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ADDIS ABABA UNIVERSITY
COLLEGE OF LAW AND GOVERNANCE STUDIES
SCHOOL OF LAW GRADUATE PROGRAM

Master of Law (LL.M) In Public International Law

Does Ethiopia have a reason not to ratify the Rome Statute?

**Examination of Arguments “For” and “Against”
Ratification.**

ATHESIS SUBMITTED IN PARTIAL FULFILLMENT FOR LL.M.

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DECLARATION OF ORIGINALITY

I, Abush Gebre hereby declare that this thesis is my original work. To the best of my knowledge, this thesis contains no material previously published by any other person except where due acknowledgment has been made. This thesis has not been submitted for any degree or examination in any other university or non-degree program.

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ABBREVIATION

ACC	-----	African Criminal Court
CAAU	-----	Constitutive Act of African Union
ACHPR	-----	African Court on Human and People's Right
AU	-----	African Union
FAGP	-----	Federal Attorney-General Prosecutor
EPRDF	-----	Ethiopian People Revolutionary Democratic Front
FDRE	-----	Federal Democratic Republic of Ethiopia
ICC	-----	International Criminal Court
NISS	-----	National Intelligence and Security Service
OLF	-----	Oromo Liberation Front
PAPSACJHR	-----	Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Right
RSICC	-----	Rome Statute of the International Criminal Court
SC	-----	Security Council
U.S.A	-----	United States of American
UN	-----	Unite Nation
UNGA	-----	United Nation General Assembly
UNSC	-----	United Nation Security Council
VCLT	-----	Vienna Convention Law of Treaty

ABSTRACT

The Rome Statute of the International Criminal Court is the treaty that established the International criminal court (ICC). It was adopted at a diplomatic conference in Rome, Italy on July 1998 and it entered into force on 1 July, 2002. 122 countries are states parties to the Rome Statute of the International Criminal Court. Although most countries in the world, especially African countries, are members of this court, Ethiopia has not yet joined. This thesis examines whether Ethiopia has a reason not to ratify the Rome Statute. The ICC has been set up as complementary to the national courts to deal with the worst crimes facing the world; genocide, crimes against humanity, war crimes, and crimes of aggression. The crimes seen at the international criminal court are so serious; so far little research has been done on the validity of reasons for Ethiopia's refusal to accede to the Rome Statute. This thesis is intended to fill this gap. Different methods have been used to deal with this question. A series of interviews were held with key informants, and various documents have been analyzed. Using empirical evidence, argumentative and comparative analyses it is found out that there is a difference between the reasons Ethiopia provided as a justification for declining the membership of the court during the discussion of the draft of the Rome Statute and that of the reasons it cites twenty years later. The reasons mentioned at both times are not valid to stay away from the Rome Statute. Thus, Ethiopia should ratify the Rome Statute and make its laws compatible with the Rome Statute.

Keywords: Rome Statue, ratification, reason ...

CHAPTER ONE

1. INTRODUCTION

1.1 BACKGROUND OF THE STUDY

The applicability of international criminal law has been a controversial issue over time. The first argument proposed by Schwarzenegger, to have international law, states should give their consent to limit their sovereignty through custom or treaty or any other agreement.¹ According to this argument “offenses of an individual against ‘the law of nations’ are not crimes under international law, but offenses against rules of internationally postulated municipal criminal law”.² But Erasmus does not agree with Schwarzenegger’s view, because offenses against rules of internationally postulated municipal criminal law without any enforcement mechanism are unlikely to be applicable. According to Erasmus “the enforcement of international criminal law remains rooted in the co-operation of states with international courts”.³ The enforcement modalities of the criminal aspect of international law are flexible for Bassiouni. He argues “the criminal aspects of international law consist of a body of international proscriptions which criminalize certain types of conduct irrespective of particular enforcement modalities and mechanisms”.⁴

The main reason behind the availability of international criminal law which works complimentary to the national law is due to the fact that millions have been victims of unimaginable atrocities.⁵ Such atrocities and grave crimes threaten the peace, security, and well-being of the world.⁶ Those parties involved in these crimes must not go unpunished and that their

¹ George Schwarzenegger, *the Problem of an International Criminal Law*, 1950, p.275,
<https://doi.org/10.1093/clp/3.1.263>.

² *Ibid*, 268.

³ Adele E Erasmus, ‘Revisiting Schwarzenberger today: The problem of international criminal law,’ 2003, p. 410

⁴ M. Cherif Bassiouni, “The Penal Characteristics of Conventional International Criminal Law”, Case Western Reserve Journal of International Law, 1983, p. 27.

⁵ The Rome Statute of the International Criminal Court (RSICC), 2002, preamble paragraph two.

⁶ *Ibid*, paragraph three.

effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.⁷

The international criminal court doesn't have jurisdiction over the crime mentioned under the Rome Statute unless the concerned State is unwilling or unable genuinely to carry out the investigation or prosecution.⁸ If the state is unwilling or unable, the court will assume jurisdiction either the state parties referred the case to the prosecutor or the Security Council referral based on chapter VII of the UN Charter or the prosecutor initiate the investigation based on article 15 of the statute⁹.

Ethiopia is among the countries which are not parties to the Rome Statute.¹⁰ The only research dealing with Ethiopia's reason not to be a party to the Rome Statute is the senior thesis by Teodros Dawit. According to his research, the reasons include the minimal penalties incorporated under the Rome Statute compared to the FDRE Criminal code; the crimes under the Rome Statute are also incorporated under the Criminal code; the criminals are not going unpunished though Ethiopia is not a party to the treaty. Furthermore, as per his interview with Ato Reta Alemu¹¹ "there is fear on part of Ethiopia that the court may serve as a political instrument and the sovereignty of members States can be jeopardized by decisions of individual prosecutors of the ICC"; as per article 88 of the Rome Statute to revise the national law, Ethiopia needs time, and article 120 of the Statute provided reservation is prohibited, so Ethiopia did not get a chance to reserve politically sensitive issues¹².

According to the findings of Tewodros, Ethiopia is not a party to the Rome Statute, for a reason that the country want to punish the perpetrator severely, it is confident that no perpetrator escape from prosecution. At the same time the country doesn't want to update its laws consistent with

⁷ RSICC (n5), paragraph four.

⁸ Ibid, Article 17(1)(a).

⁹ Ibid, article 13.

¹⁰ The USA have gone further and entered into a bilateral agreement with different countries to preclude the latter from arresting and surrendering its r suspected citizens to the court Andrew J. Walker, "When a Good Idea is Poorly Implemented: How the International Criminal Court Fails to be Insulated from International Politics and to Protect Basic Due Process Guarantees", West Virginia Law Review, Vol. 106, 2004, p. 274.

¹¹ Tewodros Dawit, "The International Criminal Court and Ethiopia: a case for Ratification", Senior Essay Addis Ababa University, Faculty of Law, 2007, p. 71.

¹² Ibid, p. 72.

the Rome Statute, on the ground that surrendering perpetrators to the ICC will compromise the sovereignty of the country.

However, the findings of the study by Tewodros has gap in investigating the details on the argument and his findings are only focusing on the reason and position of Ethiopia in relation to the ratification process, the involvement or contribution of Ethiopia for the preparation of the document, but he didn't analyze the validity of Ethiopia's reason, he didn't investigate the similarity of crimes covered under the Rome statute and the criminal code of Ethiopia. It is also important to explore in this study, since the Rome Statute was passed many years ago, and the need to assess whether there is a change in the position of the government on the ICC in connection with the country's reform in the justice system. Therefore, the gap in the existing literature and the country's current situation necessitate conducting the study at hand.

This thesis explores and examines different arguments supporting and opposing the membership of Ethiopia in the Rome Statute, and make a recommendation about whether Ethiopia should ratify the Rome Statute or not.

1.2 STATEMENT OF THE PROBLEM

Different human rights violations have occurred in different parts of the country in the past.¹³ For a long period, the recommendations of human rights advocates had been denied by the government and considered as false accusations. However, the new government officials acknowledged the commission of grave human rights violations in the past and started to take measures to make these officials accountable. Even though the effort and commitment to bring these perpetrators to justice is Commendable, so far the government's effort has not been successful. First, the court proceeding is going on in absentia while the main actors in the crimes are not yet apprehended perhaps due to the government's unwillingness to bring the suspects before the court.¹⁴ Furthermore, the Tigray regional government seems not to be cooperative with the Federal government even if the latter is said to have the willingness to seriously pursue the case. In his interview with Reporter Newspaper, the deputy president of Tigray regional state,

¹³ A proclamation to Establish Reconciliation Commission, 2018, preamble paragraph three, Proc. No. 1102, Fed. Neg. Gaz., year 25, no. 27.

¹⁴ For instance from Federal Attorney-General Prosecutor Vs. Mr. Getachew Asefa and twenty-five (Federal high court first criminal bench file no. 238040) four of the main suspects are not arrested. (Pending case).

Dr. Debretsion Gebremicheal claimed that the then prime minister should be held accountable if there is any offense Getachew Assefa, the former director-general of the National Intelligence and Security Service (NISS), is suspected of committing. He also reiterated that if Getachew is the only one being sued, it is rather a politically motivated accusation than holding people accountable¹⁵.” Second, the attorney-General prosecutor instituted criminal charges on provisions of ordinary crimes of the criminal code and a proclamation to provide for corruption crimes even if the alleged crimes are crimes against humanity.

Based on an interview¹⁶ conducted the unwillingness of the federal government to prosecute the suspect is obvious, still, the government does not ratify the Rome Statute. Many countries have used the complementarities role of the International Criminal Court (ICC) to discourage impunity, but the situation in Ethiopia is different. Therefore, indeed does Ethiopia have a reason not to ratify the Rome Statute?

1.3 RESEARCH OBJECTIVE

1.3.1 GENERAL OBJECTIVE

1.3.1.1 To explore the reason behind Ethiopia’s hesitation not to ratify the Rome Statute.

1.3.2 SPECIFIC OBJECTIVE

1.3.2.1 To assess the argument which supports Ethiopia’s membership in the Rome Statute?

1.3.2.2 To assess the argument against Ethiopia’s membership in the Rome Statute.

1.3.2.3 To identify the challenge(s) the federal government of Ethiopia has faced to prosecute those who are suspected of conduct criminalized under the Rome Statute.

1.3.2.4 To analyze and recommend whether Ethiopia should ratify the Rome Statute or not.

¹⁵ Samuel Getachew, ‘Blocking roads and prohibiting grain from coming to Tigray is a grave crime’ The Reporter, English edition, June 15, 2019.

¹⁶ Interview with Deputy Commander Solomon Dachew, Head of Federal Police Commission Crime Investigation Office, held on December 12, 2019 at 11:00 AM.

1.4 RESEARCH QUESTION

1.4.1 CENTRAL QUESTION

1.2.1.1 Does Ethiopia have a good reason (s) not to ratify the Rome Statute?

1.4.2 SPECIFIC QUESTIONS

1.4.2.1 What arguments can be advanced in support of ratification?

1.4.2.2 What arguments can be advanced against ratification?

1.4.2.3 What do we learn from the challenge(s) the federal government of Ethiopia has faced to prosecute those who are suspected for conduct criminalized under the Rome Statute?

1.4.2.4 Should Ethiopia ratify the Rome Statute?

1.5 RESEARCH METHOD

A qualitative research method is used to carry out the study for a reason that this method is best suited to address a research problem in which you do not know the variables and need to explore.¹⁷ To complete the study, both primary and secondary data were used. Primary data include data gathered through interviews, review of periodic reports of the Ethiopian Human Rights Commission, press release by Federal Attorney General, and government officials, review of criminal charges instituted against government officials in human right violation, review of investigation reports of human right violation in Oromia and Amhara region, conducted by Ethiopian human rights commission, and Universal Periodic Review. It also includes analysis of relevant laws, such as the FDRE Constitution, FDRE Criminal Code, and the Rome Statute. Secondary data used in this study include data collected from different books, journal articles, thesis, and other relevant documents and data consistent with the problem under study.

The study employed a purposive sampling technique. Since the policy direction and intention of the Ethiopian government regarding ICC can only be inferred from the concerned institutions, the researcher used purposive sampling to inquire about their view on this issue. This method

¹⁷ John W. Creswell, *Research Design, Qualitative, Quantitative and Mixed Approaches*, (4th ed. 2014), p. 16.

helps us to select people who can best help us understand our phenomenon, and help us to develop a detailed understanding.¹⁸

1.6 SCOPE

The scope of the subject matter to be studied is limited to Ethiopia's reason for not to ratify the Rome Statute. Since there are many international crimes, this study is confined to crimes mentioned under the Rome Statute.

1.7 SIGNIFICANCE

This study is believed to be of considerable significance to legislators as it attempts to reveal the existing gap with regard to Ethiopia's membership of the ICC. It is also helpful in serving future researchers, who would like to conduct further studies on the subject matter.

1.8 LIMITATION

A major limitation of this study is the researcher could not find an official document that would explain the government's position on the ICC.

1.9 THE PREFERRED REFERENCING AND CITATION STYLE

Oxford Standard for Citation of Legal Authorities (OSCILA) was used, but for domestic laws and court cases, the rules of citation of the Journal of Ethiopian Law were used.

1.10 THESIS ORGANIZATION

This study has five chapters. The first chapter is the introduction part which includes background of the study, statement of the problem, research objectives, research questions, research method, the scope of the study, the significance of the study, a limitation of the study, preferred referencing and citation style and thesis organization. Chapter two includes Argument "For" and "Against" the International Criminal Court. The third chapter incorporates the current situation of Ethiopia and practical challenges. The fourth chapter contains an analysis of Ethiopia's argument and lesson taken from the practical challenges and the final chapter contains conclusions and recommendations.

¹⁸ John W. Creswell (n17), p. 206.

CHAPTER TWO

2. ARGUMENT “FOR” AND “AGAINST” THE INTERNATIONAL CRIMINAL COURT.

The Rome Statute of the ICC is a treaty that prohibits four crimes; Genocide, Crimes against Humanity, War Crimes, and Crimes of Aggression,¹⁹ and established the International Criminal Court. Except for a referral by the UNSC, the ICC’s jurisdiction is primarily based upon the principle of territoriality, as well as active personality, “and not on a theory of universality of criminal jurisdiction”.²⁰

As declared in the preamble of the Rome Statute, the States Parties are experienced that human beings have been victims of unimaginable atrocities that deeply shock the conscience of human being,²¹ if these grave crimes happened again, it will threaten the peace, security, and well-being of the world,²² anyone who commits the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.²³

From the wording of the preamble of the ICC Statute, paragraph four can be considered as a base to establish the ICC. Because the ICC has jurisdiction only to punish the most serious crimes of concern to the international community as a whole, to avoid impunity, to ensure effective prosecution by taking measures at the national level and by enhancing international cooperation²⁴. Most of the UN members States understood that the gravity and consequence of these crimes of international concern; genocide, crimes against humanity, and war crimes; and has incorporated in their respective national laws.²⁵

¹⁹ RSICC(n5) Article 5(1).

²⁰ Steven W. Becker, the Objections of Larger Nations to the International Criminal Court, Vol. 81 (2010), P.12.

²¹ RSICC (n5), preamble paragraph two.

²² Ibid, paragraph three.

²³ Ibid, paragraph four.

²⁴ Ibid, preamble paragraphs four.

²⁵ Amnesty International, Universal Jurisdiction a preliminary Survey of Legislation around the World, (2011), p. 12, <https://www.amnesty.org/en/documents/ior53/004/2011/en/>.

The incorporation of these crimes in the national laws by itself is not a goal, rather solving the challenges that lead suspects to remain unpunished must be a priority. Anyone can understand that perpetrators carry out these crimes with a detailed plan, and in an official capacity. Most of the time very difficult to bring the suspect before justice, because in one way or another government involvement in an official capacity will be expected, or the officials don't want to submit the suspect to the appropriate justice organ, or sometimes due to the nature, complexity, and consequence of the crime, countries may not be able to prosecute and bring the suspect before court.

The principle of Complementarity is used in the Rome Statute.²⁶ In this principle, the subsidiary body has no jurisdiction over the case, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.²⁷ That means a compromise between respect for the principle of state sovereignty and respect for the principle of universal jurisdiction is the basis for the principle Complementarities.²⁸

Even though the ICC has been established so that the perpetrators of the most serious crimes of international concerns do not go unpunished, still not small numbers of countries including the most powerful states hesitate to ratify the Rome Statute. Ethiopia is among the countries which have not yet ratified the Rome Statute.

Under the FDRE Constitution, crimes against humanity, such as genocide, summary executions, forcible disappearances or torture have given much emphasis.²⁹ The constitution doesn't mention all the crimes incorporated under crimes against humanity; rather it exemplifies and takes account of crimes defined under an international agreement ratified by Ethiopia.³⁰ In the criminal code of Ethiopia, there are no clear crimes legislated as crimes against humanity, but some argue that Ethiopia's legislation has incorporated; war crimes, crimes against humanity, genocide,

²⁶ RSICC (n5), preamble paragraph ten.

²⁷ Ibid. Article 17(1) (a).

²⁸ Xavier Philippe, "the principles of universal jurisdiction and complementarity: how do the two principles intermesh?" International Review of the Red Cross, Vol. 88, (2006), p. 380.

²⁹ FDRE Constitution, 1995, Article 28(1).

³⁰ The Minutes of Ethiopia Constitutional congregational, Vol. 2 (2005), p. 107.

torture.³¹ Under the criminal code of Ethiopia, crimes such as the use of blows, cruelty or physical or mental torture, be it to obtain a statement or a confession, or to any other similar end, or to make him give testimony favorably manner;³² Enslavement;³³ and since Ethiopia is a party to Apartheid and Torture convention, pursuant to Article 17 of the criminal code and Article 9(4) of the FDRE Constitution they are a prohibited act,³⁴ but Ethiopia did not domesticated both Apartheid and Torture conventions into the national law.

Even though there is a difference in criminal code of Ethiopia and the international instruments ratified by Ethiopia, the FDRE Constitution consider it as a grave crimes and ones' it is committed, it shall not be barred by statute of limitation, and such offenses may not be commuted by amnesty or pardon of the legislature or any other state organ.³⁵

2.1 ARGUMENT “FOR” THE INTERNATIONAL CRIMINAL COURT

The ICC is a permanent independent institution established outside the organs of the UN.³⁶ It is also different from the UN *ad hoc* international criminal tribunals for Rwanda and the former Yugoslavia that were established by the UNSC to deal with specific situations, or the international court of justice, which deals with legal disputes between states.³⁷ Nor is the ICC somebody's rights court as its mandate is to investigate and prosecute specific crimes outlined within the Rome Statute.³⁸

The ICC intervenes only in situations where States themselves are either unwilling or unable to genuinely investigate and prosecute the perpetrators³⁹ of genocide, war crimes and crimes against humanity, and crimes of aggression.⁴⁰ The functioning of the Court relies on the

³¹ Amnesty International (n25), p. 57.

³² The FDRE Criminal Code, 2004, Article 424.

³³ *Ibid*, Article 596.

³⁴ Amnesty International (n25), p. 54.

³⁵ The FDRE Constitution (n29).

³⁶ The ICC, Joining the International Criminal Court why does it matter, 2018, <https://www.icc.cpi.int/Publications/Joining-Rome-Statute-Matters.pdf>, Accessed November 8, 2019.

³⁷ *Ibid*.

³⁸ *Ibid*.

³⁹ RSICC (n5), Article 17(1)(a).

⁴⁰ *Ibid*.

‘principle of complementarities’, underneath which States Parties have affirmed their primary obligation to investigate, prosecute and punish the perpetrators of the most serious crimes.⁴¹

Countries carefully evaluate what they can gain or lose as a result of joining institutions such as the ICC. Based on their analysis they will support or oppose the establishment of the institution. The ICC has identified some reasons why States should ratify the Rome Statute.⁴²

It is considered as an expression of solidarity with the victim. States Parties to the Rome Statute have set up a Trust Fund for Victims, an independent institution via which victims and their families can acquire help and reparations, including restitution, compensation, and rehabilitation. So, it is a sturdy statement of solidarity with sufferers of the gravest crimes everywhere in the world.⁴³

It contributes to the Prevention and Deterrence of Future Crimes. Through its preliminary examinations, investigations and judicial processes, the ICC’s work can help to prevent future crimes from experiencing by putting potential perpetrators on note that anybody may be held responsible if they commit core international crimes.

It reinforces the Equality of all before the Law. The Rome Statute sets one standard for all. No one is below or above the law. An official capacity is irrelevant under the Rome Statute; all individuals will be brought to justice if they commit a serious crime of international concern.

It is a Sound Investment in Strengthening States Parties’ own Criminal Justice Systems. To fulfill their obligations underneath the Rome Statute, States Parties should implement the Rome Statute by enacting domestic legislation containing provisions on cooperation.⁴⁴ Adopting national implementing legislation provides States Parties, among others, with the chance to exercise domestic jurisdiction over core international crimes and to strengthen

⁴¹ The ICC (n36).

⁴² Ibid.

⁴³ Ibid.

⁴⁴ The ICC (36).

their criminal justice systems.⁴⁵ Various States Parties to the Rome Statute and international organizations, together with the International Organization Secretariat, the Secretariat of the Commonwealth and therefore the European Union, offer technical help within the drafting of applicable domestic laws or amendments to national legislation.⁴⁶ The Rome Statute may additionally open potentialities of international cooperation and help for judicial and legal reform and facilitate States' adherence to international standards.⁴⁷

The Court plays a key role in the international Community's efforts to end impunity.⁴⁸ So far the Court has made significant progress in prosecuting those responsible for mass crimes.⁴⁹ The ICC was set up as a contribution to a collective global effort to build a safer world for everyone, and its primary mission is to help put an end to impunity for mass atrocities.⁵⁰ Every State that ratifies the Rome Statute helps strengthen the ICC system and contributes to the prevention of such future crimes.⁵¹ States not a party to the Rome Statute are encouraged to consider ratification or accession as universal ratification enhances the legitimacy and effectiveness of the Court.⁵²

It is a Powerful Foreign Policy Statement. States Parties and the international community continue to reaffirm their commitment to the ICC. Ratifying or acceding to the Rome Statute shows commitment to international peace and security and strengthens the multilateral diplomacy.

The ICC also has mentioned additional reasons why states have ratified the Rome Statute in the Side Event of the 48th Pacific Islands Forum, 8 September 2017.⁵³

⁴⁵ The ICC (n36).

⁴⁶ Ibid.

⁴⁷ ICC, Membership in the Rome Statute, Why and How, 2017, https://www.Icc Cpi.Int/Items documents/Pr1331_Lft.Pdf, Accessed November 8, 2019.

⁴⁸ The ICC (n36).

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

It strengthens international peace and security.⁵⁴ Joining the ICC is a powerful contribution to the joint efforts of the international community to ensure international peace and security, and to promote the rule of law, the protection of human rights.⁵⁵

Membership allows States to participate in elections and decisions of the ICC.⁵⁶ Assembly of States Parties, as well as to put forward candidates for various elected positions in the Assembly and the Court.⁵⁷

Rule of law as a protection for small States, their interests and their populations.⁵⁸ In particular, the Rome Statute plays a vital role for little islands in protecting their country from foreign invasion or preventing their citizens from the humanitarian crisis and atrocities committed by perpetrators. It is noteworthy that more than 70% of small island states from other regions have joined the Rome Statute.⁵⁹

2.1.1 ARGUMENTS ADVANCED IN SUPPORT OF ETHIOPIA'S RATIFICATION OF THE ROME STATUTE

Discourage impunity.⁶⁰ Being a member of the ICC is not about punishing innocent people, rather, it is to make criminals accountable for their crimes. Sometimes Countries may be reluctant to prosecute a criminal because they may be involved in the crime. In this case, even if the domestic justice system is ineffective, the international justice system (the ICC) plays a vital role in preventing criminals from being escaped.

It will help the country to prepare for the worst.⁶¹ The real situation of the country may not be the culprit. There are many instances of crimes against humanity in different parts of the country. There is still a high risk, because of the ongoing ethnic conflict; a conflict between the followers of different religion and sectarian conflicts indicates that some day the country may become a

⁵⁴ The ICC (n36).

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Interview with Mr. Endalkachew worku, Federal Attorney-General Legal Research, Drafting and induce Deputy Director, Oct. 1, 2019, 1:50 PM.

⁶¹ Ibid.

country with a high crime rate.⁶² However, when the law is enacted it should look to the future and point out how problems should be solved in the event of a difficult situation. The existing infrastructure and law enforcement agencies and the government may not be as perfect.⁶³ In this case, the establishment of an alternative judicial institution is not only preparing for the worst, but also preventing a possible crime, and considered as a modern way of figuring out how to resolve it.

It will have a deterrence effect.⁶⁴ Most serious crimes are committed by government officials and individuals who control the justice system. Without a strong democracy and justice system in the country, these individuals will not hesitate to commit crimes at any time. However, the existence of an international justice system that is beyond the control of criminals can close the gap in the national justice system and it warns others not to commit a crime.

It helps to modernize the legal system.⁶⁵ Any State a party to the Rome Statute has a duty to available a procedure under national law.⁶⁶ To fulfill this responsibility, countries will amend their criminal law provisions. This opportunity will lead to a well-developed criminal justice system. At the same time, it promotes the development of a justice system as it motivates various human rights organizations to support the justice system. In addition to that, the Rome Statute doesn't prohibit the national application of penalties and national laws,⁶⁷ nor the application of the law of states which do not provide for penalties prescribed in the Rome Statute.⁶⁸

Ethiopia's membership can lead other non-party Africans to sign the Rome Statute: Ethiopia is the founding member of the UN and AU and has contributed a significant role in the

⁶² Interview with Mr. Dan Yirga, Ethiopia Human Rights Council Senior Human Rights and Legal Expert, Oct. 9, 2019, 1:45 PM.

⁶³ Even there is anyone who thinks the machinery of the justice system doesn't require complementary justice system.

⁶⁴ Interview with Mr. Endalkachew worku (n60).

⁶⁵ Ibid.

⁶⁶ RSICC (n5), Article 88.

⁶⁷ Ibid, Article 80.

⁶⁸ Ibid.

establishment of different international human rights standards.⁶⁹ The involvement of the country concerning human rights protection must be progressive in terms of a normative and institutional framework.⁷⁰ In terms of a political gesture, the absence of Ethiopia from the Rome Statute has significant impact because in a situation most African States are being a party to the Statute to protect own people from the heinous nature of the crime, the capital city of AU absence from the Statute is against the AU Charter.⁷¹ The country is the model for all African countries in terms of independence; membership in the international institution such as the League of Nation, the UN; a signatory to many international human rights documents, and is serving as the capital of the AU; the acceptance must also be repeated in human rights protection.⁷²

Ethiopia's ratification can be viewed in to two different ways. First, the situation of Ethiopia ratification is not seen as any African country. Since Addis Ababa is being hosted headquarter of the AU, some people may think, it will become a challenge for Ethiopia, because, about investigation and assistance, member states of the Statute have a duty of identification and whereabouts of persons or the location of items⁷³ or a duty to give any other type of assistance which is not prohibited by the law of the requested State, to facilitate the investigation and prosecution of crimes within the jurisdiction of the court.⁷⁴ The AU leaders come to Addis Ababa at least once a year because the AU assembly meets at least once a year in ordinary session⁷⁵ and this session held the headquarter of the union.⁷⁶ If Ethiopia is a member of the Rome Statute, Any African leader implicated by the ICC will fear to come to the AU meeting, because, to achieve the mandate given by the Statute to party states, Ethiopia has to arrest and surrender the suspects to the ICC. So, if Ethiopia inter into this commitment, African states non-party to the Rome Statute will refuse to come to Ethiopia or instigate other Africans to shift the headquarter to other non-member states of the Rome Statute.

⁶⁹ Interview with Mr. Dan Yirga (n62).

⁷⁰ Ibid.

⁷¹ Constitutive Act of African Union (CAAU), 11 July, 2000 Article 4(h).

⁷² Interview with Mr. Dan Yirga (n62).

⁷³ RSICC(n5), Article 93(1)(a)

⁷⁴ Ibid., Article 93(1)(l)

⁷⁵ CAAU (n71), Article 6(3).

⁷⁶ Rules of Procedure of the Assembly of the Union, 2002, Article 5(1).

The second view is Ethiopia's ratification of the Rome Statute will outshine the protection of human rights in Africa. Most African leaders will commit at least one of the grave crimes prohibited under the Rome Statute when they come to power.⁷⁷ They know that once they are out of power will be criminally responsible. So they prefer to stay in power and out of the ICC to escape accountability. If Ethiopia was a party to the Statute, it could have exerted its own influence to ratify on other African States not a party to the Statute, and if Ethiopia did some work to join Africans to the ICC as it did to withdraw from the ICC, it would have been possible for all African countries to join the court. In the other hand any country which resist the influence of Ethiopia, even though it is not mentioned in the AU Constitutive Act, will understand that ratifying the Rome Statute is one of the requirements to be a party to the AU.⁷⁸ because, Ethiopia's membership to the Rome Statute not only encourages non-party African States to be a member but also it compels them to ratify the Statute, unless they determine to withdraw from AU membership. Therefore, the implication of Ethiopia's ratification has a great impact on the protection of all Africans from the four core crimes legislated under the Rome Statute.

2.2 ARGUMENT "AGAINST" THE INTERNATIONAL CRIMINAL COURT

Since the enactment of the Rome Statute, different countries oppose the ICC. Among the countries which have not ratified the Rome Statute, the opposition of the big powers of the world such as China, India, Iran, the Russian Federation, and the United States of America⁷⁹ has a significant effect. China, India, the United States object the provision that imposes an obligation on non-member states⁸⁰ without their consent, claiming that it is contrary to international law. ICC may obtain jurisdiction without the consent of the State of Nationality.⁸¹ The United States asserts that such a disjunctive jurisdictional regime is inconsistent with the principle of sovereign

⁷⁷ Interview with Mr. Abebe Akalu (nError! Bookmark not defined.).

⁷⁸ Most African States are already a party to the Statute, and if Ethiopia ratify the Statute and use its diplomatic acceptance to influence non member countries, the remaining States that are out of the ICC will be few and they will not have an option except joining the ICC unless they determine to leave the AU.

⁷⁹ Steven W. Becker (n20), P.63.

⁸⁰ Ibid, P.48.

⁸¹ Ibid. P.53

consent because without the U.S.A approval it would permit U.S.A national to prosecute before ICC solely on the consent of the nation on whose territory the conduct occurred.⁸²

Russia considers the ratification of the Rome Statute incompatible with the national constitution⁸³ because the judicial system established by the Russian Federation doesn't allow an international court to complement the national court.⁸⁴ Amnesty and/or pardon, an important right of the perpetrator will miss, if the person is prosecuting before the ICC.⁸⁵ A jury trial is considered as an essential constitutional protection in the Russian Federation and the U.S.A⁸⁶ that is absent in the Rome Statute.

India's objection relates to the SC referral. It means some members of the SC only wishing to benefit the privilege to refer cases, but they don't want to sign the Statute and take the responsibilities attached to it.⁸⁷

Another objection of the United States is related to the controlling power of the SC. The SC doesn't play a great-enough role in the control of the ICC.⁸⁸ If the SC has the power to regulate the ICC, permanent members of the ICC, such as the U.S.A, had a chance to refer cases without any reciprocal obligations, because whenever the case implicates their officials or soldiers, they would have a chance to veto the ICC action.⁸⁹ The U.S.A claims that the ratification of the Rome Statute would be inconsistent with the American democracy, the national security and foreign policy interest of the United States and it is unconstitutional.⁹⁰

⁸² Ibid, P.48.

⁸³ Ibid. P.51.

⁸⁴ Ibid.

⁸⁵ Ibid. P.55.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid. P.57.

⁸⁹ Steven W. Becker (n20), P.63.

⁹⁰ Lee A. Casey, "The Case against the International Criminal Court," Fordham International Law Journal, Vol. 25 (2001), p. 843-865.

The prosecutor power is another area that becomes a reason for the objection of the ICC by the United States, India, to a lesser degree in China.⁹¹ These countries have expressed their concerns over the Prosecutor's *proprio motu* powers to initiate investigations and the potential for politically motivated prosecutions.⁹²

According to China and India, the broadness of the definition of war crimes is considered as a threat, it will help the SC to stretch its hands to the internal affairs of the countries. China's position on the issue is a crime committed under armed conflict, not of an international character should be dealt with by the national court.⁹³

In a situation one or more crimes covered under the Rome Statute appeared, the state party can refer the case to the ICC Prosecutor.⁹⁴ Sometimes this State party's referral can be abused because leaders of those States used the ICC against their political opponents.⁹⁵ For instance, the case with Joseph Kabila in the DRC in 2004, Yoweri Museveni in Uganda in 2004, François Bozizé in the Central African Republic (CAR) in 2005, and the government in Mali in 2012.⁹⁶

The effectiveness of the court is dependent upon the cooperation of States. States can hamper the work of the ICC when they decide not to cooperate with it when it has issued an arrest warrant.⁹⁷ If states are hosting someone wanted by the ICC, they might want to avoid the accused person sensational information about crimes committed by their government, or they may hope to use the ICC as a threat in negotiations with their opponents.⁹⁸

⁹¹ Steven W. Becker (n20) P.57.

⁹² Ibid, P.58.

⁹³ Ibid, P.59.

⁹⁴ RSICC(n5), Article 13(a).

⁹⁵ International Criminal Court, "The International Criminal Court – Current Challenges and Perspectives", Salzburg Law School on International Criminal Law, 2011, p. 10.

⁹⁶ Catherine Gegout, the International Criminal Court: limits, potential and conditions for the promotion of justice and peace, Vol. 34, No. 5, (2013), p. 805.

⁹⁷ Ibid.

⁹⁸ Catherine Gegout (n96).

The court may be used to achieve political motive. Because subject to the conditions in Article 16 of the ICC Statute, states within the UNSC which are not a party to the ICC Statute can encourage the ICC to act, or prevent the international community from cooperating with it.⁹⁹

Crimes of aggression is another area of contention among members of the SC, the U.S.A and China argue that this crime is a matter of the SC, because maintaining the international peace and security is the sole duty of the SC.¹⁰⁰ The argument made by the U.S.A and China is not accepted by the Russian Federation. It argues that the power of the SC about aggression is not affected by the Rome Statute.¹⁰¹

2.3 SUMMARY AND GAP

In general, to be a member of the ICC, countries decide whether to join or not, depending on their interests. The main benefits that countries get from being a member of the ICC are to prevent the most serious crimes of international concern, to punish the perpetrators when the crimes are committed, and to discourage impunity. The reasons why countries do not become members of the ICC are different from countries to countries, but the most common reasons are the ICC is inconsistent with the country's legal system, the procedure that the prosecutor investigates and prosecutes defendants has a problem, there is a doubts that the court can be used for political purposes, etc.

The fact that countries offer different reasons for not joining the court, it is difficult to find official documents that explain why Ethiopia does not join the ICC. Moreover, the research done in the area is insufficient and is not up-to-date with the national context.

⁹⁹ Catherine Gegout (n96).

¹⁰⁰ Steven W. Becker (n20), P.61.

¹⁰¹ Ibid.

CHAPTER THREE

3. THE SITUATION OF ETHIOPIA AND PRACTICAL CHALLENGES

3.1 THE PREVALENCE OF ROME STATUTE CRIMES IN ETHIOPIA

Ethiopia's government accused much time of genocide, and crimes against humanity by different organs. The 2016 Department of State Country Report on Human Rights Practices for Ethiopia cited serious human rights violations, including arbitrary arrests, killings, and torture committed by security forces.¹⁰² The report shows that these persistent human rights abuses were sponsored by government in the region of Oromia and Amhara.¹⁰³ The Anuwak Justice Council also had accused the Ethiopia government on the commission of genocide in the Gambela region.¹⁰⁴ According to their accusation, it appears that *a prima facie* case exists against the Ethiopian government for committing the crimes against humanity of murder, deportation or forcible transfer of a population, rape, and persecution of a group.¹⁰⁵ The Council submitted a communication through Obang Metho, the Director for International Advocacy, to request the African Commission on Human and People's Rights to grant provisional measures and declare them binding on the Ethiopian government.¹⁰⁶ But, the Ethiopian government argue that the alleged violations that took place in the Gambella Region were pending before the Federal Circuiting Court, and domestic remedies have not yet been exhausted according to article 56 of the African charter,¹⁰⁷ though finally no defendant was charged with the violation of genocide or crimes against humanity or war crimes as per the claim of the Anuwak Justice Council.¹⁰⁸

At his inauguration ceremony on April 2, 2018, Dr. Abiy Ahmed stated that:

¹⁰² Mr. Smith of New Jersey, Amendment in the Nature of a Substitute to H. Res. 128, preamble paragraph ten

¹⁰³ Ibid, preamble paragraph eleven.

¹⁰⁴ Anuwak Justice Council, Legal Memorandum on Crimes against humanity and impending genocide in Gambella, 2004, http://www.anuwakjustice.org/doc_today_for_killing_anuaks.htm.

¹⁰⁵ Ibid.

¹⁰⁶ University of Mininnesota, Anuwak Justice Council v. Ethiopia, African Commission on Human and Peoples' Rights, Communication No. 299/05 (2006), <http://hrlibrary.umn.edu/africa/comcases/299-05.html>, Accessed November 8, 2019.

¹⁰⁷ Ibid.

¹⁰⁸ Legal and Administrative Affairs Standing Committee of the HPR, Resolution on the Report Submitted by the Gambella Inquiry Commission, 2004.

*In democratic governance, the supremacy of the law needs to be established. One wisdom that we need not forget while trying to ensure the supremacy of the law is that our people are not looking simply for the presence laws but also the realization of justice. The enforcement of the law need not be divorced from justice. What our people are striving for isn't a dry law but rather a system of laws conceived within justice that stands for justice. What the people are looking for are neutral and non-partisan law enforcement officers that are loyal to the law and those that jealously guard the rights of citizens.*¹⁰⁹

From the speech of the prime minister, we can understand that the availability of the supremacy of the law, the realization of justice, the connection between the enforcement of the law and justice, the availability of non-partisan law enforcement organs, and the rights of the citizens have been given much emphasis.

To build the confidence of the citizen he has informed that the necessary reform will be conducted in the administration of justice. Thousands of political prisoners are released; investigation and prosecution underway on the alleged crimes against humanity committed in different parts of the country before and after the premiere is coming into power.

The new Ethiopian people Democratic Revolutionary Front (EPDRF) leaders who has appointed after a huge turmoil in the country, believe that crimes against humanity had been committed in many parts of the country, such as Addis Ababa, Bahir Dar, Gonder, Neqemte, Jimma, Shashemene, Bishoftu, Hawasa. Jig Jiga, Harer city.¹¹⁰ These crimes are committed mainly by kidnapping and taking hostage suspects to secrete prison, especially persons who are suspected of having a relationship with, members of Oromo Liberation Front (OLF), Patriotic Ginbot 7, religious extremist and suspects who have committed economic crimes.¹¹¹ Federal Attorney-General Prosecutor (FAGP) vs. Mr. Getachew Assefa and others file tell us at least government organ contrary to the previous trend has admitted the commission of grave human right violation, such as murder, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, persecution, enforced disappearance of persons,

¹⁰⁹ Dr. Abiy Ahemed, Adress on his inauguration ceremony, Addis Ababa, Ethiopia, on April 2, 2018, https://www.youtube.com/watch?v=F4yn_bxVJIw, Accessed November 8, 2019.

¹¹⁰ FAGP Vs. Mr. Getache wAsefa and twenty-five (pending case) Federal high court first criminal bench file no. 238040.

¹¹¹ Ibid.

and other inhuman acts of a similar character intentionally causing great suffering , or serious injury to body or to mental or physical health¹¹² by a government organ.

The other file which alleges grave crimes against humanity is the case between the FAGP vs. Commander Alemayehu Hailu Babata and other nine suspects¹¹³. In these files the Attorney-General alleges that grave crimes were committed in different Federal Prison Administration of the country including the notorious ‘Maikelawi’, by members of the prison administration and crime investigators¹¹⁴ to get information.

The other criminal charge instituted by FAGP against seven federal Prison Administration officers shows that officer Gebremariyam Wolday and six others had committed grave crimes such as murder, torture, and other inhuman acts of a similar character intentionally causing great suffering or serious injury to body or mental or physical health¹¹⁵ in Qilinto, Qality, Shewa Robit, and Ziway high-security prisons on prisoners who are suspected of the outbreak of fire and disturbance in Qilinto a high-security prison.¹¹⁶

Federal high court file number 231812 is another file instituted against suspects who are participated in crimes committed in Jig Jiga and other Zonal administration of the Ethiopian Somali region. The FAGP has instituted criminal charge against former Ethio-Somali region President Mr. Abdi Muhamed and forty-six others claiming that they were involving in persecuting other religious leaders, horrible killing, such as burning in life, burring human being in life, cutting throat; bodily injury, rape, burying bodies in a mass graves of 58 people and other human right violations.¹¹⁷

The other indicator that shows the happening of human rights violations in the country is Proclamation to Establish a Reconciliation Commission (Proclamation No. 1102/2019). In this proclamation, the new government has acknowledged that gross human rights violations

¹¹² FAGP Vs. Mr. Getachew Asefa and twenty-five (n110)

¹¹³ FAGP Vs. Commander Alemayehu Hailu Babata and nine others Federal First instance court 12th criminal bench file no. 272703 (pending case).

¹¹⁴ Ibid.

¹¹⁵ FAGP Vs. Mr. Getachew Asefa and twenty-five (n110).

¹¹⁶ FAGP Vs. Officer Gebremariyam Wolday and six others Federal high court 3rd criminal bench file no. 232249 (pending case).

¹¹⁷ FAGP Vs. Mr. Abdi Muhammed and forty-six others, Federal high court, 24th criminal bench file no. 231812 (pending case).

happened through time, and historical event¹¹⁸ and these human right violations are gross, and repeatedly occurred,¹¹⁹ so, the proclamation notify the basic human rights recognized under the FDRE Constitution and international and continental agreements which Ethiopian ratified should be fully respected and implemented.¹²⁰

3.2 THE ALLEGED CRIMES IN COMPARISON WITH THE ROME STATUTE

According to the charges of the accused,¹²¹ murder, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture, rape, Persecution, Enforced disappearance of persons; and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health has been committed in Ethiopia. These crimes, by their nature, are serious and lead to great suffering. The happening of the above-mentioned crimes are not merely constituted crimes against humanity that are mentioned under Article 7 of the Rome Statute unless the acts are committed as part of a widespread or systematic. Based on this the conducts that happened in Ethiopia were created many victims, not just a one-time event, but also happened in major cities across the country, such as Addis Ababa, Bahir Dar, Gonder, Neqemte, Jimma, Shashemene, Bishoftu, Hawasa, Jig Jiga, Harer city.¹²² This indicates that one of the elements which constitutes crimes against humanity, widespread, is fulfilled. On the other hand, the criminal charge shows that the acts are organized and led by the security structure of the country. That means it fulfills the other element of crimes against humanity, systematic. To constitute crimes against humanity in the Rome Statute, the fulfillment of one of the elements, widespread or systematic, is sufficient. But, according to the criminal

¹¹⁸ HPR, Proclamation to Establish Reconciliation Commission (Proclamation No. 1102/2019), Paragraph three of the preamble.

¹¹⁹ Ibid, Paragraph two.

¹²⁰ Ibid.

¹²¹ FAGP Vs. Mr. Getachew Asefa and twenty-five (n1110); FAGP Vs. Commander Alemayehu Hailu Babata and nine others (n113); FAGP Vs. Officer Gebremariyam Wolday and six others (n116); FAGP Vs. Mr. Abdi Muhammed and forty-six others (n117).

¹²² Ibid.

charges, the FAGP instituted on the alleged criminals of human rights violation, fulfill both the elements that constitute crimes against humanity in the Rome Statute.¹²³

However, to punish the perpetrators in Ethiopia there are two problems. First, even if some of the offenses are listed in the criminal code, the penalties for the offenses are not taken in to account the seriousness of the crimes; second, there are conducts which do not constitute a crime or has not been adequately covered under the Criminal Code, where there is a possibility that offenders will be exempt without being charged.

Crimes of murder and rape are classified as ordinary crimes under the criminal code even though the conducts that occurred in Ethiopia fulfill the elements of crimes against humanity, systematic or widespread. As far as the Criminal Code has considered these crimes as ordinary crimes, both crimes can be barred by a period of limitation, or it can commute by amnesty or pardon of the legislature or any other state organ subject to the recommendation of the pardon or amnesty board.¹²⁴

The Rome Statute and the Ethiopian Criminal Code have a resemblance and difference with the crime of torture. Their resemblance is both laws have criminalized physical and mental tortures. However, they have a difference; First, the torture under the Criminal Code committed by a public servant who is responsible with the arrest, custody, supervision, escort or interrogation of a person, and the crime is committed upon a person who is under suspicion, under arrest, summoned to appear before a Court of justice, detained or serving a sentence;¹²⁵ while torture that mentioned under the Rome Statute will be committed by anyone upon a person in the custody or under the control of the accused.¹²⁶ That means the provision of the criminal code regarding torture is too narrow than the Rome Statute. Second, the amount of penalties imposed on the two laws is different. A person who commits torture can be punished with fine or simple

¹²³ FAGP Vs. Mr. Getachew Asefa and twenty-five (n11110); FAGP Vs. Commander Alemayehu Hailu Babata and nine others (n113); FAGP Vs. Officer Gebremariyam Wolday and six others (n116); FAGP Vs. Mr. Abdi Muhammed and forty-six others (n117).

¹²⁴ A Proclamation to Provide for the Procedure of Granting and Executing Pardon, 2014, Article 20, Proclamation No.840/2014, Fed. Neg. Gaz., year 20, no. 68. And A proclamation to Granting of Amnesty to Outlaw who have Participated in Different Crime, 2018, Article 3, Proclamation No. 1096/2018, Fed. Neg. Gaz., year 24, no. 59.

¹²⁵ FDRE Criminal Code, 2005, Article 424.

¹²⁶ RSICC (n5), Article 7 (1)(f).

imprisonment under Ethiopian law or punishable by imprisonment for a term not exceeding ten years.¹²⁷ But in the Rome Statute, if the crime of torture committed the court may impose imprisonment of not exceeding a maximum of thirty years¹²⁸ or a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.¹²⁹ In addition to imprisonment, the ICC may order a fine or forfeiture of proceeds, property, and assets derived directly or indirectly from that crime, without prejudice to the rights of *bona fide* third parties.¹³⁰ Therefore, the penalty in the criminal law are lenient than the penalties prescribed by the Rome Statute, and the criminal law impose fine as an optional penalty, but the Rome Statute imposes fine or forfeiture of proceeds, property and assets derived directly or indirectly from that crime, as an additional penalty. Third, torture under the Rome Statute should be committed as part of a widespread or systematic attack directed against any civilian population to call crimes against humanity, but the requirement of widespread or systematic is not the necessary condition to establish the crime of torture in the criminal code. Concerning other crimes committed in Ethiopia, such as Persecution,¹³¹ Enforced disappearance of persons other than in time of war, armed conflict or occupation organizes,¹³² are not covered under the criminal code of Ethiopia.

3.3 A REASON FOR ETHIOPIA NOT TO RATIFY THE ROME STATUTE

Ethiopia is one of the countries, which was an active participant in the preparation of the Rome Statute,¹³³ but the country didn't ratify the Statute. Today Ethiopia's government acknowledged the occurrence of grave human rights violations in the country. Even though the past atrocity

¹²⁷ FDRE Criminal Code (n125), Article 424.

¹²⁸ RSICC (n5) Article 77(1)(a).

¹²⁹ Ibid, Article 7(1)(b).

¹³⁰ Ibid, Article 77(2).

¹³¹ Ibid., Article 7 (2)(g), Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law because of the identity of the groups or collectivity. It includes political group.

¹³² RSICC (n5), Article 7 (2) (i), 'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, to remove them from the protection of the law for a prolonged period.

¹³³ Tewodros Dawit (n11) P. 67.

occurred in the country was high, government has faced a great challenge to bring the suspects to justice, the countries laws are lenient and unable to cover the tragedy; but government still has not any policy change to ratify the Rome Statute, and the transformation process of the country's justice system doesn't consider the ratification of the Rome Statute.¹³⁴

During the thirty-third session of Universal Periodic Review Report, Chile has rejected Ethiopia's effort to prevent torture and other cruel or degrading treatment.¹³⁵ Latvia, Uruguay, Cyprus, and Estonia had requested Ethiopia to ratify the Rome Statute and fully align national legislation with all obligations under the Rome Statute,¹³⁶ but Ethiopia rejected their recommendation.¹³⁷

Even if the government accepted the occurrence of grave human right violation in the country; Ethiopia failed to bring some of the main suspects before justice; there is no inclusive law to punish crimes against humanity. Although some participant's countries of the thirty-third session of Universal Periodic Review Report have recommended Ethiopia to ratify the Rome Statute; Ethiopia is not ready to bring a paradigm shift concerning the ratification of the Rome Statute.

The main reasons for the country to stay away from the ICC are different in different periods. During the enactment process of the Statute Ethiopia's reason was: the ICC doesn't impose proportional penalty in comparison to the seriousness of the crime; the Ethiopian Penal code incorporated all crimes mentioned under Rome Statute;¹³⁸ the country fears the vast power accorded to the prosecutor that may follow situations where the court may serve as a political instrument and the sovereignty of member states may be jeopardized by decision of individuals; to comply with the statute that imposes an obligation on the state parties to available a procedure under the national law immediately, Ethiopia needs some time; and due to the prohibition of a

¹³⁴ Dr. Gedion Timothewos Hassebon, Deputy Attorney General of the Federal Democratic Republic of Ethiopia, Transitional justice in Ethiopia Conference on Sky Light Hotel, Addis Ababa, Ethiopia August 2, 2019.

¹³⁵ Draft report of the Working Group on the Universal Periodic Review, established in following Human Rights Council resolution 5/1, held its thirty-third session from 6 to 17 May 2019, no. 88.

¹³⁶ Ibid, no. 163.11-163.14.

¹³⁷ Interview with Mr. Yesuf Jemal seid, Federal Attorney-General International Cooperation, and Legal Affairs Directorate Director, August 16, 2019, at 2:30 PM.

¹³⁸ Individuals who have committed the crimes within the jurisdiction of the ICC under the last regime (Derg) have been tried by an independent court within Ethiopia, is mentioned as an example.

reservation, Ethiopia did not want to take all the provisions of the statute as it is.¹³⁹ Seventeen years after the existence of the Rome Statute, Ethiopia's reasons not to ratify the Statute are: First, the country believes that the UNSC referral to the ICC prosecutor based on Article 13(b) of the Rome Statute will affect the interest of the country.¹⁴⁰ Second, Ethiopia is working with other AU members to establish African Criminal Court, to expand the Arusha Court, that is independent of the ICC, and to encourage other African countries which are members of the ICC to withdraw from the ICC.¹⁴¹

3.3.1 UNITED NATION SECURITY COUNCIL REFERRAL

When states give their consent to be bound by a multilateral treaty, they can express their reservation on one or some portion of the instrument not to apply to them, unless the reservation is prohibited by the treaty.¹⁴² Based on the general concept of a treaty expressed in the 1969 VCLT, the Rome Statute has prohibited reservation. That means, to join the Rome Statute countries should accept all the provisions of the Statute or leave at all.¹⁴³ These force countries to ratify, though they have opposition on one or more of the provision of the Statute. For instance, paragraphs eight of the preamble of the Rome Statute prohibit a state party to intervene in an armed conflict or the internal affairs of any State; the Statute allowed the SC to refer cases to the ICC prosecutor.¹⁴⁴ The SC referral includes not only parties to the Rome Statute but also non-parties. So Ethiopia doesn't accept the SC referral that is made as per Article 13(b) of the Rome Statute, especially referral to states that are not members of the ICC,¹⁴⁵ to fear on the part of Ethiopia that the court may serve as a political instrument,¹⁴⁶ and the country also opposes the legitimacy of the SC referral.¹⁴⁷

¹³⁹ Tewodros Dawit (n11), p. 71-72.

¹⁴⁰ Interview with Yanit Abera, Ministry of Foreign Affairs International legal Affairs Directorate General, August 8, 2019, at 3 PM.

¹⁴¹ Ibid.

¹⁴² Vienna Convention on the Law of Treaty (VCLT), 1969, Article 19(a).

¹⁴³ RSICC (n5), Article 120.

¹⁴⁴ Ibid, Article 13(b).

¹⁴⁵ Interview with Yanit Abera (n140).

¹⁴⁶ Tewodros Dawit (n11), p. 71.

¹⁴⁷ Interview with Yanit Abera (n140).

3.3.2 THE ESTABLISHMENT OF AN AFRICAN CRIMINAL COURT

The discussion around the African regional court begins following the different arrest warrants issued by the court as well as the application of universal jurisdiction by some European countries and consequential arrest warrants issued by national courts.¹⁴⁸ These led to discussions within the AU to explore the possibility of expanding the Arusha court and mandating it looks into cases of serious crimes (refer to assembly decisions 213¹⁴⁹ and 263¹⁵⁰).¹⁵¹ Ethiopia, as a member of the Union, actively participated in the negotiation processes leading to the protocol.

Until 17, March 2019 among the 122 member countries of Rome Statute 33 are from Africa,¹⁵² and the rest of the members are 18 from the Asia Pacific, 18 from Eastern Europe, 28 from Latin America and the Caribbean, as well as 25 from Western Europe and North America.¹⁵³ Though African countries are cooperative to the very existence of the ICC at the begging, the action of the ICC is degrading their interest to cooperate with ICC gradually.¹⁵⁴ From the eleven investigations by the office of the ICC prosecutor, ten of them are from Africa (Uganda, the DRC, CAR, CAR II, Darfur (Sudan), Kenya, Libya, Côte d'Ivoire, Mali, and Burundi).¹⁵⁵ The only prosecution outside of Africa is the case of Georgia.¹⁵⁶

¹⁴⁸ Interview with Yanit Abera (n140).

¹⁴⁹ Assembly Decision Assembly/AU/Dec.213(XII), 2009, Decision on the Abuse of the Principle of Universal Jurisdiction – Doc. Assembly/AU/3 (XII).

¹⁵⁰ Assembly Decision Assembly/AU/Dec.263(XIII), 2009, the Transformation of the AU Commission to the AU Authority.

¹⁵¹ Interview with Yanit Abera (n140).

¹⁵² International Criminal Court, the Court today, ICC-PIDS-TCT-01-101/19_Eng, updated 2019, <https://www.icc-cpi.int/iccdocs/PIDS/publications/TheCourtTodayEng.pdf>, Accessed November 8, 2019.

¹⁵³ Ibid.

¹⁵⁴ There were instances that parties to the Rome Statute did not willing to cooperate with the ICC. For instance South Africa failed to surrender former leader of Sudan president Omar Al Beshir to the ICC, and the enactment of Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, though it is not come in to practice.

¹⁵⁵ International Criminal Court, the Court today (n152).

¹⁵⁶ Ibid.

Especially, after the case of Omar Hassan Ahmad Al Bashir,¹⁵⁷ countries' opposition to the court has been increasing. On a statement made by the Sudanese Ministry of Justice at the AU Ministers of Justice meeting in 2008 concerning Universal Jurisdiction, he has mentioned in the negative.¹⁵⁸ In the statement he stresses that the condemnation against Bashir was a clear breach of Sudan's sovereignty,¹⁵⁹ and he suggests that not only Sudan is the target of this neo-imperialism, but all African, Arab, and other third world countries are equally targeted.¹⁶⁰ The prime minister of Rwanda, Bernard Makuza, in the aftermath of the July 2009 AU decision¹⁶¹ has passed a message to Westerns whom he claimed not to understand anything about Africa to stop trying and importing their solutions.¹⁶²

In 2009 the AU has expressed its deep concern that some non-African States have abused the principle of Universal Jurisdiction, and some European States continued condemnation against African leaders and personalities and finally called for immediate termination of all pending indictments¹⁶³.

The AU is not stopped by calling the immediate termination of all pending indictment, rather request the commission,¹⁶⁴ in consultation with the African Commission on Human and people's rights, and the African Court on Human and People's Right (ACHPR) to examine the

¹⁵⁷ Former President of Sudan.

¹⁵⁸ Dire Tladi, *the African Union and the International Court: the Battle for the Soul of International Law*, 2009, p. 64.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*, p. 65.

¹⁶¹ Assembly/AU/Dec. 245(xii) Decision on the Meeting of African States Parties to the Rome Statute of the ICC Doc. Assembly/AU/13(XIII), 2009, Article 10. In this decision the AU Assembly decided that in view of the fact that request by the African Union has never been acted upon, the AU member states shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relation to immunities, for the arrest and surrender of President Omar El Bashir of Sudan.

¹⁶² *Ibid.*

¹⁶³ Assembly/AU/Dec.243 (XIII), Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/11(XIII), Article 4.

¹⁶⁴ The Commission on the Implementation of the Assembly Decision Assembly/AU/ Dec.199(XI) adopted by the Assembly in Sharm El-Sheikh, Egypt, in July 2008 on the Abuse of the Principle of Universal Jurisdiction.

implications of the African Court of Justice and Human and People's Right being empowered to try international crimes such as genocide, crimes against humanity and war crimes.¹⁶⁵ The AU also met in May 2010, in Uganda, Kampala to discuss issues on, Article 13 of the Rome Statute granting power to the UNSC to refer cases to the ICC,¹⁶⁶ Article 16 of the Rome Statute granting power to the UNSC to defer cases for one year,¹⁶⁷ the procedure of the ICC,¹⁶⁸ clarification of the immunities of officials whose states are not a party to the Statute,¹⁶⁹ comparative analysis of the implications of the practical application of Articles 27 and 98 of the Rome Statute,¹⁷⁰ and the possibility of obtaining regional imputes in the process of assessing the evidence collected and determining whether or not to proceed with prosecution; particularly against senior state official.¹⁷¹ Finally, the AU decided to expand the Arusha court to fight impunity in conformity with the provisions of Article 4(o) of the Constitutive Act of the Union,¹⁷² adopted the amendment to the Protocol on the Statute of the African Court of Justice and Human Rights and the Statute,¹⁷³ even though only fifteen members States are signed and no State is ratified until December 2019.¹⁷⁴ Therefore, Ethiopia was one of the active participants in the discussion to establish the Africa Criminal Court rather than ratifying the Rome Statute.¹⁷⁵

3.3.3 OTHER REASONS FOR ETHIOPIA

Ethiopia objected to the minimal punishment incorporated under the ICC Statute against the heinous crime, which is not proportional and can not deter others not to commit similar

¹⁶⁵ Assembly/AU/Dec.213(XII) (n149), Article 9.

¹⁶⁶ Assembly/AU/Dec.245(xii) (n161) Article 8(1).

¹⁶⁷ Ibid, Article 8(2).

¹⁶⁸ Ibid, Article 8(3).

¹⁶⁹ Ibid, Article 8(4).

¹⁷⁰ Ibid, Article 8(5).

¹⁷¹ Ibid, Article 8(6).

¹⁷² Protocol on Amendment to the Protocol on the Statute of the African Court of Justice and Human Right (PAPSACJHR), preamble paragraph 12.

¹⁷³ Ibid, paragraph 18.

¹⁷⁴ AU, List of Countries which have signed, Ratified/Acceded to the Protocol on Amendment to the Protocol on the Statute of the African Court of Justice and Human Right, <https://au.int/sites/default/files/treaties/.pdf>.

¹⁷⁵ Interview with Yanit Abera (n140).

crimes.¹⁷⁶ According to the Ethiopian delegate who were participated in the discussion of the draft of the Rome Statute, the Ethiopian criminal code has incorporated up to the death penalty to deter such shocking crime, but the Rome Statute contains the maximum penalty of a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.¹⁷⁷

The willingness and ability of the country to prosecute these crimes are considered as a reason for not to ratify the Statute. The ICC demands jurisdiction when a country within the situation unable or unwilling to investigate and prosecute suspects in the national court. But Ethiopia had been successful in an investigation and prosecuting perpetrators in a crime of genocide and crimes against humanity committed by the *Derge* regime by establishing the independent court.¹⁷⁸ So, as far as the country has willingness and an ability to investigate and prosecutes the crimes, the criminal code of Ethiopia has contained all crimes that incorporated under Rome Statute;¹⁷⁹ it was understood that signing the Rome Statute was not relevant. On the other hand as far as the country is capable and willing to prosecute suspects, there would be no reason for Ethiopia to be worried about ratifying the Rome Statute, because in the principle of complementarities the ICC would be excluded from prosecution, if the case has been genuinely handled in Ethiopia.

The fear of vast prosecution power of the prosecutor is another reason not to ratify the Statute by Ethiopia.¹⁸⁰ The Prosecutor may initiate investigations on the basis of information on crimes within the jurisdiction of the Court.¹⁸¹ This power of the prosecutor will lead the court to serve as a political instrument and the sovereignty of member states be jeopardized by the decision of individuals.¹⁸² This kind of fear is not new in Ethiopia. The constitutional congregational

¹⁷⁶ Tewodros Dawit (n11) P. 71.

¹⁷⁷ RSICC (n5), Article 77(1)(b).

¹⁷⁸ Tewodros Dawit (n11) Annex two, page 15.

¹⁷⁹ Ibid.

¹⁸⁰ Tewodros Dawit (n11), P. 71.

¹⁸¹ RSICC (n5), Article 15 (1).

¹⁸² Ibid. P. 72.

empowered the House of Federation to interpret the constitution because it feared the court in similar justification.¹⁸³

Prohibition of a reservation in the Statute¹⁸⁴ and the requirement to available a procedure under national law is considered as another reason in the Ethiopian side. For all of the forms of cooperation which are specified under the Statute, States Parties shall ensure that there are procedures available under their national law.¹⁸⁵ In the other hand the Statute prohibit any reservation,¹⁸⁶ so, to consider the matter in detail manner and domesticate the procedure to national legislation, Ethiopia prefers to delay the ratification.

3.4 THE CHALLENGE(S) THE FEDERAL GOVERNMENT OF ETHIOPIA HAS FACED TO PROSECUTE THOSE WHO ARE SUSPECTED OF CONDUCT CRIMINALIZED UNDER THE ROME STATUTE.

As of the sworn of Prime Minister Dr. Abiy Ahemed during the inauguration ceremony, different measures have been taken to transform the justice system of the country. One of the measures taken is to bring justice to those who are suspected of human rights violation. These measures are considered as a great move towards the realization of justice and the assurance of supremacy of the law in the country.

Though the effort and commitment of the government to enforce the law is good, this effort is not left without challenge.

Prosecution challenges abstention

The first challenge is the unwillingness of the government to bring the main suspects before the court. Many government officials have been apprehended in human rights violations. The FAGP instituted criminal charges on them. Though most of them are in custody, the main actors are not still detained. The court proceeding is continuing in the absence of the main suspects. Police told the writer of this thesis that Police have arrested most of the suspects and are working hard to

¹⁸³ The Minutes of Ethiopia Constitutional congregational (n30) Vol. 5 (2005), p. 17-18.

¹⁸⁴ Tewodros Dawit (n11) P. 72.

¹⁸⁵ RSICC (n5), Article 88.

¹⁸⁶ Ibid. Article 120.

arrest the rest.¹⁸⁷ However to apprehend the remaining we were searched for all the addresses we were given about the suspects but did not find them.¹⁸⁸ In addition, the current political climate has a role to play not to arrest the suspects.¹⁸⁹ Sometimes it is not appropriate to ask why the suspects have not been arrested immediately, because care must be taken to ensure that efforts to arrest suspects do not disrupt the peace of the country.¹⁹⁰ The manner in which the media and activists translate the speech of W/ro Meaza Ashenafi, President of the FDRE Supreme Court, about the challenges the Court faced holding criminals accountable reinforce the Police's argument.¹⁹¹

Prime Minister Dr. Abiy Ahmed in his press conference mentioned that one of the challenges of law enforcement in the country is every one requests the government to enforce law and order, but nobody is a volunteer to surrender its own criminal.¹⁹² The Prime Minister condemnation is supported by the speech of Dr. Debretsion Gebremichael. In his interview with the reporter, the criminal charges instituted on the former director-general of the National Intelligence and Security Service (NISS), Getachew Assefa and former spy agents is false or fabricated, they are accused because of their ethnicity.¹⁹³

Due to this reason¹⁹⁴, police can't arrest the main suspects. For instance, in the case between FAGP vs. Mr. Getachew Asefa and others (pending case), Federal High Court 1st criminal bench file no. 238040, police cannot enforce the order of the court to bring four of the main suspects before the trial court.¹⁹⁵

¹⁸⁷ Interview with Deputy Commander Solomon Dachew (n16).

¹⁸⁸ Interview with Deputy Commander Solomon Dachew (n16).

¹⁸⁹ Ibid.

¹⁹⁰ Ibid

¹⁹¹ <https://borkena.com/2019/08/05/meaza-ashenafi-remark-on-holding-criminals-in-tigray-turns-out-to-be-playing-card-for-ethnic-tigray-nationalists/>; <http://www.tigraionline.com/articles/meaza-threatens-tigrai.html>

¹⁹² Prime Minister Dr. Abiy Ahmed, Address on his press conference, Addis Ababa, Ethiopia august 1, 2019

¹⁹³Samuel Getachew (n15).

¹⁹⁴ The Tigray regional government believes that Mr. Getachew Assefa is wanted by his identity and not by his own actions. Therefore, the state is not expected to hand over the suspect as it opposes the actions of the Federal Government.

¹⁹⁵ Interview with Abraham Ayalew, Federal-Attorney General Prosecutor, held on August 21, 2019, 9:00 AM.

The backward crimes investigation system is one of the challenges in Ethiopia. Some countries use modern technology such as Closed-Circuit Television (CCTV) or video Surveillance, genetic evidence in addition to documents and eye witnesses to prevent and investigate crimes. In Ethiopia, there were many people suspected of human rights violations but the FAGP instituted a criminal charge on only those who have sufficient human evidence or eye witness.¹⁹⁶ If we had used technology, instead, there would have been two benefits. First people knew that they would be arrested for a crime; they would refrain from committing a crime. Second, those who commit a crime may be punished with sufficient evidence or those who do not commit a crime will not be punished without their guilt.

Legal challenges

Failure to properly address crimes against humanity under the Criminal Code of Ethiopia is one of the challenges which the FAGP faced.¹⁹⁷ The FAGP instituted a criminal charge on the alleged criminal mainly under Article 407 of the criminal code of Ethiopia or Article 9 of the proclamation to provide for a crime of corruption (Proclamation No. 881/2015), which is an abuse of power and the provisions of the ordinary criminal law.¹⁹⁸ The reason why the prosecutor has been instituted criminal charge on the provision of abuse of power is the National Security Agency had established a secrete investigation center and conducted an investigation of crimes relating to terrorism to fulfill the responsibilities conferred on the Establishment Proclamation.¹⁹⁹ It overtakes the power of the Federal police commission given by the law.²⁰⁰ But, what if the National Security has such power, can the Agency investigate the criminals in cruel and inhuman manner against the constitution and international human right instrument ratified by Ethiopia?,

¹⁹⁶ Interview with Abrham Ayalew (n195).

¹⁹⁷ Ibid.

¹⁹⁸ FAGP Vs. Mr. Getachew Asefa and twenty-five (n110).

¹⁹⁹ A proclamation to Re-establish the National Intelligence and Security Service, 2013, Article 7-9, Proc. No. 804/2013, Fed. Neg. Gaz. Year 19, no. 55.

²⁰⁰ A proclamation to provide for the Establishment of the Ethiopian Federal Police Commission, 2013, Article 6, Proc. No. 720/2011, Fed. Neg. Gaz. Year 18, no. 2.

The prosecutor answer will be in the negative, because that is why the FAGP institutes a criminal charge against ten crime investigator officers of the Federal Police.²⁰¹

The other concern of the FAGP is the absence of pertinent punishment in the criminal code proportional to the gravity of the crime.²⁰² From the criminal charge, we can understand that the crimes committed by the suspects are crimes against humanity than ordinary crimes. This is because the nature of crimes committed are different from ordinary crimes: first, these crimes are committed in almost all the capital and zonal city of the country by the same organs, widespread, second, all the acts are conducted by security forces and political organs to achieve some intended goal²⁰³ in a planned and organized manner, systematic. The elements widespread or systematic²⁰⁴ are not cumulative; rather the fulfillment of one of the elements is a sufficient ground to establish crimes against humanity. But in Ethiopian case the FAGP due to the absence of provisions which prohibit crimes against humanity in the criminal code²⁰⁵ obliged to institute criminal charge in the violation of article 424 of the criminal code, use of improper method, Article 555 of the criminal code, grave willful injury, Article 540 and 541 of the criminal code (ordinary homicide and extenuated homicide respectively) and Article 9 of the proclamation to provide for a crime of corruption (Proclamation No. 881/2015), abuse of power.²⁰⁶

Therefore, as the new leadership admitted, the government used torture, and another unlawful technique on suspects, acknowledging that such techniques amounted to terrorism by the state,²⁰⁷ and the efforts to bring criminals to justice is appreciated; due to government unwillingness to bring these suspects to justice, and lack of appropriate law to punish criminals, the place of impunity in Ethiopia is still high.

²⁰¹ FAGP Vs. Commander Alemayehu Hailu Babata and nine others (n113).

²⁰² Interview with Abrham Ayalew (n195).

²⁰³ Most crimes are committed to collect information from suspects of different opposition and allegedly “terrorist” groups.

²⁰⁴ Under Article 7(1) (a-k) of the Rome Statute committed as part of a widespread or systematic attack directed against any civilian population is known as crimes against humanity.

²⁰⁵ Interview with Abrham Ayalew, (n195).

²⁰⁶ FAGP Vs. Officer Gebremariyam Wolday and six others (n116).

²⁰⁷ Dr. Abiy Ahemed, Address on HPR, Addis Ababa, Ethiopia, on July 1, 2018.

CHAPTER FOUR

4. ANALYSIS OF ETHIOPIA ARGUMENT AND LESSON TAKEN FROM THE PRACTICAL CHALLENGES

4.1 ANALYSIS OF ETHIOPIA ARGUMENT

Ethiopia has mentioned different grounds for the non-ratification of the Rome Statute in different periods. The main reasons Ethiopia has mentioned are the minimal punishment incorporated under the ICC Statute against heinous crime; Ethiopia's legislation has contained all crimes that are incorporated under the Rome Statute; Ethiopia proved its willingness and ability to prosecute these grave crimes by establishing independent court; Ethiopia feared that the prosecutor vast prosecution power will lead the court to serve as a political instrument and the sovereignty of member states be jeopardized by decision of individuals; the requirement to available a procedure under national law and the prohibition of a reservation in the Statute necessitate more time to consider the matter in detail manner; the country believe that the UNSC referral to the ICC prosecutor based on Chapter VII of the UN Charter will affect the interest of the country,²⁰⁸ Ethiopia is working with other AU members to establish African Criminal Court, to expand the Arusha Court, that is independent of the ICC.²⁰⁹ In this chapter, the validity of every argument given by the country will be investigated.

4.1.1 THE UNITED NATION SECURITY COUNCIL REFERRAL

The UNSC referral to the ICC prosecutor is a debatable issue. Some scholars thought that the referral of the SC gets the status of customary international law,²¹⁰ while others question the legality of the referral.²¹¹

John Laughland, criticizes the super-national criminal jurisdiction, and the imbalance which will be created in the international system if the UNSC continues to abuse its role as a guarantor of

²⁰⁸ RSICC (n5), Article 13(b).

²⁰⁹ Interview with Yanit Abera (n140).

²¹⁰ M. Cherif Bassiouni (n "Universal Jurisdiction For International Crimes: Historical Perspectives And Contemporary Practice", Virginia Journal Of International Law, Vol. 42:1(2001), P. 106.

²¹¹ John Laughland, 'The Non-Existent Legal Basis for Judicial Interventionism' in Willem de Lint, Marinella Marmo, Nerida Chazal (eds), Criminal Justice in International Society, 2014, p.41.

peace.²¹² Even though the General Assembly of the UN has mentioned that the world faced all range of threat that requires our urgent, collective and more determined response; as we are living in an interdependent and global world and many of today's threats recognize no national boundaries; the world need collective and more determined response,²¹³ there are instances the UNSC abuse its power. For instance, in 2011 the accusation of UNSC to Libya authority was, the government had failed to protect their population from genocide, war crimes, and others, and finally UNSC passed a resolution number 1973 to accomplish the mandate of "responsibility to protect", but they have committed these crimes themselves.²¹⁴ John Laughland criticism is not only the abuse of power by the SC, but also the creation of criminal tribunal since the end of the cold war by the SC, and it was clearly *ultra vires* for many reasons.²¹⁵ First, the criminal tribunal must be created by law by appropriate organ, not by SC, and chapter VII cannot be invoked unless one country is about to invade another.²¹⁶ Therefore, if a crime against humanity happened and states have a desire to permit intervention, they have to prepare a treaty and should be ratified by states. Otherwise, it is not legal and will distort the UN charter for a mysterious purpose.²¹⁷ Second, Article 13(b) of the Rome Statute that enable the UNSC to refer cases to the ICC prosecutor, increase of the dominance of the SC, and the resolutions made by the SC that invoked Chapter seven of the UN Charter has no legal bases.²¹⁸ That means the SC has now awarded itself the trappings of a world government.²¹⁹ Third, the referral of the SC against two head of states of Libya and Sudan breaks not only the basic principle of international law contained article 34 of the 1969 VCLT, but also the provision regarding Sovereign Immunity, because the Charter, the only source of the SC power, doesn't say so.²²⁰ Ambassador Scheffer also argues in line with John Laughland, concerning the application of the ICC jurisdiction over

²¹² John Laughland (n211), p. 37.

²¹³ UN General Assembly, 60/1. 2005 World Summit Outcome, 2005, p. 20.

²¹⁴ John Laughland (n211), p. 41.

²¹⁵ Ibid, p. 42.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Ibid. p. 43.

the nationals of a non-Party state.²²¹ Fourth, in the UN Charter, there is no provision²²² that gives the SC a right to determine the existence of a threat to international peace and security in pretext.²²³ Other issues like lack of precedent that support International Criminal Law and abuse of Immunity and Impunity issues are raised by John Laughland.²²⁴

Whatsoever the criticism of John Laughland, it seems to support the Ethiopian Reason. Ethiopia has opposed the SC referral to non-member states of the statute into two respects. First, Ethiopia fears that the inclusion of a provision that allows the SC referral in the Rome Statute will help the SC to extend its hand beyond the power given to it.²²⁵ Second, Ethiopia questioned the legality of the SC referral.²²⁶ Because it is unacceptable that the Rome Statute gives them the power to force others to arbitrate in a court they themselves oppose and do not belong to. Such an agreement is in breach of the 1969 VCLT. An agreement can only be fair when it governs the countries in the treaty equally and does not apply to countries, not in the treaty. Therefore, Ethiopia does not believe that it would be appropriate to ratify an illegal agreement,²²⁷ regardless of the outcome of the convention.

The argument of M. Cherif Bassiouni is different from John Laughland's and Ethiopia's arguments concerning the SC referral. M. Cherif Bassiouni argues that the crimes fall under the ICC jurisdiction are *jus cogens* international crimes, and it is difficult to argue that referral to the ICC made by State party²²⁸ or by non-party State²²⁹ flows from the theory of universal jurisdiction.²³⁰ However, "referrals" by the SC for the crimes within the jurisdiction of the Court

²²¹ Michael P. Scharf, the ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position, Vol. 64: No. 1 (2001).

²²² But Article 39 of the UN Charter empower the SC to determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

²²³ John Laughland (n211211), p. 44.

²²⁴ Ibid. p. 45-52 .

²²⁵ Tewodros Dawit (n11) P. 72.

²²⁶ Interview with Yanit Abera (n140).

²²⁷ Ibid.

²²⁸ RSICC (n5), Article 13(a).

²²⁹ Ibid., Article 12(3).

²³⁰ M. Cherif Bassiouni (n210).

constitute universal jurisdiction because they can transcend the territoriality of a state party.²³¹ Such a provision could be interpreted as allowing the SC to refer a “situation” to the ICC, even when it applies to crimes occurring outside the territory of a state party and involving the responsibility of nationals from non-parties.²³² That means the ICC empowered with a referral by the SC to prosecute nationals of non-party States.

In this regard, Ethiopia’s reason to be absent from the ICC should be evaluated independently. First, the fear of the inclusion of a provision that allows the SC referral in the Rome Statute will affect the interest of the countries. It is worth noting that in what senses the opposition of Ethiopia that the SC affects the interest of the country. Because the SC can intervene and the ICC has the power to go trial in a country when the country is unable or unwilling to look into the matter. At this time, the SC does not need to intervene, since the ratifying states are based on the Statute obliged to cooperate with the ICC. The intervention is required mainly on the crime is committed in the countries that are not members of the court. Therefore, the failure to ratify the Statute does not impede SC’s referral, and the stated reason is invalid. On the other hand, when we say it affects the interests of the country, it is important to look into what the concept of *interest* itself is. This is because interest should include the protection of citizens against all kinds of crimes other than economic benefit and political gain. Moreover, protecting citizens against serious crime should not be compared to any economic or political advantage or interest.

The second reason is related to the legitimacy and fairness of SC’s referral. One law should apply equally to all. All must be governed by common law. However, many members of the SC are opposed to the law and use it to punish others. It would be appropriate if the countries that initially agreed to the law to intervene in this matter, and would have the law only apply to member states, or if the UNGA had decided that it would apply to all countries. Where this is not the case, it does not follow the principle of membership in a treaty that violates international conventions. Powerful nations, on the one hand, commit crimes, but they are not responsible for them.²³³ In fact, if the SC members were to become members of the ICC it would be known that they could use their right to vote against to protect their citizens. However, they are not parties to the Statute.

²³¹ M. Cherif Bassiouni (n210).

²³² Ibid.

²³³ Interview with Mr. Dan Yirga (n62).

The second reason for Ethiopia seems to be strong. The issue of fairness and legitimacy is also appropriate. However, if one asks whether all international treaties ratified by Ethiopia are followed this principle, the answer sometimes in the negative. For example, the UN Charter will apply to countries that are not members of the UN.²³⁴ On the other hand, the same charter granted veto rights to the five members of the SC,²³⁵ but Ethiopia accepted and is implementing the UN Charter without any question even though it is unfair. Therefore, it is worth considering what the benefit of the agreement is. On the other hand, even if we disagree with the SC's referral, it is even more important to ask the parties to amend the terms of the agreement, since there is nothing to change by leaving the agreement.

4.1.2 THE EXISTENCE OF A COMPLETE NATIONAL LAW AND THE ABILITY TO BRING THE PAST OFFENDERS TO JUSTICE

As briefly mentioned in chapter three the government of Ethiopia witnessed the occurrence of different human rights violations in different parts of the country and named in human rights violation by the international human rights advocate. Even though the happening of the heinous crimes in the country is not denied by any concerned authority and organs, the officials of the country are not ready to use the complementary role of the ICC. One of the reasons not to join the court during the ratification process of the Rome Statute was the then officials believed that the Ethiopian criminal code was self-sufficient to solve a problem that will happen within the country. One of the instances used as evidence of the ability, the willingness of the country, and the availability of self-sufficient laws to prosecute criminals, was the prosecution of the Derg officials.

The country justified “the successful prosecution” of officials who had committed crimes of genocide, but another accusation after the prosecution of the Derge official doesn't show the real willingness, and the availability of self-sufficient laws to punish perpetrators of grave human right violations today. Even if there has been evidence to suggest ability or willingness, it cannot be a valid reason as the Rome Statute is normally to be applied in exceptional cases where states are unable or unwilling, and also the past does not guarantee the future. The accusation of the

²³⁴ Charter of the United Nations and Statute of the International Court of Justice, 1945, Article 2(6): The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

²³⁵ Ibid, Article 27(3)

Anuwak Justice council in the Gambella region was considered as a false accusation even if the independent investigation group reported the participation of the security forces on the killing of the Anuwak community.²³⁶ In addition to that for a long period of time, the Ethiopian government had denied the reports of different human rights advocates, the new government started investigation and prosecution on the grave human rights violation and corruption crimes. Most of the suspects are officials who were serving in the regime in high ranking positions.

During the ratification process, the Ethiopian government might have been confident in its ability and willingness to prosecute criminals (Derg officials) who had participated in genocide and crimes against humanity, but the accusation has come to the government, they didn't even believe that crime was committed until the new EPRDF administration was came in to power. The other ground that shows the weakness of the justification is, first, there are countries that are parties to the Rome Statute though they have a better legal system than Ethiopian. Second, ICC is playing a complementary role or doesn't replace the national jurisdiction.

The other reason that had given by the country not to ratify the Rome Statute was, Ethiopia believed that the country has self-sufficient laws. Indeed, genocide and war crimes are incorporated in the Criminal Code; crimes against humanity have not given much emphasis as the emphasis given in the Rome Statute. Ethiopia also party to the torture convention, and the convention imposes a duty on state parties to make these offenses punishable by appropriate penalties which take into account their grave nature,²³⁷ still not domesticated in the national law in the proper manner.²³⁸ That is why the FAGP has instituted a criminal charge on suspects who are involved in crimes against humanity, by ordinary crimes. Today, the FAGP recognized the missing of crimes against humanity in the FDRE Criminal Code.²³⁹ Therefore, the justification proposed by Ethiopia not to ratify the Rome Statute is not genuine.

²³⁶ Legal and Administrative Affairs Standing Committee of the HPR, Resolution on the Report Submitted by the Gambella Inquiry Commission, 2004.

²³⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987, Article 4, by General Assembly resolution 39/46 of 10 December 1984.

²³⁸ The Criminal Code of Ethiopia should criminalize the conducts that has a threat to the international community with a proportional penalty.

²³⁹ Interview with Abrham Ayalew (n195).

4.1.3 THE POWER OF ICC PROSECUTOR

The power of the prosecutor is another reason for Ethiopia not to ratify the Rome Statute. This is because the country doubts that the prosecutor's vast prosecution power will lead the court to serve as a political instrument and will compromise the sovereignty of member states. The interest that the countries need to protect, protecting the sovereignty of the country, will be jeopardized by a decision of individuals, because the prosecutor is an individual and there is a high probability that the individual will be influenced by the powerful countries or individuals may not have sufficient knowledge about everything. Due to this reason, Ethiopia believes that the court may serve to achieve some political objectives.

To understand whether Ethiopia's justification is proper or not first we have to examine the prosecutor's power given by the Rome Statute. Based on the information given to the prosecutor, she/he may initiate an investigation on crimes that fall within the jurisdiction of the ICC.²⁴⁰ As soon as the prosecutor received information about the crime, she/he doesn't start an investigation immediately; rather she/he shall analyze the seriousness of the information received.²⁴¹ The source of information she/he used to scrutinize the seriousness of the information received is States, organs of the UN, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.²⁴² In addition to examining the source of information from the pertinent organ, if the prosecutor concludes the availability of reasonable basis to precede an investigation with the representation of the victims, he or she shall submit to the Pretrial Chamber a request for authorization of an investigation, together with any supporting material collected.²⁴³

Therefore, Ethiopia's fear concerning the extended power of the prosecutor doesn't hold water. Because even if the prosecutor is an individual, the decision made by him to initiate an investigation is not considered as an individual decision. That means, the mechanism established by the Statute help the ICC prosecutor and the pretrial chamber to evaluate critically.

²⁴⁰ RSICC (n5), Article 15(1).

²⁴¹ Ibid, Article 15(2).

²⁴² Ibid.

²⁴³ Ibid, Article 15(3).

4.1.4 DOMESTICATION OF THE ROME STATUTE AND PROHIBITION OF RESERVATION

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless a reservation is prohibited by the treaty or the treaty provides that only specified reservations or which do not include the reservation in question, may be made.²⁴⁴ In multilateral treaty, the parties to a treaty can determine the possibility or prohibition of reservation based on the importance of each provision of the treaty to achieve the overall objectives of the treaty.

The Rome Statute is one of the multilateral agreements that prohibit reservation,²⁴⁵ and doesn't allow flexibility to member states. Ethiopia opposed the provision which prohibits reservation as one of the reasons not to ratify the Rome Statute, even though the country doesn't mention which provisions are become the reason. From the discussion report submitted to the then Ministry of Justice,²⁴⁶ we can grasp that Ethiopia had not any difference in respect to the types of crimes which the Rome Statute contain, rather Ethiopia had objection on the power of the prosecutor even though this objection is shifted to the SC referral today. Whatever provisions, either the extended power of the Prosecutor or the SC referral, cannot be a reason as discussed above.

In addition to the prohibition of reservation, the provision that imposes the availability of procedure under national law²⁴⁷ is another point of objection. Under this provision, all State parties shall establish a procedure under national law to cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.²⁴⁸ Establishing a national procedure is not only an obligation, rather it is a mechanism to fill gaps in the national legislation.²⁴⁹

²⁴⁴ VCLT (n142), Article 19.

²⁴⁵ RSICC (n5), Article 120.

²⁴⁶ Tewodros Dawit (n11) Annex two.

²⁴⁷ RSICC (n5), Article 88.

²⁴⁸ Ibid, Article 86.

²⁴⁹ For instance, Kenya domesticated own law without detail revision of the whole criminal law, by simply enacting the international act number 16 of 2008. Article 6(4) of this act defines:

“Crime against humanity” has the meaning ascribed to it in article 7 of the Rome Statute and includes an act defined as a crime against humanity in conventional international law or customary international law that is not otherwise dealt with in the Rome Statute or in this Act;

Kenya's experience shows that if there is a commitment to ratify, taking a longer period of time is not sufficient ground. Even if it was a sufficient ground, after twenty years the Statute comes in to practice, still, the country is not ready to ratify the Statute.

Therefore, the prohibition of reservation in the Statute and lack of sufficient time to establish national procedures to cooperate fully with the Court is not sufficient ground by itself.

4.1.5 THE ESTABLISHMENT OF THE AFRICAN CRIMINAL COURT

Ethiopia has actively participated in the enactment of Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights and encouraged the African States which are members of the Rome Statute to withdraw.²⁵⁰

African states initiated to create independent African Criminal Court because they are committed to fighting impunity in conformity with the provisions of Article 4(o) of the constitutive Act of African Union.²⁵¹ Creating a strong an African Criminal Court to fight impunity is very encouraging.

However, Ethiopia is working to establish an African Criminal Court and expand the African Court of Justice and Human Rights; it is difficult to use it as a reason not to ratify the Rome Statute. This is because, first, Ethiopia is not a party to the Arusha Court. Second, the new amendment to expand the Arusha court needs ratification of fifteen countries entry in to force,²⁵² but it does not ratified by any members of the AU. Third, a number of African states opposed the idea to withdraw from the ICC²⁵³ or the ICC has a support from African states.

In another respect the objection of Africans that the ICC targeting Africans is not reasonable, rather the court is serving Africans' better than another continent²⁵⁴ because Africa itself should mete out justice for crimes committed by Africans against Africans.²⁵⁵

"Genocide" has the meaning ascribed to it in article 6 of the Rome statute;

"War crime" has the meaning ascribed to it in paragraph 2 of article 8 of the Rome Statute.

²⁵⁰Interview with Yanit Abera, (n140).

²⁵¹PAPSACJHR (n172), preamble paragraph twelve.

²⁵²Ibid, Article 8(1).

²⁵³Dire Tladi (n158), p. 60.

²⁵⁴Judge Chile-Osuji, Address on Addis Ababa University public lecture, Addis Ababa, Ethiopia Jun 13, 2019

²⁵⁵Dire Tladi (n158), p. 67.

The objection of Africans in relation to sovereignty is problematic. The ICC will exercise jurisdiction only when the states having jurisdiction unable or unwilling to investigate or prosecute the case genuinely.²⁵⁶ As far as the states decide to investigate and prosecute the case properly the ICC has no intention to intervene in the internal affairs of any states. The court plays only complementary role.

The crimes falls under the ICC jurisdiction are grave, but African's considered it as the western's solution imposed on African's.²⁵⁷ This thought of Africans is wrong at least in two respects. First, the value protected under the Rome Statute is not only the value of Europeans but also has become the common heritage of mankind,²⁵⁸ including African's. Second, the gravity of genocide, war crimes, crimes against humanity, and crimes of aggression has given much emphasis by Africans²⁵⁹ and the same crimes legislated under the Rome Statutes are criminalized under the intended ACC,²⁶⁰ to condemn and reject impunity and political assassination.²⁶¹

Even the establishment of ACC successful, it will face many challenges. For instance budget, capacity, infrastructure, arresting, investigation and prosecution of suspects, lack of hegemonic states or group of states that compel states to surrender their criminal to the court like the SC.

Therefore, the establishment of the ACC used by Ethiopia as justification not to ratify the Rome Statute is not a genuine reason for Ethiopia to be absent from the Rome Statute.

4.2 LESSON TAKEN FROM THE CHALLENGES

There have been cases of crimes against humanity in Ethiopia. These crimes had different features at different times. The government is supposed to work on awareness creation so that the public at large understands that the persecutions of the perpetrators are merely based on the counts of criminal charges filed against them than their belongingness to a particular political organization or ethnicity. This should be done for the sake of avoiding the confusion perpetrators create claiming that they are accused of a mere reason that they belong to a particular ethnic

²⁵⁶ RSICC (n5), Article 17(1)(a).

²⁵⁷ Dire Tladi (n158), p. 65.

²⁵⁸ Pierre-Marie Dupuy, "Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi", *The European Journal of International Law*, Vol. 16 no.1 (2005) p. 135.

²⁵⁹ The Constitutive Act of the African Union, 2000, Article 4(h).

²⁶⁰ PAPSACJHR(n172), Article 3 and 4.

²⁶¹ CAAU (n71), Article 4(o).

group. Although the perpetrators may have provided cover for their crimes, the prosecution may be a precautionary measure. When criminals hide in their ethnicity, the government must use all available options to bring criminals to the court of law. Otherwise, crimes against humanity arising from ethnic and religious coverage can lead to genocide.²⁶²

The Ethiopian government should enact detail laws that cover crimes against humanity with the proper penalties for the crime. In addition to that, ratifying international human right instrument by itself is not a goal to have successful human rights protection in the country; to a certain extent, Ethiopia should domesticate these instruments into national laws. For instance, on one hand, Ethiopia is a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and International Convention on the Suppression and Punishment of the Crime of Apartheid, but when the crimes of apartheid or torture happened in the country there is no provision provided under the criminal code to punish these crimes.

The country should establish a system for monitoring how all security organs are working. It is important to open investigations centers and prisons for the various stakeholders, including the House of People's Representatives, Human Rights Commission, Civic Societies, etc. The government must ensure that security agencies perform their duties only by the rules established by law. On the other hand, in addition to increasing the capacity of the security forces, establishing a comprehensive legal framework, and modernizing the institution would contribute in curtailing such crimes; the government would have been able to resolve the challenges if there had been an international justice system that could support an alternative legal system.

²⁶² Interview with Mr. Dan Yirga (n62).

CHAPTER FIVE

5. CONCLUSION AND RECOMENDATION

5.1 CONCLUSION

The arguments which support Ethiopia's membership in the Rome Statute mainly filling the legal gap in its legal system and discouraging impunity will have significance role in implementing human rights which are provided under the FDRE Constitution.

The minimal punishment incorporated under the ICC Statute, self-sufficiency of Ethiopia's legislation, the willingness and ability of the country to prosecute former criminals by establishing an independent court, the fear to vast prosecution power of the ICC prosecutor, prohibition of reservation and the requirement to make available a procedure under the national law, the legality of UNSC referral to the ICC prosecutor, and the establishment of African Criminal Court cannot be good reasons not to ratify the Rome Statute.

From the facts alleged criminal charge which instituted against government officials in violation of human rights it appears that Police were unwilling to arrest all the suspects. Crimes against humanity are not fully covered by Ethiopian law. Though some of the conducts of crimes against humanity are criminalized under the Ethiopian Criminal code, their penalties are lenient in comparison to the penalties prescribed under the Rome Statute. Despite these facts, the Ethiopian government is not prepared to ratify the Rome Statute to fill the gaps.

Had Ethiopia ratified the Rome Statute, the problems it has faced, for instance, the absence of comprehensive laws with the right amount of punishment, and the challenges of bringing suspects to justice would not have occurred.

5.2 RECOMMENDATION

Ethiopia should ratify the Rome Statute. This would fill the legal gap in its legal system, has a paramount importance to modernize the legal system and to discourage impunity, help to prepare for the worst, has deterrence effect, considered as a symbol of confidence and innocence.

The arguments advanced against Ethiopia's ratification of the Rome Statute don't give much emphasis for the fundamental human rights protection that are guaranteed under the FDRE Constitution and international human right instruments ratified by Ethiopia, don't deter others from committing crimes and don't show criminals are going unpunished. Therefore, Ethiopia must work for the protection of human rights as provided by the Constitution to protect citizens from the crime of its officials.

Furthermore, the Ethiopian government should revise the Criminal Code and incorporate laws that cover crimes against humanity with the proper penalties for the crime, international human right instruments ratified by Ethiopia should be domesticated into national law, the country should establish a system for monitoring how all security organs are working.

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