

Joint submission to the Constitutional Council of Inquiry of the Federal Democratic Republic of Ethiopia on the matter of the House of Peoples' Representative request for constitutional interpretation

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1 Preface: The historic and constitutional significance of the process

1. Ethiopia is at a historic constitutional moment. As legal scholars and practitioners, we recognize that, although triggered by a technical legal question, the constitutional interpretation process on the possibility of postponement of elections and term of parliament is of huge constitutional and historic importance. It has immense potential for marking a break from a past devoid of constitutionalism and heralding a great new start for nurturing a constitutional democracy in which constitutionalism and the rule of law are the basis for the exercise of government power and the actions of members of society. This national exercise offers a unique opportunity to establish firm ground for the culture and practice of a system of constitutional governance in which constitutional interpretation and adjudication on the basis of judicious and sound procedures and analysis occupies a prime place of honor as the final arbiter of constitutional issues and the most preferred option for resolving disputes.
2. As a matter that has drawn immense interest in the legal fraternity, on the part of the various political constituencies of the country and among the general public, this collective national exercise has raised enormous expectations and hope on the possibility of resolving pressing matters of national importance through an independent and deliberative constitutional interpretation process. Many ask: will this be an occasion for charting a transition towards a society that operates on the basis of constitutional principles and duly established legal rules rather than on the basis of balance of power of the particular moment and political expediency? Will this be a momentous occasion to write a new constitutional story, a story of hope and possibilities, for the country? Will this be that long-awaited time to demonstrate that the Constitution is not merely a piece of paper carrying grand ideals and principles with no application in the life of people but a supreme guidepost based on which democratic ideals are enforced, the fundamental rights of citizens are protected and the common aspirations of the people are pursued?
3. What makes this exercise extraordinary is also the overall historical context in which it is being undertaken. It is happening at a time of major political transition whose central promise is to fulfill the longstanding quest of the country for a vibrant and genuine constitutional democracy in which the voice and interest of all sections of society are duly safeguarded. It is a historical moment to chart a path and lay the background to the 'democracy question'. It is happening at a time when various constitutional bodies, for example, the National Human Rights Commission, have for the very first time started to make strides towards fulfilling their constitutional mandate. This exercise is also taking place at a time when the expression and organization of political plurality is regaining space on the political landscape of the country. It is also happening at a time when many hope the upcoming national election to be qualitatively different from previous elections in that it will be an election that is run by a body whose independence is widely recognized and conducted on the basis of a transparent, credible, free and fair process.
4. This exercise is also happening at a time when trust among various political and social forces in the country has as yet to be firmly established. It also comes against the background of highly contested recent past that continues to affect not only the politics of

the country but also how the public views the conduct of various actors including state institutions.

5. As a result, this is also a time when lack of trust and widely held perception of poor legitimacy in the processes of state institutions, including the bodies charged with constitutional adjudication, is in abundance. The prevailing national context is thus one that will benefit tremendously from robust articulation of constitutional principles that offer inclusive pathways to allow principled political imagination and actions. Why can not this constitutional interpretation process be the avenue for charting new pathways for overcoming these challenges and for forging shared ground and build trust in legal processes as preferred modes for settling differences?
6. For the CCI (and HoF), in short, this is a moment to prove their worth and demonstrate firmly that they are reclaiming and assuming their constitutional role as a non-partisan umpire and as a trusted and independent guardian of the Constitution. It is a time to show to the public that they are on a path of parting ways from their history of being subservient to the incumbent party. It is a time for these bodies to rise to the occasion by seizing this historic constitutional moment and deliver equally historic jurisprudential resolution of the matter in a manner that eases members of society who may be apprehensive about this process and that affirms the expectations of those hoping for an outcome that earns the support of the public and puts the country on a stable path towards the institutionalization of the democratization process.
7. In this submission, we outline the kind of expert constitutional opinion that we believe will enable the CCI both to recognize the momentous nature of this constitutional moment and significantly to rise to the moment for writing a historic constitutional story befitting the aspirations of our people and the ambition of this great country. The next part presents our legal analysis on preliminary process and jurisdictional issues. We thus first provide our legal analysis on the process that should be followed by the CCI and discuss whether the CCI has the constitutional mandate to provide advisory opinion. The last item of this part addresses whether there is a need for constitutional interpretation. After establishing that there is a constitutional oversight that warrants constitutional interpretation, we move to the next part where the submission moves to the substantive issues that need constitutional interpretation. In this regard, the focus is first on whether the constitution allows for the postponement of the election and, if so, which entity could make the decision on postponement, through what process and for how long. The next part of the submission deals with the consequences of the decision to postpone elections, namely the fate of the parliament and government whose terms would end before holding of elections. The last part ends our submission with a conclusion.

2. Procedural and jurisdictional issues

2.1. Presenting submissions to the CCI and holding public hearings

8. Following the referral of the constitutional matter to the CCI by the House of Peoples' Representatives, the CCI made an announcement inviting constitutional experts to make submissions of expert opinion on the matter as amicus to the CCI. Additionally, the

Chairperson of this constitutional body also announced that ‘the CCI will hold a hearing with relevant institutions and prominent individuals.’

9. Explaining the importance of these processes, the Chairperson expressed her hope that ‘such participation is important to demonstrate to the public the integrity of the process and the outcome as well as to cultivate a positive tradition of constitutionalism in Ethiopia.’ These objectives are consistent with various principles enshrined in the constitution including the principle of human and democratic rights under Article 10, the principle of transparency in Article 12(1), the principle that those affected by a decision should be given a chance to be heard in the principle of self-government and democratic form of government which are the basis of the Constitution. These objectives that the Chairperson of this constitutional body articulated require for their full realization and satisfaction more than allowing access to constitutional experts. It principally demands that other members of the public interested to make representation with the CCI are also given an opportunity to be heard – not just as experts, but also as stakeholders and resource persons. Given that this matter is of national importance and affects the public in general, making the process inclusive and fully participatory guarantees the integrity of the process and the outcome in the eyes of the public. As such, allowing other members of the public to make submissions would endow the process with a much-needed public support and legitimacy which ensures that the outcome would earn acceptance across the social and political divide. We understand that by the time the CCI reads this submission, the timeline for written submissions would have closed. We also understand the logistical difficulties of a fully open process. We nevertheless wish to stress our view that the constitution is not the sole province of legal experts, but is and must be seen as the concern of everyone.
10. Not any less important is making the conduct of the proceedings of this constitutional interpretation process open to the public. As noted above, it is highly commendable that the CCI Chairperson stated that ‘the CCI will hold a hearing with relevant institutions and prominent individuals.’ In the light of the historic importance of this process and the huge interest in this process on the part of the wider public, it is of paramount constitutional importance, including from the perspective of ‘cultivat(ing) a positive tradition of constitutionalism in Ethiopia,’ that these hearings are made public and broadcasted on national media platforms. When it comes to bodies with judicial responsibility such as the HoF and the CCI, it can be surmised that the principle of transparency under Article 12 of the Constitution is an embodiment of a judicial practice of holding hearings that are open to the public. The more the public interest in the matter as in this particular case, the more fundamental the constitutional imperative for conducting hearings in public, which in recent times expanded to include live transmission of such hearings.

2.2. Does the CCI have the mandate to issue an advisory opinion?

11. It is important to state from the outset that the request for interpretation has been submitted directly to the CCI, not the HoF. Second, the postponement of the elections is presented as a fact, i.e. elections cannot be held within the constitutionally provided timeline. Beyond this, there is no specific government decision, law or even proposal on whether the

constitution allows postponement, nor on the consequences that draw from such postponement, including the modality of interim governance.

12. Accordingly, the request does not relate to the compatibility of a chosen course of action with the constitution. In the absence of a chosen course of action, there is neither ‘concrete’ dispute (in the sense of there being a direct ‘victim’ (applicant) challenging a law or decision), nor even an ‘abstract’ dispute (in the sense of review of a final or proposed law or decision). Therefore, the HPR is not seeking a ‘review’, whether concrete or abstract, but a consultative or advisory opinion on what the constitution *requires* or *allows* in relation to the two issues.
13. The letter of request from the HPR indicates that Article 3(2)(c) of proclamation no 798/2013 defining the mandate of the CCI, which allows one-third of members of a federal or state legislature, or the federal or state executive to submit a request for constitutional interpretation on any ‘unjusticiable [sic] matter’, provides the basis for the request for interpretation. This has created a perception on the part of some commentators that the HPR is seeking a review of constitutionality of a chosen course of action, i.e. the decision on postponement. This is not, however, the correct provision to base the request for interpretation. This provision cross-references and gives effect to Article 3(1) which clearly refers to challenges to any ‘law, customary practice or decision of government organ or decision of government official’. In this particular case, it is clear the HPR is not challenging the decision it has made or a law it has adopted. It is rather requesting constitutional guidance on the road it should take. In fact, this procedure under Article 3(2) (c) read with Article 3(1), known as abstract review, is usually relied upon by members of the opposition party (and not the majority party) that have lost the battle in parliament. It gives such members another opportunity to challenge a law adopted by parliament. Further, under this law, the CCI only has the mandate to review a law, decision, or customary practice, and not to offer an advisory opinion.
14. Before delving into the substantive issues and in the light of the foregoing, the CCI must first determine whether it has the constitutional and legal mandate to provide an advisory opinion. It is our view that there are two plausible possibilities for determining this question.

2.2.1. CCI has mandate to issue advisory opinions but upon request by HF

15. Under Article 62 of the Constitution, the HoF has a plenary power to ‘interpret’ the constitution. There is no reference to ‘disputes’ or even ‘review’, which would assume the presence of an impugned decision or law. In contrast, Article 83(1) refers to the power of the HoF to resolve ‘constitutional *disputes*’, in the Amharic version ‘ክርክር’, which under normal legal parlance assumes the existence of disputant parties, an applicant and a respondent. A cumulative reading of these two constitutional provisions may suggest that the HoF has both the power of review (concrete and abstract), but also a broad mandate to interpret the constitution, which could arguably be understood to include providing advisory or consultative opinions.

16. In contrast, in relation to the CCI, the English version of Article 84(1) of the constitution speaks of constitutional *disputes*. But the authoritative Amharic version uses ‘ጉዳዮች’ (‘issues’), which could arguably be understood to be broader than constitutional ‘ክርክር’. The drafters of the Constitution may have intended to grant the CCI a power equivalent to the broad adjudicative powers of the HoF. The broad reference to ‘ጉዳዮች’ (issues) involving constitutional interpretation could be understood as a mandate to provide an advisory opinion. It can, therefore, be argued based on the overall formulation of Article 84 that the CCI’s mandate is not narrower than the broad mandate to interpret the Constitution conferred on the HoF in Article 62.
17. Article 4(2) of HoF Proclamation No 251/2001 provides that the HoF ‘shall not be obliged to provide consultancy service on constitutional interpretation’. The *a contrario* reading of this provision could be interpreted to mean that the HoF has the *discretion* to offer an advisory opinion. Indeed, the HoF has on occasions provided such advisory opinion (e.g., on the issue of whether a federal family code could be enacted as part of the need to create a single economic community), but has also declined to offer such service (e.g., on the meaning of the ‘special interest’ of Oromia over Addis Ababa). In contrast, the Proclamation No 798/2013 regulating the CCI has no provision authorising the CCI to issue a consultative or advisory opinion.
18. Given that there is less uncertainty regarding the discretionary power of the HoF to provide advisory opinion, it is better to opt for a procedure in respect of which there is clarity. It is also clear that Article 6 of Proclamation No. 251 enjoins the HoF to forward direct requests for constitutional interpretation to the CCI. Existing practice also suggest that such process is followed. This means that while the CCI can indeed engage in providing advisory opinion on request for constitutional interpretation, it is ordinarily initiated following the referral by the HoF under Article 6 of Proclamation No. 251. This alternative would leave the sensitive decision on whether to accept or reject a request for an advisory opinion to the HoF, and preserve the status of the CCI as a technical advisory body.
19. On the above line of arguments, one possible and legally sound, albeit conservative, possibility that the CCI has is to decline the request from the HPR. The HPR and government may subsequently either choose a course of action, which could then be challenged as unconstitutional or submitted to the CCI/HoF for abstract review; or redirect the request for advisory opinion to the HoF, which would then transfer the request to the CCI pursuant to Article 6 of Proclamation No.251.
20. Alternatively, it could be argued that the NEBE report indicating that it is unable to hold elections as well as the decision of the HPR endorsing the report could be considered as ‘decision’ postponing the elections within the meaning of art 3(1) of Proclamation No 798. Accordingly, even if this has not been specifically stated in the request for interpretation, the underlying question is on whether the decision to postpone the elections is constitutionally allowed. The two specific questions can therefore be considered as subsidiary questions that arise from the decision of postponement. On this logic, the request would fall under Article 3(2) of Proc No 798, allowing the CCI to exercise jurisdiction. The problem with this argument is that Article 3(1) speaks about applications alleging that

a law or decision is contrary to the Constitution. This would appear to exclude the entity that has taken a decision (in this case the HPR) to challenge the constitutionality of its own decisions. That is not also what the HPR is doing with this request to the CCI:

2.2.3. *Should the CCI accept the current request?*

21. As noted above, the power of the HoF to issue an advisory or consultative opinion is not mandatory, and in practice the HoF has on occasions declined to exercise this discretionary power, although it can be surmised from the totality of the reading of the Constitution that this discretion cannot be exercised arbitrarily. Analogically, even if the CCI concludes that it has the mandate to issue an advisory opinion, such mandate should similarly be understood as discretionary. Accordingly, even if the CCI finds that it has the mandate to issue an advisory opinion, it could still exercise the discretion to decline the request in the current matter. While the question of whether the CCI has the mandate to issue advisory opinions has a legally objective ('yes' or 'no') answer, regardless of the context, the exercise of a legitimate discretionary power requires a decidedly contextual answer considering the circumstances and context.
22. On the one hand, the momentous and unprecedented constitutional conundrum that the country finds itself in and the need to clarify the constitutional cloud and timely identify a constitutionally defensible pathway may be necessary to allow the relevant stakeholders sufficient time to engage in needed deliberations and politico-legal adjustments. The authoritative resolution of the matter is arguably necessary to direct the collective popular and political conscience towards issues of continuous governance, and to managing the pandemic and addressing its impacts. In a moment when time is of the essence, refusal to issue the opinion may constitute an abdication of responsibility.
23. At the same time, , the request for interpretation is extremely broad and may require the CCI to choose among *multiple* plausible alternatives not just on what the constitution *requires*, but rather on what it *allows*. While a level of politicisation is inherent in fundamental constitutional issues, the current decision may force the CCI to make policy choices that a principally legal body may not be suited for. The CCI must be cognizant of the limitation this puts on the nature of the advice it offers.
24. If the Council decides that it has jurisdiction to provide advisory opinion, the next question that needs to be determined is whether the matter before the Council needs constitutional interpretation. That is the focus of the next section.

2.3. The need for constitutional interpretation

25. The key provisions to be considered in the case at hand are Articles 54(1) and 58(3), both of which limit the term of the HPR to five-years. Seen in isolation, there is no ambiguity in the two provisions on the term of the HPR. At the same time, Article 93 of the Constitution anticipates the declaration of a state of emergency including in the case of a pandemic and allows the suspension of constitutional guarantees to the extent necessary to avert the conditions that required the state of emergency (Article 93(4(b)), with a few

exceptions. Articles 54(1) and 58(3), as well as the right to vote under Article 38, are not part of these exceptions. Accordingly, seen in isolation, Article 93 allows the suspension of these provisions, effectively ‘pausing the countdown on the term of parliament.

26. There is no reported case before the CCI challenging the constitutional validity of the state of emergency to tackle the COVID-19 pandemic. The measures under the state of emergency and related laws have thwarted preparations towards the holding of the elections before the expiry of the term of the current parliament. Elections are not a one-day event. They rather involve an arduous preparatory process. We therefore take it as given that the emergency has disrupted preparations for the elections.
27. Accordingly, the isolated and literal reading of Articles 54(1) and 58(3) on the one hand and Article 93(4) on the other hand would lead to opposite conclusions. Moreover, a literal reading of Articles 54(1) and 58(3) that the term of the HPR and government must end at the end of the five-year period would lead to a power vacuum in cases where elections cannot be held and a new parliament and government cannot be formed. Considering the necessity of continued government, this interpretation inevitably generates a collapse of the constitutional order, which is against the spirit of the Constitution.
28. These apparently incompatible constitutional provisions raise several questions including: does the constitution allow the postponement of elections in any way? How should the country be governed when an emergency situation prevents the conducting of elections? Does this mean the HPR will continue governing until the next elections are held? Or, on the contrary, are Article 54(1) and 58(3) applicable with no exception? Does that Constitution envisage a power vacuum? Finding the appropriate answer to these issues requires constitutional interpretation.
29. In sum, an argument that the constitution is clear and does not need interpretation does not exclude the CCI from entertaining the request, if only to confirm whether interpretation is indeed unnecessary. A finding that there is no need for constitutional interpretation is itself an exercise in interpretation. In any case, while the relevant constitutional provisions may appear clear in isolation, a constitutionally defensible outcome requires reconciling the logic, interaction, and implications of the various provisions. Once the CCI/HoF establish their mandate to issue an advisory opinion on the current request, the need for constitutional interpretation is evident.
30. If constitutional interpretation is required, the next unavoidable question is the method of constitutional interpretation that must be employed. We submit that there are different methods of interpreting the constitution. The originalist method of interpretation seeks to find meaning in the intention of the framers of the constitution. It seeks to determine the intent of the drafters of the Constitution. The proponents of this method of interpretation argue that it provides ‘a method of interpretation that is objective’. The other commonly known method of interpretation is textualism, which demands that the plain reading of a constitutional provision must be applied as if the textual language of the relevant provision is clear. Doing so, goes the argument, is not, in fact, a constitutional interpretation but ‘a

description of what happens when constitutional meaning is not problematic'.¹ There is also a structural approach to constitutional interpretation. Unlike textualism, this approach does not only focus 'on the specific words of a constitutional provision'. Rather, a constitutional adjudicative organ has to also determine whether and to what extent the plain reading of a constitutional provision is compatible or in conflict with the rest of the Constitution and/or the purpose and spirit of the Constitution. A Constitution is not merely a collection of articles. Its provisions do not exist in isolation and the ordinances should be presumed to be normatively coherent. Accordingly, structural interpretation treats the constitution as one whole document. It 'relies on the structure of government set up by the Constitution'. The purpose of the constitutional text takes center stage in the interpretation of the Constitution.

31. We submit that no constitutional adjudicating body uses a single method of constitutional interpretation. The same is true with the HoF and the CCI, who are yet to systematically deploy a particular method of interpretation. If anything, the Council and the HoF are often criticized for not producing a consistent constitutional jurisprudence. Some argue that the Ethiopian Constitution expects the Council and the House to follow an original method of interpretation. Nevertheless, originalism and textualism tend to assume that the drafters anticipate and provide solutions to all scenarios. This goes against human fallibility and oversight common in constitutional formulation. But given the method of constitutional review that Ethiopia has adopted, one can reasonably argue that if there is any method of constitutional interpretation the Ethiopian constitution implies, it is definitely not the originalist approach to interpretation. By taking away constitutional interpretation from the courts and giving it to the sovereign nations, nationalities and peoples through their representatives in the HoF, the constitution is making itself a truly living document, thereby leaving it for each generation to determine the meaning of the constitution in accordance with the demands of its particular context and the changes and progress in society. The constitution must be interpreted through constant conversation between the people and the framers of the constitution that determine the meaning and content of the Constitution. This approach allows for the Constitution to be renewed by each generation in order to respond to emerging needs. Accordingly, what fits both the purpose and design of the Constitution is a purposive and contextual method of interpretation, although this does not preclude the method of interpretation based on the original intent of the drafters.
32. With this perspective on constitutional interpretation in mind, the remaining parts of the submission focus on the substantive questions posed in the request, both those mentioned explicitly and implicitly. The first question is whether the constitution allows for the postponement of elections until after the expiry of the term of government and parliament.

¹ Lefort, C (1990) 'Theories of constitutional interpretation' 30 *Representations* 14; Keslo R R (1994) 'Styles of constitutional interpretation and the four main approaches to constitutional interpretation in American legal history' 29 *Valparaiso University Law Review*

3. Does the Constitution allow extension of the timeline it has set for the organisation of elections? Under what circumstances?

33. The Constitution under Article 1 states that it establishes a ‘democratic state structure’. In the matter of the *Benshangul Gumuz case*,² the HoF stated that a democratic state structure means a system of government in which a) all government structures (offices) of the federal and state government are occupied on the basis of all inclusive, fair and free elections conducted on the basis of equality and secret ballot, and b) the human and democratic rights of all individuals and groups are fully respected.
34. The establishment of a democratic state structure under Article 1 is given institutional and legal expression in the Constitution in various forms. The first is the principle of popular sovereignty stipulated under Article 8. For purposes of the matter at hand, the most relevant part of the popular sovereignty clause is found in Article 8(3) which stipulates that the sovereignty of the people ‘shall be expressed through their representatives elected in accordance with this Constitution and through their direct democratic participation’. This affirms that elections are the vehicle through which the sovereign people express their sovereign will, hence are constitutionally sacred. As the HoF held in the *Benshangul Gumuz case*, respect for this right ensures that people exercise control over their representatives and will have full and direct participation in the management public affairs. It further held that ensuring respect of the right to election has ‘no alternative for guaranteeing the process of building a democratic system of government.’ The details of electoral rights are provided for in Article 38 of the Constitution.
35. These foundational objectives of the Constitution can be given effect and assured of becoming the lived experience of the sovereign only through the regular or periodic convening of elections. People will be able to express their sovereign will through election only when elections are held within a fixed time cycle. The periodicity of elections is the most important guarantee that elected representatives of the people will exercise their delegated authority responsibly. Without regularity of elections, there can be no occasion for the people to affirm their sovereignty and for elected officials to be held accountable before the electorate. Periodicity of elections is also an affirmation and key manifestation of the democratic character and the limited nature of the authority of elected representatives of the people. While people are sovereign, they delegate their sovereign power to their elected representatives subject to review within a constitutionally stipulated time period. Regularity of election is accordingly an extension of and guarantee to popular sovereignty, which is the foundation of the Constitution and the democratic system of government it purports to establish. The importance of periodicity of elections is also enunciated in Articles 2(3) and 3(4) of the African Charter on Democracy, Elections and Governance (ACDEG) and Article 25(b) of the International Covenant on Civil and Political Rights, to which Ethiopia is a party, and which by virtue of Article 13(2) of the Constitution form part of the human rights chapter of the Constitution.

² Decision of the House of the Federation on ‘Constitutional Dispute Concerning the right to elect and be elected in Benshangul Gumuz Regional State’, 13 March 2003 (Benshangul Gumuz Case).

36. Against the background of the foregoing and in pursuit of these fundamental constitutional precepts, the Constitution establishes a five-year time period for the conduct of elections. Accordingly, it fixes the term of the HPR, and therefore government, to a maximum of five years under Article 54(1). Underscoring the importance of periodicity of elections, the Constitution reiterates under Article 58(3) that the HPR ‘shall be elected for a term of five years.’ In the same provision, it also requires that elections are concluded at least a month prior to the end of the term of the HPR.
37. It is clear from the foregoing analysis that the overall structure of the Constitution and the demands of the foundational principles on which the edifice of the Constitution is built suggest that regularity of elections is a sacred principle of the Constitution. This supreme status of regularity of elections is, however, not absolute. Constitutional guarantees are not a ‘suicide pact’ and must be understood in conjunction and in a comprehensive manner. A constitution is not simply the sum of individual articles, but the outcome of their interaction. A proper interpretation of any constitution requires the construction of an appropriate balance between the various constitutional guarantees consistent with the overall goal of establishing, nurturing and sustaining a democratic republic enunciated in Article 1 of the Constitution. This brings us to the question of whether there could be conditions that may justify the extension of the five-year period for holding of elections.
38. The Constitution under Article 93 envisages that a state of emergency could be declared. One of the grounds for the declaration of a state of emergency is the occurrence of an epidemic or disease that endangers public health. Following the declaration by the World Health Organization that the novel coronavirus (COVID19) constitutes a global pandemic and the confirmation of cases of COVID19 in Ethiopia, various measures for preventing the spread of the virus have been introduced. Subsequently and having regard to the serious threat that COVID19 poses to the health and life of the public, the Government declared a state of emergency. There is wide support that the social distancing measures introduced in the country, within the framework of the state of emergency, that impose limitations on fundamental rights are justifiable. The constitutional validity of the declaration has also not been challenged.
39. Under international human rights law, it is well established that postponement of elections is anticipated in exceptional circumstances. Such is in particular the case when a country faces a state of emergency. Accordingly, Article 25(b) of the ICCPR, which guarantees periodicity of elections, can be suspended pursuant to Article 4 of the ICCPR that states that ‘in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation’.
40. It is a requirement of the design of the Constitution and of international human rights standards that the limitations on the periodicity of elections have to be necessary and justified by important public interests. In the instant case, such public interest that justifies the suspension of periodicity of elections relates to the health and life of the people of the

country. As the African Commission on Human and Peoples' Rights pointed out in its 24 March 2020 statement on COVID19, states have a legal obligation to safeguard their people from threats to their health and life. It was thus legitimate and legally required that the government takes the required measures to secure the right of people to their health and life, which COVID19 threatens.

41. It is important to point out that for the limitation that a state of emergency imposes on the periodicity of elections to be constitutionally legitimate, it is imperative to demonstrate that the nature of the emergency is such that it does not allow the conditions for free, fair and credible elections to exist. Where the emergency is such that it does not inhibit the logistical preparations of elections and does not require limiting electoral campaigns, the convening of party assemblies, the holding of demonstrations, then it would be contrary to the design and requirements of the Constitution, Articles 2 and 3 of ACDEG and Article 4 of the ICCPR to postpone the holding of elections on account of such emergency.
42. In the current context, the measures required for fighting COVID19 are such that the freedom of movement and freedom of assembly are limited. These limitations automatically preclude the possibility of conducting logistical arrangements by the electoral management body. These limitations also exclude the possibility of holding party conventions, rallies and other electoral campaign meetings. In other words, the conditions for holding elections in an atmosphere that is demanded by the Constitution and other international treaties are absent.
43. If we follow the logic of Article 58(3), this would have entailed that elections are concluded before 5 September 2020, which is exactly one month before the five-year term of the current parliament comes to an end on 5 October. Despite the uncertainties surrounding when the emergency arising from COVID19 would come to an end, it has become clear that it would not be possible to convene free, fair and credible elections within the time set under Article 58(3). This means that the elections have to be held after the expiry of the time stipulated under Article 58(3).
44. It is however imperative to state that the nature of the design of the Constitution, the special place it accords to the periodicity of elections and the legal obligations the country bears under international human rights treaties is such that the extension of the time period for holding of elections should be only 'to the extent necessary to avert the condition that required the declaration', as provided in Article 93(4)(b) of the Constitution. Article 4(1) of the ICCPR similarly limits the suspension of rights only to the extent 'strictly required by the exigencies of the situation', in the words of. It is thus a constitutional requirement that the postponement of the election is made for a period of time for overcoming the emergency situation and for allowing the election management body and the political parties the required time for making the necessary preparations, campaigning and establishment of a level playing field that guarantees the credibility and fairness of the elections and for creating the conditions for the electorate to be informed and to participate freely in the process.

3. Who could postpone the elections? Through what process? For how long?

45. The second substantive issue in the request for constitutional interpretation relates to the time within which elections must be conducted after the end of the circumstances that necessitated the state of emergency. It is important to clarify from the outset that this is not an issue about how long the emergency may last – this is not part of the request for interpretation. Under Article 93 of the Constitution, the duration of the emergency may only be determined by the Council of Ministers, with the approval of the HPR (although such decision could be challenged in the CCI/HoF).

46. If the CCI rules, as argued here, that the presence of emergency circumstances that necessitate the disruption of preparations for organisation of elections justifies the postponement of elections, it must then determine the entity that can decide on the postponement, the process and considerations, as well as bounds for the duration of the postponement.

a. Who decides the period of postponement?

47. Under Article 93(4)(b and c) of the constitution, the power to determine the restrictions on constitutional rights and guarantees during an emergency is conferred on the Council of Ministers. Indeed, the current state of emergency approved by the HPR opts for a flexible approach and largely leaves the necessary restrictions and measures to tackle the pandemic to the Council of Ministers.

48. Nevertheless, considering the fundamental nature of the right to vote as the epitome of popular sovereignty as discussed above, regular elections as the foundations of democratic and legitimate representative government, and that the HPR is the ‘highest authority’ at the national level (Article 50(3)), the CCI/HoF should rule that the decision on the postponement of the elections as well as the exact length of the preparatory period for elections should be made by the HPR itself, rather than the Council of Ministers. The suspension of a right as fundamental as the right to vote and regular elections should not be delegated to the executive.

49. Unlike the executive, which is designed to be controlled by a single party or aligned coalition, the HPR is designed to reflect the spirit and diversity of the voices of the nation. Moreover, the expectation of transparency is higher in the HPR than in the Council of Ministers, where there is a higher logic and tolerance for a level of secrecy. The HPR provides opposition parties a formal platform to contribute to and critique policy decisions.

50. Moreover, the approval/renewal of a state of emergency requires a two-thirds majority in the HPR (Article 93(2)(a)). A finding that the decision on postponement must be taken by the HPR would therefore necessitate compliance with a high supermajority which, under more competitive elections, would ensure that no single transient political party or coalition controlling the executive would be able to unilaterally decide on postponement of elections - a matter that such party or coalition has a stake in.

51. It may be argued that this interpretation would be difficult to implement in cases where an emergency necessitating postponement of elections occurs at a time where parliament is

dissolved under Article 60, but before elections under a caretaker government have not been conducted. This is a difficult situation that would make the declaration of emergency itself unconstitutional, as such declarations must be approved by the HPR under Article 93. To avoid this scenario, the CCI/HoF should specifically rule that the finding requiring the HPR, not Council of Ministers, to make decisions on postponement of elections applies only in cases where parliament is functioning.

52. In the current context, a finding that the power to postpone elections belongs to the HPR alone may seem like a mere formality, as the ruling party controls both the Council of Ministers and the HPR. Nevertheless, the opinion of the CCI/HoF will have general application and implications beyond the current situation. It is therefore critical that a clear and important precedent is established in terms of compliance with proper legal procedures.
53. In sum, considering that election postponement fundamentally concerns all political parties and the broader public, such decision should be made in the HPR through a heightened procedure, rather than the Council of Ministers.

a. Based on what considerations and process?

54. The right to vote and periodic renewal of the mandate of political institutions lies at the heart of a democratic dispensation. The period of postponement of elections must therefore be only to the extent reasonably necessary to allow proper preparations to ensure competitive, free, fair and informed elections. We aver that the determination of the period of postponement should not be left entirely to the HPR or government; nor should it be too inflexible.
55. Accordingly, the CCI should require that the determination of the period between the end of emergency and election date should reasonably consider the needs of the various stakeholders, notably the electorate, but also the resources and capacity of the National Electoral Board (NEBE) and the views of political parties, including opposition parties. In recognition of the importance of ensuring the legitimacy of elections, the CCI/HoF should specifically require that the decision should be based on the proposal of NEBE, after prior consultation with the ruling as well as opposition parties (both at the federal and state levels), with a duty to provide public and written justification for any changes to NEBE's proposal. This would be compatible with the mandate of NEBE to 'conduct' elections under Article 102(1) of the Constitution. The CCI may even recommend the establishment of a committee of relevant experts that periodically reviews whether the country is ready for election lest this is completely left to the executive and NEBE that is still struggling to earn the trust of all political parties.
56. Beyond such procedural safeguards and guidance, the CCI/HoF do not have the necessary institutional capacity and resources to define a specific period of postponement, especially in a context of a pandemic that makes even weekly planning untenable. Nevertheless, to dampen concern that the government may unduly prolong or shorten the period of postponement, the CCI/HoF may impose a framework. This could take the form of a requirement that elections *shall not* be held within (say) four months of the end of the emergency situation, to allow sufficient time for preparations for the people, NEBE and

parties. For instance, in Poland, elections *cannot* be held within 90 days of the end of an emergency – Article 227(7) of the 1997 Constitution of Poland, as amended.

57. To preclude the possibility of excessive extensions, the CCI/HoF should require that elections cannot be postponed for more than six months at a time. This would ensure that the HPR has to regularly reconsider and justify the necessity of a postponement as well as its duration. Alternatively, the CCI/HoF may rule that elections must in any case be held within six months of the formal end of the state of emergency. For instance, in India, elections must be held within six months of the end of a proclamation of emergency – Article 83(2) of the 1949 Constitution of India, as amended.
58. In Mauritius, the Constitution allows postponement of elections for a maximum of one year – Article 57(4) of the 1968 Constitution of Mauritius as amended. Nevertheless, the COVID-19 pandemic has demonstrated that some of the restrictions affecting the organisation of elections – such as social isolation - may continue even after a state of emergency has been formally lifted. The implication of this would be, as it seems to be the case for many countries affected by COVID19, that measures are put in place to ensure not only the convening of elections within reasonable period of time after the end of the emergency but also that they are held under conditions that make observance of social distancing possible. Considering the unpredictable nature of emergencies that may occasionally necessitate the postponement of elections, we believe that the establishment of a definite time beyond which elections may not be postponed could force the organisation of elections under extremely onerous circumstances and is therefore inappropriate.

4. What happens to the parliament and government whose terms would end before holding of elections?

59. If the CCI finds that the constitution allows the postponement of elections under exceptional emergency circumstances, the next question is on the consequence of the postponement on the fate of the HPR and government whose term would end before holding of elections

4.1. The principle of continuity of government

60. A fundamental notion in parliamentary democracies is that there must always be a government in place. ‘No interregnum or power vacuum can occur between one government and the next’. When the incumbent must leave office for any reason, ‘a new one must be capable of being formed and sworn in immediately to ensure that government continues’.
61. This principle of continuity of government finds application in situations when a new government cannot be formed for any legitimate reason. This could be when early elections are called; or when elections results are inconclusive, without any party or a coalition of

parties capable of forming government; or when government is defeated in a motion of no confidence or resigns; or when the term of parliament expires but elections have not been held. The mandate of the government-in-office does not come to an end by the mere fact that its legal term ends, but rather when it is replaced by a successor government.

62. The principle of continuity of government has also found expression in the Ethiopian Constitution. Article 60 of the Constitution allows the sitting government to continue to govern in a caretaker role after the dissolution of parliament. Underlying this provision is the understanding that there must always be government in place. The constitution, however, explicitly covers only situations where an early election is necessary because of the dissolution of the HPR, or when the sitting administration loses the confidence of parliament until a new government is formed, with or without an election. Nevertheless, the inclusion of Article 60 signifies that the principle of continuity of government is in the DNA of the Ethiopian constitution, as in any constitution that provides for a parliamentary system of government.
63. Continuity of government means the incumbent stays in power until the next government is formed. It is not a reference to the creation of a new interim or transitional government. This is also what distinguishes parliamentary systems from presidential systems. In purely presidential systems, the government continues but the leader of the sitting administration (the president) is replaced based on a pre-established order of succession.

4.2. What kind of government?

64. If the incumbent government should continue, in what form and with what powers and responsibilities? In general, the nature of powers of the sitting administration depends on two conditions. First, it depends on whether the interim period is created during a pre-election period (the period that runs from the dissolution of parliament to polling day) or post-election period (the period that runs from the election until it is clear who has won the election and a new government is formed). We are obviously dealing here with a pre-election period. Second, it depends on how the interim period is created.
65. In pre-election interim periods resulting from a parliamentary vote of no confidence, the interim government operates in caretaker role undertaking limited routine government business. This is envisaged in Article 60 (2) of the Ethiopian Constitution.
66. But when the incumbent has not been defeated in parliament, the role of the government should not be reduced to routine administrative decisions. The suggestion is that 'undefeated government is entitled to carry on with the normal business of government during the pre-election campaign period but it will restrict itself during the election campaign to the completion of commitments or policies it had previously initiated during its term in office'. This view has strong support especially when the interim period is created as a result of emergencies, during which the government should be allowed to carry on with the normal business of government or even with exceptional powers. This view is also consistent with the fact that the logic of a caretaker government with limited powers is inconsistent with the logic of emergencies, which necessitates a government with full, even exceptional powers during and in the immediate aftermath of the emergency.

67. The above scenarios apply in situations where parliament is dissolved and the issue, as a result, is only about the executive branch of government. The question remains, however, whether parliament should also continue to function after the expiry of its term. There does not seem to be a clear answer to this question – certainly not in the Ethiopian Constitution. But one can argue that the emergency that the country finds itself in and the state of emergency that has been subsequently declared warrants the continuity of parliament beyond the expiry of its current term. First, the exceptional nature of the powers that can be exercised by the executive during this period requires that there is a body that oversees and monitors their implementation and ensures accountability. Emergencies are a time more than any where the executive should remain accountable to a sitting parliament. Second, there might be a need to renew the emergency. If parliament is dissolved when its term comes to an end but there is need to extend the emergency or issue a new one, there would not be a parliament to extend or approve it under the Constitution. This view seems to be the reason behind the laws of some of the few countries that provide for the continuity of parliament after the expiry of its term. In India, for example, the duration of the lower house (i.e. Lok Sabha) can be extended to a maximum of one year at a time by passing a law in the parliament. The only limitation is that the extension cannot continue beyond a period of six months *after* the state of emergency ceases to operate.
68. In sum, we aver that a proper interpretation of the relevant provisions of the Constitution as well as the logic of parliamentary democracies and emergencies necessitates the continuity of the government and parliament with full powers until such time as elections can be held.
69. It is critical to note that the convention of the parliamentary system that allows government to continue requires that the incumbent does not, in the meantime, abuse state institutions to develop unfair electoral advantages over challengers. The CCI/HoF may therefore advise the government and others not to make certain decisions or engage in certain activities without consulting the opposition. They may even go further and indicate what may be regarded as unacceptable conduct or activity.
70. Finally, given that the constitutional timeline could not be complied with and the people are not afforded the opportunity to exercise their sovereign authority through the ballot box, although out of a constitutionally sanctioned necessity, it could not be assumed that government would continue to conduct the affairs of the state in a business as usual manner. A necessary measure of compensating for the extension of the term of government without election is that there is consultative and deliberative processes in the exercise of the power of government during this interim period until elections are held. This entails that in the conduct of the affairs of the state, the government should be more participatory and that it puts in place consultative processes for engaging opposition parties and various sectors of society.

Conclusion

71. Our submission has clearly established that this is a unique occasion. It is a historic constitutional moment for sending a clear message to all members of society on the possibility to meet the longstanding expectation for a system of politics founded on and guided by constitutionalism and rule of law. This requires that the constitutional interpretation process allows a much more participatory procedure. It is also our submission that the current situation certainly necessitates and warrants constitutional interpretation, and the interpretation to meet the enormous expectations of this momentous occasion should take a purposive and contextual approach rather than a narrow legalistic approach. While our submission also affirms that the constitution allows the extension of the timeline stipulated in Article 58(3) for holding of elections, it is also the requirement of the design of the Constitution that periodicity of elections occupies a special place of honor and not complying with it should strictly follow conditions of necessity and principles of proportionality and reasonableness. Such an approach is not only consistent with the Constitution and the requirements of international human rights obligations but will also assure and ease the concerns of opposition parties and the wider public.
72. The insistence on finding solutions within the constitutional framework for the political and constitutional quandaries facing the country is indeed praiseworthy. However, a decision of the CCI or the HoF to the effect that the term of the current Parliament could be extended beyond its five-year term should not be taken as precluding inclusive political process or as justifying or legitimizing ‘going it alone mentality’. It should be noted in the decision that the roots of the political problems of the country go beyond the Constitution and the CCI must indicate in its recommendation the need for an inclusive political process.
73. Finally, we wish to note that the assessments made in this submission all relate to the term of the HPR and the federal government. We understand that the term of the HoF, as well as the terms of regional councils will also come to an end before the elections can be held. While the arguments and analysis could have a bearing on decisions on fate of these institutions, our submission is not directly addressed to them.