይዚ ምጉት'ዚ ዓንቀጽ 46 ናይቲ ብ "ቬና ኮንቬንሽን" ዝፍለጥ፡ ንምትርጓም፣ ምምጽዳቕን ምፍራስን ኣህጉራዊ ስምምዓት ዝምልከት ኣህጉራዊ ውዕል፡ ከምኡ 'ውን ናይ ሕቡራት ሃገራት ኣካል ዝኾነ፡ ኣህጉራዊ ቤት ፍርዲ ፍትሒ ዝወሰኖ ዝተፈላለየ ውሳኔታትን'ዩ። ዝኾነ ብመንግስቲ ኤርትራ ዝፍረም ውዕላት፡ ንሃገራዊ ረብሓ ኤርትራ ብርኡይ ዝጻረር፡ ከምኡ 'ውን ንሃገራዊ ሕግታት ኤርትራ ብዝዋሕስ "ኣልትራ ቫይረስ" ብዝኾነን ቅንዕና ብዝጎደሎን ኣገባባት ዝተፈረመ ውዕል ምስ ዝኸውን፡ በዚ ኣብ ላዕሊ ዝተገለጸ ኣገባብ ምስዓሩ ይከኣል።

ብመትከል ደረጃ ማሕበርና፡ ኣብ ሞንጎ ኤርትራን ኢትዮጵያን ዝህሉ ጸገማት ብሰላማዊ ኣገባብ ክፍታሕ'ዩ ዝድግፍ። ንሃገራዊ ረብሓ ኤርትራ ብዝርኢ ግን፡ ኣብ ኤርትራ ብህጹጽ ቅርጻውን መሰረታውን ፖለቲካዊ ለውጢ ክግበር ከም ዘድሊ ንኣምን። እዚ ምስ ዝግበር ጥራይ'ዩ ዘላቒ ሰላም ክህሉ ዝኽእል። ኣብ ልዕሊ መራሒ ሃገረ-ኤርትራ ክምስረት ብዛዕባ ዝኽእል ገበናዊ ክስታት ብዝምልከት፡ ኣብዚ መጽናዕቲ'ዚ ቀሪቡ ዘሎ መደምደምታታት፡ ፍትሓዊ ናይ ፍርዲ መስርሕ ብዝኽተል፡ ናጻን ዘይሻራውን ቤት ፍርዲ ክህቦ ንዝግብኦ ውሳኔ ዝትክእ ከም ዘይኮነ ምግንዛብ የድሊ። ተሓቢሩ ዘሎ ናይ ተጻባጻብነት ለበዋታት 'ውን ምስ ዘሎ ናይዚ እዋን ፖለቲካዊ ኩነታት ኤርትራ ቀጥታዊ ተፈጻምነት ክህልዎ ከም ዘይክእል ርዱእ'ዩ። ከም እማመ ግን፡ ኣብ ኤርትራ ይኹን ኣብ ካልኦ ሃገራት፡ ኣብ መጻኢ ክግበር ንዝኽእል መስርሓት ኣንፈት ኣብ ምትሓዝ ተራ ክህልዎ ይኽእል። እዚ መጽናዕቲ'ዚ ንህልዉ ጸገማት ኤርትራ ብዝምልከት፡ ብኤርትራውያንን መሓዙት ኤርትራውያንን ንዝካየድ ዝተወሃደ ሕጋዊ፣ ፖለቲካውን ዲፕሎማስያውን ጎስጓሳት ኣብ ምሕጋዝ ተራ ክህልዎ ማሕበርና ትጽቢት ይገብር።

1. Introduction

On 9 July 2018, the governments of Eritrea and Ethiopia signed a bilateral agreement, known as the *Joint Declaration of Peace and Friendship* (hereinafter the "*Asmara Declaration*").[1] The agreement heralded a major breakthrough in their frozen conflict of more than 15 years, the roots of which date back to the 1998-2000 border war. Indeed, the move was taken many as a harbinger of the down of a new era, not only for the two countries but also for the entire Horn of Africa, sub-region with a long history of armed conflicts and mass human suffering. As a sequel to the *Asmara Declaration*, on 16 September 2018, the two governments signed another agreement known as the *Agreement on Peace, Friendship and Comprehensive Cooperation between the Federal Democratic Republic of Ethiopia and the State of Eritrea* (hereinafter the "*Jeddah Declaration*").[2]

With a combined total of 573[3] words, which is a length of less than two pages in a standard A4 size paper, the text of the two bilateral agreements is nothing more than an expression of a general interest of both governments for a peaceful relationship. However, there is a growing concern among Eritreans emanating from repeated and alleged reports about "behind the scene" secret negotiations that may have taken place before and after the adoption of the *Asmara* and the *Jeddah Declarations*, posing potential grave threats to the sovereign independence and territorial integrity Eritrea. Based on such concerns, the Eritrean Law Society (ELS) received persistent requests to clarify potential threats using the most applicable national and international laws, leading to the production of this report.

The concerns under discussion are exacerbated by a series of irresponsible public utterances and gestures made by leaders of the two countries in different occasions. The following are some examples. In his first and second official visits to Ethiopia, ever since the outbreak of the border conflict in 1998, the President of Eritrea made controversial statements to the following effect. In one occasion, he said: anyone who from now on thinks that Eritrea and Ethiopia are two countries is oblivious to history, adding that the new rapprochement between the two countries means that there were no losses over the pass twenty years (in Tigrinya: he said **ኣይከሰርናን**/*aykesernan*,

[1] Available at http://www.shabait.com/news/local-news/26639-joint-declaration-of-peace-and-friendship-between-eritrea-and-ethiopia (accessed on 16 May 2019).
[2] Available at http://www.shabait.com/news/local-news/27076-agreement-on-peace-friendship-and-comprehensive-cooperation-between-the-federal-democratic-republic-of-ethiopia-and-the-state-of-eritrea- (accessed on 16 May 2019).
[3] 248 for the *Asmara Declaration* and 325 for the *Jeddah Declaration*.

meaning we did not lose anything).[4] In another occasion, he said he has given the mandate to the Ethiopian Prime Minister to lead the two countries jointly.[5] Although seemingly rhetorical expressions, a combined understanding of these statements sent shockwaves to the general Eritrean public, in particular to Eritrean diaspora communities, triggering several requests addressed to ELS for the preparation of this document.

On the Ethiopian side, there are other developments that add-up further impetus to the growing concern felt by many Eritreans. These include, among several others: a public comment by Prime Minister Abiy Ahmed, made in February 2019 in which he said it is a matter of time before those entities that have broken away from Ethiopia will have to reunite with Ethiopia again (in an apparent reference to Eritrea).[6] Many Eritreans have interpreted such utterances and gestures as part of a hostile preparatory act that can eventually lead to coerced-unity of Eritrea with Ethiopia — by systematically eroding the former's core attributes of sovereign identity and territorial integrity (in broader sense Eritrea's national independence).

Eritrea as a county has a long history of troubled relationship with Ethiopia. In addition, there is a lingering expansionist sentiment among many Ethiopians that questions the very sovereign independence of Eritrea, either in whole or in part. Part of this lingering expansionist sentiment includes propagation of an unlawful Ethiopian claim over the Port City of Assab. This unlawful claim is advanced in the context of a populist argument that portrays Ethiopia as a big country "undeservedly" condemned to become a landlocked state, ostensibly as a result of the declaration of formal independence of Eritrea in 1993. In reality, none of such claims is based on a sound interpretation of international law.[7] Seen against such threats, it becomes imperative to address the concern felt by a growing number of Eritreans using the most appropriate and applicable national and international law provisions pertaining to the inviolability of the sovereign independence and territorial integrity of Eritrea. In other words, the concern expressed lately by

[4] ERi-TV, "Speeches by President Isaias Afwerki & PM Abiy Ahmed During State Dinner in Asmara," 8 July 2018, available at https://www.youtube.com/watch?v=wAvZpSYjy8w (accessed on 23 May 2019).
[5] Alfa Stat, "President Isaias Afwerki Warmly Welcomed in Hawassa," 14 July 2018, available at https://www.youtube.com/watch?v=Pm0TgwQfxso (accessed on 23 May 2019).
[6] This comment was made in the Prime Minister's Speech given at the Ethiopian Parliament in early February 2019.
[7] For a comparable and a more responsible view about Eritrea's sovereign independence, by a former official of the *ancien* regime of the *Derg* (*Shaleqa* Dawit Weldegiorgis), see the comment in the source indicated below. In spite of his well-known background as a former official of the *Derg*, a regime notoriously known for its anti-Eritrean position, Weldegioris now staunchly opposes the lingering expansionist sentiment of some Ethiopians, including the person who is interviewing him in the video clip indicated below. YouTube Posting by Grmay Abraha (abridged version), 10 May 2019, available at https://www.youtube.com/watch?v=_m5cRhxEn_M (accessed on 16 May 2019). See also Endalcachew Bayeh, "The Rights of Land-Locked States in the International Law: The Role of Bilateral/Multilateral Agreements," *Social Sciences* (2015) 4(2), pp. 27-30.

many Eritreans cannot be simply ignored. This concern is perhaps the single most important driving factor for the launch of a recent social media campaign known as "ይኣክል/yakil" or "Enough," which started in mid February 2019 and is gaining momentum rapidly.

However, as a matter of cautionary note, it would be important to highlight that ELS is in principle supportive of the idea of a peaceful settlement of any dispute between the two countries. In fact, if handled in a responsible, transparent and accountable manner, the new rapprochement between the two countries has a great potential to usher a lasting peace not only between the two of them but also in the broader Horn of Africa. However, as far as Eritrean interests are concerned, there are some key observations that can be briefly made here. Whatever unexploited potential dividends the rapprochement may have, the sustainability of such benefits will depend on the introduction of a fundamental and structural political reform in Eritrea, which does not seem to be a priority of the Eritrean Government at this particular moment. While this broader issue can be addressed separately in a different contribution, in this document we focus only on those aspects of the new rapprochement that have a bearing on the sovereign independence of Eritrea.

Understandably, the discussion in this document will be based both on known facts and interpretations of public utterances given by key figures from both countries. Known facts are known. With regard to the analysis of controversial public utterances, ELS acknowledges that there is a slight risk of misunderstanding the true intention of such utterances. From a purely legal point of view, this makes the exercise an extremely difficult assignment. However, in countries such as Eritrea and Ethiopia that share a long history of mistrust and armed conflicts, politics have been routinely played out both by known facts and plausible assumptions. And as such, in matters as sensitive as the sovereign independence of Eritrea it is very natural to take into account all possible scenarios without blowing any fears and concerns out of proportion.

2. What are the Real Threats?

This document aims at deciphering potential threats to the sovereign independence and territorial integrity of Eritrea, stemming from developments directly related to the Eritrea-Ethiopia rapprochement of 2018. At the outset, there are some key elements that require clarification. Firstly, the *Asmara* and the *Jeddah Declarations* do not pose a direct and apparent risk on the sovereignty and territorial integrity of Eritrea. Moreover, there is no publicly available official

document or legal instrument that depicts a real and imminent danger to Eritrea's sovereignty and territorial integrity, apart from the gestures and utterances described above, in addition to few examples discussed below. However, in light of the extremely secretive governance practice, reckless and vindictive modus operandi of the Eritrean Government, in particular the State President, the risk of a deliberate surrender of Eritrean sovereignty (in whole or in part) cannot be underestimated. Many Eritreans feel there is a real risk of subterfuge.

Some of the most recent public utterances and gestures made by key Ethiopian figures (both from governmental and non-governmental entities) are particularly odious. There are also certain media outlets and key political figures in Ethiopia and in Ethiopian diaspora circles that have gone to the extent of calling for a coercive reversal of Eritrean independence, and accordingly openly campaigning for the unlawful reunification of Eritrea with Ethiopia. One concrete example is briefly discussed below.

A case in point is the official position of a newly formed political organisation by the name Ethiopians National Movement (ENM). In a very irresponsible move, the organisation uses, as part of its logo, the old map of Ethiopia, which incorporates Eritrea as a province of Ethiopia. In a recent televised interview, the founder and chairperson of the movement was not even willing to apologise for the irresponsible action of his organisation, sending a clear message about his intention to pursue a reckless political agenda.[8] All of these activities are done in a ways and manners that flout well settled principles of international law on the inviolability of the sovereign independence of Eritrea. Because of such developments, it is natural to observe a growing sense of anxiety among Eritreans.

In a very unusual way, the concern is gaining increased momentum even within traditional circles of supporters of the Eritrean Government. The following two examples are illustrative of this. The first one is related to an online opinion poll conducted recently by a well-known supporter of the Eritrean Government. Although not conclusive evidence in gauging public opinion, the survey is helpful in asserting some of the tentative obviations made in this analysis. The pollster posed a question to his respondents to the following effect: Should Eritrean authorities ask Prime Minister Abiy Ahmed to address Ethiopians undermining Eritrean sovereignty, independence, history and wish, publicly and on Ethiopian media? The result was revealing. From a group of

[8] See, YouTube, "LTV Show Interview with Engineer Yilkal Getnet," 31 January 2019, available at https://www.youtube.com/watch?v=fthnSFdtRtU (accessed 16 May 2019) (10:30 to 13:08 of the file).

131 respondents, 69% responded in the affirmative, while 31% responded in the negative.[9] The corresponding numbers are 93 and 7, respectively.

The second example is also a comment made by another prominent supporter of the Eritrean Government. In a recent Twitter posting, he said: "In Eritrea we have a saying about someone who is given to unwise verbosity. We say of such a person, 'His mouth is not his companion.' It seems the Prime Minister of Ethiopia is determined to continue his impolitic rhetoric that sounds disrespectful of Eritrean sovereignty. Shame."[10]

In the face of such irresponsible actions, one would expect a serious reaction on the part of the Eritrean Government. Contrary to logic and popular expectation, the response of the government has thus far been nothing more than a deafening and unusual silence. This behaviour is interpreted by concerned Eritreans not only as an utter disregard to potential threats to Eritrea's sovereignty and territorial integrity, but also as a green light to hostile Ethiopian entities, which are persistently pursuing a manifest agenda diametrically opposed to the national interest of Eritrea. Indeed, with the exception of sporadic, trivial and rambling social media remarks made by low prolife figures and personalities with a chequered background (such at the Ambassador of Eritrea to Japan), the government is yet to come up with a substantive, weighed-up and appropriate response to the matter.[11]

With the above observations in mind, in the following sections and sub-sections we will examine the most important remedies available under national and international laws, in particular those that may help in challenging the potential risk of surrendering Eritrea's national sovereignty via a follow-up bilateral agreement or any act of subterfuge orchestrated by the Eritrean Government. Over and above articulating the issue, using the most appropriate legal tools, and broadening awareness among concerned Eritreans and friends of Eritrea, the analysis is expected to send a

[9] Twitter Posting of Amanuel Biedemariam, available at https://twitter.com/Amanbiede/status/1092934672328335360, 5 February 2019 (accessed on 16 May 2019).
[10] Twitter Posting of Elias Amare, available at https://twitter.com/eliasamare/status/1093332199103840257, 6 February 2019 (text slightly adapted from Twitter language to fit the requirements of formal writing) (accessed on 16 May 2019).
[11] In spite of numerous provocative instances originating from Ethiopia, there was only one occasion, known to ELS, in which the Eritrean Government tried to challenge the trend by issuing an editorial published in its major media outlets. ERi-TV, "ሓተታ: ሰረታዊ መትከላትን ኣታሓሕዛን ሰላምን ርግኣትን ቀይሕ ባሕሪ" (Editorial: Fundamental Principles and the Approach to Peace and Stability in the Red Sea), 23 March 2019, available at https://www.youtube.com/watch?v=dVwjynzAsAA (accessed 23 May 2019). See also Twitter Posting of the Ambassador of Eritrea to Japan, 19 February 2019, available at https://twitter.com/ambassadorestif/status/1098085282631413761?s=21 (accessed on 23 May 2019). It reads: "Changing map/boundaries of sovereign nations is unavoidable but artificial boundaries in people's minds is avoidable."

clear message to our Ethiopian counterparts on the danger of embarking in a risky business that gravely jeopardises the sovereignty and territorial integrity of Eritrea.

3. Analysis of Applicable Eritrean Laws

There are two angles from which the problem at hand can be analysed, using: 1) the legal framework provided by national laws of Eritrea, in particular legal provisions related to the adoption of international agreements (bilateral and multilateral), including those related to obstruction of major government functions, abuse of government power, and potentially also high treason, and 2) the legal framework provided by international law relative to the adoption of international agreements. For purposes of this study, the most relevant Eritrean laws are Proclamation No. 37/993, the Transitional Penal Code of Eritrea (hereinafter the "Penal Code"), and the 1997 Constitution. It is a well-known fact that in spite of its ratification the 1997 Constitution remains unimplemented. Therefore, due to purely pragmatic reasons, the discussion will start with what are known as other operational laws of the country. A discussion of the relevant provisions of the 1997 Constitution pertaining to the issues at hand will follow after this.

3.1. The Issue under Proclamation No. 37/1993

In its full title, Proclamation No. 37/1993 is officially known as *Proclamation to Provide for the Establishment, Powers and Functions of the Government of Eritrea* [12] (hereinafter the "*Foundational Law*"). Together with its predecessor, Proclamation No. 23/1992, and the myriad of other proclamations promulgated between early 1990s to mid 1990s, this law can be appropriately considered as making part of the transitional constitutional framework of Eritrea.[13]

For reasons discussed above, the set of "causes of action" giving rise to the widely felt concern of tempering on Eritrean sovereign independence are directly related to the signature of a new rapprochement agreement between Eritrea and Ethiopia on 9 July 2018. Certainly, the debate starts by examining the competence of the Eritrean President or Government, under relevant Eritrean laws, regarding the signature of international agreements, including bilateral ones.

[12] The Tigrinya version of the proclamation reads as follows: **ኣቃውማን ስልጣንን ዕማማትን መንግስቲ ኤርትራ ንምውሳን ዝወጸ ኣዋጅ**. The Proclamation is available only in Tigrinya and Arabic versions. It was promulgated on 19 May 1993.

[13] For further discussions on this, see in general Yohannes Gebremedhin, *The Challenges of a Society in Transition: Legal Development in Eritrea* (Red Sea Press, 2004); Simon M. Weldehaimanot and Daniel R. Mekonnen, "The Nebulous Lawmaking Process in Eritrea," *Journal of African Law* (2009) 53(2), pp. 171-193.

As in many other areas, the relevant provisions of the *Foundational Law* that govern state behaviour in the area of signature and/or ratification of international treaties are found in Articles 4, 5 and 6 of the same Proclamation, that define the core functions of the legislative and the executive branches of government. According to sub-article 5(*a*), 5(*b*) and 5(*j*) of Article 4, the full versions of which are cited below, the National Assembly of Eritrea (the parliament) is entrusted with the powers to:

> (a) Design the internal and external policies of the Government of Eritrea and monitor their implementation;
>
> (b) Safeguard the territorial integrity and unity of the Eritrean people and state;
>
> …
>
> (f) Approve, or delegate authority to approve in the name of Eritrea, vital international agreements in the area of economic, political, and defence cooperation.

In what seems to be an apparent instance of contradiction, the *Foundational Law* also gives similar powers to the executive branch of government, namely: the Cabinet of Ministers and the President. This applies both to the competence of ratification of international agreements and other vital matters stipulated in the relevant sub-articles of Article 4, seemingly conceived as the exclusive remits of the National Assembly. Among other things, sub-article 4(*h*) of Article 5 also empowers the Cabinet of Ministers to decide the relationship of Eritrea with other states and to enter into agreements in this regard. Similar powers are also given to the President in sub-article 4(*c*) of Article 6, in addition to sweeping powers that are given to the President under sub-article 4(*b*) of the same provision.

However, borrowing some interpretational clues from the conventional practice of democratic political orders across the globe, the following observations can be made regarding the superiority of the powers and functions of the National Assembly over that of the Cabinet of Ministers and the President (collectively, the executive branch). The general understanding in most democratic systems is that the legislative branch of a government is the highest government organ with the last say in all matters of vital national interest, in particular in those matters having serious repercussions on the national sovereignty and territorial integrity of a state.[14] The comparison in this is regard is mainly with the executive branch. It follows that any major action of the executive branch (including the President), in particular that which is related to the core

[14] See in general, Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, 2001).

national interest of a given country, is subject to prior approval or follow-up oversight mechanism of the legislative branch. This is a well-known practice in many democracies throughout the world. In an Eritrean context, support to this argument is to be found in the following provisions of the *Foundational Law* that defines the characteristic features of the National Assembly, distinguishing the latter from the executive branch.

In Article 4(4) of the *Foundational Law*, the National Assembly is defined as the highest legislative organ of the Government of Eritrea. No other provision of the *Foundational Law* uses such an explicit language that attributes an elevated status to the executive branch in apparent encroachment to the preeminent status bestowed on the legislative branch. Seen against this interpretative logic, it would be safe to conclude that all powers entrusted to the executive branch, regarding the negotiation and adoption of international agreements, are ultimately subject to approval and oversight procedure by the legislative branch.

In addition, there is another supplementary argument that stems from Article 5(3) of the *Foundational Law*. According to this provision, between any formal meetings of the National Assembly, the highest executive authority of the government shall be vested on the Cabinet of Minsters. This means that even in the absence of approval or oversight on the part of the National Assembly, the actions of the President are subject to control mechanism exercised by the Cabinet of Minister.

Having examined the relevant provisions of the *Foundational Law* regarding the negotiation, adoption and approval of international agreements, it would be important now to briefly state the most evident facts about how the Eritrean Government, so to speak the President, has handled the issue of ratification of a new rapprochement agreement with Ethiopia.

It is a well-known fact that since February 2002, Eritrea does not have a functioning parliament (National Assembly) that should have played its lawful role as provided by the relevant provisions of the *Foundational Law* cited elsewhere in this document. The National Assembly was informally and unilaterally dissolved by the President, after its last meeting in February 2002, making Eritrea probably the only country in the world without a functioning parliament (regardless of the democratic or non-democratic nature of such a parliament).

Given that the National Assembly has never been convened since February 2002, one would normally expect for the Cabinet of Minsters to assume a lead role in the on-going rapprochement with Ethiopia. Such has not been the case thus far. The record of the Cabinet of Ministers, although only slightly different from that of the National Assembly, is not dependable as far as the objectives of democratic oversight and control are concerned. More so, with regard to the particular issue of the ratification of a new rapprochement agreement with Ethiopia, there is no publicly available information showing any active role played by the Cabinet of Ministers. The record in this regard is perfectly evident. It is only the President who is playing a key role in all of this process, effectively violating several of the provisions of the *Foundational Law* cited above.

The above argument presupposes the following major assumptions. The President has acted in violation of his legal (or "constitutional") obligations emanating from the relevant provisions of the *Foundational Law*, with a possibility to indict him under the relevant provisions of the Penal Code (in particular those related to abuse of government power and related offences, as will be substantiated in sub-section 3.3 below). His behaviour portrays a classic example of an *ultra virus* government action, an act that goes beyond legally permissible parameters of authority and delegation of the executive branch.

Last but not least, it is worth mentioning the following key observation by concluding the main findings in this sub-section. The *Foundational Law* is a law that was promulgated to provide for the establishment of a "transitional government," whose tenure was clearly defined by the same law as that of only four years, running from May 1993 to May 1997. This is according to Article 3(2) of the *Foundational Law*. Therefore, over and above the issue of illegality pertaining to the behaviour of the Eritrean President discussed above, it is important to remember that the incumbent government in Eritrea is a regime whose legal tenure has already expired twenty-two years ago, after which it has unilaterally imposed itself on the Eritrean people, regardless of the grounds that have led to such a very unfortunate circumstance.

Nonetheless, irrespective of the government's expired tenure, it remains a well-established fact that the incumbent regime is the only de facto political entity officially recognised by the international community (in particular by the United Nations, the African Union, the European Union, and virtually by the remaining segments of the global political order) as the official government of the State of Eritrea. It is precisely because of this irreversible nature of Eritrea's political reality, a *fait accompli*, an obligation exists to examine potential parameters of

accountability for grave violations related to the sovereign independence and territorial integrity of Eritrea.

3.2. The Issue under the 1997 Constitution

Much of the arguments put forward in the preceding paragraphs would not have changed in any substantive way if one were to use the relevant provisions of the 1997 Constitution, namely, those defining the respective competence areas of the legislative and executive branches of government. ELS is cognizant of the divergent views entertained by various Eritrean groups and experts on core issues surrounding the 1997 Constitution, such as the legitimacy of the very drafting and ratification process of the constitution, as well as some substantive shortcomings of the constitution itself.[15] However, for purposes of this study it would still be important to address the problem at hand in the light of the most relevant provisions of the 1997 Constitution. This has the following advantages.

In articulating the main arguments made in this study, the 1997 Constitution serves as a most powerful legal weapon in substantiating the arguments made in this document. In the event that a counter argument is made to the contrary, claiming that the 1997 Constitution remains unimplemented and thus its provisions are not enforceable, it is important to remember that operational Eritrean laws (discussed elsewhere in this document) are more than enough to articulate the main arguments. Having said that, we now discuss provisions of the1997 Constitution deemed relevant for the problem at hand.

As in the case of the discussion under the *Foundational Law* of Eritrea (presented in sub-section 3.1 above), a closer look at the relevant provisions of the 1997 Constitution reveals that in his latest dealings with Ethiopia the Eritrean President has indeed acted in an *ultra virus* manner. The most important staring point in this regard is Article 32(1)(*a*), which stipulates that "the power to enact laws and pass resolutions for peace, stability, development and social justice of Eritrea" is the exclusive remit of the National Assembly of Eritrea.

[15] For varied academic views on this, see in general Bereket Habte Selassie, *The Making of the Eritrean Constitution: The Dialectics of Process and Substance* (Red Sea Press, 2003); Testafion Medhanie, *Constitution-Making, Legitimacy and Regional Integration: An Approach to Eritrea's Predicament and Relations with Ethiopia* (Institut for Historie, Internationale Studier og Samfundsforhold, Aalborg Universitet, 2008); Daniel R. Mekonnen, "Introductory Note on the Constitution of Eritrea," in Rüdiger Wolfrum *et al* (eds.), *Constitutions of the Countries of the World* (Oxford University Press, 2016), pp. 1-32; Simon M Weldehaimanot, "The Status and Fate of the Eritrean Constitution" *African Human Rights Law Journal* (2008) 8, pp. 108-137; Simon M Weldehaimanot, "Eritrea's Two Constitutions: A Comparison," *Eritrean Law Society Occasional Papers* (ELSOP), No. 4, March 2010, avaiblae at http://dx.doi.org/10.2139/ssrn.1576969 (accessed on 16 May 2019).

It is true that the President has powers under Article 42(6) of the Constitution to "negotiate and sign international agreements." However, this power of the President cannot be above the power of the National Assembly stipulated in Article 32(1)(*a*), in particular if the matter over which the President wants to exercise power is related to peace (one of the listed enumerated in the same article). This needs to be seen also in line with the stipulation of Article 32(1)(*b*) in which the power to made decisions having the force of law is exclusively reserved to the National Assembly. Moreover, under Article 31(1) of the Constitution, the National Assembly is defined as the supreme representative body of the Eritrean people. Inherent in this description is the power attached to the same body when it comes to decision-making processes involving matters of utmost national interest for Eritrea, such as issues of war and peace. It follows that everything done by the State President in the latest rapprochement with Ethiopia without formal approval of the National Assembly is, legally speaking, an *ultra virus* action (regardless of the declared intention of such agreements).

The next logical question is what happens if the State President conducts himself in a manner that is contrary to the letter and sprit of the Constitution and/or and other laws of the country. The answer to this is provided by Article 41(6)(*a*) of the Constitution, which is removal of the President from office. According to Sub-Article (6)(*b*) of the same provision, the State President can also be removed from office if he conducts "himself in a manner which brings the authority or honour of the office of the President into ridicule, contempt and disrepute." Clearly, based on the arguments made thus far, it can be said that the State President is suspected of committing a crime that makes him liable for removal from office. In an ideal political situation, where there is a properly functioning parliament, this could have triggered an impeachment process.

It is true that since 2014, the government's position about the 1997 Constitution has changed dramatically, when it announced the start of the drafting of a new constitution and the "death" of the 1997 edition. This was communicated in the State President's televised interview of December 2014. In the one hand, this comes as one the best examples of the President's erratic and authoritarian behaviour. On the other hand, it also meant to make the 1997 Constitution completely irrelevant, leaving the country without any option. Nonetheless, ELS believes that this does not have a major bearing on the main conclusions and findings of this study, in particular on the issues of individual criminal accountability, framed in the context of the *Foundational Law* and the Penal Code. In a worse case scenario, all other arguments based on the 1997 Constitution also have validity at least for all transgressions committed up to the point when the government

continued to recognise the 1997 Constitution a valid or a living document. In addition to this, there is also a need to look into all these issues in terms of the relevant provisions of the Penal Code. This will be done in the next sub-section.

3.3. The Issue under the Penal Code

Penal Code previsions deemed most relevant for this study are those dealing with "Offenses Against the State," listed in Part II (Special Part), Book III, Title I of the Code. As can be seen from the very title of Book III of Part II of the Penal Code, by their nature these are offences committed against the national interest of Eritrea. It needs to be remembered that there are several alleged criminal activities, in addition to those that make the immediate focus of this study, for which the State President is suspected of committing, offences having a direct bearing for what transpired in the aftermath of the new rapprochement with Ethiopia.

For our discussions, the two most important provisions that come at the forefront of this debate are Articles 250 and 251 of the Penal Code. All reference to the provisions of the Penal Code takes into account several amendments introduced by Proclamation No. 4/1991, promulgated on 15 September 1991 (the amending law). At least since May 1997, the State President is believed to have committed grave violations of Eritrea's national laws that have far-fetching ramifications on the national of the country. Two of the gravest of such violations are: 1) refusal to implement the 1997 Constitution immediately after its ratification, or at least right away after the end of the 1998-2000 border conflict with Ethiopia, following the ratification of the Agreement on Cessation on Hostilities in June 2000 and the Algiers Peace Agreement in December 2000); 2) unilateral dissolution of the National Assembly ever since the Assembly's last meeting in February 2002. There might be other several crimes for which the State President may be blamed. We will briefly discuss them at the end of this sub-section.

The above two major violations are befitting of the definition of the following crimes envisaged in Articles 250 and 251 of the Penal Code, the full versions of which are cited below.

> **Art. 250 – Outrages against the Government or the Governmental Authorities.**
>
> Whosoever, by violence, threats, conspiracy, or any other unlawful means, overthrows, or attempts to overthrow, change or destroy the Government or any constituted public, legislative, executive or

judicial authority, is punishable with rigorous imprisonment from three years to life, or, in cases of exceptional gravity, with death.[16]

Art. 251 – Obstruction of the exercise of Governmental Powers.

Whosoever, by violence, threats, conspiracy, or any other unlawful means, prevents, or attempts to prevent or restrain any legislative, executive or judicial authority from exercising its government powers, or to force a decision,

is punishable by with rigorous imprisonment not exceeding fifteen years.

As noted before, the Transitional Government of Eritrea, established by the *Foundational Law* of 1993, ended its tenure officially in May 1997. This is according to Article 3(2) of the *Foundational Law*, which reads: '"The tenure of the Eritrean Government should be for a maximum of four years." Seen against the commitments proclaimed at the Preamble of the same law, the government of the day assumed an obligation to transit the country to a constitutional government that should have been elected after the ratification of a new constitution, which is the 1997 Constitution. However, based on his unilateral decision, a typical instance of an "unlawful means" envisaged in Article 250 of the Penal Code, the State President refused to end the four-year transitional period prearranged by the *Foundational Law*. He did this without formal blessing either from the National Assembly itself or at least the deliberative organs of the People's Front for Democracy and Justice (PFDJ).

Moreover, it can also be argued that the President's refusal to end the four-year transition period has taken place in the form of making it impossible for the structures of the transitional government of the day (in particular the National Assembly) to facilitate the necessary arrangements that should have make it possible to usher the much anticipated transition of the country to a democratic order, via free and fair general elections. The very act of failing to implement the 1997 Constitution also falls under this obstructive-destructive act of the President that ultimately made it impossible for the legally constituted government organ (National Assembly) to move to next stage of the political transition, namely implementation of the 1997 Constitution and facilitation of all the necessary preparatory work for the forthcoming constitutional government. All of these obstructive and destructive actions are the kind of

[16] Translation of the amended Tigrinya version by ELS. The Tigrinya equivalent provided by the amending law reads as follows:

ዓንቀጽ 250 – ኣብ ልዕሊ መንግስቲ ወይ መንግስታዊ ስልጣናት ዝፍጸም ገበን

ዝኾነ ሰብ ብሓይሊ፡ ብምፍርራሕ፡ ብውዲት፡ ወይ ብኻልእ ዘይሕጋዊ ኣገባብ ንመንግስቲ ወይ ንቕውም ህዝባዊ፡ ሓጋጊ፡ ፈጻሚ ወይ ፍርዳዊ ስልጣን ዝግልብጥ ወይ ንምግልባጥ፡ ንምልዋጥ ንምዕናው ዝፍትን ብካብ 3 **ዓመት ክሳብ ሕልፊት ጽኑዕ ማእሰርቲ ይቕጻዕ፡ ወይ ከኣ ኣብ ፍሉይ ከቢድ ጉዳያት ብሞት ይቕጻዕ።**

violations proscribed by Articles 250 and 251 of the Penal Code. These major transgressions opened the floodgate of a political crisis, including the 1998-2000 border conflict with Ethiopia, with a devastating consequences to the country.

The argument made above has unqualified applicability for the period between May 1997 and May 1998, the latter being the start of the border conflict with Ethiopia. It is true that after May 1998 the actions of the State President may be excused on the basis of an alleged "state of emergency" that came into being in the context of the border conflict with Ethiopia. However, as a legal defence this does not hold true for the period preceding the start of the boarder conflict in 1998 and the official end of the boarder conflict in June to December 2000. Suffice would it be to mention here that as an excuse to the prevailing political crisis in the country, any reference to any kind of state of emergency (*de facto* or *de jure*) was found to be a legally fallacious argument, at least according to the UN Commission of Inquiry on Human Rights in Eritrea (the COI), with which ELS concurs.[17] It also needs to be noted that during its two Universal Periodic Reviews at the UN Human Rights Council the Eritrean Government admitted that there is no state of emergency in the country.[18]

From a merely speculative but caution point of view, the following final observation can be made. If concrete evidence were to be found about any secret dealings the President may have concluded with Ethiopia or any other foreign power, with the effect of surrendering (in whole on in part) the sovereign independence of Eritrea, such an act can be addressed by Penal Code provisions that deal with: attacks on the political or territorial integrity and sovereignty of the state (Articles 253 and 255), attacks on the independence of the state (Article 259), and high treason (Article 261). Conversely, in a classic Orwellian fashion, the State President and members of his inner circle accuse others (in particular the so-called G-15) by citing similar provisions of the Penal Code. Such was the case, for example, in the official response of the government sent to the African Commission on Human and People's Rights (ACHPR) – in a

[17] *First Report of the Detailed Findings of the Commission of Inquiry on Human Rights in Eritrea*, A/HRC/29/CRP.1, 5 June 2015 [Long Version], A/HRC/29/CRP.1, 4 June 2015, para 55 [footnote removed].
[18] See in particular *Report of the UN Working Group on the Universal Periodic Review*, 8 March 2010, A/HRC/13/2/Add.1. para. 31 in which the State of Eritrea said: "There is no state of emergency in Eritrea and the human rights of the Eritrean people are fully respected." See also *Report of the UN Working Group on the Universal Periodic Review*, 17 June 2014, A/HRC/26/13.Add.1, para. 122.38; Daniel R. Mekonnen, "The Reply of the Eritrean Government to ACHPR's Landmark Ruling on Eritrea: A Critical Appraisal," *Journal for Juridical Science* 2006 31(2), pp. 44-46.

matter dealing with the plight of the G-15. Such accusations have never proved by a court of law.[19]

In addition to the core criminal acts discussed above, such as the deliberate destruction of a legally constituted government organ (the National Assembly) and refusal to implement the 1997 Constitution, the President is also officially accused by a UN mandated fact finding mission (the COI) of orchestrating a political system that perpetuates a situation of crimes against humanity. If proven to be true by an open and impartial court of law, this would also entail grave criminal consequences pursuant to the relevant provisions of the Penal Code dealing with such offences. In a lesser degree of responsibility, Article 412 (Breach of Official Duty) and Article 414 (Abuse of Power) of the Penal Code may also have applicability in the current debate.

All in all, it can be concluded as follows. In an ideal democratic system, supported by the existence of an independent and impartial judiciary, an autonomous prosecutorial authority and a fully-functional legal profession (a bar association), operational Eritrean laws (with or without the 1997 Constitution) would be more than enough to set a scene for a legal battle that can be fiercely fought in a criminal docket named *The State v. Isaias Afwerki*.[20] Needless to say, anything said in this report does not mean to serve as a replacement for a verdict that should be given by a competent court of law, operating within the parameters of conventional requirements of a fair trial. However, in keeping with the methodological approach of the COI, ELS also believes that there are "reasonable grounds to believe"[21] that the State President is one of the most responsible officials for the overall political crisis in Eritrea, including the on-going situation of crimes against humanity, as sufficiently corroborated by the First and Second and reports of the COI.[22]

We conclude this sub-section by underscoring the following observation. The arguments discussed here can serve as additional factors in substantiating the impeachment of the President pursuant to Article 41(6) of the Constitution. Having made this conclusion, it is also important to note that the enforceability of the legal options set out in this document is hardly possible in

[19] See in general Mekonnen 2006, note 18 above.
[20] This imaginary name of the criminal docket is borrowed from Ghezae H. Berhe's (founding member of ELS) innovative comment, which appeared on awate.come a few years back (the URL link is currently not available).
[21] *First Report of the Commission of Inquiry on Human Rights in Eritrea* [Short Version], A/HRC/29/42, 4 June 2015 [hereinafter "First COI Report Short Version"], para. 21.
[22] For a depiction of the State President as one of the most responsible officials, see First COI Report Short Version, note 21 above, para. 21; *Second Report of the Commission of Inquiry on Human Rights in Eritrea* [Short Version] A/HRC/32/47, 8 June 2016 [hereinafter "Second COI Report Short Version"], p.1 and paras. 59-95.

Eritrea due to the prevailing crisis of rule of law in the country. However, should the political situation change and there is a need to initiate prosecutorial measures according to operational Eritrean laws, the observations made in this study can serve as a staring point to the next possible stage. In the remaining part of this study, we will discuss aspects of international law that are relevant for our understanding of the remedies for potential threats that may be posed against the sovereign independence of Eritrea as a result of on-going negotiations with Ethiopia.

4. International Law and the Rapprochement with Ethiopia

In this Section, we will focus mainly in addressing the question of what needs to be done under international law, in the event the State President maliciously enters into an agreement having the effect of surrendering the sovereign independence of Eritrea (in part or in whole) to Ethiopia. What does international law say about this kind of issues? Starting from an elaboration of the concept of sovereignty, the discussion will move to the issue of state practice in treaty obligations, concluding with an examination of the grounds for termination of international treaties and the available avenues to pursue this objective.

4.1. Sovereignty under International Law

As a concept, sovereignty is more of a political term referring to supreme authority. In modern democracies, sovereign power rests with the people and is exercised through a democratically constituted parliament. The term has a very strong connotation of autonomy; thus to have sovereign power means to be beyond the power of others to interfere.[23] At the international level, the most important attribute of sovereignty lies in its emphasis on the equality of all sovereign states (Members States of the UN). In other words, this means that all states are sovereign and the appropriate legal relationship is one of equality.[24]

The right to conclude international treaties is a characteristic feature of a state's sovereignty. There are instances under international law and practice in which a state may voluntarily limit or qualify certain aspects of its sovereignty by entering into an agreement having such an effect. For purposes of this study, one particular type of limited sovereignty may take place in the form of leasing (to another state) part of a given territory, for a specific period of time, during which time

[23] Cornell Law Scholl, Legal Information Institute, "Sovereignty," available at https://www.law.cornell.edu/wex/sovereignty (accessed on 16 May 2019).
[24] Ibid.

the lessor state may not exercise meaningful rights of sovereignty over the territory.[25] This may be the case, for example, with regard to the alleged rental of the Port City of Assab by some Gulf States, although detailed information about this matter is not readily available, limiting the scope of analysis beyond this point. If true, this may be regarded as an instance of surrendering certain aspects of Eritrea's sovereignty consensually. In the case of recent dealings with Ethiopia, apart from rhetorical manifestations expressed by leaders of Eritrea and Ethiopia in different occasions, the agreements that have been made public thus far (essentially the *Asmara* and *Jeddah* Declarations) are not problematic per se.

Nonetheless, following a new defence agreement signed with France and Ethiopia in March 2019, there are reports that Ethiopia is planning to re-establish its naval force in the Port City of Massawa, namely in the sovereign territory of Eritrea. In relation to the new Franco-Ethiopian agreement, the French President said: "This unprecedented defence cooperation agreement provides" the possibility for France "to assist in establishing an Ethiopian naval component."[26] Regarding the exact location of the proposed naval force of Ethiopia, the governments of Eritrea and Ethiopia have not given any further details. However, the President of Djibouti stated that the naval force is to be based in the Eritrean Port City of Massawa.[27] If true, this can be a cause for serious concern.

Indeed, the complete block out of information surrounding this issue, the lack of democratic consultation on the matter (in particular on the part of Eritrea), coupled with a very perfidious history of involvement of foreign powers in the region, trigger questions that cannot be simply ignored. Therefore, Ethiopia's plan to re-establish its navy, possibly in the Port City of Massawa, may give rise to serious concerns related to the likelihood of voluntarily giving up part of Eritrea's sovereignty, should that plan is given full effect in the form of a lease. In this regard, there is a need to closely follow the actions of both governments and explore the legal implications of any secret dealings around this particular issue.

Other than the above considerations, sovereignty may also be trumped-up through what are generally known as direct and indirect violations – some of which are classic examples of

[25] Ibid.
[26] John Irish (for *Reuters*), "Ethiopia, France Sign Military, Navy Deal, Turn 'New Page' in Ties," 12 March 2019, available at https://uk.reuters.com/article/uk-ethiopia-france-idUKKBN1QT2W0 (accessed 16 May 2019).
[27] François Soudan (for *Jeune Afrique*), "Interview with Ismaïl Omar Guelleh," 10 April 2019, available at https://www.jeuneafrique.com/mag/759507/politique/djibouti-ismail-omar-guelleh-nous-navons-rien-a-craindre-du-big-bang-regional/ (accessed 16 May 2019).

aggression, as established by the jurisprudence of the International Court of Justice (ICJ).[28] In the current debate, and in particular since the signature of the *Asmara* and the *Jeddah Declarations*, classic examples of violations of sovereignty are not a major issue of concern. What has been done on the part of some Ethiopian actors (state and non-state actors) since the signature of the said *Declarations* is more of an action encouraged by the carless stance of the Eritrean Government, in particular some controversial statements given by the President of Eritrea in different occasions since the signature of the *Asmara Declaration* – examples of which are discussed in Section 1 of this study. In earnest, some of these issues are matters of a purely political nature, and as such they may not have solid legal ground under international law to constitute a real threat to the sovereign independence of Eritrea. However, the likelihood needs to be discussed by way of flagging out lines that should not be crossed even as a matter of mere rhetoric.

A closer look at the relevant provisions of the *Asmara* and the *Jeddah Declarations* reveals a certain degree of attention paid to the sovereign independent identities of both countries. For example, in Article 4 of the *Asmara Declaration* there is emphasis on the need to implement the decision of the Eritrea-Ethiopia Boundary Commission (EEBC), a commitment that cements the sovereignty of the State of Eritrea. The *Jeddah Declaration* also contains explicit provision reiterating to the commitment of each country to respect each other's sovereign independence and territorial integrity, including a stark reminder to both countries to implement the decision of the EEBC. In this regard, the *Jeddah Declaration* contains relatively stronger wording than that of the *Asmara Declaration*. At any rate, neither of the two *Declarations* poses apparent threat to Eritrea's sovereignty. In fact, both documents concretize Eritrea's sovereignty unequivocally.

4.2. State Practice on Treaty Obligations

Another angle from which the problem at hand should be seen is that of state practice on treaty obligations, including obligations emanating from general principles of international law.[29] Under international law and practice, there is a general understanding, as will be shown below, that unilateral acts of states may have the effect of modifying or revoking obligations emanating from bilateral or multilateral treaties. The following well-known statement, habitually attributed to Sir

[28] Christian Marxsen, "Territorial Integrity in International Law: Its Concept and Implications for Crimea," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZaöRV)/*Heidelberg Journal of International Law* (2015) 75, pp. 7-26.
[29] Christina Voigt, "The Role of General Principles in International Law and their Relationship to Treaty Law," *Retfærd / Nordic Journal of Law and Justice* (2008) 121(2), 31, pp. 3-25.

Elihu Lauterpacht, is a stark reminder in this regard: "Today's rule reflects in part yesterday's deviance and ... the cloth of obligation is partly cut from the pattern of non-conformity."[30] Therefore, state practice is an important element of customary international law and a crucial tool for interpreting obligations of states: treaty-based and non treaty-based.[31]

It follows that over and above what has been stated in the concise text of the *Asmara* and *Jeddah Declarations*, how Ethiopia acts on certain matters and how Eritrea responds with regard to the issue at hand may have legal implications. It would be naïve to assume that some actions by state and non-state actors in Ethiopia that disrespect Eritrea's sovereignty are unintentional or casual. This promotes presumptions to the contrary and naturally Eritrea is expected to react to such actions in the strongest possible terms. In contrast to repeated hostile actions coming from the Ethiopian side, since the signature of the *Asmara* and *Jeddah Declarations*, the record shows that the Eritrean Government responded substantively only once in the form of an editorial published in its major news outlets, including the national television in (late March 2019).[32] Given that the reckless behaviour on the part of some Ethiopian actors seems to be continuing unabated, there is a need to challenge it by sustained outcry using available legal, political and diplomatic forums.

However, coming back to the issue of international treaty law, there is one additional dimension that needs to be understood, which is the issue of good faith in the ratification of international treaties, including performance of obligations emanating from such treaties. In this regard, like in many other areas of international law, the main authority is the jurisprudence of the ICJ. In one of its landmark judgements, the *Nuclear Tests Case*, the ICJ has recognised good faith as "one of the basic principles governing the creation and performance of legal obligations."[33]

Following the signature of the *Asmara* and *Jeddah Declarations*, there were actions emanating from Ethiopia (including actions of state actors) that do not bode well with the concept of good faith as far as the long-term national interests of Eritrea are concerned. Some of these actions do not demonstrate "reasonable regard"[34] for the rights and interests of Eritrea, giving rise to

[30] Elihu Lauterpacht, "The Development of the Law of International Organisations by the Decisions of International Tribunals," *Recueil des cours/Collected Courses* (1976) 152(4), p. 389, cited in Andrés Rigo Sureda, *Investment Treaty Arbitration: Judging Under Uncertainty* (Cambridge University Press, 2012), p. 9.
[31] Arthur Mark Weisburd, "The International Court of Justice and The Concept of State Practice," *University of Pennsylvania Journal of International Law* (2009) 32(2), pp. 295-372.
[32] EriTV Editorial 2019, footnote 11 above.
[33] *Nuclear Tests Case (Australia v France)* (Merits) [1974] ICJ Reports, p. 253. See also Michel Virally, "Review Essay: Good Faith in Public International Law," *American Journal of International Law* (1983) 77, p. 130.
[34] For comparable jurisprudence on this, see *Lac Lanoux Arbitration (France v Spain)* (Award) [1957] XII RIAA 281.

legitimate concerns on the part of Eritreans, concerns already discussed elsewhere in this study. If this trend continues, it can indeed be a cause for serious concern. In such cases, since good faith cannot be reliably presumed, there may be a need to do further investigation with the aim of establishing the existence of other dealings that are not yet revealed to the general public.

A very similar argument on good faith can also be made based on the stipulations of Article 18 of the *Vienna Convention on the Law of Treaties* (the Vienna Convention).[35] According to this provision, a state that has signed or ratified a treaty has the obligation to refrain from acts that would defeat the object and purpose of that treaty.[36] With regard to the material duty to act in good faith during the performance of a treaty, the International Law Commission (ICL) has once stated that it is "one of good faith and not *stricti juris.*"[37] Inherent in this obligation is the understanding that a treaty should be performed with the intentions of the parties in mind, and not just merely looking at formalistic understanding of the wording.[38]

It is true that looking at the wording of the *Asmara* and *Jeddah Declarations* one may not spot a major flaw. Building on the above observations, however, what matters equally is Eritrea's and Ethiopia's object and intent that would ultimately influence future relations of the two countries. Thus, one cannot be complacent and simply admit that the said *Declarations* would respect Eritrea's sovereignty so long as Ethiopia's bad intentions can be inferred from its actions, omissions and rhetoric of its officials. As discussed above, the formalistic understanding of the two *Declarations* cannot guarantee Eritrea's sovereignty. Therefore, there is a need to regularly monitor every actions and omissions, and concomitantly explore available legal avenues where any illegal action can be challenged.

[35] Full text of the Convention is available at https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf (accessed on 16 May 2019).
[36] Paolo Palchetti, "Article 18 of the 1969 Vienna Convention: A Vague and Ineffective Obligation or a Useful Means for Strengthening Legal Cooperation?," in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011).
[37] ICL, *Yearbook of the International Law Commission* Vol. II (1964) A/CN.4/SER.A/1964/ADD.1 7. The Latin term *stricti juris* denotes the following concept: "according to or determined by strict interpretation of the law." See, for example, the online entry of the term at Merriam-Webster Dictionary, available at https://www.merriam-webster.com/legal/stricti%20juris (accessed on 16 May 2019).
[38] *ICL Yearbook* 1964, note 37 above.

4.3. Termination of International Treaties

In this sub-section, we turn to the following question: What if there are already treaties (that are signed discreetly), or if new ones are signed in the future, compromising the sovereign independence of Eritrea? In answering this question, the scope of this paper will be limited to treaties that are in written forms. Article 2 of the Vienna Convention defines a treaty as an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. However, Article 3 of the Vienna Convention specifies that the fact that treaties are not in written form shall not affect the legal force of such agreements and the application to them of any of the rules in the Vienna Convention to which they would be subject under international law independently of the same convention. Thus, in light of these two provisions of the Vienna Convention, our focus is on treaties in written form, as we may never know of treaties that may have been concluded discreetly or that will be concluded in other forms.

In the event there is a need to terminate a potentially harmful treaty to the national interest of Eritrea, how can this be done? International law envisages various ways by which a treaty can be terminated. The relevant rules in this regard are stipulated in different provisions of the Vienna Convention. In general terms, the most known methods are called: treaty termination, withdrawal and denunciation.[39]

Article 56(1) of the Vienna Convention stipulates that a treaty that contains no provisions for termination, denunciation, or withdrawal is not subject to denunciation or withdrawal except under the following conditions: it was recognized that the parties envisaged the possibility of denunciation or withdrawal, or if it can be inferred from the nature of the treaty itself that there is a right of denunciation or withdrawal. For such types of treaties, a state is obliged to give twelve months' notice before withdrawal or denunciation (Article 56 (2) of the Vienna Convention).

The Vienna Convention does not suggest the types of treaties that require no exit clauses. However, the ILC has developed a list of such treaties.[40] There shall not be any concern regarding treaties that permit an exit. However, it will be greatly challenging, both legally and

[39] See in general, Laurence R. Helfer, "Terminating Treaties," in Duncan Hollis (ed.) *The Oxford Guide to Treaties* (Oxford University Press, 2012), pp. 634-649.
[40] ICL Yearbook 1964, noted 37 above. For examples of treaties that permit exit and those that do not, see Helfer 2012, note 39 above.

politically, if the Government of Eritrea signs a treaty that does not include an exit clause. Since both Eritrea and Ethiopia agreed to implement the EEBC's Decision from 2002, a decision that has defined the border between Eritrea and Ethiopia, this does not appear to be problematic in the absence of subsequent agreements contrary to the letter and spirit of the EEBC's Decision. However, if the Government of Eritrea signs a new treaty that provides for the bestowal of Eritrea's territory or a grant of rights over Eritrea's territory, or if the government tries to change the EEBC's final settlement of the border dispute, it will equally be a challenging task for Eritrea to terminate such an agreement in the future without recourse to other grounds of termination of treaties. At this stage, much of the discourse on this issue is highly speculative. Nonetheless, available options are discussed in the next sub-section.

4.4. Grounds for Terminating a Treaty

From the various possibilities, we focus on those examples that have peculiar relevance to the case at hand, namely termination of a treaty having a detrimental effect on the sovereign independence of Eritrea, should such a treat is signed in the future, or if it had been already signed (discreetly). In sub-section 3.1 of this document, we have seen that the recent agreements signed between Eritrea and Ethiopia were done in a context that violates Eritrean laws on the adoption of bilateral or multilateral agreements. Naturally, this would be the most important challenge that may be put forward contesting the validity of any agreement that may jeopardise Eritrea's national interest.

A challenge of this type is envisaged under Article 46 of the Vienna Convention. However, the provision is formulated in a way that makes it difficult for a state to invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties, unless the violation in question was manifest and concerned a rule of its internal law of fundamental importance. A violation is manifest if it would be objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith.[41] This is the part, which is very important for our case, to which we will return few paragraphs below.

[41] See Institute for International Law and Justice (IILJ), "Invalidity of Treaties," available at http://www.iilj.org/wp-content/uploads/2016/08/Note-on-Invalidity-of-Treaties-under-Art.-46.pdf (accessed on 16 May 2019).

There is a broad body of international case law clarifying the principle contained in Article 46 of the Vienna Convention.[42] One particular example involves a dispute between Iraq and Kuwait from 1990. The matter relates to a boundary dispute between the two countries in which context Iraq contested the validity of a certain agreement on the same issue that was not approved by the Iraqi Parliament. The argument was not accepted.[43] The following additional examples are helpful for our discussion.

In an agreement concluded between the United States and Panama in 1977, regarding the Panama Canal, the United States Senate raised the issue of constitutional competence based on the requirements stipulated in Panama's Constitution. A group of Senators argued that Panama's Constitution required plebiscite to approve the treaty. They stressed that since additional clauses were added (including reservations and conditions), they had to be submitted to a second plebiscite. Many Senators argued that Panama might invoke constitutional defect in the future unless the violation described as "manifest" and concerning a rule of fundamental importance was corrected by renegotiation. However, Panama stated that the reservations, conditions and understandings of the Senate are to be taken as interpretation of the treaty rather than as alternations or amendments. Based on this, Panama argued that a plebiscite was not needed. The White House agreed with Panama's stand as reasonable. [44]

In the *Eastern Greenland Case*, decided by Permanent Court of International Justice, an oral statement attributed to a Norwegian Foreign Minister was taken by Denmark as a major ground to contest Norwegian claim of sovereignty over some part of Greenland. The oral statement of the Norwegian Foreign Minister went as follows: "Norwegian Government would not make any difficulty in the settlement of this question."[45] Norway argued that the statement of the Foreign Minister was not binding, as he could not enter into a binding international treaty on "matters of importance" without King in Council's approval. The Court rejected Norway's contentions.[46]

4.4.1. Lack of Good Faith

On the other side of the argument, the following observations are important. In order for a state to impeach the validity of a treaty under Article 46 of the Vienna Convention, three conditions

[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] Ibid.
[46] Ibid.

should be satisfied: a) there must be a major issue or violation "regarding competence to conclude treaties"; b) and this must also be one "of fundamental importance" and c) the violation itself must be "manifest."[47] According to this test, a violation is manifest if it would be objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith. In the context of the current deeply seated political crisis in Eritrea, where there is not even a functioning national parliament, it may be argued that the manner in which the President of Eritrea has been acting in relation to the signature of the *Asmara* and *Jeddah Declarations* is manifestly in contradiction with Eritrea's internal law of fundamental importance.

It is true that content wise, as already shown, the *Asmara* and *Jeddah Declarations* do not have anything that jeopardises the national interest of Eritrea. However, one thing is very clear in this entire process. It is evident to the Ethiopian government that the treaties it has recently signed with Eritrea are based on the consent of one man, the President of Eritrea. Therefore, if a treaty that violates the sovereign independence of Eritrea is signed, illegality is to be presumed. The standard should be: "would the people of Eritrea approve such a treaty had they been given the opportunity to have a say?" Manifest violation of a rule of fundamental importance for Eritrea shall be objectively evident to Ethiopia if it acts in good faith, for the simple reason that the way the Government of Eritrea conducts its business (internally and externally) is now known to the rest of the world as fundamentally flawed and very problematic.

Over and above the deeply seated deficit of democratic governance in Eritrea, since June 2016 the government of the country is officially accused, by a credible fact-finding mission of the United Nations, of sustaining a political situation amounting to a *prima facie* case of crimes against humanity, affecting a large proposition of the Eritrean population.[48] Seen against this background and other structural political problems of Eritrea, adequately substantiated discussed in Section 3 of this document, there is little doubt in concluding that in several instances the Government of Eritrea (especially the State President) operates in a manner that is manifestly inconsistent with the national interest of Eritrea. The conclusion to be drawn is as follows.

The issue of constitutional competence alone may not be sufficient ground to trigger invalidation of a treaty. However, if one can show that good faith was manifestly absent in the treaties signed with Ethiopia, the issue becomes completely different. Seem from this angle, the two major

[47] Stanislav E. Nahlik, "The Grounds of Invalidity and Termination of Treaties," *American Journal of International Law,* (1971) 65(5), pp. 736-756.
[48] *Second COI Report Short Version*, note 22 above, p. 1 and paras. 59-95.

treaties signed thus far, the *Asmara* and the *Jeddah Declarations*, are less controversial, since they do not contain anything that is manifestly contrary to Eritrea's national interest. However, this does not mean that the manner in which the Government of Eritrea signed the agreements was free from procedural irregularities.

4.4.2. Void Ab Initio Treaties

For treaties that are manifestly against the national of interest of Eritrea, there is another possible angle from which termination of such agreements can be argued. The basis for such an argument is to be found in the concept of so-called *void ab initio* treaties (treaties not legally binding). However, it needs to be emphasised that the relevance of this argument is mainly for treaties that contain explicit language violating the sovereign independence of Eritrea.

Article 53 of the Vienna Convention stipulates that a treaty is void if, at the time of its conclusion, it conflicts with *jus cogens* or a peremptory norm of general international law. In its simplified form, *jus cogens* means a norm of international law from which derogation is not permitted. For example, the prohibition against torture or crimes against humanity is a typical example of a peremptory norm of international law.[49]

If one was to assume that there is a bilateral agreement between the Governments of Eritrea and Ethiopia that is manifestly against the national of interest of Eritrea (for example, providing for the surrender of Eritrean sovereign independence in part of in whole to Ethiopia), adopted without formal consultation of Eritrean people or their legitimate representatives, this would be considered an instance that violates a *jus cogens* norm on the following grounds. Much of the argument in this regard is based on some of the cardinal principles contained in the Charter of the United Nations (UN),[50] many provisions of which are considered as making *jus cogens* norms. In support of this argument, we cite here Kamrul Hossain's assertion to the following effect: "we may construct the argument that the [UN] Charter had embodied the norms of fundamental importance, which correspond to the *jus cogens* rules."[51]

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[49] See in general, Kamrul Hossain, "The Concept of *Jus Cogens* and the Obligation Under The UN Charter," *Santa Clara Journal of International Law* (2005) 3(1), pp. 72-98; Kennedy Gastorn, "Defining the Imprecise Contours of *Jus Cogens* in International Law," *Chinese Journal of International Law* (2017) 16(4), pp. 643-662; Markus Petsche, "*Jus Cogens* as a Vision of the International Legal Order," *Pennsylvania State International Law Review* (2010) 29(2), pp. 233-273.

[50] Full version of the Charter is available at https://www.un.org/en/sections/un-charter/un-charter-full-text/ (accessed on 16 May 2019).

[51] Hossain 2005, note 49 above, p. 85.

The principle of sovereign equality of all Member States of the UN, as enshrined in Article 2(1) of the UN Charter, is one of the founding blocks of international law. In our understanding, any agreement that impinges on the sovereign independence of any Member State of the UN is an act that violates a *jus cogens* norm of international law, and thus inherently a *void ab initio* treaty. The underlying assumption here is that given the prevailing political situation in Eritrea, in disregard of which the Ethiopian government is not expected to operate (at least in terms of the requirements of good faith), it is incumbent the latter to operate in a manner that is not inconsistent with *jus cogens* norm of international law; for any treaty that does not respect the sovereign independence of Eritrea is inherently a *void ab initio* treaty.

Moreover, international law also attaches greater value to the territorial integrity or political independence of all Member States of the UN. This is emphasised, among other things, in two major aspects of the UN Charter: a) in the stipulation that prohibits the use of force, namely Article 2(4); and a) in the stipulation that provides for exceptional circumstances in which the use of force is permitted, namely Article 51. The latter possibility is conceived in the form of a balanced and appropriate defensive action against a violation of territorial integrity and political independence of a state, and it represents a very eminent norm of international law.[52] All of this is aimed at providing a strong legal protection to the sovereign independence of all Member States of the UN.

From the above it follows that if a balanced and appropriate defensive action against a violation of territorial integrity and political independence of a state represents a very eminent norm of international law, a treaty that violates the sovereign independence of Eritrea shall be considered against such a norm. One such norm is the sovereign equality of Eritrea with Ethiopia as enshrined in Article in 2(4) of the UN Charter. It follows that any agreement between the governments of the two countries contrary to this stipulation is a *void ab initio* agreement.[53]

By way of winding up the aforementioned arguments, the following remarks come in good order. With regard to potential reckless actions of the Eritrean Government, there is a need to put in place a vigilant monitoring mechanism, including the deployment of legal and diplomatic

[52] Hossain 2005, note 49 above, p. 90.
[53] Other examples of grounds for termination of a treaty as *void ab initio* include the following: non-observance of either certain rules of constitutional law of the state represented or such powers as were given to the representative by his state and the limits of which had been known to his partner, as well as error, fraud, and corruption, 2) coercion, directed against the person of a state's representative or against such a state itself and 3) treaties the contents of which are in conflict with a nom of *jus cogens*. Nahlik 1971, note 47 above.

resources to challenge such behaviour. The same can be said about statements made by Ethiopian state and non-state actors unless Eritrea protests diplomatically or by means of public statements. In this regard, international law does not dictate any special or strict requirements as to form; it can be either oral or written. The question of form is not decisive, whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form.[54]

4.5. The Question of Legal Forum

Ultimately, if a treaty is terminated based on any of the possibilities envisaged above, the parties to such a treaty will be released from any obligation emanating from such treaty. This is clearly stipulated in Article 70 of the Vienna Convention. There are certain caveats to this rule that are not the immediate focus of this paper. There is, however, another issue that requires clarification. If a legal challenge based on any of the possibilities discussed above were to be taken, where would be the most appropriate legal forum to do that?

In order to address this question, it would be important to characterise the nature of the legal dispute that needs to be addressed. Presumably, the dispute would be that of challenging the legality of a bilateral treaty between Eritrea and Ethiopia that violates the sovereign independence of Eritrea. Naturally, a dispute like this may involve several issues that fall under the exclusive jurisdiction of the ICJ, as listed in Article 36, paragraphs 2-5, of the Statute of the ICJ.[55] Such issues include, among other things, questions related o the interpretation of a treaty, any question of international law, the existence of any fact which, if established, would constitute a breach of an international obligation.

There are two ways in which the ICJ may exercise jurisdiction on matters such are those discussed in this document. In the first instance, known as jurisdiction over contentious cases, the ICJ can exercise jurisdiction only if the parties to the dispute (Eritrea and Ethiopia) are states parties to the Statute of the ICJ, or alternatively if they have voluntary accepted jurisdiction of the ICJ. As of yet, none of them is a state party.[56] Whether they will accept jurisdiction of the ICJ in the future is an open question. Therefore, it is important to examine the only second available

[54] See, for example, Temple of Preah Vihear (Cambodia v Thailand), ICJ Reports (1961) 17, p. 31.
[55] A full version of the Statute is available here https://www.icj-cij.org/en/statute (accessed on 16 May 2019).
[56] See ICJ, "Declarations Recognizing the Jurisdiction of the Court as Compulsory," available at https://www.icj-cij.org/en/declarations (accessed on 16 May 2019).

possibility, which is that of advisory opinion that may be requested by the UN General Assembly.[57] In the past, the UN General Assembly has requested advisory opinion of the ICJ on the following matters that have some degree of resemblance with some of the central issues discussed in this study: Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter); International Status of South West Africa; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory; Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo.[58] However, it needs to be recalled that a request for an ICJ advisory opinion by the UN General Assembly may require a lot of diplomatic and political campaigning.

5. Concluding Remarks

ELS conducted this study in response to a growing demand it received from many Eritreans, who are showing a growing sense of anxiety about the future of their country. The concerns are prompted by new developments related to the new rapprochement between Eritrea and Ethiopia. On its face value, the rapprochement has received widespread appreciation by external observers. Conversely, in the eyes of many Eritreans there are a lot of uncertainties associated with this development, including fears related to potential threats posted against the sovereign independence and territorial integrity and of the State of Eritrea. Much of this concern was prompted by an overly disdainful behaviour the Eritrean State President portrayed for the needs and aspirations of the Eritrean people, contrary to popular expectations.

While the ideal of a peaceful settlement of any disputes between Eritrea and Ethiopia cannot be over emphasized, and ELS has an unwavering support towards this objective, the manner in which the latest rapprochement has been conducted has generated a lot of critical questions. This is true as far as the long-term national interest of Eritrea is concerned. The study showed that in spite of the initial sense of optimism the rapprochement generated for the people of the two countries, the process risks failure mainly due to lack of its institutionalization. To a great extent, this shortcoming is to be blamed to a long overdue need of fundamental and structural political reform in Eritrea. In addition to this, the study shows that the growing sense of anxiety felt by many Eritreans cannot be ignored as merely speculative sensationalism given that Eritrea and

[57] IJC, "Organs and Agencies Authorized to Request Advisory Opinions," available at https://www.icj-cij.org/en/organs-agencies-authorized (accessed on 16 May 2019).
[58] Ibid.

Ethiopia share history marred by problematic relationship, deep seated mistrust and prolonged animosity.

The study shows that before and after the conclusion of the latest agreements with Ethiopia, the State President has acted in a manner which is fundamentally contrary to operational Eritrean laws, so much as some of his actions are deemed the equivalent of grave criminal actions proscribed by the Penal Code of Eritrea, involving the severest of punishments envisaged by the same Code. If there were a government subject to democratic accountability, the violations examined in this study would have been sufficient enough to trigger an impeachment process envisaged by Article 41(6) of the 1997 Constitution.

Arguably, any bilateral or international agreement entered into with the Eritrean Government raises inevitable legal questions. Eritrea does not have a democratically elected government. It is ruled by a government notoriously known not only for its despicable record of democratic accountability but also for its deeply-seated crisis of human rights sufficiently corroborated by a UN-mandated fact finding mission as a situation of crimes against humanity. Because of such very problematic attributes of the government, any international agreement signed by the incumbent government and which seriously jeopardizes the national interest of Eritrean is easily susceptible to termination pursuant to existing norms of international law. This leads to the following conclusion. If a treaty that violates the sovereign independence of Eritrea is signed, now or in the future, illegality is to be presumed. A treaty like the one envisaged here would fall under a manifest violation of a rule of fundamental importance for the State of Eritrea, as envisaged under Article 46 of the *Vienna Convention on the Law of Treaties*.

Eritrea has more than enough operational laws (with or without the 1997 Constitution) that would make it possible for a successful criminal prosecution of major government misconduct if there were to be a properly functioning judicial system working independently from any undue interference of the executive branch. Understandably, due to the prevailing repressive political situation in the country, accountability options indicated in this study are not implementable immediately. However, the findings and conclusions made in this study can always serve as a basis for future accountability options that can be undertaken in Eritrea or elsewhere.