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ADDIS ABABA UNIVERSITY

SCHOOL OF GRADUATE STUDIES

**THE CONSTITUTIONALITY OF NON DISCLOSURE OF
WITNESS'S IDENTITY FOR THE CRIMINAL
DEFENDANT IN ETHIOPIA**

BY

DESTA MESFIN MKONEN

ADDIS ABABA

JUNE, 2020

**A THESIS SUBMITTED TO THE SCHOOL OF GRADUATE STUDIES OF
ADDIS ABABA UNIVERSITY IN PARTIAL FULFILLMENT OF THE
REQUIREMENT FOR THE AWARD OF THE DEGREE OF MASTER OF
LAWS IN CONSTITUTIONAL AND PUBLIC LAWS**

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Dedication

This thesis is dedicated for those who are convicted by terrorism charges without prior knowledge of the witnesses testifying against them.

Declaration

I, Desta Mesfin Mekonen, declare that this thesis is my original work and where other's works have been quoted; it is clearly indicated and all sources used for this thesis have been duly acknowledged. This thesis is submitted in partial fulfillment of the requirements for the award of the degree of Master of Laws in Constitutional and Public Laws from the College of Law and Governance Studies, Addis Ababa University. I declare that this thesis has never been submitted to this or any other institutions.

Declared by: Desta Mesfin Mekonen

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Acknowledgment

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Acronyms

ABA	American Bar Association
ACPHR	African Charter on Peoples’ and Human Rights
CCI	Council of Constitutional Inquiry
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of human Rights
FDRE	Federal Democratic Republic of Ethiopia
HOF	House of Federation
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal on Rwanda
ICTY	International Criminal Tribunal on Yugoslavia
OLF	Oromo Liberation Front
RPE	Rules and Procedures of Evidence
TPDM	Tigray People’s Democratic Movement
UNHRC	United Nations Human Rights Committee
USA	United State of America

Abstract

The objective of this thesis is to investigate and analyze the constitutionality of non-disclosure of witness' identity and its impact on the right of the accused to a fair trial, cross-examination, and confrontation in Ethiopia. For the purpose of this research qualitative methodology is used. Both secondary and primary data were collected. As far as secondary sources are concerned; books, journal articles, and government enactments are analyzed.. Laws and cases were taken as a primary source. In addition to these key informants, interviews were done with thirteen persons as primary sources. For this purpose the research analyzed to answer the question does the laws and the practices which affirm for the non-disclosure of witness's identity are compatible with the constitutional and human rights principles of accused persons in Ethiopia. As the analysis of data shows, there are proclamations that allow for non-disclosure of witness's identity in Ethiopia. Among them, the Revised Proclamation to Provide for Special Procedure and Rules of Evidence on Anti-corruption, the Prevention and Suppression of Terrorism Crimes Proclamation, and the Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation are some of them. They violate the constitutional rights to confrontation, cross-examination, and fair trial of accused persons. In addition to those laws, the practice done by the Federal Attorney General, Courts, and Council of Constitutional Inquiry concerning the non-disclosure of witnesses identity to accused person also show that the government is giving decisions incompatible with the Federal Democratic Republic of Ethiopia Constitution. Therefore the thesis paper recommends for the amendment of those proclamations in relation to the provisions which allow for non-disclosure of witness identity for accused persons or if those laws are not amended the constitutionality of those provisions should be submitted to the House of Federation for constitutional interpretation and make void pursuant to article 9/1 of the FDRE constitution.

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Chapter One

Introduction

1.1. Background of the Study

The Federal Democratic Republic of Ethiopia /FDRE/ Constitution in chapter three incorporates different human and democratic rights. Among those rights of accused persons are stipulated under article 20 the constitution and among those rights of accused persons, accused persons have a constitutional right to full access to any evidence presented against them and to examine witnesses testifying against them¹. Thus, the right to confrontation is related to the opportunity to effective cross-examination, and the right to cross-examination is recognized in the FDRE constitution. According to article 13/1/ and /2/ of the FDRE constitution, all federal and state-level organs of government have a duty and responsibility to respect and enforce the right of accused persons.

In addition to the FDRE Constitution, the rights of accused persons are also recognized in the International Covenant on Civil and Political Rights/ICCPR/.² Among those rights of the accused person recognized by this covenant is the right to a fair and public trial by a competent, independent, and impartial tribunal established by law, the right to be presumed innocent until proved guilty according to law, to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing, to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him and to prepare his defense. This covenant is ratified by Ethiopia and pursuant to article 9(4) of the FDRE constitution; it is part of the law of Ethiopia. Moreover, pursuant to article 13/2 of the FDRE constitution, it prescribed that fundamental rights and freedoms stipulated in chapter three of the constitution should be interpreted in conformity with the Universal Declaration of Human Rights/UDHR/, International Covenants on Human Rights, and other international instruments adopted by Ethiopia. Thus, according to the FDRE Constitution and international and regional human rights instruments

¹ Federal Democratic Republic of Ethiopia/FDRE/ Constitution, article 20(4).

² International Covenant on Civil and Political Right/ICCPR/, article 14.

the right to fair trial, confrontation, and cross-examination and preparing for the defense of the accused person is recognized.

What consisted of the right to cross-examination is stipulated in different laws, decisions of courts, and explained by different authors. Among those laws, the Indian Evidence Act stipulated that cross-examination consisted of cross-examining about the matters in issue and the creditability of the witness testifying against the defendant.³ According to this law cross-examination to the opponent's witness is allowed or the other party has a right to test his veracity; to discover who he is, to shake his credit by injuring his character, to show him to be unworthy of credit; to prove that the witness has been bribed or has had the offer of bribe or has received any other corrupt inducement to give his evidence and to prove of former statements inconsistent with any part of his evidence. This right could be achieved effectively if the witnesses' identity is disclosed to the accused before the date of cross-examination or trial.

As the writer, Robert Allen Sedler explained the subjects of cross-examination are categorized into two. Those are to cross-examine on the subject matter the witness is testifying about and to cross-examine on the character of the witness which includes the witness is not credible, has made prior statements inconsistent with his testimony in the court, he has a poor reputation for telling the truth and he has been convicted of certain criminal offenses reflecting on his trustworthiness.⁴ Thus, in order to cross-examine the witness testifying against him he should confront him face to face to know his character. Tateq Tadese also explained that cross-examination consisted of questions not only related to the subject matter rather it also includes questions relating the credibility, bad reputation, incapacity to testify, trustworthy, the character of the witness.⁵ Thus, impeachment and discrediting of the witness's testimony is among the characteristics of confrontation.

As Gashaw explained also the right to confrontation is basically a trial right and includes both the opportunity to cross-examine and the occasion for the judge to weigh the demeanor of the

³ Indian Evidence Act, section 146/1, 2 and 3/ and 155/1, 2, and 3.

⁴ Robert Allen Sedler, *'Ethiopia Civil Procedure'*, (Faculty of law Haile Sellasie I University, 1968), pp.203-204

⁵ Tateq Tadese, *'Evidence Law Fundamental Ideas'*, (title in Amharic), (1st Ed. Addis Ababa University, 1997 E.C), pp.200-201

witness.⁶ From this, it is understandable that disclosure of the witness's identity before the date of trial or testimony has an advantage to the accused to prepare his defense in order to make a meaningful cross-examination. Unless the identity of the witness is known to the accused before the date of the trial the accused could not prepare to make an effective and meaningful cross-examination to make the testimony of the witness is incredible. Thus, the defendant should be in a position to understand and what the witness is saying and able to access and challenge the evidence.

But, in Ethiopia, there are laws that allow for non-disclosure of witnesses' identity for the criminal defendant. The laws aiming at non-disclosure of witness's identity in Ethiopia are recognized by different legal acts. Among them, the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation⁷, the Prevention and Suppression of Terrorism Crimes Proclamation⁸, and the Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation⁹ are some of them. There are also non-disclosures in practices or by decisions of the government organs.

Paragraph 3 of the preamble of Witness and Whistleblowers Protection Proclamation no. 699/2010 stipulates the objective of the adoption of this proclamation. According to this preamble, the objective of the proclamation is to protect witnesses and whistleblowers of criminal offense from direct or indirect danger and attack they may face as a consequence thereof and thereby to ensure their safety. Article 4 of this proclamation listed the types of protection measures. Among those measures not to disclose the identity of a witness until the trial process begins and the witness testifies is one of them.¹⁰ The other measure is hearing testimony

⁶Gashaw Sisay Zenebe, 'Admissibility of Hearsay Evidence in Criminal Trials: An Appraisal of the Ethiopian Legal Framework', *Haramaya Law Review*, vol. 5:1(2016), p.131.

⁷Revised Anti Corruption Special Procedure and Rules of Evidence Proclamation No.434/2005/may be cited as Proclamation No.434/2005/, article 38/2/.

⁸The Prevention and Suppression of Terrorism Crimes Proclamation no.1176/2020 (may be cited as Proclamation No.1176/2020), article 16/1/.

⁹ Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation No.699/2010 (may be cited as proclamation no.699/2010)

¹⁰Ibid, article 4/1/h/.

behind the screen or by disguising identity¹¹. Article 16/1 of the Prevention and Suppression of Terrorism Crimes Proclamation 1176/2020 also allows for withholding and non-disclosure of the names and identities of the witness. This is due to the fact that this provision refers to the proclamation which allows for non-disclosure – to Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation No.699/2010. Article 38/2/ of the Revised Proclamation to Provide for Special Procedure and Rules of Evidence on Anti-Corruption Proclamation no.434/2005 also allows for non-disclosure of witnesses' identity to accused persons.

Though those proclamations stated those types of protection measures different practitioners, professionals, accused persons, and academicians claim that this type of measure is the non-disclosure of witnesses' identities and in effect, it is unconstitutional and violates the fundamental rights of the criminal defendants. To the worst of all, it is shown also in the practice in interpreting and applying those provisions in a very wide sense by devoting the principle of criminal law should be interpreted narrowly. The Federal High Court Lideta Division also submitted a case to the Council of Constitutional Inquiry (CCI) for constitutional interpretation. But the CCI gives a decision that non-disclosure of witnesses' identity is constitutional and it does not violate the rights of the accused person to cross-examine a witness testifying against him. The witnesses of the public prosecutor should be also protected from the danger which comes from the accused persons or his relatives. The issue arises, however, regarding the legal and constitutional legitimacy of the non-disclosure of witnesses' identities for the criminal defendant before the time of trial or at the time of trial by different proclamations and the practices such as by decisions of the courts and different government organs. Due to this fact, the writer believed to analyze and studied this issue thoroughly.

1.2. Statement of The problem

The FDRE Constitution recognized 1/3 of its provisions by composing human and democratic rights. Among them, the rights of the accused person are incorporated in article 20 of the constitution. From those rights stipulated in this provision the right to a fair trial, confrontation, and cross-examination of the accused person are some of them. This provision did not stipulate

¹¹Ibid, article 4/1/j/.

any exception on the right of the accused person to cross-examination or opportunity for cross-examination. Thus, pursuant to the FDRE constitution and international human rights instruments ratified by Ethiopia access to evidence and the right to confrontation and cross-examination is a constitutional right and there is no exception to it. But in practice and in different laws the right to know the witnesses and prepare for defense and cross-examination is not respected due to the non-disclosure provision allowed by the Prevention and Suppression of Terrorism Crimes Proclamation no. 1176/2020, Protection of Witnesses and Whistleblowers of Criminal Offence Proclamation no. 699/2010, and the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation no. 434/2005 and the practice. Therefore, the subject matter of this study revolves around the issue of whether the proclamations and practices which allow for non-disclosure of witnesses' identities are constitutionally legitimate when they are seen from the values of the FDRE Constitution.

1.3. The Research Objective

1.3.1. General Objective

The general objective of the study is to investigate and analyze the constitutionality of non-disclosure of witness' identity and its potential impact on the right of the accused persons to a fair trial, cross-examination, and confrontation in Ethiopia.

1.3.2. Specific Objectives

- To analyze the conceptual understanding of the right to confrontation and non-disclosure of witnesses' identity to the accused person.
- To evaluate whether the FDRE Constitution and international human rights treaties ratified or adopted by Ethiopia allow for non-disclosure of witness' identity to the criminal defendant.
- To analyze the legal frameworks and practical responses of our courts and other pertinent government institutions for non-disclosure of witnesses' identity for the criminal defendant in Ethiopia.
- To critically evaluate the constitutionality of Non-disclosure of witness identity in Ethiopia.

1.4. Research Question

1.4.1. General Question

Are the laws and the practices which affirm for the Non-disclosure of witnesses' identity compatible with the constitutional and human rights principles of accused persons in Ethiopia?

1.4.2. Specific questions

- What is the concept of Non-disclosure of witness's identity for the criminal defendant and the right to confrontation?
- What is the position of the FDRE constitution and the international human rights treaties ratified and adopted by Ethiopia concerning the Non-disclosure of witnesses' identities for the criminal defendant?
- What are the legal frameworks and practical responses of our courts and other pertinent government institutions for non-disclosure of witnesses' identity for the criminal defendant in Ethiopia?
- Are the laws and practices which affirm for non-disclosures of witness's identity compatible with the FDRE constitution?

1.5. Significance of the Study

First, the knowledge generated by this study will enable readers to grasp the necessary information with respect to the legal aspect of non-disclosure of the witness's identity for criminal defendants in Ethiopia. Second, the research will try to come up with practical problems, such as allowing for non-disclosure of the witnesses' identities by the court and by the public prosecutor itself and its effect on the right of the accused person. Third, by critical analysis of the FDRE Constitution and the laws which allow for non-disclosure of witnesses' identity for the criminal defendant, it will help for policy and law-making especially for amendment of those laws. Fourth, it will help for accused persons and defense lawyers in invoking the constitutionality of those proclamations and practices. In addition to this, since this research has practical and academic relevance it will contribute to the debate concerning the study and it's being a reference for those who are interested in the study of the subject. In other words, the study will contribute to the literature on the subject. This study may be also used by public prosecutors, attorneys, judges, and students of law as reference material.

1.6. Literature Review

As the literature showed, there is no enough written literature concerning the constitutionality of non-disclosure of the witness's identity for the criminal defendant in Ethiopia. Though Tadesse Melaku wrote an article on The Right to Cross-Examination and Witness Protection in Ethiopia, his main argument is that a recent constitutional ruling by the committee of the Council of Constitutional Inquiry in favor of withholding the identity of prosecution witnesses has failed to properly balance between the right to cross-examine and protecting witnesses.¹² As he explained, the ruling is likely to have a negative effect on fair trial and can adversely affect the fundamental rights of accused persons in Ethiopia. But he did not argue on the constitutionality of the different laws and practices and his subject of study only one case and was not an in-depth study. Thus, there is no enough literature concerning this issue in Ethiopia. But, the experience elsewhere outside Ethiopia shows the constitutionality of non-disclosure of witness's identity for the criminal defendant has drawn the attention of scholars and it is imperative to review some of them for this purpose. Among the literature dealing with this issue, the following are some of them.

As Sangkul Kim explained, in order to effectively exercise the right of the accused person to examine the witnesses against him, the names and identifying information of the prosecution witnesses need to be disclosed to the accused so that he can prepare his defense adequately.¹³ Thus, as to him withdrawing the names and identity of the witnesses should not be allowed. If each party is to confront the evidence of his opponent then parties should have to disclose evidence prior and in advance of the trial¹⁴.

Another writer called Darryl k. Brown also noted that even though, the longstanding norm was that one party need not aid the other's preparation by sharing evidence prior to trial, nowadays all common law criminal justice systems moved away from their tradition of non-

¹²Tadesse Melaku, 'The Right to Cross-Examination and Witness Protection in Ethiopia: Comparative Overview', *Mizan law review*, Vol. 12, No.2 (2018), p.303

¹³Sangkul Kim 'The Witness Protection Mechanism of Delayed Disclosure at the Ad hoc International Criminal Tribunals' *IX Jeil* 1(2016), p.54

¹⁴Darryl k. Brown, *Evidence Disclosure and Discovery in Common law Jurisdictions*, Non-final draft: Forthcoming in *The Oxford Handbook of Criminal Process* (Brown, Turner & Weisser eds., 2018), University of Virginia School of Law, (2018), p.3.

disclosure.¹⁵ Because traditionally common law legal system followers were adversarial and where considering that disclosing a witness of the one party to the opponent was against the adversarial way of litigation. But, thorough time they left this thinking and currently they followed the principle of disclosure of witnesses to the opponent. As to this writer's view, the witness cannot be confronted effectively at trial without advance notice and preparation and effectively challenging witnesses' credibility requires knowledge of their affiliations, interests, or backgrounds. Thus, if there is nondisclosure of witness identity before the time of trial, consequently it has a negative effect on cross-examination and confrontation.

As another writer Joanna Pozen also explained, the argument that the use of anonymous witnesses infringes upon the accused person's right to a fair hearing presumes that the accused person's right to cross-examination of a witness is absolutely indispensable to a fair criminal trial.¹⁶ As an aspect of the right to examine a witness, the defense should have sufficient information about the witness to challenge his or her reliability and to impeach him and to prepare a defense for it.¹⁷

From that literature, although the existing foreign literature deals with the central issue of the right to confrontation and disclosure of witnesses before the date of trial, the Ethiopian literature does not deal with this issue. The writer used those works of literature as an initiation to fill the gap or the problem at hand in Ethiopia.

1.7. The Research Methodology

The approach adopted to undertake this research is qualitative. In order to accomplish the purposes of this research both primary and secondary sources of information are collected. As far as primary sources are concerned the writers analyze the various laws that allow non-disclosure of witness identities. In addition to this, different international human rights documents which have a direct relation to the non-disclosure of witness's identity such as the Universal Declaration of Human Rights /UDHR/, and ICCPR, the European convention on human rights /ECHR/ and the African Charter on Human and Peoples' Rights are analyzed. Other countries'

¹⁵ Ibid, p.3

¹⁶ Joanna Pozen, "Justice Obscured: The Non-disclosure of Witnesses' Identities in ICTR Trials", *International Law and Politics*, vol. 38[2005-2006], p.290.

¹⁷ 'Right of the Suspect and the Accused', available at <<https://www.usip.org/sites/default/files/MC2/MC2-7-Ch4.pdf>> (last accessed on March 25/2019).

experiences and laws are also reviewed for the purpose of analyzing the Ethiopian laws. Moreover, to examine the response given to those laws by the Court and prosecutors Attorney General purposefully selected interviews with concerned three judges of the Federal High Court; five public prosecutor of the federal attorney general working in the organized and transnational crimes directorate is intensely employed. They are selected for the interview because they work for a long time on the terrorism crimes bench and have an experience in giving decisions relating to withholding or non-disclosure of witnesses identity for the criminal defendant.

In addition to this, two legal experts working in the House of Federation /HOF/ is interviewed their view about those laws which allow for non-disclosure of witness identity to the criminal defendant. Three lawyers and consultants of accused persons in crimes of corruption and human right violations are also interviewed. Furthermore, analysis of cases decided by courts and recommendations given by the Council of Constitutional Inquiry/CCI/ is analyzed.

As far as secondary sources books and journal articles are taken as sources. To this end, reviewing relevant literature to compile in a form of over view of what is currently known about the nexus between the non-disclosure of witnesses' identity to the criminal defendant and his rights to confrontation and fair trial is carried out.

1.8. Limitation of the Study

The main limitation that the researcher faced during the study is the lack of cooperation from the archival employees of the courts to show the dead files dealing with the subject matter. The other limitation is key informants don't have the willingness of participants in a free discussion to participate in the study and to provide accurate information. Another problem is, since the cases in the courts are not put in catalog order in the database according to their type, it was time-consuming to search them. In the purposeful interview with a concerned person, they did not disclose information on the designed themes.

1.9. The Research Organization

This research paper is organized in five chapters. The first chapter is an introductory part and provides the general background of the study together with the problems, the research questions, the research objectives, and the significance of the study, the limitations, and the

methodologies employed in the study. In the second chapter, an attempt is made to see the Conceptual understanding of non-disclosure of the witness's identity for the criminal defendant and experience of international and regional tribunals and other states. In this chapter, the concern is given to the theoretical and normative analysis of some ideas that have direct relevance to the study, such as disclosure of witnesses' identities, the right to cross-examination, and the right to confrontation and how these concepts are employed by different states and tribunals and courts.

The third chapter involves an extensive discussion on the position of Ethiopia concerning non-disclosure of witnesses' identity for the criminal defendant in Ethiopia. In this chapter, the right to confrontation and non-disclosure of witness identity for the criminal defendant under the FDRE Constitution and different international human rights treaties ratified by Ethiopia is analyzed. In addition to this, in this chapter, if there are exceptions to this right is analyzed. Moreover, the subjects of constitutionality issue and constitutional interpretation is discussed in this chapter. The fourth chapter focuses on analyzing the Ethiopian proclamations which allow for non-disclosure of witnesses' identities and it intensively analyzes the response to those proclamations by considering decisions of Courts, the Council of Constitutional Inquiry, and the Federal Attorney General and purposefully selected key informants. In the last chapter, the conclusion and recommendation part that summarizes the findings in the study and the proposed recommendations are dealt with.

Chapter Two

Conceptual Understanding of Non-Disclosure of Witness's Identity for the Criminal Defendant and Experience of International and Regional Tribunals and Other States

2.1. Concept of Non-Disclosure of Witnesses' Identity for the Criminal Defendant

2.1.1. Definition

Since the aim of the paper is to analyze the constitutionality of the non-disclosure of witnesses' identities for criminal defendants first it is imperative to define the positive form of non-disclosure- disclosure. As Black's law dictionary defined Disclosure is a divulging of information to the opponent in the litigation. Discovery is a process by which evidence is exchanged between the defense and prosecution prior to trial.¹⁸ The subjects to be disclosed are regarding witnesses, evidence, and objections.

Discovery provides pertinent information allowing each side to adequately prepare for the prospect of a trial and it gives the defendant information on how to plead.¹⁹ If there is no adequate discovery the accused could not get a meaningful opportunity to challenge and test evidence in a fair hearing before a court and it threatens the reliability of outcomes in criminal cases and significantly undermine a defendant's right to due process of law.²⁰ Thus, discovery helps the accused to get a meaningful opportunity to challenge and test evidence in a fair hearing before a court of law and it helps the criminal justice system reach reliable outcomes efficiently in criminal cases.²¹ Discovery is a vital procedural safeguard that protects against wrongful imprisonment, helps to make the legal system more transparent by increasing pretrial disclosure, and ensures a fair procedure by allowing each side in a trial to adequately prepare their case and enhance judicial efficiency.²² In other words, the identity of the witness testifying against him should be disclosed or meet face to face to the accused person. Since non-disclosure is the opposite of disclosure, it can be concluded that non-disclosure is a condition where withholding

¹⁸ The Justice project, 'Expanded Discovery in Criminal Cases: A Policy Review' available at <https://www.pewtrusts.org/.../expanded20discovery20policy20briefpdf> > (last accessed 25 May 2019).

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

the identities of the witnesses and the evidence is done by the operation of the laws or practices. Thus, non-disclosure is a situation whereby the identity of the witness is not disclosed to the accused persons.

As Yogi Berra also explained; ‘the purpose of disclosure is two-fold: to ensure that the accused knows the case to be met, and is able to make full answer and defense; and to encourage the resolution of facts in the issue including, where appropriate, the entering of guilty pleas at an early stage in the proceedings.’²³ He noted that disclosure of the witnesses face to face with the accused helps the accused to prepare effectively.

This right of an accused to face one’s accusers is regarded as an old and venerable tradition and is traced back to Roman law dates back to around 80 – 90 A.C by recognizing that the law could not convict a man before he is given an opportunity to defend himself face to face with his accusers or witnesses testifying against.²⁴ This law clearly recognizes the duty of the opponent party to disclose his witness to the other party. This law in effect recognized the right of confrontation of accused persons to witnesses testifying against them and in effect it guaranteed the right to cross-examination.

The Roman Governor Festus have made also the following comments regarding a prisoner: ‘It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges.’²⁵ As he noted Romans could not give a decision of death to the accused before he confronts and cross-examine the witnesses testifying against him and the charges brought against him.

For several centuries, prosecution witnesses in common-law criminal cases have given their testimony under oath, face to face with the accused, subject to cross-examination by him at trial.²⁶ This shows disclosing a witness to the accused person was

²³Yogi Berra, ‘Disclosure’, available at <<https://www.justice.gov.nl.ca/just/prosect/guidebook/009.pdf>> (last accessed on 25 March 2019).

²⁴‘The Right to Confrontation’, available at <<http://uir.unisa.ac.za/bitstream/handle/10500/1840/09>> chapter9.pdf> (last accessed on May 26, 2019).

²⁵Ibid.

²⁶Richard D. Friedman, ‘Face to Face: Rediscovering the Right to Confront Prosecution Witnesses’, *The International Journal of Evidence and Proof*(2004), p.1.

practicing by common law legal system followers and civil law legal system followers, such as Romans, for a long period of time. It can be concluded that disclosure was recognized as the main instrument to confront the witnesses and accusers testifying against accused persons. Thus, even in ancient times civilization non-disclosure of the witnesses was considered as it is against the right of accused persons and due to this fact non-disclosure was not allowed.²⁷ A witness cannot be confronted effectively at trial by the accused without advance notice and preparation. So, disclosure is one of the fundamental rights of accused persons.

2.1.2. The Relationship between Disclosure of Witnesses' Identities for the Criminal Defendant and the Right to Cross-Examination and Confrontation

Confrontation is composed of two parts: a prosecutorial burden in which the prosecution must produce its witnesses and elicit their testimony at trial in the presence of the defendant and the defense right in which entitlement to confrontation and examination of testifying witnesses to face his accuser, to hear the allegations against him, and to challenge those allegations through cross-examination.²⁸ As Gordon Van Kessel also explained the right to confrontation assumes the right to cross-examination by the respective parties.²⁹

According to Dean Wigmore's definition, this right of accused persons to examine witnesses testifying against them or the right to the opportunity of cross-examination is the right of confrontation.³⁰ He noted that the right of confrontation is the right to the opportunity of cross-examination and also involves a subordinate and incidental advantage, namely, the observation by the tribunal of the witness' demeanor on the stand.³¹ If the accused cross-examined his opponent's witness by confronting face to face, the eye contact and body language of the accused may make to him to testify truthfully. But, if the witness is anonymous and confrontation to him

²⁷ Ibid.

²⁸ Pamela R. Metzger, 'Confrontation as a Rule of Production', *William & Mary Bill of Rights Journal*, Volume 24 | Issue 4(2016), p.998

²⁹ Gordon Van Kessel, 'Adversary Excesses in the American Criminal Trial', 67*Notre dame L. Rev.* 403, 857 (1992) .cited in Kweku Vanderpuye, Traditions in Conflict: The Internationalization of Confrontation, *Cornell International Law Journal*, Vol. 43(2010), P.524

³⁰ Robert B. McKay, 'The Right of Confrontation', *Washington University Law Review*, volume/issue 2(1959), p.123

³¹ Ibid, pp.123-124.

is prohibited eye contact and body language is not possible and there will not be effective cross-examination. Thus, the right of confrontation guarantees the opportunity for effective cross-examination. But this could not do without disclosing the witness to the defendant.

Using confrontation to the witnesses the accused can assess not only the content of their evidence but also their demeanor, facial expressions, body language, and inflections of the voice.³² The importance of confrontation is that the court has an opportunity to observe the witness and determine if he is a credible witness.³³ The Confrontation Clause is said to grant the accused the right to the most accurate truth-determining process.³⁴ The right to Cross-examination is regarded as an example of confronting one's adversary and this right to challenge evidence includes the right to confrontation.³⁵

2.2. The International and Regional Frameworks and Tribunals Experience on Non-Disclosure of Witnesses' Identity for the Criminal Defendant

2.2.1. International Frameworks and Tribunals Experience on Non-Disclosure of Witnesses' Identity for the Criminal Defendant

In this section, the stand of International Covenant on Civil and Political Rights (ICCPR) and the reflection of its committee-the Committee of the International Covenant on Civil and Political Rights (ICCPR), the ad hoc criminal tribunals of International Criminal Tribunal for the former Yugoslavia/ICTY/ and International Criminal Tribunal for Rwanda/ICTR/concerning non-disclosure of witnesses identities to the accused person is analyzed.

2.2.1.1. International Covenant on Civil and Political Rights and the Committee of International Covenant on Civil and Political Rights (ICCPR)

As the International Covenant on Civil and Political Rights (ICCPR) provided in the determination of any criminal charge against an accused, everyone is entitled to the minimum guarantees to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against

³²The Right to Confrontation, (n24).

³³*Lee v Illinois* 476 US 530, 540 (1986), cited in 'The Right to Confrontation' available at <<http://uir.unisa.ac.za/bitstream/handle/10500/1840/09>> chapter9.pdf> (last accessed on May 26, 2019).

³⁴The Right to Confrontation, (n24)

³⁵Ibid.

him.³⁶ Those rights are formulated without restriction.³⁷ Thus, this right has no exception for its application.

The Committee of the International Covenant on Civil and Political Rights decided that there are Violations in relation to the withholding of the names of witnesses from the defense in drug trafficking trials in Columbia.³⁸ The Committee also found In *Espinoza de Polay* those trials involving ‘faceless judges’ were a violation of Article 14(3)(e).³⁹ The Committee does not formulate any exceptions to the right to confront witnesses.⁴⁰ Thus the right to confrontation and cross-examination is guaranteed under the ICCPR and exception to this right is not stipulated by the covenant or by the Committee. Due to this fact, since, member states to the ICCPR have a duty to enforce minimum rights recognized by the covenant state parties are not allowed to allow non-disclosure of witness’ identities to the criminal defendant.

2.2.1.2. International Crime Tribunal of Yugoslavia (ICTY) and International Crime Tribunal of Rwanda (ICTR)

In principle, the international criminal tribunals did not allow non-disclosure of the identity of a witness at the trial stage. The only exception to this is the TADIĆ case which is decided by the International Crime Tribunal of Yugoslavia/ICTY/.⁴¹ Thus, although the international legal community tends to disfavor anonymous testimony or non-disclosure of witnesses because it

³⁶ICCPR, article 14/3/e/.

³⁷M Nowak (1993) UN Covenant on Civil and Political Rights: CCPR Commentary (2005 Ed) p.342, cited in *Tim Welch, Huma Haider, Martin Meenagh, and Yassin M'Boge*, ‘Witness Anonymity at the International Criminal Court: Due Process for Defendants, Witnesses or Both?’ *The Denning Law Journal*, Vol. 23 (2011), p.43.

³⁸Concluding Observations by the Human Rights Committee U.N.Doc.CCPR/C/79/Add.75, 9 April 1997 Paras. 21-40. Cited in *Tim Welch, Huma Haider, Martin Meenagh and Yassin M'Boge*, ‘Witness Anonymity at the International Criminal Court: Due Process for Defendants, Witnesses or Both?’ *The Denning Law Journal*, Vol. 23 (2011), p.44.

³⁹Communication No. 577/1994: Peru. 09/01/1998. U.N.Doc.CCPR/C/61/D/577/1994. Cited in *Tim Welch, Huma Haider, Martin Meenagh and Yassin M'Boge*, ‘Witness Anonymity at the International Criminal Court: Due Process for Defendants, Witnesses or Both?’ *The Denning Law Journal*, Vol. 23 (2011), p.44.

⁴⁰*Tim Welch, Huma Haider, Martin Meenagh and Yassin M'Boge*, ‘Witness Anonymity at the International Criminal Court: Due Process for Defendants, Witnesses or Both?’ *The Denning Law Journal*, Vol. 23 (2011), p.44.

⁴¹*Public Prosecutor V. TADIĆ* case is the first trial of the ICTY. It is available at <https://www.legal-tools.org/uploads/tx_ltpdb/>(last accessed on December 1/2019).

undermines the effectiveness of cross-examination and the reliability of the testimony, the Yugoslavia tribunal⁴² in its first case *Prosecutor v. Tadic* decided, in light of the unique context of the ongoing war, to allow three witnesses to shield their identity from the defense.⁴³ In this case, the trial chamber granted witness anonymity on the prosecutor's motion requesting protective measures for victims and witnesses. Thus, in the international arena non-disclosure of the witness's identity for the criminal defendant was allowed in the *Prosecutor v. Tadic* case. The tribunal decided to allow an anonymous witness to testify because of two reasons: there was the ongoing war in Yugoslavia and there was no effective witness protection program adopted. This is mainly due to the fact that there is no international police and international organs to protect the victims and witnesses.

But, this decision got a deep scholarly debate. Not only a debate rather the Yugoslavia Tribunal's subsequent jurisprudence has indicated discomfort with extending *Tadic*'s precedent of granting anonymous witnesses to other trials.⁴⁴ To minimize this discomfort the *Ad hoc* International Criminal Tribunals of the International Criminal Tribunal on Yugoslavia /ICTY/ and the International Criminal Tribunal on Rwanda /ICTR/ used "the delayed disclosure mechanism" as the key witness protective measures. Through the delayed disclosure mechanism, the prosecutor can temporarily keep the names and other identifying information of witnesses confidential to the accused up until the point in time as determined by a Trial Chamber, mostly sometime before the commencement of the trial.⁴⁵ Thus, delayed disclosure is not disclosure at the time of trial rather it is a mechanism whereby the identity of the witness is not disclosed until another protection mechanism is done but it is disclosed before the date of giving testimony or trial. Either party may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.⁴⁶ As article 69/C/ of both the ICTY and ICTR rules and procedures of evidence/RPE/ prescribed the identity of the victim or witness shall be disclosed within such

⁴² This tribunal is an ad hoc international criminal court established by the UN Security Council to handle cases of war crimes that took place during the conflicts in the Balkans in the 1990s.

⁴³ Pozen, (n16), p.282

⁴⁴ Ibid, p.293.

⁴⁵ Kim, (n13), p.55.

⁴⁶ Ibid, p.57

time as determined by the Trial Chamber to allow adequate time for preparation of the Prosecution and the Defense. From those rules, it can be deduced that even though non-disclosure is allowed but it should be disclosed before the trial is started to create a conducive opportunity for cross-examination.

For instance, the Trial Chamber in *Blaskic*⁴⁷ re-struck the *Tadic* balance between the right of the accused to a fair trial and the right of the witness to protective measures by explicitly favoring the rights of the accused over those of the witness.⁴⁸ In striking this balance, the *Blaskic* Chamber distinguished the periods before and after the commencement of a trial. That is to say, during preliminary proceedings and continuing for a reasonable time before the start of the trial, the right of the accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favors.⁴⁹ By differentiating between pre-trial and trial rights of the accused relative to those of the witness, the *Blaskic* ruling lifted the veil of anonymity in time for the defense to adequately prepare for cross-examination.⁵⁰ *Blaskic* specifically acknowledged the interdependence of the accused person's right to reasonable time for preparation of his case and the time when witnesses must disclose their identities to the defense.⁵¹

In addition to concern for the rights of the accused, the development of the witness protection program at the ICTY also explains the judicial practice of not granting anonymity after *TADIC*. Thus, it can be concluded that during the time of *Tadic* case there was no witness protection program, and in order to protect the witnesses' rights allowing anonymous witness was the better solution. But, since this mechanism is against the right of the accused person in the *Blaskic* case protecting witness right mechanism is done before the trial beginning and if they are protected no need of giving anonymity.

⁴⁷*Prosecutor v Tihomir Blaskic*, (International Crime Tribunal of Yugoslavia, March 3, 2000, file no. IT-95-14-T). it is available at <https://www.icty.org./blaskic/acjug> (last accessed on March 15, 2020).

⁴⁸*Prosecutor V Blaskic*, Case No. IT-95-14-T, Decision on the Application of the Prosecutor Dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses (Nov. 5, 1996), cited in Joanna Pozen, 'Justice Obscured: The Non-disclosure of Witnesses' Identities in ICTR Trials', *International Law and Politics*, vol. 38, [2005-2006], p.293.

⁴⁹Pozen, (n16), pp.293-294.

⁵⁰*Ibid*, p.294.

⁵¹ *Ibid*.

2.2.2. Regional Frameworks and Tribunals Experience on Non-Disclosure of Witnesses' Identity for the Criminal Defendant

2.2.2.1. European Convention on Human Rights/ECHR/ and European Court of Human Rights

Based on the Universal Declaration of Human Rights, the European Convention on Human Rights/ECHR/ was drawn up in 1949 by the Council of Europe.⁵² The ECHR has greatly expanded the conception of the right to examine as a fundamental principle of procedural fairness in criminal proceedings across Europe and has had an appreciable impact upon the right, particularly as administered in Continental systems.⁵³ Article 6(3) (d) of the ECHR provides that everyone charged with a criminal offense has the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The principle is that all evidence must be produced in the presence of the accused with a view to an adversarial argument, and the accused is entitled to take part in the hearing and to have his case heard.⁵⁴

The European Court of Human Rights has posited that the use of anonymous testimony is against the right of the accused to examine the witnesses against him.⁵⁵ The process of withholding the identity of the witnesses violated the rights of the accused, under Article 6 insofar as it: deprived the defense of the very particulars enabling it to demonstrate that the witness is prejudiced,

⁵² 'European Court of Human Rights, Information Document on the Court' (2006), p.1, available at http://www.echr.coe.int/NR/rdonlyres/981B9082-45A4-44C6-829A-202A51B9_4A85/0/ENG_Infodoc.pdf, Cited in Kweku Vanderpuye, 'Traditions in Conflict: The Internationalization of Confrontation', *Cornell International Law Journal* Vol. 43, (2010), p.543.

⁵³ Dennis P. Riordan, 'The Rights to a Fair Trial and to Examine Witnesses Under the Spanish Constitution and the European Convention on Human Rights', 26 *Hastings Const. L.Q.* (1999), p.373,376,407, Cited in Kweku Vanderpuye, 'Traditions in Conflict: The Internationalization of Confrontation', *Cornell International Law Journal* Vol. 43, (2010), p.548.

⁵⁴ Kweku Vanderpuye, 'Traditions in Conflict: The Internationalization of Confrontation', *Cornell International Law Journal* Vol. 43, (2010), p.55.

⁵⁵ *Kostovski v. The Netherlands*, 166 Eur. Ct. H.R. (ser. A) pp.44– 45, at 21; Cited in Kweku Vanderpuye, 'Traditions in Conflict: The Internationalization of Confrontation', *Cornell International Law Journal* Vol. 43, (2010), p.551.

hostile or unreliable.⁵⁶ The European Court determined the witnesses' anonymity during the investigation and subsequent trial impermissibly restricted the defendant's right to fair trial.⁵⁷

For instance, the European Court of Human Rights made the following pertinent remarks regarding the right to confrontation, in *Kostovski v The Netherlands*:

'If the defense is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile, or unreliable. Testimony or other declarations inculcating an accused may well be designedly untruthful or simply erroneous and the defense will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility.'⁵⁸

The European Court of Human Rights' decision in *Kostovski v. The Netherlands*⁵⁹ rejected the prosecution's request for anonymous witnesses to testify by reasoning that if the accused is unaware of the identity of the person it seeks to cross-examine, it deprived him to demonstrate that he or she is prejudiced, hostile, or unreliable and such testimony involved limitations on the rights of the defense which were irreconcilable with the guarantees contained in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁶⁰ Thus, the court requires, the presence of the witnesses at the trial, so that the accused is accorded an effective opportunity to challenge the evidence against the accused and to check the truthfulness and reliability of the witness evidence.

⁵⁶Vanderpuye, (n53), p.552

⁵⁷Mayali v. France, App. No. 69116/01, p. 36– 38, June 14, 2005 ,[http://cmiskp.echr.coe.int/tkp197/view.asp?action;](http://cmiskp.echr.coe.int/tkp197/view.asp?action;Cited%20in%20Kweku%20Vanderpuye%20%2C%20%22Traditions%20in%20Conflict%3A%20The%20Internationalization%20of%20Confrontation%22%2C%20Cornell%20International%20Law%20Journal%20Vol.%2043%2C%20(2010)%2C%20p.553.)
Cited in Kweku Vanderpuye , “Traditions in Conflict: The Internationalization of Confrontation”, *Cornell International Law Journal* Vol. 43, (2010), p.553.

⁵⁸ ‘The Right to Confrontation’, (n24)

⁵⁹*Kostovski v. Netherlands*, 166 Eur. Ct. H.r. (ser. A) At 6 (1989), cited in Joanna Pozen, ‘Justice Obscured: The Non-disclosure of Witnesses’ Identities in ICTR Trials’, *International Law and Politics*, vol. 38[2005-2006], pp.290-291.

⁶⁰Pozen, (n16), pp.290-291

2.2.2.2. African Charter on Peoples' and Human Rights/ACPHR/

The African Charter on Peoples' and Human Rights is one of the regional human rights instruments which recognize the rights of accused persons. According to this charter, every accused person has the right to defense.⁶¹ The right to defense could not be effectively enforced without disclosure of the witness who testified against him. In addition to this, the charter also recognizes the right to presumption of innocent until proved guilty.⁶² Even though the right to cross-examination is stipulated in this provision expressly, tacitly it can be concluded that the right to cross-examination is related to the right to presumption of innocence and defense. From those provisions, it can be deduced that in order to defend what is testified against him, the person who testified should be disclosed to the accused. If the witness testifies without disclosing his identity, the opportunity to cross-examine him will be less and it has a negative impact on the right to presumption of innocent recognized by the charter.

As it is stipulated under article 1 of the charter, State parties to the charter undertake to adopt legislative or other measures to give effect to them. State parties are duty-bound to adopt laws that respect the right to presumption of innocence and the right to defense of accused persons enshrined in the charter. Thus, if states adopt a law that has a negative impact on the right to defense and presumption of innocent, such as a law allowing non-disclosure of witness' identities for the criminal defendant it is against this charter.

2.2.3. Other Countries Experience on Non-Disclosure of Witnesses' Identity for the Criminal Defendant

Even though the thesis is not a comparative thesis, but in order to take a lesson from other countries' experience, the writer analyzed the United States of America and English courts as follow.

2.2.3.1. United States of America /USA/

In the United States of America /USA/ Constitution, the right to confrontation is recognize. This is because of the fact that the sixth amendment of the USA constitution provided that in all criminal prosecutions; the accused shall enjoy the right to be confronted with the witnesses

⁶¹African Charter on Peoples' and Human Rights, article 7/1/c/.

⁶²Ibid, article 7/1/b/.

against him. Thus, the USA constitution did not allow for non-disclosure of a witness for the defendants.

The American Courts in different cases decided that cross-examination consisted not limited to matters brought out on direct examination only rather to questions of all circumstances within the witness's knowledge that explain, qualify, discredit, or destroy his direct testimony. For instance, in *Mattox v United States*⁶³ In the first case to interpret the Confrontation Clause, the American Supreme Court remarked that the Sixth Amendment grants accused individuals the right to be confronted by their accusers and to cross-examine the witnesses. In addition to this the court stated that the function of the Confrontation Clause is to provide the accused with an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief'.⁶⁴

In addition to this, the Ohio Supreme Court in *State v. Roberts*, concluded that the right of confrontation meant the right to cross-examine and that the purpose of the Confrontation Clause was to guarantee to defendants the right to cross-examine adverse witnesses and it requires the witness' attendance in court so that the jury might assess his demeanor.⁶⁵ Thus, if the witness is not brought face to face with the accused person his right to cross-examination and impeaching that he is not credible could not be achieved. In *Crawford v. Washington*, the Supreme Court decided that 'a witness's testimony against a defendant is inadmissible unless the witness appears at trial or if the witness is unavailable and the defendant had a prior opportunity for cross-examination'.⁶⁶

⁶³*Mattox v United States*, 156 US 237, 242-43 (1895), Cited in 'The Right to Confrontation', available at <<http://uir.unisa.ac.za/bitstream/handle/10500/1840/09>> chapter9.pdf> (last accessed on May 26, 2019).

⁶⁴'The Right to Confrontation', available at <<http://uir.unisa.ac.za/bitstream/handle/10500/1840/09>> chapter9.pdf> (last accessed on May 26, 2019)

⁶⁵Christopher C. Manthey and Carol G. Simonetti, 'Constitutional Law: Sixth Amendment, Right of Confrontation Unavailable Witness, *Akron Law Review*, and Vol. 12:3 (1979), p.577.

⁶⁶*Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009), Cited in Pamela R. Metzger, Confrontation as a Rule of Production, *William & Mary Bill of Rights Journal*, Volume 24 | Issue 4(2016), p.1022.

The American Supreme Court in the case of *Melendez-Diaz v. Massachusetts* decided drug analysis report by an expert technician to reject it is as evidence due to the fact that it is not cross-examined and it is against the right to confrontation.⁶⁷ In *Melendez-Diaz* the accused was arrested for a street sale of cocaine and three 'certificates of analysis' prepared by a laboratory technician attesting to the fact that the substance identified as cocaine was produced against him in the trial and the trial court convicted him was convicted of distributing and trafficking cocaine, which he appealed without success to the Massachusetts Court of Appeal., but the supreme court of America reversed the decision by reasoning that the accused did not get the opportunity to cross-examine the expert's analysis certificate.

In 1994, the American Bar Association (ABA) also issued new standards related to criminal discovery.⁶⁸ For instance, the ABA recommends disclosure of tangible objects; information related to witnesses, including names, addresses, and statements; expert witness information, including qualifications.⁶⁹ The ABA also recommends remedies for the suppression of or violation of the obligation of disclosure. Among the ABA's recommended remedies for the suppression of disclosure rule or obligations are orders to produce discoverable evidence, trial continuances, exclusion of the withheld/non disclosed/ evidence, or personal sanctions are some of them.⁷⁰ Thus, the ABA recommends the guarantee of disclosure of witnesses' identities for the criminal defendants.

2.2.3.2. England

English courts consider disclosure prior to trial as it is the obligation for prosecutors as essential to a fair trial and a requirement of the equality of arms principle, by rejected the longstanding argument in the common law world that trial by surprise or ambush serves the truth-finding enterprise.⁷¹ Currently, even common law legal systems including England are following the

⁶⁷*Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009), cited in Kweku Vanderpuye, 'Traditions in Conflict: The Internationalization of Confrontation', *Cornell International Law Journal*, Vol. 43(2010), p.529.

⁶⁸ The Justice Project, (n18)

⁶⁹ Ibid

⁷⁰ Ibid

⁷¹*R v. Brown* [1994] 1 WLR 1599, at 1606; *R. v. Chorley Justices and Another* [2006] EWHC 1795; *R v. DPP ex parte Lee* [1999] 2 All ER 737, [1999] 1 WLR 1950; *R v. Ward* [1993] 96 Cri, App. 1, 51, cited in Darryl K. Brown,

obligation of disclosure. Using this obligation the identity of the witness' will be known to the opposite party and it will create a conducive opportunity for cross-examination and confrontation.

'Evidence *Disclosure and Discovery in Common Law Jurisdictions*', (University of Virginia School of Law, 2018), p.5.

Chapter Three

The Constitutional Base of Disclosure of Witnesses' Identities for the Criminal Defendants in Ethiopia

3.1. Subjects and Effects of Constitutionally Issues in Ethiopia

The FDRE Constitution provided that any law, customary practice or a decision of an organ of state or a public official which contravenes the Constitution does not have an effect.⁷² Thus, pursuant to this provision the constitutionality issue arises in three scenarios. Those are when a law contrary to the constitution is adopted, there is a customary practice contrary to the constitution, or when there is a decision of a state contrary to the constitution. If those conditions are claimed to exist there will be a constitutional interpretation by the organ which has the power to interpret the constitution. In Ethiopia, the power to interpret the constitution is given to the HoF.⁷³ By way of constitutional interpretation, the law, practice, or decisions that contravene the constitution will be unconstitutional. This is also reflected in article 84/2/ of the FDRE constitution by stating that if there is any federal or state law contrary to the constitution, it is subject to interpretation for its constitutionality.

Based on those scenarios the writer analyzes whether there is any law or decision of the organs of the state which contravene the constitutional rights stipulated in the FDRE Constitution in relation to non-disclosure of witness's identity to the criminal defendant. This is because the constitutional issue arises not only in relation to law rather it is also related to the decision of the government. Thus, the subjects of the constitutional issue are laws, practices, and decisions made by the government organs.

⁷²FDRE Constitution, article 9(1).

⁷³ Ibid. articles 62/1/ and 83/1/.

3.2.The FDRE Constitution’s Positions Concerning Non-Disclosure of Witnesses’ Identity for the Criminal Defendant in Ethiopia

Among, the fundamental principle of the FDRE constitution, transparency is one of them. As article 12/1/of the FDRE constitution stated that the conduct of affairs of government shall be transparent. The government consists of three organs: the legislative, executive, and judiciary organs. Thus, all organs of government have a duty to perform their responsibilities in a transparent way. As the judiciary organ's main responsibility is analyzing the fact to the law, it is expected to get those facts in a transparent way. So the court should hear the witnesses in a transparent way. Thus, if the court hears anonymous witness which could not be seen by the public and the accused, it is against the principle of transparency. In addition to this pursuant to article 13/1 of the 1995 FDRE constitution, all Federal and State legislative, executive and judicial organs at all levels have the responsibility and duty to respect and enforce the provisions of Chapter three of the FDRE constitution. Thus, the legislative organ could not make a law which is contrary to the right stipulated under chapter three of the FDRE Constitution and the executive organ cannot implement action or practices contrary to chapter three of the FDRE constitution. If those organs perform their responsibility contrary to chapter three of the constitution their act will be brought to constitutional interpretation and will be unconstitutional and has no effect pursuant to article 9/1/ of the FDRE Constitution.

Among the rights which are provided under chapter three of the FDRE Constitution, includes the right of accused persons for the right to full access to any evidence presented against them, to examine witnesses testifying against them, to adduce or to have evidence produced in their own defense, and to obtain the attendance of and examination of witnesses on their behalf before the court, to confrontation, cross-examination, prepare a defense and fair trial are some of them.⁷⁴ Thus the right of accused persons to cross-examination a witness testifying against them and confrontation is recognized by the FDRE Constitution.

The FDRE Constitution does not provide an exception to this right. If the constitution wants an exception it would have stipulated an exception in a clear way like the right to a public trial. The right to a public trial is stipulated under article 20/1 of the FDRE constitution and the right to full access to any evidence presented against them, to examine witnesses testifying against them is

⁷⁴Ibid, article20(4).

stipulate under sub-article 4 of the same article. But this sub-article did not stipulate any specific limitation and the constitution does not have a general limitation clause. So the intention of the constitution-makers is clear that they intentionally and purposely leave from stipulating any limitation or exception to the applicability of this right.

The writer goes more than reading the textual meaning of the FDRE Constitution. The writer also read the historical making of the FDRE Constitution to know the intention of the constitution-makers. Thus, according to the constitutional draft approved by the council of representatives explanation, though the right to public trial stipulated in sub-article of 20 provided an exception but in the case of the right to cross-examination and confrontation, it does not put any exception.⁷⁵ In the discussions conducted by the constitutional commission, by the council of representatives, and by the constitutional assembly, the exception to the right to cross-examination, confrontation, and fair trial is not raised. Thus, in the FDRE Constitution non-disclosure of the witness's identity for the criminal defendants is not allowed.

3.3. International Human Rights Ratified or Adopted by Ethiopia's positions Concerning Non-Disclosure of Witnesses' Identity for the Criminal Defendant

The right to examine one's accusers is universally reflected in regional and multilateral treaties.⁷⁶ There are many human rights relating to the rights of accused persons, in relation to the disclosure obligation of the public prosecutor. But, since the scope of the paper is to deal with international treaties ratified or adopted by Ethiopia, the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) are the prominent ones at the international level adopted and ratified by Ethiopia. In this paper, UDHR and ICCPR are analyzed as a baseline for the constitutionality of the non-disclosure of the witnesses' identity to accused persons due to the fact that they are adopted and ratified by Ethiopia and pursuant to article 13/2/ of the FDRE Constitution the right to confrontation and cross-examination stipulated under article 20/4/ of the constitution are to be interpreted in line with those treaties.

⁷⁵ Short explanations to the Council of Representatives Approved Constitutional Draft, October 18, 1994

⁷⁶Vanderpuye, (n54), p.515

3.3.1. The Universal Declaration of Human Rights (UDHR)

Though the UDHR is not a binding human right document, it provided some protections for the right of accused persons. It recognized the entitlement of for accused person, the right for full equality to a fair hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.⁷⁷ This declaration did not stipulate any provision which allows for non-disclosure of witnesses' identity to the criminal defendant. To have an equal and fair trial opportunity for it should be there. One of the opportunities for achieving a fair trial is there should be cross-examination and confrontation against the witnesses testifying against the accused.

3.4.2. The International Covenant on Civil and Political Rights (ICCPR)

The ICCPR emerged as a product of the failure of United Nations member states to reach a consensus on making the Universal Declaration of Human Rights (UDHR) binding.⁷⁸ Article 14 of the ICCPR requires that in every phase of the trial process the parties should be considered procedurally equal and thus be placed in an equal position to advance their respective cases.⁷⁹ The right of accused persons to cross-examination for witnesses testifying against them is provided in article 14(3) (e). As it is provided in article 14/1 of the covenant the right to a fair trial is recognized. Pursuant to article 14/3/e/of the ICCPR, accused persons have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. This has been concretely interpreted to mean that the prosecution must inform the defense of the witnesses it intends to call at trial within a reasonable time prior to the trial so that the defendant may have sufficient time to prepare his/her defense.⁸⁰ This covenant granted the right to

⁷⁷Universal Declaration of Human Rights/UDHR/, article 10.

⁷⁸Vanderpuye, (n54), p.538

⁷⁹See *Ofner and Hopfinger v. Austria*, 1963 Y.B. Eur. Conv. H.R. 680, 696 (Eur. Comm'n on H.R.); Cited in Kweku Vanderpuye, "Traditions in Conflict: The Internationalization of Confrontation", *Cornell International Law Journal* Vol. 43(2010), p.539.

⁸⁰Lawyers Committee for Human Rights, 'What Is a Fair Trial? A Basic Guide to Legal Standards and Practice' March 2000, p.18, available at <https://www.humanrightsfirst.org/wp-content/uploads/pdf/fair_trial.pdf> (last accessed on June 2/2019)

disclosure of witness' identities and confrontation and there is no limitation to it. Thus, this convention did not allow for non-disclosure of witnesses' identity to the criminal defendant.

The United Nations Human Rights Committee /UNHRC/ interpreted this provision as it was designed to guarantee the accused the same legal powers of examining or cross-examining any witnesses as are available to the prosecution.⁸¹ UNHRC jurisprudence suggests that the right to examine arguably requires a component of effectiveness in cross-examination.⁸² If the witness is not disclosed there could not be effective cross-examination and due to this fact, the fundamental principle of a fair trial will deviate. Due to this fact, state parties could not allow for non-disclosure of witnesses' identity for the criminal defendant.

3.4. Types of Non-Disclosure of Witnesses Identity for Criminal Defendant in Ethiopia

In addition to the FDRE Constitution's and international human rights treaties ratified or adopted by Ethiopia, the writer analyzed whether non-disclosure of witness identity to the criminal defendant is provided or not by other subsidiary laws. In doing this the writer identified that the Revised Proclamation to Provide for Special Procedure and Rules of Evidence on Anti-Corruption, Prevention and Suppression of Terrorism Crimes Proclamation, and the Protection of Witness and Whistleblowers of Criminal Offence Proclamation allow for two types of non-disclosure of witnesses identity to the criminal defendant. Those are non-disclosure until trial and the witness give testimony, and hearing testimony behind a screen or by disguising identity. In practice, there is also non-disclosure of the witnesses' identity at the time of trial or testimony. This is done by invoking by those proclamations and article 145 of the criminal procedure code.

3.5.1. Non-Disclosure Until Trial and the Witness Give Testimony

Non-disclosure until trial and the witness gives testimony is provided in article 4(1)(h) of the Protection of Witness and Whistleblowers of Criminal Offences Proclamation no.699/2010. This type of non-disclosure is a type of disclosure in which the name, address, and identity of the

⁸¹U.N. Human Rights Comm., *General Comment 13: Article 14*; see also *Compass v. Jamaica*, U.N. Human Rights Comm., Communication No. 375/1989, Cited in Kweku Vanderpuye, 'Traditions in Conflict: The Internationalization of Confrontation', *Cornell International Law Journal* Vol. 43(2010), p.541.

⁸²Vanderpuye, (n54), p.543

witness listed in the criminal charge is not disclosed to the accused until the date of trial or the witness is supposed to give testimony. In this case, the accused could not know who the witness is before the date of giving testimony. So, the accused could not prepare about the background, reputation, and credibility of the witness to ask him in cross-examination.

3.5.2 Non-Disclosure at the time of Trial/Anonymous Witness/

As Andra le Roux--Kemp defined Witness anonymity refers to witnesses who provide testimony in criminal proceedings without being seen, heard, or identified by the accused or his legal representative.⁸³ This type of non-disclosure is a type of disclosure in which the name, address, and identity of the witness listed in the criminal charge are not disclosed to the accused at any stage of the litigation. In this case, the accused could not know who the witness is giving testimony. The witness could not be seen by the accused even in the date of hearing of the witness's testimony. Since the accused person could not confront the witness and he did not know who is testifying against him, could not prepare about the background, reputation, and credibility of the witness to ask him in cross-examination.

Non-disclosure even at the time of trial or anonymous witness is provided in article 4/1/j/ of the Protection of Witness and Whistleblowers of Criminal Offences Proclamation no.699/2010. It is also provided in article 38/2/ of the Revised Proclamation to Provide for Special Procedure and Rules of Evidence on Anti-corruption.

⁸³Andra le Roux—Kemp, ‘*Witness Anonymity and the South African Criminal Justice System; SACJ*’, (City University of Hong Kong, 2010), p.353

Chapter Four

The Legal and Practical Aspect of Non-Disclosure of Witnesses' Identity for the Criminal Defendant in Ethiopia and its Constitutionality

4.1. The Legal Frame Works for Non-Disclosure of Witness's Identity in Ethiopia and its Constitutionality

The Ethiopian laws have failed to put guidance on how to resolve the conflicting rights of the accused and the protection of the witness. Rather they broaden the gap by allowing withholding and non-disclosure of witnesses' identity at the stake of the accused persons for the right fair trial, cross-examinations, and confrontation provided by the FDRE Constitution. In this section the Revised Proclamation to Provide for Special Procedure and Rules of Evidence on Anti-corruption, the Prevention and Suppression of Terrorism Crimes, and the Protection of Witness and Whistleblowers of Criminal Offence proclamations constitutional base is dealt. In addition to those laws, the practice or response of different government organs concerning the application of withholding the identities of witness identity's constitutional base is analyzed.

4.1.1. The Non-Disclosure of Witness's Identity in the case of the Prevention and Suppression of Terrorism Crimes and its Constitutionality

The writer analyzed the FDRE Constitution and the constitutional assembly's minutes that non-disclosure of witnesses' identity is not allowed. This is because while article 20/4/ of the FDRE Constitution granted the right to cross-examination and access to the witnesses testifying against him as a principle. It does not put any limitation to this right whether in specific or general limitation clauses. Thus access to evidence or disclosure of witnesses' identities is a constitutional right stipulated in the FDRE Constitution.

Even though, the FDRE constitution granted to the accused person the right to confront the witness testifying against them, according to article 16/1/ of the Prevention and Suppression of Terrorism Crimes Proclamation allows for withholding and non-disclosure of the identities and addresses of the witnesses.⁸⁴ This non-disclosure of witnesses' identities minimizes the opportunity to cross-examination and confrontation against those witnesses. Beyond the

⁸⁴ This provision cross-refers to the Protection of Witness and Whistleblowers of Criminal Offence proclamation no.699/2010, which allowed for non-disclosure of witnesses' identities.

constitutional assembly's minute and the FDRE Constitution, the writer also analyzed the minute of the draft of the Prevention and Suppression of Terrorism Crimes proclamation. In the minutes of the draft of the Prevention and Suppression of Terrorism Crimes Proclamation the idea of whether article 16/1 of the provision which allows for non-disclosure of witnesses' identity is contrary to the constitutional rights of the accused person or not is not raised at any level of discussion.⁸⁵ So, even if it is not raised since the constitution did not provide an exception and criminal law should be interpreted narrowly and in favor of the accused this provision is unconstitutional.

4.1.2. The Non-Disclosure of Witness's Identity in the case of Witness and Whistleblowers Protection Proclamation of Ethiopia and its Constitutionality

In Ethiopia, a proclamation aiming in protecting witness and whistleblowers of criminal offense is adopted via proclamation no.699/2010. This proclamation focuses not on the due process of the law model rather it focuses on the crime control model. This crime control model is reflected in the first paragraph of the preamble of the proclamation by saying the objective of the proclamation is to ensure the safety and security of the public by having criminal offenders brought to justice and sustains the right penalty. From this, it is clear that the right of the accused is not taken into account of consideration by this proclamation. As article 4/1/h and /j of this proclamation prescribed not to disclose the identity of a witness until the trial process begins and the witness testifies, and hearing testimony behind the screen or by disguising identity are some of the witness protection measures allowed by the law. In short the proclamation allowed for anonymity of the witness until the trial date and anonymity even at the time of trial. In both types of non-disclosure of the witness's identity, the accused will not know the witnesses before the date of the trial and could not prepare for cross-examination.

Since the FDRE Constitution does not provide any limitation to the right to confrontation and cross-examination; the writer also analyzed the Ethiopian Constitutional Assembly Minute to understand how the provision was adopted and whether the issue of limitation to this right is raised. Based on this constitutional assembly minute there is no any idea raised for discussion that it has an exception, rather a member from region 05 Ato Mohamed Tahir said that if a

⁸⁵ A short explanation of the Draft of Anti-Terrorism Proclamation, the FDRE 3rd House of Peoples Representative 4th year session adopted proclamations, public discussions, and recommendations, volume 3(2009), pp.1012-1085.

person is accused he has the right to oppose the witnesses and cross-examine that the witnesses are opponent of the accused and they are not credible.⁸⁶ His idea is all about the right to confrontation and cross-examination of the accused against the opponent parties witness rather than giving a limitation on those rights.

Beyond the constitutional assembly's minute, the writer also analyzed the minute of the draft of the Protection of Witnesses and Whistleblowers of Criminal Offence Proclamations. But in the draft of Witness and Whistleblowers Proclamation, the issue of whether non-disclosure of witness identity or anonymous witness limits the right of the accused person stipulated in the FDRE constitution is explained.⁸⁷ In this explanation, it explained that the disgusting of witness from the accused person has violated the constitutional rights of the accused in two ways. Those are one thing if the witnesses give testimony by disgusting their identity, the accused could not see the witness face and demure him and second, knowing the identity of the witness helps the accused to know the background of the accused to impeach his testimony but if it is not disclosed the accused could not use this right. It explained that though the proclamation concerning non-disclosure of witnesses identity limits the constitutional right of the accused person, it should be weighted with the collective security of the people and explained that the main aim of giving protection to witness and whistleblowers are not protecting the eligible persons for protection rather by creating a comfortable condition for disclosure of committed crimes to protect the general security of the public.

The minute explained that the non-disclosure or allowing of anonymous witness to testify against the accused person violates the constitutional rights of the accused persons but it considers the general public security as an exception and allows for non-disclosure of the identity of the witnesses for the criminal defendant. From this though they understand that the constitutional right of the accused person is violated but they consider this an exception to the FDRE Constitution. Thus, even if admitting by the lawmaker as it is unconstitutional is a good thing but since exception should be interpreted narrowly and the lawmaker cannot provide any

⁸⁶ Minutes of the Ethiopian Constitutional Assembly, November 10-17/1994, pp. 82-84.

⁸⁷ The FDRE, 4th House of Peoples Representative 1st year session, Adopted Proclamations, Public Discussions and Recommendations, Volume 1, Short Explanation of The Draft of Protection of Witnesses and Whistleblowers Proclamation, 2010, pp.307-308.

limitation to the constitution which is not provided in the FDRE Constitution, it is unconstitutional.

4.1.3. The Non-Disclosure of Witness's Identity in the case of the Revised Proclamation to Provide for Special Procedure and Rules of Evidence on Anti-Corruption and its Constitutionality

As article 38/2/ of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation no.434/2005 stipulated unless it is deemed necessary to keep secret the identity of the witnesses upon the application of the prosecutor and court authorization, the witness who will speak to those facts should be disclosed. From the contrary meaning of this provision it can be deduced that if there is a necessity to make the witness secret, they could testify against the criminal defendant without disclosing their identity to the accused. This is a clear non-disclosure of witness identities to the criminal defendant in Ethiopia.

4.2. Practical Aspect of Non-Disclosure of Witness's Identity in Ethiopia and its Constitutionality

4.2.1. Courts

In Ethiopia, courts have the responsibility and duty to respect and enforce the provisions of Chapter three of the FDRE Constitution.⁸⁸ In addition to this, the fundamental freedoms and rights stipulated in chapter three of the FDRE Constitution should be interpreted in conformity with the principles of UDHR and other international treaties ratified by Ethiopia.⁸⁹ Among the fundamental rights stipulated in chapter three of the FDRE Constitution the right of accused persons to access evidence brought against them and to cross-examine witnesses testifying against them are some of them.⁹⁰ Thus, courts have a responsibility to respect and enforce the right of an accused person for confrontation and cross-examination and to do this to interpret those rights applicability in conformity with UDHR and other international treaties ratified by Ethiopia. Thus, courts should decide cases by adhering to the right of accused persons for confrontation and cross-examination for witnesses testifying against them stipulated under article

⁸⁸ FDRE constitution, article 13/1/.

⁸⁹ Ibid, article 13/2/.

⁹⁰ Ibid, article 20/4/.

20/4/ of the FDRE Constitution and different international instruments adopted and ratified by Ethiopia.

To examine the response of the courts regarding the laws which allow for non-disclosure of witnesses' identities for the criminal defendants, the writer analyzes cases decided by courts to know whether the courts are allowing non-disclosure of the identities of witnesses' for the criminal defendant or not. The cases are decided by Federal High Court Lideta Division 4th and 19th Criminal Benches. In addition to these cases decided by the Federal High Court Lideta Division, Corruption Crimes Criminal Benches are decided. Those benches decision concerning non-disclosure of witness identity is inconsistent and is not predictable and worsen the problems in the proclamations by doing the following variety of problems.

First, among the decisions of the courts, although article 32/1/ of the Anti-Terrorism Proclamation no.652/2009⁹¹ prescribed that before the court allows for the withholding of the name and identity of the witness the court should be satisfied that the life of such witness is in danger, the courts failed to analyze whether there is a need of non-disclosure of the witness identity to the accused is the prior one.⁹² In addition to this, courts allow for non-disclosure even if the witness does not object to the disclosure of his identity and there is no reasonable basis to believe that the disclosure will lead to interference with the witness safety.⁹³ Instead, the courts have relied on the application made by the public prosecutor to justify its practice of non-disclosure of witness's identity without sufficient analysis of the grounds for non-

⁹¹is repealed and replaced by Prevention and Suppression of Terrorism Crimes proclamation no.1176/2020 since the latter also recognized for non-disclosure of witness identities via its article 16/1/, it has no major difference with the prior proclamation.

⁹² Interview with, KasahunAwraris, Federal Public Prosecutor in the Federal Attorney General, March 15, 2019, Interview with, Said Hasen, Federal Public Prosecutor in the Federal Attorney General, May 15, 2020, Interview with, WondmMeasho, Federal Public Prosecutor in the Federal Attorney General, March 15, 2019, Interview with, Hana Mebratu, Federal Public Prosecutor in the Federal Attorney General, March 15, 2019, Interview with, MekuriyaAlemu, Federal Public Prosecutor in the Federal Attorney General, March 30, 2019, interview with AberaAmare, a judge in the Federal High Court, March 30, 2019, interview with KebedeTadese, a judge in the Federal High Court, March 30,2019, and interview with MulugetaKidane, a judge in the Federal High Court, March 30, 2019.

⁹³Ibid

disclosure.⁹⁴ Even though the proclamation said in determining the type of protection measure to be provided to a protected person, the nature of the imminent danger to which the protected person is exposed shall be taken into account, but in practice, the courts did not consider the nature of imminent danger and in every case, if the public prosecutor asks for non-disclosure the court allows for withdrawing of the identities of the witnesses until the date of the trial. The courts did not consider several factors required by the law in giving decisions for withholding on non-disclosure of the witnesses' identity.⁹⁵

One example of the courts' inappropriate reliance on the application of the public prosecutor's motion without analyzing the sufficiency of the reason for non-disclosure appears in the case between the *Federal Public Prosecutor v. Tsegaye Alemu Asana et al*⁹⁶. They were accused of two charges: Four of the defendants were accused of violating article 32/1, 35, and 38/1 of the FDRE criminal code and article 4 of the Anti-Terrorism Proclamation no.652/2009 being a member of the designated terrorist organization Oromo Liberation Front/OLF/ attempted to commit a crime of terrorism and five of them were accused of violating article 32/1 of the FDRE criminal code and article 7/1/ of the Anti-Terrorism Proclamation no.652/2009 being a member of the designated terrorist organization Oromo Liberation Front/OLF/ participate as a member of a terrorist organization. In this case, the public prosecutor asked to the court to allow for non-disclosure of the witnesses identity under article 32 of the Anti-Terrorism Proclamation no.652/2009 and the court allow for non-disclosures without taking in to account whether there is danger on the safety of the witness by the mere fact that they are charged in terrorism crime.

Second, sometimes the courts do not litigate whether non-disclosure should be allowed or not rather the public prosecutor informs the court that it did not disclose by itself without the decision of the court.⁹⁷ For instance in the case between *Federal Public Prosecutor V. Dribsa Damtie Jotie et al*⁹⁸ the public prosecutor informs the court in the charge by saying he

⁹⁴Ibid

⁹⁵ Ibid

⁹⁶*Federal Public Prosecutor vs. Tsegaye Alemu Asana et al 9 defendants (Federal High Court, Lideta Division, 19th Criminal Bench, 2/11/2010 E.C, File No.192412) (unpublished).*

⁹⁷Interview with, (n92)

⁹⁸*Federal Public Prosecutor V. Dribsa Damtie Jotie et al 17 defendants (Federal High Court, Lideta Division, 19th Criminal Bench, 3/3/2011 E.C, File No.186478) (unpublished).*

does not disclose the identities and names of the public prosecutors' witness for the accused. The court received and tried the charge and did not litigate the litigant parties regarding the issue to disclose or non-disclosure of the witness's identity rather it affirms the view of the public prosecutor for non-disclosure of the witness's identity.

In the case of *Federal Public Prosecutor V. Abebe Temesgen Getahun et al*⁹⁹ the federal public prosecutor mention in its charge that the identity of the witness is not disclosed to the accused and the court accepted the charge. The public prosecutor does not even request for the non-disclosure of the witness's identity rather it decided by itself and the court confirms it without asking the opinion of the accused. In the case of *Federal Public Prosecutor V. Nebyi Siraj Fenino et al*¹⁰⁰ they were accused of violating article 32/1/a and 38/1/ of the Criminal Code and article 7/1 of the Anti-Terrorism Proclamation no.652/2009, being a supporter of free for arrested persons who were arrested in terrorism crimes such as Abubekr Ahmed and others. In this case, the public prosecutor informs the court that the names of the witnesses are not disclosed for the accused. It says 'for witness protection, we want to inform that the names of the witnesses are not disclosed pursuant to article 32 of the Anti-Terrorism Proclamation.'

In addition to those cases in the case of *Federal Public Prosecutor V. Abdulwahd Abdela Guadu et al*¹⁰¹ they were accused of violating article 32/1/a and 38/1/ of the Criminal Code and article 4 of the Anti-Terrorism Proclamation no.652/2009, being a believer of "Quwarjiya" teach only their belief is acceptable one and other believes are not acceptable and attempt, incite and planned for terrorism. In this case, the public prosecutor informs the court by saying 'for witness protection we want to inform the names of the witnesses is not disclosed pursuant to article 32 of the Anti-Terrorism Proclamation. In the case of *Federal Public Prosecutor V. Kasahun Shegie et al*¹⁰² they were accused of violating article 7/2/ of the Anti-terrorism Proclamation no.652/2009,

⁹⁹*Federal Public Prosecutor V. Abebe Temesgen Getahun et al 10 defendants*, (Federal High Court, Lideta Division, 19th Criminal Bench, 23/11/2010 E.C, File no.171419)(unpublished).

¹⁰⁰*Federal Public Prosecutor V. Nebyi Siraj Fenino et al 7 defendants*(Federal High Court, Lideta Division, 4th Criminal Bench, 27/4/2009 E.C, File No.171651) (unpublished).

¹⁰¹*Federal Public Prosecutor V. Abdulwahd Abdela Guadu et al 20 defendants*(Federal High Court, Lideta Division, 4th Criminal Bench, 19/7/2010 E.C, File No.171423) (unpublished).

¹⁰²*Federal Public Prosecutor V. Kasahun Shegie et al 2 defendants* (Federal High Court, Lideta Division, 4th Criminal Bench, 11/8/2010 E.C, File No.184181) (unpublished).

being a member of Tigray People's Democratic Movement/TPDM/ participates in the management of the designated terrorist organization. In this case, the public prosecutor informs the court by saying for witness protection we want to inform that the names of the witnesses are not disclosed pursuant to article 32 of the Anti-Terrorism Proclamation. In all those cases the role of the court is nothing except knowing that the names of the witnesses are not disclosed to the accused. The information or description of the public prosecutor did not include the grounds for its allegation of witness protection. Thus, even though, courts are the ultimate guardians of the constitution by checking and balancing to the works of the executive but in practice, they accept what the executive public prosecutor said.

But, after the court saw many terrorism charges like the above conditions, the court changed its position in the case of Federal Public Prosecutor V. MehadiAliyGeda.¹⁰³ They were accused of violating article 7/1/ of the Anti-Terrorism Proclamation no.652/2009 being a member of the designated terrorist organization Oromo Liberation Front/OLF/ participate as a member of a terrorist organization. In this case, the public prosecutor as usual did describe in its charge that the names of the witnesses are not disclosed for the accused pursuant to the Witness and Whistleblowers Protection Proclamation and article 32 of the Anti-Terrorism Proclamation of 652/2009. But the accused persons raised an objection claiming that those laws which allow for non-disclosure of witnessed identity for the criminal defendant are contrary to the right to cross-examination, confrontation, and fair trial provided in article 20/4 of the FDRE constitution. The court submitted the case to CCI for constitutional interpretation by framing an issue of whether those laws are contrary to the constitution or not. The court explained in its decision that article 20/4/ of the constitution provided that accused persons have the right to confrontation of witnesses testifying against them and to prepare and to cross-examination and this provision of the constitution does not stipulate any exception to those rights seems that those laws are contrary to the constitutional rights of an accused person. In this case, the decision of the court is sound.

¹⁰³*Federal Public Prosecutor V MehadiAliyGeda et al 3 defendants, (Federal High Court, Division, 19th Criminal Bench, 14/08/2009 E.C, File No.192735) (unpublished)*

The Amhara Regional State Supreme Court also submit a case between *Public Prosecutor V. Husien Ali Husien*¹⁰⁴ the accused of violating article 7/1 of the Anti-Terrorism Proclamation no 652/2009 being a member of the designated terrorist organization OLF participate as a member. The public prosecutor did not disclose the witness identity in the charge and the accused ask for disclosure and the public prosecutor claim article 32 of the Anti-Terrorism Proclamation no.652/2009 allows for non-disclosure. The court reasoned in its decision the right to confrontation and cross-examination is provided under article 20/4 of the FDRE constitution and the Anti-Terrorism Proclamation is contrary to the constitution. In the opinion of the writer, the decision of the courts concerning this case is sound.

Third, even though, the witness protection is applicable if the witness testifies for crimes punishable with rigorous imprisonment for ten or more years or with death without having regard to the minimum period of rigorous imprisonment:¹⁰⁵, but in practice, the courts allow for non-disclosure for crimes punishable less than ten years rigorous imprisonment.¹⁰⁶ For instance, as the public prosecutors said if the accused was charged for violation of article 32/1/a and 240/3/ of the 1996 FDRE criminal code the courts allow for non-disclosure of the witnesses' identity to the criminal defendant. But this provision is punishable from 7 years up to 15 years of rigorous imprisonments.

In addition to this, pursuant to article 3/1/ a/ of the Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation witness protection should be applicable where the offense may not be revealed or established by another means otherwise than by the testimony of the witness. But, the practice is not in line with this requirement.¹⁰⁷ As the public prosecutors said in practice even the public prosecutor does not list or mention it could not be revealed by other means in his application or motion. The court allows for non-disclosure of the witnesses' identity for the criminal defendant even if the public prosecutor does not say,

¹⁰⁴ *Amhara Regional State Public Prosecutor V. Husien Ali Husien et al 23 defendant* (Amara Regional State Supreme Court, Desse District, 21/7/2007 E.CFile no.0202712)(Unpublished).

¹⁰⁵ Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation no.699/2010, article 3/1/.

¹⁰⁶ Interview with, (n92)

¹⁰⁷ Ibid.

he/she could not reveal the case by other witnesses. The courts did not observe any reason to allow for non-disclosure rather they allow non-disclosure as a trend.

Furthermore, courts accept statements given in police situations to the polis investigator if the witness does not come to the court to testify.¹⁰⁸ The courts use article 145 of the Ethiopian criminal procedure code as a reason for their justification to accept those out of court statements as witnesses' testimony. The courts accept the statements of the witnesses which are given in police situations without giving an oath, and without cross-examination and in the absence of the accused person, and without confrontation. The written statement given to police investigator pursuant to article 30 of the criminal code without disclosing who is testifying against the suspect/accused is accepted by the courts in the absence of the witness in court by justifying that the witness is not found in his address or he wants to abroad countries.

For instance in the case of *Federal Attorney General v. NahomMehari*¹⁰⁹ the court accepts the statements given in police investigation and convict the accused and sentenced for 13 years of rigorous imprisonment without giving an opportunity to cross-examine the witness. The court reasoned that the witness went abroad and accepts her statement given to the police investigator.

In another case in the case of *Federal Attorney-General V. Kinfedagnew et al*¹¹⁰ when a witness called Chief Engineer MelakuSeyfu did not appear before the court and the public prosecutor request for the attachment of his statement given to the polis investigator pursuant to article 145 of the criminal procedure code. The court accepts the public prosecutor's request after it brings evidence from the Immigration office that the witness went abroad. Furthermore, in the case of *Federal Attorney-General V. G/her Gebrehiwet et al*¹¹¹ the statement given by the witness to the polis investigator is attached and considered as it is witnesses' testimony without disclosing who testified it, confrontation and cross-examination by the accused persons.

¹⁰⁸ Ibid

¹⁰⁹ *Federal Public Prosecutor V. NahomMehari* (Federal First Instance Court, Yeka Division, 5h Criminal Bench, 25/10/2011 E.C., File no.192735) (unpublished).

¹¹⁰ *Federal Attorney-General V. Kinfedagnew et al 14 defendants* /Federal High Court, Lideta Division, 15th Criminal Bench, February 19/2012 E.C. File no. 229443)(unpublished).

¹¹¹ *Federal Attorney-General V. G/her Gebrehiwet*, /Federal High Court, Lideta Division, 3rd Criminal Bench, 22/11/2011 E.C. File no. 225011) (unpublished).

Moreover and to the worst of all, some courts allow for non-disclosure of the witnesses' identities even the time of trial or anonymous witness.¹¹² In *Federal Attorney-General v GetachewAsefa et al*¹¹³ the court submits the case for constitutional interpretation to the CCI by deciding that the law which allows for anonymous witness is unconstitutional and it violates the right to confrontation and cross-examination. In this case, the accused are accused of violating article 407/3/ of the FDRE criminal code by committing human rights. The federal public prosecutor did not mention the names of the witnesses in the charge and request for the anonymity of 26 witnesses and to testify by hiding out of the accused persons.

4.2.2. The Council of Constitutional Inquiry /CCI/

When the unconstitutionality of any law or customary practice or decision of government organ or decision of government official is submitted in writing to the Council of Constitutional Inquiry/CCI/, it has the power to consider the matter and if it finds it is necessary to interpret the Constitution; it has the power to submit its recommendation there on to the House of the Federation.¹¹⁴ Thus, if there is any law claimed contrary to the constitution the CCI has the power to consider and give a recommendation whether it is contrary to the constitution or not. Based on this power if the CCI finds it needs constitutional interpretation or belief that the law is contrary to the constitution it has the power to submit its recommendations to the House of the Federation for a final decision¹¹⁵ remand the case to the concerned court if it finds there is no need for constitutional interpretation.¹¹⁶ As article 84/2/of the FDRE constitution provided Where any Federal or State law is contested as being unconstitutional and is submitted to it by any court or interested party, the CCI shall consider the matter and submit it to the House of the Federation for a final decision.

¹¹² Interview with HabtomKesete, Lawyer and consultant, March, 19/2020, and Interview with, Tadele G/medhin, Lawyer and consultant, March, 19/2020, and Interview with, KiflayMehari, Lawyer and consultant, March, 19/2020.

¹¹³ *Federal Attorney-General v GetachewAsefa et al 26 defendants (Federal High Court, Lideta Division, 1st, Corruption Crimes Bench, February 19/2012 E.C. File NO. 238040) (unpublished).*

¹¹⁴ Council of Constitutional Inquiry Proclamation No.798/2013, article 3/1/.

¹¹⁵ FDRE Constitution, article 84/3/b/.

¹¹⁶ Ibid, article 84/3/a/.

Based on this provision the case between *Federal Public Prosecutor V.MehadiAliyGeda*¹¹⁷ was submitted to the CCI by the court for constitutional interpretation claiming that the law which allows for non-disclosure of witness's identity is unconstitutional. But the CCI remand the issue by explaining that the law which allows for withholding and non-disclosure of witness identity is not contrary to the right to fair trial and cross-examination provided under article 20/4 of the FDRE constitution and it does not need constitutional interpretation. The CCI explained in its decision that the constitution does not provide any obligation on public prosecutor to disclose the names and address of the witness to the accused person and since the constitution is general it does not provide whether to disclose or not of witness identity in the charge and such issues are to be decided by specific laws. Thus, the council decided that those laws are not contrary to the constitution rather they are in line with the principle of the constitution and decide that it does not need constitutional interpretation.

Another similar case was submitted to the CCI by Amhara Regional State Supreme Court Dessie District for constitutional interpretation of the Anti-Terrorism Proclamations provision which allows for non-disclosure of witness identity to the accused person to be decided whether it is constitutional or not. The CCI investigate and consider the case and decide that this provision is not contrary to the constitution and remand the case to the court by saying that it does not need constitutional interpretation.¹¹⁸ The CCI gives the same reason as in the case of *Federal Public Prosecutor V.MehadiAliyGeda's* case.

In another case of *Federal Attorney-General v GetachewAsefa et al 26 defendants*¹¹⁹ the court submits the case for constitutional interpretation to the CCI by deciding that the law which allows for non-anonymous witness is unconstitutional and it violates the right to confrontation and cross-examination. In this case, the federal public prosecutor did not mention the names of the witnesses in the charge and request for the anonymity of 26 witnesses and to testify by hiding out of the accused persons. But the CCI decided that it did not need constitutional interpretation.

¹¹⁷*Federal Public Prosecutor V MehadiAliyGeda et al 3 defendants*, (n102)

¹¹⁸*Amara Regional State Supreme Court Dessee District V. Husien Ali Husien 23 defendants et al* (Committee of the Council of Constitutional Inquiry, 6/9/2007 E.C, File no.1365/07) (unpublished).

¹¹⁹*Federal Attorney-General v GetachewAsefa et al 26 defendants*, (n112).

In the opinion of the researcher, the recommendations of the CCI are not sound because while the constitution allows for confrontation and cross-examination and they have the right to prepare for cross-examination and if they did not know the witness before the date of cross-examination it is not expectable to effective cross-examination without preparation and though the constitution is general it does not stipulate any exception for the right to access to evidence, cross-examination, and confrontation. So since there is a generally accepted rule of interpretation which shows exception should be interpreted narrowly a law interpreter should not interpret in a wide way to limit the right which was absolute rights in the constitution is against accepted rules of interpretation of laws. In addition to this since criminal law should be interpreted narrowly and in favor of the accused person it should interpret it as it does not provide an exception to the right of the accused person for cross-examination and confrontation of witnesses testifying against him.

4.2.3. The House of Federation

According to article 62/1 and 83/1 of the FDRE constitution the power to interpret the constitution and decide all constitutional disputes is given to the House of Federation. As it is also provided under article 3/1/ and 4/1/ of the Consolidation of the House of the Federation and the Definition of its Powers and Responsibilities proclamation no.251/2001 this power of interpreting the constitution is given to the HOF. As article 5/1/ of the Consolidation of the House of the Federation and the Definition of its Powers and Responsibilities proclamation no.251/2001 and article 84/3/b/ of the FDRE constitution prescribed, the HOF has the power to make the final decision upon draft proposal of constitutional interpretation submitted to it by the Council of Constitutional Inquiry. A party dissatisfied with the decision of the Council of Constitutional Inquiry of rejection of case relating to a review of constitutional interpretation may appeal to the House.¹²⁰ Thus, the procedure to handle a law or a governments decision whether it has a constitutional dispute or not is first it should be investigated by the CCI and after this, if the CCI finds it needs constitutional interpretation, it will submit the issue to the HOF, but if it does not find it has a constitutional dispute, it will remand the case to the concerned court

¹²⁰FDRE Constitution, article 84/3/a/. .See also the Consolidation of the House of Federation and the Definition of its Powers and Responsibilities Proclamation No.251/2001, article5/2/.

saying that it did not need constitutional interpretation and the party dissatisfied by this has the right to appeal to the HOF.

Even though there are no cases decided by the HOF concerning the issue at hand, the researcher interviewed legal experts from the office of HOF. The researcher interviewed two legal experts. They said the Anti-Terrorism Proclamation and the Witness and Whistleblowers Proclamations which allow for non-disclosure of witness' identity to the criminal defendant until trial and hearing testimony behind the screen or by disguising identity are unconstitutional.¹²¹ They are unconstitutional because while the constitution provides a right of accused persons to cross-examination a witness who testifies against them and to confrontation but those proclamations allow for non-disclosure of the witness identity not to be disclosed. So, if they are not disclosed to the accused, the accused person did not know them before trial that who they are and could not cross-examine their character as if they are incapacitated to be a witness and have a bad reputation. Thus, had this issue was submitted to the HOF there is a probability for the decision to be reversed it as unconstitutional.

4.2.4. The Federal Attorney General

The Federal Attorney-General has a vital duty concerning witness protection. It must implement the protection mechanisms provided under the Witness and Whistleblower of Offences Protection Proclamation. Among the duties required from the Federal Attorney-General the danger that may likely sustain against the eligible person or the witness should be included in the application for protection.¹²² But, in practice, the public prosecutor rather than invoking those provisions for allowance of non-disclosure does not mention any type of danger that may be likely sustained against the witness.¹²³ In addition to this, the public prosecutors in the organized and transnational crimes directorate terrorism crimes division request for the non-disclosure of

¹²¹ Interview with YakobBekeleHunde, director of intergovernmental fiscal transfer of HOF, June 4/2019, and Interview withTinsaieKetemaAsefa, Constitutional and Identity Issues Directorate Legal Expert of HOF, June 4/2019.

¹²²Proclamation no.699/2010, (n10), article 6/2/c/.

¹²³ Interview with, (n92)

the witnesses' identities in every Charge they brought without showing that there is likely danger to the witness or his family.¹²⁴

For instance, in the case of *Federal Public Prosecutor V. KasahunShegie*¹²⁵ the public prosecutor informs the court that the names of the witnesses are not disclosed for the accused. It says for witness protection we want to inform that the names of the witnesses are not disclosed pursuant to article 32 of the anti-terrorism proclamation. In this case, the public prosecutor does not mention any danger which could be sustained to the witness. So not only the law rather in practice the public prosecutor makes it to be worse than the proclamations to violate the right to access evidence, confrontation, and opportunity to cross-examination.

From this, it can be concluded that the response of the Federal Attorney General is not only applied the unconstitutional provisions which allow for non-disclosure rather it also interpret those proclamations in a very wide manner without any reason by simply invoking the provisions which allow for non-disclosure.

¹²⁴ Ibid

¹²⁵ *Federal Public Prosecutor V. KasahunShegie et al 2 defendants (n102)*.

CHAPTER FIVE

Conclusion and Recommendations

5.1. Conclusion

The right to examine one's accusers or witnesses testifying against him is universally reflected in regional and international human rights treaties and the FDRE Constitution. An accused person in Ethiopia has a constitutional right to a fair trial, confrontation, and cross-examination of witnesses testifying against him. Article 20/4/ of The FDRE Constitution provided this right to confrontation and cross-examination. This provision does not stipulate any exception or limitation to this right and the constitution does not provide a general limitation clause. There is an accepted general interpretation of the law which says exception should be interpreted restrictively. So, since in the FDRE Constitution no exception is stipulated for the right to confrontation and disclosure and cross-examination right, we could not interpret and include what was not stipulated from the very beginning. Thus, it can be concluded that access to evidence, confrontation, and cross-examination is an absolute constitutional right and there is no exception to it.

To have an effective confrontation and cross-examination and fair trial the identity of the witness should be known and disclosed before the date of testimony. This is important to prepare effectively about the creditability and reputation of the witness to be known to the accused person, the identity of the witnesses should be disclosed before the date of trial. A witness cannot be confronted and cross-examined by the criminal defendant well without prior knowledge of who is the witness.

Even though the FDRE Constitution does not provide an exception for this right but the Ethiopian lawmaker adopts a law that allows for non-disclosure of a witness until trial and anonymous witness. Among the laws which allow for non-disclosure of witnesses identity, whether up to trial date or anonymous witness, the Prevention and Suppression of Terrorism Crimes Proclamation no.1176/2020, the protection of Witness and Whistleblowers of Criminal Offence Proclamation no.699/2010, and the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation 434/2005 are some of them. Those laws are adopted because Witnesses have also the right to be protected from any harm by the mere fact of being called as a witness. But those proclamations are against the constitution and other international human

rights covenants ratified by Ethiopia because they limit the constitutional right to confrontation, fair trial, and cross-examination.

To the worst of this, even if those proclamations allow for non-disclosure of witnesses' identity to the criminal defendant in exceptional times, but in practice those laws are interpreted broadly and if there is terrorism crime charge witnesses' identity are not disclosed to the criminal defendants. In those cases, the public prosecutor decides by itself not to disclose and the courts did not hear his reason by doing this they are not fulfilling their obligation stipulated in article 13/1 of the FDRE constitution. The CCI also interprets those provisions as they are not unconstitutional by reasoning that the constitution in general and allowing for non-disclosure of witnesses' identity create a conducive way for a fair trial. From the beginning, the criminal defendant is considered as a weaker party in the criminal justice system and if the non-disclosure is added to this it will be worse to achieve equal justice and fair trial. The legal frameworks and practices or decisions of government that allow non-disclosure of the identities of the criminal defendant deviates the fundamental rights of an accused person for the right to cross-examination, access to evidence, defense, equality of justice, and the presumption of innocent until proved guilty.

The Federal Attorney-General also had failed to make a good faith effort to determine which type of witness protection is necessary in each case as required by article 5/1/ of the Protection of Witness and Whistleblowers of Criminal Offences Proclamation no.699/2010. In this case, while the witness does not require his anonymity the public prosecutor applies to the court for anonymity without showing reasonable ground that the safety of the witness is at stake. Thus, it can be concluded that the right to confrontation and cross-examination given by the constitution is denied by the lawmaker and executive organ government of government by both laws and practices. The power to make the practices and laws which contravene the constitution is given to the HoF. But, since there is no case submitted to the HOF for decision the view and decision of it are unknown except the experts view working in it.

5.2. Recommendation

The FDRE Constitution does not allow for non-disclosure of the witnesses' identity to the criminal defendant and is in line with the right to confrontation and cross examination rights of a criminal defendant. Thus, according to the constitution, the defendant should be in a position and a right to understand what the witness is saying and able to access and challenge the witness. But, the proclamations and practices show non-disclosure of witness' identity for the criminal defendant in the name of protecting the rights of witnesses. Those proclamations did not consider the right of the accused person for cross-examination and confrontation and protecting the right of witnesses gets more protection than the right of the accused persons. Placing greater value on protecting witnesses than on guaranteeing the minimum rights of the accused to a fair trial and confrontation is not sound before international covenants ratified by Ethiopia and the FDRE constitution. Thus, the constitutional supremacy principle should not be deviated by laws enacted by the lawmaker and the practice.

Since the laws and practices are unconstitutional there is no greater value than protecting and respecting the constitution and the writer gives the following recommendations.

- Balancing the interest of the accused and the witness should be the responsibility of the government. Among those, there should be a legal framework to protect both rights without infringing one of the rights to protect the other right. So, to balance the two rights the existing proclamations which allow for non-disclosure of witness' identities should be amended and the witness protection mechanism should put protection mechanisms before the trial is started and the witnesses should be disclosed before the trial is started. That is to say, the Ethiopian laws should look to the Yugoslavian tribunal's *Blaskic* decision, which holds in favor of full disclosure of witnesses' identities to the defense at the commencement of the trial.¹²⁶ Since the law aims to balance the interest of the accused and the witnesses 'delayed disclosure' should be allowed because ones they are protected there is no need for non-disclosure until a trial is commenced or during the trial. So to balance the protection mechanism which is delayed non-disclosure could be a solution to

¹²⁶Joanna Pozen, "Justice Obscured: The Non-Disclosure of Witnesses' Identities in ICTR trials" *International Law and Politics*, vol. 38,[2005-2006], p.318

be compatible with the right to defense and confrontation of the defendant and the right to get protection to the witnesses. The laws should be amended to allow for delayed disclosure before the beginning of the trial to make the defendant well prepare for effective and meaningful cross-examination and preparation of a defense. Thus, using delayed disclosure mechanism the issues of witness protection and the rights of the accused could be solved and the constitutional dispute existing in those proclamations could be repealed.

- When the courts use 'delayed disclosure', they should apply it an exceptional time, and after the belief that there is reasonable ground that danger could be sustained against the witness or his relatives. Thus, the courts should not allow delayed disclosure as a trend rather this mechanism should only use if there is reasonable ground to do so.
- If the laws are not amended the courts should implement the other witness protection mechanisms provided in the protection of Witness and Whistleblowers of Criminal Offence Proclamation no.699/2010 rather than allowing for non-disclosure of the witnesses' identities to the criminal defendant. Since pursuant to article 13/1/ and/2/ of the FDRE Constitution, courts have a duty to respect and enforce the rights of criminal defendants stipulated under article 20 of the Constitution, they should interpret it in line with international human rights instruments ratified by Ethiopia. Thus, courts should not allow for non-disclosure of witness' identities for the criminal defendants.
- If those proclamations provisions that allow for non-disclosures of witness's identity to the criminal defendant are not amended this matter should be submitted to the HOF for constitutional interpretation. If those provisions constitutionality is submitted to the HOF for constitutional interpretation, since, adopting laws which contrary to the constitution is unconstitutional and void pursuant to article 9/1 of the FDRE constitution, those provisions will not have effect if the HOF decide that they are unconstitutional.
- Like the ABA recommendations for the remedies for the suppression of or violation of the obligation of disclosure, there should a law which orders to produce discoverable evidence, trial continuances, exclusion of the withheld/non disclosed/ evidence, or personal sanctions.
- In addition to this, Courts should not accept the witness's statement given to the police investigator by invoking article 145 of the Ethiopian Criminal Procedure Code and the

witness could not be found. Thus, this provision should be read-only in line with the witness who is present in the court and testifying by making an oath and disclosing their identity to the criminal defendant, not for those who did not appear in court and cross-examined by the accused.

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