The Right to Cross-Border Identity of Individuals with Eritrean and Ethiopian Ancestry: International and Comparative Law Perspectives

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Abstract  The article addresses critical issues of law, policy and practice related to the right to cross-border identity of individuals with Eritrean and Ethiopian ancestry. It makes a call for a holistic approach in addressing the rights of such individuals, who are believed to form a considerable proportion of the total population in both countries, if not the majority. The article’s central argument is framed in the context of the developing norm of the right to dual nationality of those who have recognised origins in more than one country. It gleans insights from international and comparative law perspectives, by looking into the practice of some states that allow dual nationality. The argument aligns with fundamental principles of equality and the right to non-discrimination based on one’s national origin, as enshrined in various instruments of International Human Rights Law (IHRL). By making an explicit call for the recognition of dual nationality of individuals with Eritrean and Ethiopian ancestry, the article also argues that attendant questions and answers surrounding the issue of cross-border identity need to be ironed out in a sustainable manner in forthcoming rounds of negotiations between the governments of the two countries. This is imperative for ending the prolonged suffering of thousands of people from both countries, fulfilling also the international obligations of both states, all of which are important for ushering in a lasting peace between the two countries.

1 Introduction

This contribution draws its motivation from the need to usher in a lasting peace between Eritrea and Ethiopia, two countries in the troubled region of the Horn of Africa.
Africa, which are still struggling to emerge triumphantly from the consequences of a full-scale international armed conflict they fought between May 1998 and June 2000. Unsettled residual matters related to the 1998–2000 armed conflict kept the two countries in a prolonged state of “no war no peace” until 9 July 2018, by which time both countries signed a much celebrated bilateral agreement, spearheaded by the new Prime Minister of Ethiopia (Abiy Ahmed), a move that has earned him a Nobel Peace Prize.

With the exception of a very brief, relatively peaceful time experienced between May 1991 and May 1998, the modern history of the relationship between Eritrea and Ethiopia is replete with major instances of political violence of all sorts, including a prolonged history of inter-state and intra-state armed conflicts. Until 1991, Eritrea was “part” of Ethiopia in the background of a very controversial historical context that compelled the people of Eritrea to wage a 30-year armed struggle for liberation against Ethiopia, starting in 1961. The war officially ended in 1991, at which time Eritrea achieved de facto independence from Ethiopia. For Ethiopia, this was also the end of the previous dictatorial regime of Colonel Mengistu Hailemariam (commonly known as the Derg regime) that ruled Ethiopia, which then included Eritrea, for 17 years, from 1974 to 1991.

Only seven years after the de facto independence of Eritrea, both countries again went through another cycle of armed conflict; this time, taking the form of a full-scale international armed conflict between two sovereign states. The conflict was formally ended by two major agreements signed in June and December 2000, namely the Agreement on Cessation of Hostilities and the final Algiers Peace Agreement.

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2Shinn (2010), for example, describes the region as the most conflict-ridden region of the world, at least in terms of the frequency of armed conflicts the region has experienced since the end of World War Two (WWII). See also Mekonnen and Tesfagiorgis (2012).

3For analysis of some of the causes and consequences of the 1998–2000 border conflict, see in general the following contributions: Tronvoll and Negash (2001), Gray (2006), Murphy et al. (2015), Mekonnen and Tesfagiorgis (2012), Woldemariam (2018), Yiallourides and Yihdego (2018).

4Woldemariam (2018) and Mekonnen and Tesfagiorgis (2012).

5The agreement is formally known as Joint Declaration of Peace and Friendship. It was supplemented by a follow-up agreement, signed on 16 September 2018 in Jeddah, Saudi Arabia, and known as Agreement on Peace, Friendship and Comprehensive Cooperation between the Federal Democratic Republic of Ethiopia and the State of Eritrea. See also Eritrean Law Society (ELS) (2019).

6Nobel Peace Prize (2019).

7In May 1991, the Eritrean People’s Liberation Front (EPLF) took full control of Eritrea by defeating the Ethiopian army, and from that time Eritrea was a de facto independent state, awaiting formal or de jure recognition by the UN, which happened in 1993.
Agreement, respectively. Despite this, both countries were unable to return to normalcy until July 2018, when the new Prime Minister of Ethiopia broke the stalemate, leading to the signing of two bilateral agreements, signed in Asmara and Jeddah in July and September 2018, respectively.

Ever since, there has been a lot of enthusiasm about the prospect of a new era of peace and cooperation between the two countries. Common borders that were sealed for 20 years were reopened. People, particularly those living in the border villages and towns, who were physically separated for two decades (separated in such a way for the first time since antiquity), were also able to meet again. In addition to the re-opening of common borders, the rapprochement has also led to the resumption of diplomatic relations between the two countries and the recommencement of direct air flights between their capital cities. However, the pace with which the new peace process is expected to transform the lives of ordinary people at the local level, particularly in the common border areas, remains terribly slow. Not only this, all the common borders between the two countries were closed again as of end of 2018, sending negative signals about the sustainability of the new peace process. Accordingly, in what seems to be a “business as usual tone,” media outlets have already started to talk about a stagnated peace process.

The fact that the new peace process is suffering from major setbacks is most evident from a televised interview of the President of Eritrea, given on 8 February 2020. In the interview, the President uses openly hostile language in reference to the Tigray People’s Liberation Front (TPLF), a major political organisation in Ethiopia that is widely regarded as a major role player in whatever peace that needs to be made between the two countries. In the interview, the President has lamented about what he calls the continued, illegal and belligerent acts of new settlement by Ethiopians in the village of Badme (ostensibly under the orchestration of the TPLF) that is allegedly taking place, following the signing of the peace and friendship agreement on 9 July 2018. Furthermore, in a typical belligerent behaviour, the President went out of proportion by prescribing specific policy options for Ethiopia in a manner that is seen by some Ethiopians as an instance of meddling in the internal affairs of Ethiopia.

8Mekonnen and Tesfagiorgis (2012).
9ELS (2019).
10ELS (2019).
11VOA (2019). The closure of the common borders of the two countries is truly worrisome. Two major stories published in November 2019 by BBC Tigrinya are indicative of the fragile nature of the newly initiated rapprochement in spite of the high level of enthusiasm many people from both countries demonstrated when the leaders of the two countries paid several visits to each other in 2018. One of the BBC reports tells a story of an Eritrean man who recently travelled to Mekele (Ethiopia) for medical treatment. He died in Mekele and while he was there, the Zalambesa-Senafe border was closed. After his death, his relatives were unable to transport the corpse to the man’s birthplace for burial. They were forced to bury the corpse in Zalambesa. The other BBC story laments that after the closure of the border, the main asphalt road between Zalambesa and Senafe became an ideal choice for traditional threshing field of crops (harvesting) because there is no traffic in the area since the closure of the border (“business as usual”). See BBC Tigrinya (2019a, b).
12Eritrean Television (2020). This has prompted a group of 48 Oromo scholars to issue an Open Letter addressed to the President of Eritrea in which the authors expressed dismay about some
There is no doubt that the rapprochement, initiated by Prime Minister Abiy Ahmed, is a step in the right direction, and there is no intention here to undermine its potential for ushering in a lasting peace between the two countries. In fact, with the requisite political commitment of both governments, the rapprochement can still serve as a stepping-stone to a long-awaited era of cooperation and peaceful coexistence between the two countries, including the consolidation of genuinely accountable, transparent and democratic governments in both countries. However, there is a need to underscore the importance of addressing several residual issues related to the 1998–2000 conflict that are not adequately addressed by both governments, issues that will emerge every now and again if they are not properly addressed starting from now.

2 Theoretical and Methodological Considerations

This article focuses on one major problem area related to the issue of official recognition of the right to cross-border identity of individuals with Eritrean and Ethiopian ancestry, or effectively the right of as such individuals to dual nationality in both countries. As will be seen later, this group of people is among the most affected societal groups from a wide spectrum of civilian groups that were hugely impacted by the brunt of the 20-year state of “no war no peace.” In articulating the plight of these people, the article will try to address the following key questions. What is the status of international law on nationality in general, and dual nationality in particular, and how has state practice evolved over the last century during which time international human rights law (IHRL) has begun to play a central role in the manner in which states define their relationship with their nationals? What does the law of Eritrea and Ethiopia say about dual nationality? How did both countries approach the issue of dual nationality in the past, and how do they intend to address it in their future bilateral relations? What needs to be done to provide tangible and practical solutions for the plight of people with ancestral background in both countries?

This article adopts Boll’s working definition of nationality, which is that of a term signifying “the quality of the legal relationship between an individual and the state which regards him or her as its national, or such status of the individual, following comments made by the Eritrean President. In the opinion of the authors, the behaviour of the Eritrean President was not only inappropriate but also overtly provocative and thus unbecoming of a leader expected to play a constructive role in cultivating a culture of peaceful coexistence between the peoples of the two neighbouring countries. See Open Letter to Mr. Isaias Afwerki (dated 28 February 2020). This sentiment was shared by a group of 95 exiled Eritrean scholars, who also published their own separate Manifesto on 7 April 2020 (which includes grave concerns related to COVID-19).
the conventional terminology used in international law.” However, in keeping with the observation of Vink and de Groot, the article also notes that the term nationality is often times interchangeably used with citizenship, indicating to a certain degree the synonymous nature of the two terms. This contribution uses mainly nationality.

From the viewpoint of a rights-based approach to societal problems, the main argument in this article takes a cue from Spiro’s theoretical formulation of “dual citizenship as human right.” This claim is based, among other things, on the understanding that dual nationality is no longer an “anomaly” or “abomination,” but rather “a commonplace of globalization.” Of course, the shift in perception about dual nationality, like in several other rights issues, did not happen overnight. The “historical opprobrium attached to the status” of dual nationality dissipated only with time, particularly because of the unavoidable consequences of globalisation. Current levels of international acceptance of the practice of dual nationality have prompted scholars such as Spiro to call for recognition of the status as a human right. Although it may seem difficult to claim that the right to dual nationality has already reached a level of a protectable right, recent developments (as will be seen in Sect. 5 below) are indicative of a move towards that direction. Spiro even goes to the extent of recommending the 1997 European Convention on Nationality as a model for a future international treaty that guarantees the right to dual nationality at the global level.

Additional insights are also borrowed from previous observations made in relation to the precarious situation of the rights of “trans-boundary indigenous peoples” in Eritrea and Ethiopia, as formulated by Weldehaimanot and Mekonnen (2011). This observation is based, among other things, on the sad reality of African national borders, designed and fixated by European colonisers, having the consequence of unmindfully dividing sociologically similar groups, ascribing to them different legal identities (citizenships). For the average person in such groups, particularly those in the border areas, communal markers of identity are more important than the dominant lens of national identity (citizenship).

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13Boll (2007), p. 2. This definition needs to be compared with Nottebohm Case (Liechtenstein v. Guatemala), Second Phase, International Court of Justice (ICJ), 6 April 1955, p. 24.
14Vink and de Groot (2010), p. 1.
15Spiro (2010), p. 111.
16Spiro (2010), pp. 111–112.
17For instance, in Switzerland, one of the leading democracies in the world, women gained the right to vote only “on 7 October 1971, 53 years after Germany, 52 after Austria, 27 after France and 26 after Italy.” See The Swiss Parliament (2020).
18Spiro (2010), pp. 129–130. See also Spiro (2018).
19This observation is based on various informal encounters of the author with average people living in the border areas of Eritrea and Ethiopia, particularly individuals belonging to the Afar and the Tigrinya ethnic groups.
20Although not with the required level of academic rigour, a similar observation in this regard was made most recently by a famous Eritrean writer, who commented in reference to the Tigrinya-speaking community of Eritrea as “Eritrean Tegaru” (_Column16_Bold). The use of Tegaru in reference to
Before moving to the next substantive level of the discussion, the following cautionary note comes in good order, by way of alerting the reader about some peculiar aspects of the development of this article and its attendant methodological approach. There is a personal touch to this article at least on two major grounds: (1) on account of the author’s background as an individual with Eritrean and Ethiopian ancestry, and (2) on account of his experience as a former combatant who was deployed during the 1998–2000 border conflict between Eritrea and Ethiopia. Therefore, it will be evident from the remaining parts of this contribution that some observations, arguments and conclusions made herein are intimately intertwined with the personal background of the author. In legal scholarship, such a personal approach is “neither better nor worse than a more detached, more ‘academic’ viewpoint. It is simply different.”

As a result, by way of a declaration of interest, it is also important to note that the author has a vested interest in promoting and making an explicit call for a progressive approach to the right to dual nationality in Eritrea and Ethiopia. Nonetheless, it is equally important to note that regardless of the author’s vested interest, and in keeping with the requirements of conventional academic writing, every effort has been made to make a scholarly case supported by appropriate evidence, research and authority. In this regard, the author draws additional inspiration from the global movement of “inclusive citizenship,” epitomised by the Latin maxim of nihil de nobis, sine nobis (nothing about us without us), as used particularly by the disability rights movement.

the Tigrinya-speaking Ethiopians is a standard practice. In an Eritrean context, it remains controversial. The Tigrinya-speaking people of Eritrea and Ethiopia, at least those in the border area, are typical examples of African peoples who were unmindfully divided by European colonial borders. See Tesfai (2020).

Between June 1998 and August 1998, the author was deployed as a combatant in one major segment of the Eritrean army, at the time known as Division 161, which was stationed in the Western Front of Eritrea. He was deployed as a personnel officer of a battalion that was stationed in Sheshebit and Adi Tsetser, two villages in very close proximity to the village of Badme, the flashpoint of the border conflict. He was demobilised from the army in August 1998 on account of a request for skilled workforce emanating from the Eritrean Ministry of Justice.

MacPherson (2019), p. 148, elaborating the role of “a personal approach” to legal scholarship in the context of human rights, disability and nuclear releases. For similar observations in the context of the Eritrean constitution-making process, see Rosen (1999), pp. 263–265.

Needless to say, as a person who has been actively involved (since 2001) in human rights activism and advocacy work related to the dire situation of human rights violations in Eritrea (to a certain degree also in Ethiopia), it has become a routine practice for the author to include in most of his contributions such an acknowledgement, declaration or disclaimer, clarifying challenges and opportunities associated with his personal experience. See, for example, Mekonnen (2016a), pp. 223–224. In fact, in the summer of 2015, the author was viciously attacked by a mainstream Eritrean opposition website merely on account of his Ethiopian ancestral origin. This was one among many other personal attacks he experienced since 2001. See, for example, Amnesty International (2019), pp. 15–17, in which the author’s predicament is featured as one of the main stories of the report. See also Al-Jazeera (2019).

See in general Charlton (1998), Ngwena (2018) and Powell (2012).
There is also a need to acknowledge one obvious preference this article makes. Eritrea and Ethiopia have individuals with ancestral backgrounds from other immediate neighbouring countries (such as Djibouti, Kenya, Somalia, South Sudan, Sudan, Saudi Arabia and Yemen), and from other non-neighbouring countries for that matter. However, in this article a conscious choice has been made by focusing only on those who have ancestral backgrounds in Eritrea and Ethiopia, the plight of whom is considered most precarious on account of the troubled and controversial political history and attitude of both countries towards each other. However, the article can pave a way to a broader discussion on the plight of individuals with ancestral background in other countries as well.

The remaining part of this article is structured in the following manner. Following the first two introductory sections, in Sect. 3 the article discusses the prevailing political situation in Eritrea and Ethiopia as is relevant for a discussion of the right to dual nationality of people with ancestral backgrounds in both countries. Section 4 explores international and comparative law perspectives on nationality in general, and state practice on dual nationality in particular. The experience of Northern Ireland is discussed as an illustrative example from which Eritrea and Ethiopia may glean insightful lessons as they deal with the right to cross-border identity in their respective situations. The discussion in this Section also includes examination of the relevant jurisprudence from international law, as well as from other national jurisdictions deemed helpful for the objectives of comparative legal study.

Section 5 returns to a discussion of nationality laws in Eritrea and Ethiopia. It starts by analysing the pervasive problem of discrimination in both countries—discrimination based on ancestral background of individuals and how the national laws of both countries respond to this. It also highlights the divergent practice adopted by both countries before and after the 1998–2000 border conflict. In Sect. 6, by way of concluding the debate, the article presents, in a forward-looking manner, some of the most important practical considerations for the provision of legal protection for the right to dual nationality in both countries.

3 The Overall Political Situation in Eritrea and Ethiopia

For nearly three decades (between May 1991 and until April 2018), the political landscape of Eritrea and Ethiopia has been dominated by two political organisations that are led by Tigrinya-speaking political elites of both countries. The organisations are the Tigray People’s Liberation Front (TPLF) on the Ethiopian side, and the People’s Front for Democracy and Justice (PFDJ) on the Eritrean side. The later was formerly known as the Eritrean People’s Liberation Front (EPLF), until it changed its name in 1994. Effectively, both Fronts came to power in May 1991 after they jointly defeated the dictatorial regime of Colonel Mengistu Hailemariam. It should

25 See, for example, Abbay (1998) and Tronvoll and Negash (2001).
be noted that the TPLF came to power in 1991 as a member of a coalition group known as the Ethiopian Peoples’ Revolutionary Democratic Front (EPRDF), which included three other political organisations. The EPRDF was initiated by the TPLF in which the latter assumed a very dominant role until the emergence of Prime Minister Abiy Ahmed in April 2018.

The defeat of the regime of Mengistu Hailemariam in 1991 was the beginning of a new chapter in the modern history of both countries. For Eritrea, it was an important step in the realisation of the project of an independent State of Eritrea. For Ethiopia, it was an opportune moment for the establishment of a modern democratic order premised on the ideals of accountable and transparent government. It would not be an over exaggeration to say that in both countries (and much so in the case of Eritrea) the past three decades were lost years in terms of the requirements of the establishment of a viable democratic order.

As noted in Sect. 1, for the first seven years both countries enjoyed very close and peaceful neighbourly relations. However, between May 1998 and June 2000, they fought a full-scale international armed conflict. In the words of the Eritrea-Ethiopia CLAIMS Commission (EECC), in the two-year period, both countries “waged a costly, large-scale international armed conflict along several areas of their common frontier.” Although the conflict is officially categorised as a border problem, there are underlying socio-economic and ideological causes that remain unresolved until today. Some commentators describe the experience as “a devastating armed conflict caused by various factors but later painted in the guise of a boundary war.” One, among several other factors, that complicated the problem is related to the troubled political history of the two most dominant political organisations in both countries: the TPLF and the PFDJ.

Having spent 20 wasteful years because of complications related to the 1998–2000 border conflict, starting from July 2018 Eritrea and Ethiopia are now making initial entry to a long-awaited journey of peaceful coexistence. This does not

26The other three political organisations are: the Oromo People’s Democratic Organization (OPDO), presently the Oromo Democratic Party (ODP); the Amara National Democratic Movement (ANDM), presently the Amara Democratic Party (ADP); and the Southern Ethiopian People’s Democratic Movement (SEPDM).

27May 1991 marks the emergence of Eritrea as a de facto independence state. In 1993, the country obtained de jure independence, following a national referendum for independence, the process of which was supervised by the UN. See Eritrea-Ethiopian Claims Commission (EECC), Partial Award, Civilians Claims, Eritrea’s Claims 15, 16, 23 & 27–32, 17 December 2004, paras 6–7; Letter dated 13 December 1991, from the President of the Transitional Government of Ethiopia to the Secretary-General of the United Nations Concerning the Results of the Conference on Peace and Democracy held in Ethiopia in July 1991, UN Doc. A/C.3/47/5, Annex II (1992); Tronvoll (1996).

28Eritrea-Ethiopia Claims Commissions, Partial Award, Diplomatic Claim, Ethiopia’s Claim 8 (19 December 2005), para 3; Eritrea-Ethiopia Claims Commissions, Partial Award, Diplomatic Claim, Eritrea’s Claim 20 (19 December 2005), para 3.

29Yiallourides and Yihdego (2018), pp. 35–61. See also in general Tronvoll and Negash (2001), Aldrich (2003), Gray (2006), Abebe (2009), Mekonnen and Tesfagiorgis (2012), Murphy et al. (2015) and Woldemariam (2018).
overlook the prevalence of complex legal and political problems related to the border conflict, which are not yet officially resolved or properly addressed by both governments in a sustainable manner. One problem area, probably the most sensitive of all other issues, is related to the cross-border identity of individuals with ancestral backgrounds in both countries. In relation to this particular problem, the following additional observations come in good order.

This article is written at a time when Eritrea and Ethiopia are experiencing heightened levels of political debates formulated along ideological divides with strong propensity towards the politics of identity. Never in their history have these countries experienced such a flood of ideas aimed at deconstructing long held belief systems about group identity.\(^{30}\) The only difference between the two countries is in the following. In Ethiopia, the debate is raging mainly within the national geographic boundaries of the country because of the relatively open political space, following the ascent to power of Prime Minister Abiy Ahmed.

In the case of Eritrea, owing to the country’s entrenched problem of dictatorship, the debate is experienced mainly in Eritrean diaspora circles. In this regard, it is important to acknowledge that due to its long history of forced migration, Eritrea has unique characteristic features of a transnational nation-state\(^ {31} \) and as such it will not be an over exaggeration to say that what happens in Eritrean diaspora circles is crucially important for what happens now or in the future within the national geographic boundaries of Eritrea. Having said the above about the prevailing political situation in both countries, it is important to move to the next level of the discussion by gleaning some insights from international and comparative law perspectives, with the aim of framing the right to dual nationality in both countries in a forward-looking manner.

### 4 International and Comparative Perspectives to Nationality Law

This section aims at gleaning some key lessons Eritrea and Ethiopia can learn from international and comparative law perspectives on the right to nationality. This needs to start by considering the most common objective of comparative legal inquiry, the starting point of which is trying to find answers to societal problems by learning from the experiences of others. It is admitted, at least in sociological terms, that such an endeavour makes part and parcel of the historical-epistemological venture of

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\(^{30}\)For closer observers of political developments in both countries, this is evident from a myriad of heated debates (or rather fights) currently taking place in unregulated and unruly social media (mainly Facebook) platforms of both countries. Due to the voluminous and controversial nature of some of the discourses, a contribution like this may not be suitable for further exposition of the discourses.

\(^{31}\)For more on this, see in general Bernal (2014) and Hepner (2009).
“answering the eternal questions of what there is that can be known and how one can go about knowing it.”

In the words of David, the French legal scholar whose fingerprint looms largely in the modern civil codes of both Eritrea and Ethiopia, comparative legal inquiry is also about our collective human effort of “labouring to give society a model of ideal justice.”

Following the same line of thinking, Sereke and Mekonnen have most recently contended: “the pursuit of justice can be better served by an inquisitive approach that makes one’s own experience the object of scrutiny by others.” Inevitably, this also “entails examining the experiences of others with the aim of learning from their lessons.”

4.1 Nationality Under International Law

At the global level, the position of international law on nationality was for the first time substantively discussed by the Permanent Court of International Justice (PCIJ) in 1923. This was the time in which the state was deemed to have uncontested authority to confer and withhold nationality without any considerations for the human rights of its individual subjects. Notwithstanding such an overwhelming credence of the time, the PCIJ opined that the state’s discretion is nevertheless restricted by obligations, which the state may have undertaken towards other states pursuant to rules of international law. With time, it came to be seen that some of the obligations hinted by the PCIJ ruling happen to be obligations emanating from the developing norm of IHRL.

The adoption of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Law has also helped in changing old age conceptions about nationality. The Convention was the first international document to set limits to the state’s discretion on matters of nationality, noting that such a discretion does not amount to an omnipotent authority. What followed is, after the end of WWII, the proliferation of international and regional human rights instruments that cemented the right to nationality as one of the most important fundamental rights and freedoms. The foremost of such examples is Article 15 of the UDHR, as will be discussed below.

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32Lincoln and Guba (1985), pp. 7, 19.
33David (1999).
34Sereke, Mekonnen (2019).
35Ibid.
36Malcolm (2010), p. 222.
37Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco, 4, Permanent Court of International Justice, 7 February 1923.
38See in general Brownlie (1963), Chan (1991), pp. 1–2; Van Waak (2008), Spiro (2011), McDougal et al. (1974) and Paul (1979).
39Brownlie (1963), p. 284; Van Waak (2008), p. 38.
The history of international and comparative nationality law would be incomplete without a discussion of the 1955 *Nottebohm* case of the International Court of Justice (ICJ), which is helpful in understanding some of the most important ingredients that constitute the entitlement of an individual to nationality. This case involves a dispute between Guatemala and Liechtenstein, related to the non-recognition by Guatemala of a certain national of Liechtenstein who was formerly a national of Germany. The man, named Nottebohm, who had business interests in Guatemala, obtained the nationality of Liechtenstein in 1939, shortly after Germany’s attack on Poland, which marked the beginning of the World War II (WWII). The man used to live in in Guatemala before, during and after the start of the WWII. His acquisition of a new nationality was believed to have been done with the objective of disassociating himself from his previous German nationality—ostensibly fearing undesirable consequences due to the start of the war. His new nationality was contested by Guatemala, with which the ICJ agreed. Guatemala refused to recognise the new nationality, arguing that there was no genuine connection between the man and Liechtenstein. In agreeing with the position of Guatemala, the ICJ introduced what is now widely known as “the principle of effective nationality.”

In deciding the case, the ICJ also provided the following definition of nationality, this being probably the first time the term nationality was defined by an international court as: “a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.” It was in this context that the ICJ devised “the principle of effective nationality.” According to this principle, a person can only have an assertive claim of nationality over a given state by proving meaningful connection or a genuine link to the state in question. Nottebohm was not considered to have such a connection with Liechtenstein. In the Court’s opinion, the connection shall include a link based on: tradition, establishment, interests and activities (such as financial, business or otherwise), family ties and intentions for the future (whether a person intends to maintain the nationality).

From the above we observe that there is no clear-cut position in international law about the issue of dual nationality as, in principle, nationality must be determined by the national law of sovereign states. This is also clearly stated by one of the partial awards of the EECC, which was called to decide on a number of nationality related violations committed in the context of the 1998–2000 border conflict between Eritrea and Ethiopia. In one such award, the EECC notes that although states are at a liberty to regulate the manner in which their citizens avail from the benefits of

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40ICJ 1955 Judgment, pp. 23–24.
41ICJ 1955 Judgment, p. 23.
42ICJ 1955 Judgment, p. 24.
43ICJ 1955 Judgment, p. 24.
dual nationality, international law neither permits nor prohibits the practice of dual nationality.\footnote{EECC, Partial Award, Civilians Claims, Eritrea’s Claims 15, 16, 23 & 27–32, 17 December 2004, para 57–59. For a comparative overview on the approach of other arbitral tribunals, notably the Iran-United States Arbitral Tribunal, on the issue of dual nationality, see Aghahosseini (1997), Mahoney (1984), Michigan Law Review (1984).}

Moreover, the right to nationality is one of the building blocks of IHRL. Among other things, it is part of the long list of fundamental rights and freedoms enumerated by the 1948 Universal Declaration of Human Rights (UDHR or the Declaration). Article 15 of the Declaration, in addition to asserting the right to nationality, imposes negative obligation on states by prohibiting arbitrary deprivation of nationality, including the prohibition towards denial of the right to change nationality. Most recently, in interpreting Article 15 of the Declaration, the African Court on Human and Peoples’ Rights (the African Court) ruled that the Declaration itself has matured to a level of customary international law.\footnote{Anudo Ochieng Anudo v Tanzania (‘Anudo case’), Application No. 012/2015, 22 March 2018.} In saying this, it is believed, the African Court has made a revolutionary contribution by explicitly elevating the status of the UDHR to that of customary international law.

This was clearly asserted in Anudo Ochieng Anudo v Tanzania (‘Anudo case’), in which the African Court was called for the first time to directly engage itself on the right to nationality.\footnote{Anudo case. See also Manby (2019), p. 171; Palacios Arapiles (2019).} The African Court’s approach is ground-breaking in that no other regional or international judicial or semi-judicial organ has thus far ruled in such a very explicit way in terms of raising the status of the UDHR to such an elevated station. From a broader context, this can be taken as a classic example of the contribution of an African Court to the development of international law. There is near consensus, at least among scholars of the developing world, that the development, scholarly analysis and debate of international law is disproportionately dominated by a process of knowledge production, the origin of which is Western legal erudition. This underscores the need to diversify the debate by engaging critical voices from less represented corners of the world, whose contribution to the said debate has hitherto remained marginal and fragmented. With Africa being a marginalised section of the world, the African Court’s approach can be taken as an exemplar of the potential contribution towards filling the aforementioned gap and the long-term goal of rebalancing the narrative of international law.\footnote{The argument on the need to rebalance the narrative of international law draws inspiration from the stated objective of this journal, including the Editorial published in the journal’s maiden issue.}

There is another important lesson the African Court offers to the general discourse on international and comparative nationality laws. Noting the non-existence of a general provision on the right to nationality, both under the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples’ Rights (the African Charter), the African Court came up with an innovative improvisation, which is that of filling the gap by drawing on the wording of Article 15(2) of the UDHR, which says “no one shall be deprived of his
nationality.’” It is in this context that the African Court promoted the UDHR to an elevated status of customary international law. The Court’s approach is admired by Manby, who characterises it as “a welcome endorsement of a point more often argued by human rights lawyers than accepted by states.”

Previously, the African Commission on Human and Peoples’ Rights (the African Commission) has also held that a claim to nationality as a legal status is protected under Article 5 of the African Charter on Human and Peoples’ Rights (the African Charter). Manby notes that this is an established position of the African Commission, reiterated in a vast body of jurisprudence the African Commission has produced over many years, pointing to the fact that “contested rights to belong to the national community have been at the basis of many of the most intractable political and military conflicts in the continent.” In the next sub-section, we will see the prevailing state practice on dual nationality.

However, it needs to be noted that the right to nationality recognised under Article 15(2) of the UDHR may also be subject to certain limitations, as noted for example, by the UN Secretary-General’s thematic report on Human Rights and Arbitrary Deprivation of Nationality. Under paragraph 8 of the same report, the Secretary-General recognises that nationality laws of countries may provide for the automatic loss of nationality in response to the voluntary acquisition of another nationality. The document also recognises that while dual nationality is gaining increasing acceptance, it is still a commonplace that it is a ground for deprivation. Citing the arbitral award of the EECC, the Secretary-General argues that there is no evident international norm regarding a right to dual nationality.

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48 Anudo case, para 76. In contrast, the American Convention on Human Rights, in Article 20, explicitly provides for the right to nationality.

49 Manby (2019), p. 173; Palacios Arapiles (2019).

50 ACHPR, Communication No. 317/06, Nubian Community in Kenya v Kenya, 30 May 2006; ACHPR, Communication No. 97/93, John K. Modise v Botswana, 6 November 2000; ACHPR, Communication No 211/98, Legal Resources Foundation v Zambia, 7 May 2001. See also Manby (2018, 2019).

51 Manby (2019), pp. 174–175. For a comparative perspective from Europe, see Alpeyeva and Dzhalagoniva v Russia (European Court of Human Rights, Application Nos. 7549/09 and 33330/11, 12 June 2018). For comparative perspective from South America, see Inter-American Court of Human Rights, Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, OC- 4/84, 19 January 1984, para 35, in which nationality is defined as: “The political and legal bond that links a person to a given state and binds him to it with ties of loyalty and fidelity, entitling him to diplomatic protection from that state.”

52 Human rights and arbitrary deprivation of nationality, Report of the Secretary-General, 19 December 2013, A/HRC/25/28, para 8.

53 Human Rights and Arbitrary Deprivation of Nationality, para. 6, 2014, citing Eritrea-Ethiopia Claims Commission (EECC), Partial Award, Civilians Claims, Eritrea’s Claims 15, 16, 23 and 27-32, 17 December 2004.
4.2 Comparative Law Perspective on Dual Nationality

The issue of dual nationality is a major problem area of international law, affecting millions of people globally and their governments. For a long time, the issue was seen as an “aberration to be avoided at worst, and eliminated at best.” However, because of globalisation and the increased movement of people from one place to another, the issue is no longer a rarity but a reality of the modern international legal order. Boll clarifies this observation as follows: “In current practice, States’ policies and laws regulating nationality continue to produce instances of multiple nationality, and international and municipal efforts to avoid or eliminate it have been largely unsuccessful.” This is also evident from the growing number of countries that allow dual nationality.

According to the 2019 edition of the World Population Review, there are 60 countries in the world that allow dual nationality. This number represents 33% of the total number of countries of the world, which are 193, based on current membership of the United Nations. This is a very significant figure. State practice is divergent, and in some cases the right to dual nationality is subject to certain types of restrictions. In some countries, for instance, individuals holding dual nationality are not allowed to hold public office or serve in the military.

The purpose here is not to explore the practice of dual nationality in all the 60 countries that are said to have a liberal approach to dual nationality. What can be done conveniently is to have a cursory look at some of the most representative examples that are deemed to have certain degree of similarity with the experience of Eritrea and Ethiopia on three grounds: (1) on account of the most troubled political history between the two countries; (2) on account of the right to cross-border identity of individuals with more than one ancestral background, and (3) on account of the multi-lingual nature of the populations in both countries.

On the third factor, the account of a multi-lingual nature of a given society, one of the most insightful examples is Switzerland (without forgetting other factors that may not make Switzerland a suitable example). Switzerland is a country constituted by multiple linguistic communities, with historical linguistic attachments to its most immediate neighbours, notably: France, Germany and Italy. Switzerland, in addition to allowing multiple nationalities, in 1992 also eliminated the condition that

54 Boll (2007), p. 1. In support of this claim, Boll cites the following observations of Bar-Yaacov (1961), p. 4: “[i]t is a widely held opinion that dual nationality is an undesirable phenomenon detrimental both to the friendly relations between nations and the well-being of the individuals concerned.”
55 Boll (2007), p. 2. See also Spiro (2010), pp. 129–130; Spiro (2018).
56 World Population Review (2019). Six of these countries are in Africa: Algeria, Angola, Benin, Malawi, Nigeria, and South Africa.
57 UN (2019).
58 See, for example, U.S. Department of State (2020).
individuals applying for nationality should divest themselves of foreign national-
ity.\textsuperscript{59} From the Swiss experience, there is a very recent and illustrative example of
two prominent Swiss politicians with dual nationalities who run for an election of
high-level government positions at the same time but with varying approaches to
dual nationality.

One of the two Swiss individuals is Ignazio Cassis, who eventually became Head
of the Federal Department of Foreign Affairs (FDFA). He obtained this position via
his election in 2017 to the Swiss Federal Council, the highest executive body of the
country.\textsuperscript{60} In preparation for election, he renounced his Italian citizenship. Although
Swiss law does not require this, seemingly the decision by Cassis was promoted by
the need to avoid potential controversy related to his political loyalty because of his
dual nationality. Born to an Italian father, Cassis is said to have obtained Swiss
nationality at the age of 15.\textsuperscript{61}

In contrast, there was another well-known politician with dual nationality from
the French-speaking part of Switzerland who ran for an election to the Swiss Federal
Council at the same time with Cassis. This person is Pierre Maudet, the former
mayor of Geneva and a dual national of Switzerland and France. During the election,
Maudet did not renounce his French nationality, saying that he would only discuss
the matter at the Swiss Federal Council if he were to be elected.\textsuperscript{62} The disparity of
approaches between the two politicians shows the level of freedom Switzerland
offers to dual nationals even when it comes to their personal ambitions related to
election to the highest levels of government office in the country. While it is true that
the level of political maturity in Switzerland is an outcome of a democratic exercise
of many decades, which may not be the case with many other countries from the
developing world, the country’s experience still offers insights on the way to handle
the issue of dual nationality in a democratic way.

On account of the other two factors, that of a troubled political history, and the
right to cross-border identity of individuals with more than one national ancestry, the
most insightful example is the experience of Northern Ireland. About the same time
when Eritrea and Ethiopia started a full-scale international armed conflict in 1998,
Northern Ireland was entering a new era of peace, heralded by the ratification of
the so-called Good Friday Agreement.\textsuperscript{63} The agreement helped Northern Ireland end a
political violence of three decades, commonly referred to as “The Troubles.” The
conflict was between two major political rivalries.

On one side of the conflict, there were so-called “nationalists,” mainly self-
identified as Irish or Roman Catholics, who sought to end British rule in Northern

\textsuperscript{59}Boll (2007), p. 524. See also the experience of Belgium as discussed by Boll (2007), p. 331;
World Population Review (2019).

\textsuperscript{60}\textit{Neue Zürcher Zeitung} (2017).

\textsuperscript{61}Ibid.

\textsuperscript{62}Ibid.

\textsuperscript{63}Agreement between the Government of the United Kingdom of Great Britain and Northern
Ireland and the Government of Ireland, 10 April 1998.
Ireland, and ultimately facilitate Irish reunification, by bringing about an independent republic encompassing all of Ireland.\textsuperscript{64} On the other side of the conflict, there were the so-called “unionists,” mainly self-identified as British or Protestants, who espoused continuation of a political union between Northern Ireland and Great Britain, or in other words preserving the place of Northern Ireland within the United Kingdom (UK).\textsuperscript{65} The major parties to the conflicts were also known as Loyalists (referring to unionists) and Republicans (referring to nationalists).\textsuperscript{66}

When signing the Good Friday Agreement, the political parties in Northern Ireland as well as the British and Irish governments did not only commit themselves to end a three-decade conflict, but they also provided explicit guarantee for the right to cross-border identity of individuals with Irish and British ancestry. This guarantee was included in Article 1(vi) of the Agreement, imposing obligations on the British and Irish governments, in which the governments committed themselves to:

recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.

At the very end of the Agreement, the parties included the following declaration that strengthens the commitment made in Article 1(vi) of the Agreement:

The British and Irish Governments declare that it is their joint understanding that the term “the people of Northern Ireland” in paragraph (vi) of Article 1 of this Agreement means, for the purposes of giving effect to this provision, all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence.

Given the peculiarly divided history of Northern Ireland, this was a very innovative approach, perhaps the most important element of the Good Friday Agreement, as far as the objectives of peaceful coexistence of Irish and British communities in Northern Ireland is concerned.

However, in the context of controversies triggered by “Brexit,”\textsuperscript{67} the terms of the Good Friday Agreement related to cross-border identity of individuals has faced a major challenge, as was seen in a landmark judgement delivered on 14 October 2019 by the UK’s Upper Tribunal of the Immigration and Asylum Chamber.\textsuperscript{68} The matter relates to a legal challenge posed against the UK Home Office by a Northern

\textsuperscript{64}Keogh (1993), Ahern (1998), Rose (2001), p. 94; Hackney, Hackney (2004), p. 200; Claire (2013), p. 5; Wallefeldt (2019).

\textsuperscript{65}Ibid.

\textsuperscript{66}Ahern (1999), p. 1196. For a critique of the dismal record of the role of the legal profession in the Northern Ireland conflict, see McEvoy (2011).

\textsuperscript{67}This term refers broadly to the process of withdrawal of the UK from the EU, following the 2016 UK referendum on the matter. See Pinnemore and Hayward (2017).

\textsuperscript{68}Upper Tribunal of the Immigration and Asylum Chamber. Secretary of State for the Home Department v Jake Parker de Souza, Appeal No. EA/06667/2016, 14 October 2019, para 28.
Ireland-born woman, Emma DeSouza, who wanted to be identified as an Irish citizen pursuant to the stipulations of Article 1(vi) of the Good Friday Agreement. The Home Office disagreed, claiming that by virtue of the British Nationality Act 1981 all people born in the UK, including in Northern Ireland, are considered British citizens, and that pursuant to the well-known theory of parliamentary supremacy, this law has precedence over the stipulations of Article 1(vi) of the Good Friday Agreement. The Upper Tribunal agreed with the position of the Home Office, noting in the same fashion that the stipulations of the Good Friday Agreement on dual nationality are unconstitutional because they effectively superseded the British Nationality Act 1981, which is an act of parliament.

The controversy started in 2015, when DeSouza approached the UK Home Office seeking a UK residence permit for her US-born husband. DeSouza was told that she could only do this if she had formally obtained British citizenship. She refused to do this arguing that she never considered herself a British citizen and that the terms of the Good Friday Agreement support her claim for Irish citizenship at the exclusion of British citizenship. Despite this, the UK Home Office rejected her application to which she appealed to the First-tier Tribunal of the UK Immigration and Asylum Chamber. The First-tier Tribunal reversed the decision of the Home Office in 2017. The latter appealed against this judgment, securing reversal of the same by the Upper Tribunal on 14 October 2019. In November 2019, DeSouza filed an application for leave to appeal, challenging the judgement of the Upper Tribunal. Her application was refused on 23 November 2019, following which her lawyers were preparing an appeal to the Court of Appeal.

Regardless of the recent setbacks, the Good Friday Agreement stands out as the most innovative example in providing safeguards for the right to cross-border identity of individuals hailing from more than one national ancestry. The challenge it is currently facing in the context of the Brexit political crisis is indicative of the need to make such agreements independent of future political influences, by also providing for constitutional entrenchment of the rights recognised under such agreements. This was a shortcoming not foreseen by the negotiators of the Good Friday Agreement, for which a solution may be secured by another round of negotiations between the major actors, or as part of the on-going political negotiations on Brexit. For other countries, the most important lesson that can be gleaned

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69 This theory holds that parliament as the legislative body has absolute sovereignty, and consequently, all its actions have precedence over any other actions of other organs of the government, notably the executive and judicial organs. The UK Parliament itself defines the theory as follows: “Parliamentary sovereignty is a principle of the UK constitution. It makes Parliament the supreme legal authority in the UK, which can create or end any law. Generally, the courts cannot overrule its legislation and no Parliament can pass laws that future Parliaments cannot change. Parliamentary sovereignty is the most important part of the UK constitution.” UK Parliament (2019).

70 Upper Tribunal of the Immigration and Asylum Chamber, Secretary of State for the Home Department v Jake Parker de Souza, Appeal No. EA/06667/2016, 14 October 2019, para 28.

71 The Journal (2019).

72 Ibid.
from this experience is that negotiations of this nature need to be supplemented by constitutional and/or parliamentary guarantees that should not be affected by unpredictable political developments.

5 Contextualising the Nationality Laws of Eritrea and Ethiopia

In both countries, there is a pervasive problem of discrimination against individuals having ancestral roots in the other neighbouring country. This issue was one of the central themes adequately discussed by several partial awards delivered by the Eritrea-Ethiopia Claims Commission (EECC), as further considered later.\(^{73}\) The issue of discrimination needs to be seen in the context of the internationally recognised right to non-discrimination of human beings as one of the most important principles of International Human Rights Law (IHRL), enshrined in various international instruments such as the International Covenant on Civil and Political Rights (ICCPR). Article 26 of the Covenant explicitly prohibits discrimination based on national origin (among several other grounds).\(^{74}\)

The principles of equality and non-discrimination “appear near the beginning of virtually every major human rights instrument,” simply because “prejudice is often the motivation underlying other rights violations, so measures that protect against manifestations of that prejudice serve to protect a broad array of human rights.”\(^{75}\) In Eritrea and Ethiopia,\(^{76}\) the pervasiveness of the problem is so entrenched that whenever there is any major incident of a political dispute between the governments of each country, individuals having dual ancestral background find themselves in a perpetual state of a “prime suspect,” a difficult situation that exposes them to

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\(^{73}\)See, for example, EECC, Partial Award, Civilians Claims, Eritrea’s Claims 15, 16, 23 & 27–32, 17 December 2004; EECC, Partial Award, Civilians Claims, Ethiopia’s Claims 5 (17 December 2004).

\(^{74}\)See also Article 7 of the UDHR: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” Similar observations can also be made from the Convention on the Elimination of All Forms of Racial Discrimination (CERD), particular the CERD Committee’s General Recommendation No. 30 on discrimination against non-citizens.

\(^{75}\)Farrior (2015), p. 1.

\(^{76}\)In the case of Ethiopia, there is one enigmatic aspect of the problem. In the one hand, Ethiopia is known for its notable role in the global movement for equality and non-discrimination in that it was one of two African countries that have brought a dispute before the ICJ (for the first time), challenging the legality of apartheid in the then South West Africa. See South West Africa (Second Phase) [1966] ICJ Reports, Judgment of 18 July 1966. When it comes to its commitment towards the protection and promotion of the fundamental rights and freedoms of its own people, the country does not have a commendable record.
perennial condemnation for potential ill-deeds committed by the government of one
country against the other.77

Discrimination against the group of people under discussion takes different forms
and shapes. One quite common example is the widespread usage of derogatory
words in reference to this group of people, a practice that seems to have implicit
official blessing from government authorities. The far-reaching implication of this
practice is not limited to the mere usage of derogatory language, including in semi-
official channels. Rather inappropriately, these expressions are oftentimes conflated
with highly repugnant behaviours and actions, such as treason, a typical criminal act
subject to the death penalty according to operational criminal laws in both countries.
Such highly stigmatising societal and political attitudes have given way to a repug-
nant belief system and practice that equates the group of people under discussion
with all that is against the national interest of the country in question, depending on
the national context.

In different contexts, ultra-nationalist entities from both countries are seen vehe-
mently blaming the category of people under discussion for the ill fate of their
respective countries. When this happens, blames were apportioned, rather absurdly,
based on a mere account of the ancestral roots of the targeted individual. In most
cases, the accusation goes as follows: this person is doing all the bad things to our
country, because they are not “genuinely” Eritrean or Ethiopian, thus they do not
have at heart the best interest of the country in question.78

At least on the Eritrean side of the coin, historical antecedents of this nature, in
their modern sense, date back to a well-known controversy from the 1940s between
two important figures of the day in the highlands of Eritrea: Woldeab Wodemariam
and Tedla Bairu. The former was a staunch proponent of Eritrean independence,
while the latter favoured a union with Ethiopia. Due to animosity resulting from their
divergent political orientations, Bairu is said to have attacked Woldemariam, citing
Woldemariam’s “non-pure” Eritrean origins, the latter’s ancestral origin being in
Tigray, northern Ethiopia. Accordingly, Woldemariam was deemed incompetent to

77See note 78 below.

78One most recent example can be observed from a question asked of the Eritrean Minister of
Justice in a town hall meeting she conducted in August 2019 in Dallas, USA, to Eritrean residents of
the city. See YouTube (2019). At the meeting, a commentator by the name of Nasser Umer Ali
asked the Minister about a potential problem of “conflict of interest” between the national interest of
Eritrea and that of the personal interest of the incumbent Eritrean President. This was so, according
to the commentator, on the ground that the Eritrean President is not “genuinely” Eritrean due to his
alleged ancestral roots in Ethiopia. The commentator is known for his controversial social media
postings that target certain Eritrean politicians mainly because of their alleged ancestral roots in
Ethiopia. See, for example, the following two Twitter postings from 8 February 2020 by the same
commentator: https://twitter.com/NasserOAli/status/1225990570889404416 and
https://twitter.com/NasserOAli/status/1226226045403238400. In the latter posting, Ali comments as follows in
direct reference to the incumbent President of Eritrea: “Ethiopian Ambassador to Eritrea or a
President of Eritrea who is Ethiopian by origin and sentiment?” Ostensibly, Ali is emerging as
one of the leaders of a newly established Eritrean political movement, known as
didn’t see any specific reference to this.
speak about Eritrean matters. This gave rise, among other things, to Woldemariam’s famed opinion piece, “Who has the right to speak about Eritrea?”

Sweeping claims and blames, although not new to history and persist as a malpractice in different contexts, flout the dictates of common sense and logic. It is extremely problematic to continue judging people based on flawed assumptions that cannot be backed by objective or scientific evidence. The problem is deeply entrenched. As a result, people even with the most successful political and non-political credentials do not have the courage to speak out publicly about their ancestral backgrounds: in most cases doing so is considered a “taboo” due to the repugnant stigma attached to the category of people under discussion.

There is no better example in explaining this deep-seated problem than the way issues have been framed and argued over the past many years in matters related to two prominent leaders from both countries: the late Meles Zenawi, former Prime Minister of Ethiopia and Isaias Afwerki, the incumbent President of Eritrea. It is a matter of general knowledge that both individuals have ancestral background from both countries; only because of this factor they have been viciously attacked by ultra-nationalist groups from both countries (in addition to any problem of political leadership they may have).

Much, if not all, of the excuses used in exacerbating the consequences of the “no peace no war” situation of the previous two decades were very much linked to the core issue of people having ancestral backgrounds in both countries. Nonetheless, reminiscent of the proverbial ostrich that hides its head in the sand in the disguised belief of outwitting its predator, both governments have not yet shown an iota of courage to face the challenge head-on. Over and above addressing the pervasive problem of discrimination against individuals hailing from ancestral backgrounds in both countries, there is also a need to look at the prevailing legislative framework of the two nations, by asking the following question: how does the law in both countries address the right to cross-border identity, or put differently, does the law

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79 As cited in Mesfin (2017), p. 127. Woldemariam’s opinion piece appeared in the Tigrinya newspaper of the day, Eritrean Weekly News, No. 222, 28 November 1946, the editor of which was himself.

80 From recent history, Donald Trump’s well-reported repugnant behaviour towards immigrants is a case in point. In a recent opinion piece, a writer for The Washington Post opines: “Trump’s most insulting – and violent – language is often reserved for immigrants.” The Washington Post (2019). The fact that his present wife is Slovenian-American does not make any difference in his notoriously anti-immigrant standing. His mother is also said to be a Scottish-born housewife.

81 In the case of Meles Zenawi, the author personally knows two individuals who confirmed to him that they are close and distant relatives of the former Prime Minister of Ethiopia. The close relative lives in Germany. The distant relative lives in Switzerland. The birthplace of Meles Zenawi’s mother is Adi Quala, Eritrea. In the case of the Eritrean President, at least two well-known figures from Ethiopia have come out publicly stating that the Eritrean President is their close relative. These are Mr. Yamane Kidane (also known as Jamaica), a former senior freedom fighter of the TPLF; and Dr. Solomon Unquay. See Tigrai Mass Media Agency (YouTube) (2017), around 47 minutes of the audio-visual file; and BBC News Tigrinya (2018).

82 As seen, for example, in note 78 above.
permit the practice of dual nationality or make a similar arrangement to protect the interests of such group of people?

5.1 The Ethiopian Approach to Nationality

Ethiopia has one of oldest nationality laws in Africa, which is from 1930, predating its 1994 Constitution. However, the 1994 Constitution itself (in Article 6) also briefly speaks about nationality, by way of providing a general principle, the details of which are left to “be determined by law.” The first paragraph of Article 6 of the Constitution is inspired by the well-known principle of *jus sanguinis*, by which nationality is acquired based on ancestral background, namely: if one or both of the parents of an individual are Ethiopians. This tends to be the most common practice in the civil law systems of continental Europe. In contrast, other countries, and most notably the United States, are known for their propensity towards the principle of *jus soli*. According to this principle, also known as birth-right citizenship, nationality is accorded automatically to any person born in the territory of the state in question. This is the most favoured approach by the 1961 *Convention on the Reduction of Statelessness*, and it is deemed a highly effective remedy to counter statelessness.

The original Ethiopian law on nationality was promulgated on 22 July 1930, before the Italian invasion of Ethiopia. Among other things, the law is known for its firm position on the prohibition of dual nationality. Article 11 of the law clearly stipulates that Ethiopian nationality can be lost if a person acquires another nationality. Like the 1994 Constitution, the old law also subscribes to the principle of *jus sanguinis* as the main guiding principle for the acquisition of nationality. This law was repealed in 2003 by Proclamation No. 378 of the same year, officially known as the *Ethiopian Nationality Proclamation*. However, the two important elements of the old law, namely, the prohibition of dual nationality and the principle of *jus sanguinis* were retained by the new law.

For this article, there is one striking element on the treatment by Ethiopia of Ethiopians who had also acquired Eritrean nationality, thus effectively becoming dual nationals. Before the start of the 1998 border conflict, the groups of people under discussion were treated in a privileged manner that did not comply with the new Ethiopian law on nationality. In very simple terms, they were allowed to...

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83Literally, this means “law or right of blood.” According to this principle, nationality is based on descent from parents who themselves are or were citizens. See Manby (2016), p. 43.
84See in general Schachar (2009), p. 120; Koslowski (2000), p. 77; Vincent (2002), Vink and de Groot (2010), p. 35.
85Literally, this means “law or right of the soil.” Accordingly, a person can obtain nationality if they are born in a particular country. See Manby (2016), p. 43. See also the distinction between nationality by descent and nationality by acquisition as defined by Manby (2016), p. x.
86Chen (2015), p. 223; Shearer and Opeskin (2012), p. 99. See also Manby (2018).
87Promulgated in Federal Negarit Gazette, Vol. 19, No. 13, dated 23 December 2003.
maintain Ethiopian and Eritrean dual nationalities. This is clearly acknowledged by
the EECC in the following manner: “[Ethiopia] allowed Ethiopians who had also
acquired Eritrean nationality to continue to exercise their Ethiopian nationality,
while agreeing with Eritrea that these people would have to choose one nationality
or the other at some future time. The war came before these matters were
resolved.”

According to the spirit and letter of the 1930 Ethiopian law of nationality,
Ethiopians of Eritrean origin who preferred to maintain their Eritrean nationality
(after Eritrea became an independent state in 1991) should have been deemed to have
renounced their Ethiopian nationality. This did not happen primarily due to the very
warm relationship enjoyed by the two major political forces of the day in both
countries, namely the EPLF (later PFDJ) and the TPLF, both of which were and are
still ruled by Tigrinya-speaking political elites of both countries.

The above approach, described by the EECC as “quite commendable” was
adopted on a tentative basis, supposedly taken into account the peculiar circum-
stances surrounding the emergence of Eritrea as a de facto independent state in 1991,
after winning a liberation war of 30 years against Ethiopia. According to the EECC,
this tentative approach was not to last forever. The Commission notes that Eritrea
and Ethiopia had an agreement to the following effect: that at some future time
Eritreans who were living in Ethiopia and who want to retain their Ethiopian
nationality had to choose between the two, apparently as per the requirements of
the 1930 nationality law of Ethiopia. The border conflict erupted in May 1998
before this could have happened, exposing thousands of Ethiopians of Eritrean
origin to untold levels of suffering as sufficiently corroborated by the findings of
the EECC. Of course, Ethiopians who lived in Eritrea before and after the eruption of
the border conflict have also taken their share of the suffering, as sufficiently
corroborated by the EECC’s rulings. Lack of clearly defined legislative frame-
works in both countries is one of the key factors that have caused untold suffering of
individuals having ancestral backgrounds in both countries.

88EECC, Partial Award, Civilians Claims, Eritrea’s Claims 15, 16, 23 & 27–32, para 59. The basis
for this is an agreement reached between Eritrea and Ethiopia in August 1996 at the Fourth Ethio-
Eritrean Joint High Commission Meeting, cited in para 52 of the same Partial Award. Accordingly,
implementation of this agreement was subject to “granting the freedom to trade and to invest
in either country for both nationals of Ethiopia and Eritrea.” There were concerns that on the Eritrean
side the promise in this regard was not fulfilled to the satisfaction of Ethiopian traders/investors,
giving rise on the part of the latter a sense of resentment, exacerbated by the privileged treatment
Eritreans received in Ethiopia before the outbreak of the war in 1998.

89EECC, Partial Award, Civilians Claims, Eritrea’s Claims 15, 16, 23 & 27–32, para 59.
90Ibid.
91EECC, Partial Award, Civilians Claims, Ethiopia’s Claim 5, 17 December 2004.
5.2 The Eritrean Approach to Nationality

Eritrea promulgated its first post-independence nationality law, formally known as the *Eritrean Nationality Proclamation*, in 1992 as part of preparations for the 1993 national referendum for independence. Like Ethiopia, Eritrea also subscribes to the principle of *jus sanguinis* as the main guiding principle for the acquisition of nationality. However, there is a major distinction between the two countries when it comes to the issue of dual nationality. Paragraph 5 of Article 2 of the Eritrean nationality law exempts Eritrean citizens living abroad and who have obtained the nationality of other countries. The law gives individuals the option of retaining their foreign nationality, provided they have a good reason to do so. This approach is prompted by the following considerations.

Due to a prolonged history of forced migration, Eritrea has one of the largest diaspora communities in the world in which context many Eritreans have obtained the nationality of other countries, long before the emergence of Eritrea as an independent state. During the war of liberation, many in the Eritrean diaspora served as active and committed members of the liberation front, the EPLF, supporting the armed struggle for liberation in various forms, substantially, no less than what could have been done by the freedom fighters in the battlefield. In real terms, it was too costly and practically impossible for the newly independent State of Eritrea to categorically coerce many of its citizens to abandon many entitlements accrued to them by virtue of their prolonged stay in their adopted countries. Moreover, in proportion to its very small population size, the total number of Eritreans who live outside the country is too big, prompting the Eritrean Government to adopt a less restrictive approach towards dual nationality.

Eritrean nationality law was proclaimed several years before the adoption of the country’s 1997 Constitution. Compared to Ethiopia, and many other countries for that matter, Eritrea’s constitutional experience is very unusual, as would become clear in a moment. In style, however, Article 3 of the 1997 Constitution of Eritrea is fashioned in very similar ways with that of Article 6 of the 1994 Ethiopian Constitution in that it recognises the right to nationality of anyone born to an Eritrean father or mother. Like its Ethiopian equivalent, the Eritrean Constitution leaves the details of the matter to subsidiary legislation. Clearly, both countries follow a commendable egalitarian approach to the issue of gender equality in matters of nationality in that their constitutions recognise the right to nationality of individuals regardless of whether such a right devolves from the maternal or paternal line. This observation requires a little more explanation.

With the exception of certain ethnic groups, such as the Kunama in the case of Eritrea, both Eritrea and Ethiopia have dominant ethnic groups (most notably, the Amara in the case of Ethiopia and the Tigrinya in both countries) that adhere to a social structure premised on patriarchy. According to this structure, individual and organised societal relationships are defined based on male-dominated power
structures. In such societies, traditionally, important societal roles, such as “belonging,” moral authority, as well as other related privileges and entitlements are defined primarily based on patrilineal considerations. Seen against such deeply entrenched societal practices, especially in the highlands of both nations, the egalitarian approach to nationality both countries followed (at least at the level of principle) is truly commendable. For example, both countries allow nationality based on maternal or paternal lineage without any bias to both genders.

However, on the issue of constitutional practice in Eritrea, there are certain caveats that need to be put here. Eritrea has duly adopted its first post-independence constitution in 1997. For reasons that are sufficiently discussed in previous academic contributions of this author, the constitution remains unimplemented—simply because the government did not want to do so, as part of the deep-seated political crisis in the country. Therefore, in practical terms, a discussion of the 1997 Eritrean Constitution does not go beyond the benefits of academic discourse, having no added value to present day real-life situation in Eritrea. Anything that can be said about constitutionalism in Eritrea is inevitably in a forward-looking manner, focusing on the forthcoming and much-anticipated post-dictatorship era of Eritrea.

6 Concluding Remarks and the Way Forward

With the ascent of Ethiopia’s reformist prime minister, and following the courageous move he took only two months after he came to power, Eritrea and Ethiopia seem to be entering a new era of a much anticipated peaceful coexistence. However, there are also concerns prompted by some worrying signals that point to a certain degree of stagnation in the newly started rapprochement. Despite such concerns, the following observations are absolutely true about the internal political dynamics in each country.

With all its limitations, Ethiopia is making significant strides towards democratisation (in relative terms). Eritrea’s internal political crisis remains unresolved. At least by the measurement of the two most important reports about the situation of human rights in Eritrea, there are reasonable grounds to believe that high-ranking Eritrean government officials, including the State President, are suspected of involvement in the commission of gross human rights violations, which may have reached the threshold of crimes against humanity.

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92 On “belonging” and the related topics of “othering” and “identity,” see in general Hall (1996), Abbay (1998), Yuval-Davis (2006), Powell (2012), Ngwena (2018), Tesfai (2020).
93 See, for example, Mekonnen (2016a, b).
94 See Mekonnen (2016b), p. 4, 16.
95 UN commission of inquiry report (2015, 2016).
96 UN commission of inquiry report (2015), para 23 read in conjunction with UN commission of inquiry report (2016), p. 1, paras 66–68; Mekonnen (2016a), p. 226.
In bilateral relations, the two countries have a lot of work to do. Other than inherent questions that ensue from the very difficult nature of the issue of dual nationality, Eritrea and Ethiopia should prepare themselves for many other questions that are expected to emerge in the future once the rulings of the Eritrea-Ethiopia Boarder Commission (EEBC) are fully implemented. The rulings are expected to give rise to hard-hitting questions that would emerge from newly formed group identities who find themselves switching nationalities because of demarcation and delimitation resulting from the rulings of the EEBC.\(^97\)

The more daunting task is related to the issue of dual nationality. Both countries have divergent policies on this issue. Eritrean laws are lenient on this, while Ethiopian nationality law is deemed stricter. The following recommendations are important for improvement in both countries. For Eritrea and Ethiopia to promote a lasting peace between them, they should produce a modality that officially addresses the plight of individuals with ancestral backgrounds in both countries. This needs to be done in a way that is transparent, democratic and participatory, and most of all by a process that ensures the full and meaningful inclusion of the most affected people in any decision-making processes that affect their rights and interests. Both countries have a significant number of people that are affected by the question of nationality. Common sense dictates that both governments should produce a policy that safeguards the right to cross-border identity of individuals with ancestral background in both countries. Many of such people live in the common border areas between the two countries, making it imperative for both countries to give consideration to the plight of these people.

In the current context, their right to cross-border identification is understood as a fundamental entitlement to dual nationality, including the right of affected individuals to freely and publicly identify themselves in a way that fits them without any fear of discrimination, ill-treatment, or stigma, be it from the government of the day or any other entity in any of the two countries. The right shall also include, among others, the right to live, work, study and engage in any legitimate activity without any restriction in any of the two countries in which the person in question has direct ancestral background.\(^98\) As shown in Sect. 3 above, there is dependable state practice supporting this argument, at least as seen by the experiences of Switzerland and Northern Ireland.

In the most immediate future, for example, as a follow-up to the peace and friendship agreements of July and September 2018, it would be helpful to encourage both governments to start negotiations in which the issue of dual nationality can be articulated in a manner that considers the peculiar political history of both countries. The negotiations can hopefully lead to a separate bilateral treaty modelled from the

\(^{97}\)Southwick (2009), p. 15.

\(^{98}\)Considering the troubled political history of the relationship of the two counties, some rights, such as the right to be elected to the highest political office, may be made subject to a special procedure of allegiance or loyalty. In this context, a person who wants to assume such a political office may be required to relinquish all previous nationalities they have had before they assume office. See, for example, the experience of the Swiss politician discussed in note 60 above.
Good Friday Agreement of Northern Ireland, with the possibility for the provision of additional constitutional or legislative guarantees in both countries.

The agenda of promoting the above objective can be best served if it is pushed by researchers, human rights activists and people who are most affected by the problem under discussion. Therefore, it is incumbent on the most affected societal segments of both countries to get organised and start playing a proactive role not only in defending and promoting their rights but also in shaping the agenda for a lasting peace between the two countries. In any political process, sustainable change in life standards, including the promotion of peaceful coexistence, can only be achieved by active and meaningful participation of all segments of a society. There is a general assumption that the category of people under discussion makes up a substantial part of the total population in both countries (at least in Eritrea). Accordingly, a political process in any of these two countries that does not adequately address the plight of this group of people, coupled with other political factors, risks the danger of relapsing to the status quo of the last two decades.

Achievement of a lasting peace would be difficult without protecting the fundamental rights and freedoms of every segment of the society in both countries. In both countries, the plight of the category of individuals discussed here remains a hitherto neglected area of concern, both in mainstream policy and non-policy debates. It is about time to initiate a meaningful dialogue and conversation about this topic, by encouraging the establishment of grassroots movements, research centres and similar initiatives, primarily driven by people most affected by the problem at hand, with a clear objective of shaping policy and practice in a way that ensures full respect for their right to cross-border identity. The guiding principle in this regard is allegiance to the dictates of human dignity and the worth of every person. The proposed initiatives shall work hard in spreading a resounding message of love and peace to the following effect: it is perfectly fine to be officially Eritrean and Ethiopian at the same time, as in many other countries, without questioning the independent sovereign existence of the two sisterly countries.

As the Latin maxim, nihil de nobis, sine nobis (nothing about us without us), puts its clearly, issues around this issue are better articulated and fought for by people who are not only the most affected but also the most committed in addressing those particular challenges. At the core of such initiative, there should be particular focus on empowerment of people. Discrimination and stigma can only be overcome by empowering people, both those who are most affected by the problem and those who sympathise with the cause but do not have the courage to speak out in support of people discriminated against based on national origin. Such kind of initiatives need to be guided by the ideal of promoting fundamental rights and freedoms as the rewards of courageous fellow citizens who can claim their entitlement towards them assertively. The initiatives need to loudly and clearly propagate that in most cases rights are not given for free. They must be earned and fought for, and eventually they must be safeguarded by legislative frameworks. To that end, it is hoped that the

99These are the group of people identified as the “Double E People” or DEP, in note 1 above.
observations made in this contribution will generate thoughtful conversation, dialogue and debate on the topic at hand.

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