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Retrial of Persons tried in Foreign Courts and Applicability of the Constitutional Principle of Prohibition of Double Jeopardy: A Reference to Ethiopia

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GSR/5324/09

Submitted to: College of Law and Governance Studies in Partial Fulfilment of the Requirements of Master's Degree in Public International Law (LL.M)

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Declaration

I, Dawit Redae, hereby declare to the Addis Ababa University thesis approval committee that the contents of this thesis are my own original works except those which are duly cited and quoted. I also declare that it has not been previously or concurrently submitted for any degree in any other institution or university.

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List of Acronyms

CAT	Convention Against Torture
ECHR	European Convention for the Protection of Human Rights and Freedoms
FDRE	Federal Democratic of Ethiopia
ICC	International criminal court
ICTY	International Criminal Tribunal for the former Yugoslavia
ICCPR	International covenant on civil and civil and political rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
HRC	Human Righty's Committee
U.N	United Nations
U.S.	United States of America

Abstract

The prohibition of double jeopardy is among the human rights granted by the FDRE Constitution under article 23. This constitutional right gives protection to the individual from successive trial and punishment that may have effects of ordeal and tribulations up on the individuals who are subject of the repeated proceeding. On the other hand the Revised Criminal Code of FDRE under article 16 states that, an individual who has been tried and sentence in a foreign country may be tried and sentenced again on the same charge in Ethiopia, if he is found in Ethiopia or was extradited to it. A person who read these two provisions may question inter alia what is the scope of the constitutional right of prohibition of double jeopardy? Can the Ethiopian court try and sentence again a person who has been tried and sentenced in foreign country without violating the constitutional principle of prohibition of double jeopardy? If the answer is affirmative what is the justification behind?

The issue is important due to its contribution to ensure the protection of human rights that granted under the Constitution particularly defendants right. Here the problem is, despite the Constitutional prohibition of double jeopardy the criminal code permits as to the double trial and punishment of foreign tried person for the same crime. Therefore, the purpose of it is important to scrutinize the scope of prohibition of double jeopardy in the Ethiopian constitution in order to determine whether the criminal provision is Constitutional or not. Doctrinal and qualitative methodology is employed to conduct this research. Besides analysing national and international legal rules and court decisions different scholars and legal systems are examined their position in relation to this issue. A jurisdictional theory that developed in relation to the rule of double jeopardy in relation to the multiple sovereigns is applied.

Even though, it is not clear form the constitution itself as to the scope of double jeopardy, but when we interpret it in line the international instrument to which Ethiopia is a party particularly article 14(7) of the ICCPR, since this provision limit the scope of the protection within a single country by stating "….finally convicted or acquitted in accordance with the law and penal procedure of each country" and the quasi-judicial Human Rights Committee, whose job is to interpret and implement the Convention, states article 14, paragraph 7, of the Covenant does not guarantee non bis in idem with regard to the national jurisdictions of two or more States. From this we can conclude that the prohibition of double jeopardy that granted by the constitution should construe restrictively and its scope is limited only to a person adjudicated by Ethiopia courts.

In other word in principle a person will not get guarantee against double jeopardy in Ethiopia even if he has been prosecuted in a foreign court for the same crime. Accordingly, where a criminal who is subject to Ethiopia's principal jurisdiction was tried and sentenced by foreign court the Ethiopian criminal justice system follows the principle of ne bis poena in idem (i.e. retrying and sentencing the person with deducting the punishment that has been already undergone in the foreign country from the new sentence to be passed). This principle has dual benefit one reserving the Ethiopian interest to punish persons whose act is against its vital interest irrespective of their punishment in foreign country. On the other hand it has effect on human right value by minimizing the dangers that come due to repeated proceeding of an individual. This makes Ethiopian criminal justice system goes in line the Jurisdictional Theory that developed by Professor Anthony J Colengelo for the "Double Jeopardy and Multiple Sovereigns"

CHAPTER ONE

INTRODUCTION

1.1. Background of the study

The concept of double jeopardy triggers different interpretations among various states' jurisdictions, provokes different judicial standards depending on whether a defendant is tried in foreign court or not. Successive trial and punishment of a person that has been tried in foreign court may affect three distinct protections afforded to a defendant: the bar of a second prosecution for the same offense after an acquittal, the bar of a second prosecution for the same offense after a conviction, and the bar of multiple punishments for the same offense after a conviction. In this case two competent values (i.e. human right value and the value of sovereign's right to enforce its law) come in to the display place of scholarly debate.

The protection of double jeopardy among states (i.e. international double jeopardy) is an important concept that should be seen in relation to the international legal systems' concept *inter alia* with the concept of sovereignty, human rights and criminal jurisdiction. The academic opinions are not congruent as to the scope of prohibition of double jeopardy whether it is limited within a single jurisdiction or extends among states too. *Nerep*, for example, concludes that the principle is not recognised in international law, consequently according to him the application of prohibition of double jeopardy is limited only within a single state and it doesn't give protection to individuals tried and sentenced in foreign court. [1] Similarly *Oehler* concludes that *ne bis in idem* will never become a rule of international law until a greater approximation of laws on the issue among individual states is achieved.[2]

To the contrary numbers of arguments are made in favour of the recognition of prohibition of double jeopardy among states. the proponent of international prohibition of double jeopardy argued that, first the principle has achieved, in admittedly different forms, nearly universal recognition in national systems; and acceptance of the general principle behind *ne bis in idem* is, therefore, widely shared; that the exact operation and forms of the principle are open to debate does not necessarily preclude recognition of it internationally at a more general level.

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[1] E. Nerep, Extraterritorial Control of Competition under International Law: Vol. 2 (1984), pp. 620–621; *M. N. Morosin*, Double Jeopardy and International Law: Obstacles to Formulating a General Principle (1995), 64 Nordic Journal of International Law 261

[2] D. Oehler, 'The European System', in *M. C. Bassiouni* (ed.), International Criminal Law, Vol. 2, Procedural and Enforcement Mechanisms (2nd edn., 1999), 618

As a result, it may be possible, to identify a lowest common denominator among applications of the principle to determine the scope of a future rule on the international level. Secondly, the view that national laws are too diverse to accommodate an effective operation of the principle internationally arguably pays inadequate attention to the high level of cooperation in such matters actually achieved, e.g., in the context of extradition law and the principle of double criminality. Therefore, these writers offer a view more favourable to the operation of the rule among states. *Bedi*, for example, observed that although the principle was normally confined to intra-state offences, it was frequently invoked in the context of extradition proceedings.[3] *Bassiouni* has concluded in favour of a full recognition of the status of the rule, albeit as a general principle of international law, rather than as a rule of custom, in view of its importance in the criminal law generally.[4]

A reconciling third argument is suggested by Gerard and *Boehringer.* According Gerard only territorial jurisdiction *stricto sensu* should be exception from a *ne bis in idem* rule. The rationale that territorial jurisdiction be an exception to a *ne bis in idem* rule, apart from the practice of states being consistent on the point, would seem to be that territorial offences generally involve a more intimate and pressing invasion of a state's interests than arguably do extraterritorial offences.[5] He further stated as with the exception for territorial jurisdiction, this exception may be narrowly or broadly formulated. A narrower formulation seems more consistent with the human rights dimension to the operation of *ne bis in idem*; the broad formulation of the exception would allow considerable scope for governments to interpret it widely and to abuse the concept of protective jurisdiction in order to circumvent a *ne bis in idem* rule. In the case of these jurisdictional bases, the application of *ne bis poena in idem* could help compensate for the non-applicability of a full *ne bis in idem* rule.[6] This principle restricts the double jeopardy rule within a single state in case of territorial jurisdiction but allows deducting of punishment in foreign country. As to Gerard: "The increasingly internationalised dimension of criminal prosecution, evidenced most dramatically in recent times in matters of terrorism, makes all the more likely the potential future relevance of international double jeopardy protection."[7]

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[3] S. D. Bedi, Extradition in International Law and Practice (1966), p. 171

[4] M. C. Bassiouni , International Extradition Law: United States Law and Practice (2nd edn., 1987), p. 107.

[5] Gerard Conway, "Ne bis in idem in International law", International Criminal Law Review **3:,** (2003.), p 240

[6] Ibid 241

[7] Ibid 244

Different international instrument are inserted the prohibition of double jeopardy or the right not to be tried or punished twice. The ICCPR under art 14(7) represents this rule as a core right of a defendant. Thus, when we deal this specific human right's provision application, practically it is important to conceder sovereignty and criminal jurisdiction too.

Taking some states practice which have developed legal system and advanced court jurisprudence that represent different legal system to the case at hand as example; France, amended its domestic legislation to distinguish between cases in which prosecutions in France are based on a "territorial" application of its criminal laws to acts committed, even in part, in France, and "extra-territorial" applications of its laws to acts committed entirely outside of France (such as conduct occurring abroad committed by a French person or corporation, or where a French person or corporation is a victim). In the latter case, article 113-9 of the Penal Code[8] and article 692 of the Code of Criminal Procedure[9] provide that "no prosecution can take place with respect to a person who has been definitively convicted in another country for the same facts, and, in case of conviction, where the penalty has been performed or suspended." However, for all "territorial" prosecutions, domestic French law does not provide any *ne bis in idem* protection for individuals that have been the subject of prosecutions overseas.

From the common law legal system U.S. is prominent example among the countries that follow stricter scope of application that its double jeopardy protection is limited only to single sovereign jurisdiction.[10] This approach is developed by courts practice and on the notion of dual sovereign exception doctrine. On the other side, unlike the U.S. approach there are countries that follow broad approach of prohibition of double jeopardy. For instance, Canada and England have a broader protection against double jeopardy, where successive prosecutions are barred if a foreign "court of competent jurisdiction" has already tried a defendant.[11]

Coming to Ethiopia, Ethiopia has ratified and granted domestic law effect to a number of the core international human rights treaties *inter alia* ICCPR that recognizes the prohibition of

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[8] CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 113-9 (Fr.). The French Penal Code is available in an "official" English version at https://www.legifrance. gouv.fr/Traductions/en-English/Legifrance-translations.

[9] CODE DE PROCÉDURE PÉNAL [CPP] art. 692. The French Code of Criminal Procedure is also available in official English translation at https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations

[10] *See* Heath v. Alabama, 474 U.S. 82, 90 (1985); *see also* Anthony J. Colangelo, 'Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory' (2009), Q, 86 WASH. UNIV. L. REV 769,

[11] *See infra* part…..

double jeopardy under article 14(7). Besides, art 23 of the FDRE Constitution provides the prohibition of double jeopardy. This constitutional provision provides as follows: "No person shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the criminal law and procedure".

Yet, FDRE Criminal Code provides possibilities for the retrial of persons sentenced in foreign jurisdiction. As such there seems to be a contention between the right not to be tried and punished twice and the Ethiopian demand to exercise its prosecutorial and jurisdictions for various purposes as expressed in the FDRE revised criminal code. This is because despite the constitutional guarantee against double jeopardy article 16 (1) of the Criminal Code stated as "where a criminal is subject to Ethiopia's principal jurisdiction ….has been sentenced in a foreign country, he may be tried and sentenced again on the same charge in Ethiopia…" on the same article sub 2 states "his discharge or acquittal in a foreign country shall not bare to a fresh trial or sentence being passed in Ethiopia according with this code" It is far from clear that why the legislator allows this multiple prosecution contrary to what the constitution states.

It is important to make sure that whether this criminal provision in line the constitutional stipulation (since the constitution is the supreme law of the land) and as per article 9(1) if this contravenes to the right granted constitutionally shall be of no effect. if it is in line with the constitutional provision what the justification and policy behind this multiple prosecution. It is also important to know the exact scope of the double jeopardy protection under the Ethiopian legal system whether it is limited to a person who prosecuted by Ethiopian courts or extend to the persons tried and sentenced in foreign court too. to achieve this, it is necessary to look through the law and the practice of international and practice of some countries which have advanced legal system and developed jurisprudence in this particular issue. . This is because; since Ethiopia is under obligation to make sure that whether its law is in line to the international instruments or not, particularly human rights instruments to which Ethiopia is a party and when interpretation of human rights provision is needed should interpret in a manner conforming to the principles of international human right instruments to which Ethiopia is a party inter alia the ICCPR[12]. Furthermore, the criminal provision seems

[12] See article 13(2) of the FDRE Constitution

give discretion to the court on deciding retrial or not by stating "….he may be tried and sentenced again…"[13]

1.2. Statement of the problem

Despite article 23 of the constitution prohibit double jeopardy, article 16 of the FDRE Criminal Code states that a person that has been tried in foreign court may be tried and prosecuted for the same crime if he found within its jurisdiction. Therefore, dose this criminal provision is in line the Constitution is an issue that should be answered. if the answer for this question is affirmative, what effect will have on the individual's constitutional right against double jeopardy and how courts construed the criminal jurisdiction in line the constitutional principle thereby apply their responsibility and duty to respect and protect human rights in one hand and the state's interest to enforce its law is another problem that should be answered.

Therefore, to solve these problems the study examined and answers the following research questions:

1.3. Research questions

1. What is the scope of prohibition of double jeopardy under the Ethiopian criminal justice system?
2. Can the Ethiopian courts exercise criminal jurisdiction over a person convicted in foreign courts without contradicting the constitutional principle of prohibition against double jeopardy?
3. What kind of consideration can the Ethiopian courts apply in order to decide retrial or not a person that has been tried and sentenced in foreign court?

1.4. Objectives of the study

1.4.1. General objective

The general objective of this study is to examine whether the Ethiopian criminal provision that allows retrial of foreign sentenced person is in line with the constitutional principle of prohibition of double jeopardy or not.

[13] See article 16(1) of the FDRE Criminal Code

1.4.2. Specific Objectives

1. Searching the exact scope of application of the prohibition of double jeopardy under the Ethiopian criminal justice system;
2. Examine whether the Ethiopian courts can retry a person that has been tried and sentenced in foreign court without violating the constitutional principle of double jeopardy ; and
3. Find out if there are mechanisms that would apply by Ethiopian courts to mitigate the effects of subsequent trial.

1.5. Methodology

The doctrinal and a qualitative research methodology are employed to conduct the study. It mainly involves the analysis of primary and secondary sources in order to answer the research questions. The primary sources include national and international legal documents, court decisions and interviews of key informants mainly judges, practitioners and academicians is conducted. As secondary sources also scholarly writings on state sovereignty, criminal jurisdiction, and double jeopardy particularly a theory called "a jurisdictional theory" developed by Professor Anthony J Colengelo in relation to Double Jeopardy and Multiple Sovereigns will use for this study. In addition some countries which have developed legal system form both civil and common law legal systems are taken as example in relation to the scope of double jeopardy rule.

1.6. Significance of the study

The significance of the study can be put as its academic and practical importance. In terms of academic, it can contribute to the scarce knowledge about retrial of persons tried in foreign courts in Ethiopia and its consistency with the constitutional principle. It will able to depict the causes and principles behind the retrial of foreign sentenced person under Ethiopian and has contribution to the Ethiopian criminal justice system. Moreover it can aspire and encourage others for further researches on similar themes.

1.7 Literature review

As far as finding of this research there is no research conducted in relation to this issue. Therefore, this research may be put foot stone for further research to be made.

CHAPTER TWO

DOUBLE JEOPARDY, CRIMINAL JURISDICTION AND SOVEREIGNTY: THE THEORETICAL FRAMEWORK

2.1. The genesis, concept and rational behind the protection against double jeopardy

The origins of the double jeopardy rule reaching back to ancient Greece and Rome.[14] It was adopted early on in Church canon law, perpetuated through the Dark Ages, and gained more widespread use under 12th century English law.[15] At that time there were two different court systems one ecclesiastical or church-run and the other the king's court and there was concern about whether someone convicted in the church-run court could subsequently be tried in the king's court. By the middle of the following century the principle of double jeopardy had emerged to mean that a defendant could only be prosecuted once, no matter what the verdict.[16] At early common law, the plea at bar took two forms, *auterfois convict de même felonie* already convicted of the same offense and *auterfois acquit de même felonie* already acquitted of the same offense.[17] Civil law systems and international legal instruments[18] often refer to this principle "not twice for the same thing" known by its Latin maxim, *non bis in idem* or *ne bis in idem*,[19] deriving from the Roman maxim *nemo bis vexari pro una et eadam causa*, "a man shall not be twice vexed or tried for the same cause."[20]

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[14] Anthony J. Colangelo, 'Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory' (2009), wahsington university law review, vol. 86, Issue 4, 778

[15] Ibid

[16] Lincoln, Robyn and Bennett, Steven "Should the double jeopardy rule be in jeopardy?," The National Legal Eagle": (2003) Vol. 9: Iss. 2, Article 5. 12, Available at, htt://epublications.bond.edu.au/nle/vol9/iss2/5

[17] Anthony J. Colangelo, 'Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory' (2009), wahsington university law review, vol. 86, Issue 4, 778

[18] *See, e.g.*, A.P. v. Italy, Communication No. 204/1986, Report of the Human Rights Comm., 43d Sess., supp. No. 40, U.N. Doc. A/43/40 (1988) (interpreting the International Covenant on Civil and Political Rights)

[19] BLACK'SLAWDICTIONARY1077(8th ed. 2004) http://www.republicsg.info/Dictionaries/2004_Black%27s-Law-Dictionary-Edition-8.pdf accessed on December 12, 2018

[20] Gerard Conway, 'Ne bis in Idem in International Law' (2003), 3 INT'L CRIM. L. REV. 217

Every democratic society's criminal justice system operates on the basis of certain values within which it admits no compromise. The "double jeopardy" principle is one such value protected by different democratic societies and got an acceptance by multiple states and international instruments in the contemporary time. This is prevalent among the legal systems of the world.[21] This rule stipulates that no-one may be put in peril twice for the same offence. If a person has been previously acquitted or convicted (or could, by an alternative verdict, have been convicted) of an offence and is later charged with the same offence, the rule against double jeopardy will apply to bar the prosecution.

The rule of double jeopardy is grounded on the notion that a person who has undergone the ordeal of a criminal trial should be left undisturbed following the final verdict, either to go on to lead a normal life if acquitted or to face the appropriate punishment if convicted. Different scholars and jurisdiction put various justifications. For instance Gerard stated dual rational for the double jeopardy rule. He put as, it ensures the resources of the state can only be applied once to the prosecution of an individual; this can ensure both that prosecutions are conducted as thoroughly as possible and that an individual cannot be harassed by repeated prosecution and, in effect, made subject to a punishment additional to the sentence handed down following a conviction if, in fact, there is a conviction.[22] But generally the objectives or justifications behind it can be summarizing as serving the main functions of: protecting the individual's human rights, fair administration of justice and ensuring the integrity of the justice system. The rule by enhance the integrity of the judicial system plays a role in upholding public confidence in the justice system and respect for judicial proceedings, with the additional practical benefit of conserving judicial resources."[23] To support to this assertion we can see the explanation of Justice Black on the role of double jeopardy rule's in protecting the individual in *Green v. United States*.[24] He observed,

> …..The State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby

[21] Ibid

[22] Gerard Convey (n 5)

[23] L. Finlay 'Does the International Criminal Court Protect Against Double Jeopardy: An Analysis of Article 20 of the Rome Statute' (2009), 15 U.C. DAVIS J. INT'L L. & POL'Y 223 223

[24] Green v. United States, 355 U.S. 184 (1957) available at https://casetext.com/case/green-v-united-states?utm_source=google&utm_medium=paidsearch&utm_campaign=api cases&utm_content=multiple&gclid=EAIaIQobChMIlfLq5PDd3wIViRrTCh2XNwa0EAAYASAAEgLR1vD_BwE, accessed on 8, 1. 2019 See also, Principato, Daniel A. 'Defining the Sovereign in Dual Sovereignty: Does the Protection against Double Jeopardy Bar Successive Prosecutions in National and International Courts' (2014) cornell international law journal: Vol. 47: Iss. 3, Article 9. Available at: http://scholarship.law.cornell.edu/cilj/vol47/iss3/9

> subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing sense of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[25]

In this statement, by making subject for repeated trial a defendant faces a higher likelihood of being convicted, even if he or she is innocent. The defendant's increased probability of being convicted has two primary sources. First, the defendant may not have the stamina or resources to maintain a continued defence. Second, the government also would gain the tactical advantage of learning the defendant's theories and evidence at the first trial.[26] Therefore, by protection the defendant to prove his innocence again and again the rule protect him from being guilty due to exhaustion of repeated trial.

2.2. The concept of sovereignty and criminal jurisdiction

2.2.1. Sovereignty

Sovereignty is an essential characteristic of a state. In defining state and to show the main four basic components namely 'population', 'territory', 'government' and 'sovereignty'.J.W.Garner states as follows:

> " … a community of persons more or less numerous, permanently occupying a definite portion of a territory, independent or nearly so of external control and possessing an organized government to which the great body of inhabitants render habitual obedience."[27]

In this definition though not clear but we can find the notion that seemingly sovereignty. The phrase independent or nearly so of external control has the element of sovereignty since it states about being independent or supreme in a single territory and population that can be manifested by enacting and enforcing its law within the specified territory and population.

Sovereignty includes various important principles or laws which are essential for its legitimate power-exercise over people. In the sphere of sovereignty when one owes his duty to the state, the state in turn is expected to provide complete protection to his life and

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[25] Ibid 187 88

[26] E. Costa, 'Double Jeopardy and non bis in idem: Principles of Fairness", 4 U.C. DAVIS J. INT'L L. & POL'Y 181, 185 (1998) see also, Principato, Daniel A Defining the Sovereign in Dual Sovereignty

[27] Garner, J.W., *Political Science and Government,* (World Press Calcutta, 1955), p.49.

property. The sovereign's duty to its subject to protect his life and property may be manifested through enacting criminal legislation among others. Thus, in sovereignty there exists a logical relationship between duty and right.

Here we have to be aware of that sovereignty has two basic aspects 'external' and 'internal'. Internally speaking it means that state has supreme power over the people within its domain and externally it implies complete freedom from foreign rule.[28] Thus, in a state, sovereign power is indispensable so as to free it from both the internal and external control. The concept of sovereignty as it developed includes a number of general features and also a series of distinctions. All of this helps to arrive at the correct meaning of sovereignty. As noted by Max Huber in the *Palmas Island* case:

> Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.[29]

2.2.2. Jurisdiction

In this sub section, I will give a concise overview of the legal phenomenon of jurisdiction. This will be done by examining the concept of criminal jurisdiction on different levels and by posing different questions. In doing so, an attempt is made to integrate same states as well as international legal doctrines into the examination. This examination only constitutes one way of looking at the matter that helps to the main objective of this study. Neither does the section constitute an exhaustive examination of jurisdiction, but rather an assortment of selected aspects I find essential for understanding jurisdiction as a legal phenomenon that help to give clue for the scope of application of the prohibition of double jeopardy.

[28] Ray, A., Political Theory: Ideas and Institutions, (published by The World Press Private Limited Calcutta, 1979), p.41.

[29] Island of Palmas Case, Netherlands Vs. USA RIAA II 829, at 838 Available at http://legal.un.org/riaa/cases/vol_II/829-871.pdf , accessed on 11, 21, 2018

In the term of pronounced legal technical concept, the meaning of criminal jurisdiction will not only depend upon the legal context generally, but also which legal system we are examining. For instance, in Finnish legal doctrine, the equivalent to the concept of jurisdiction would be *toimivalta*, which can be translated as 'power to act' whereas as regards criminal jurisdiction, the German concept of *Strafgewalt* is also quite apt for this study, as it could be translated as 'penal power' or 'authority'.[30] In a sense, these terms are more telling than the English term *jurisdiction*, since they already semantically imply some form of power or authority.[31]

As already indicated above, jurisdiction presupposes a special type of state power, namely the power to enact law and punish transgressors, which is one element among the attributes of sovereign power. In order for a state to claim such a normative power, the claim must also be regarded as authoritative. This can be expressed as the state having penal authority.[32]

Here it is important to note that similarly as sovereignty, criminal jurisdiction also always has a national as well as an international dimension. On the national level, jurisdiction is commonly defined as the lawful competence of the state to influence the legal position of persons through the exercise of powers in different forms.[33] Here, jurisdiction concerns the relationship between the state and individuals, *i.e.* how the state exercises its jurisdiction vis-à-vis individual persons. On the other hand the international aspects of jurisdiction concerns on the relationship between states, *i.e.* how states exercise or are entitled to exercise their jurisdiction vis-à-vis other states and as stated by Max Huber in the Palmas Island case exclusive competence of the State in regard to its own territory.[34] This means when a state establishes its criminal jurisdiction over a certain act, it is simultaneously stating that it has the right vis-à-vis all other states to penalise and punish this act. This dimension has relation with the main focus of this study and will deal in detail on the forgoing discussion.

As soon as an offence displays connections to more than one state, jurisdictional problems arise that would not otherwise have arisen on the national level, or that at least cannot and

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[30] DAN HELENIUS, "The If, How, and When of Criminal Jurisdiction – What is Criminal Jurisdiction Anyway?", (2015) Bergen Journal of Criminal Law and Criminal Justice • Volume 3, Issue 1, 23

[31] Ibid

[32] Ibid 24

[33] Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th ed. Taylor & Francis e-Library, 2002), 109

[34] Ibid

should not be solved without referring to international law.[35] Then, the question of double jeopardy or successive prosecution may come in to picture when the alleged act has connection with more than two sovereign states and both claim criminal jurisdiction proving the connection in the side of the defendant.

Accordingly, if we accept that jurisdiction is a question that in some way falls within a normative framework regulated by international law, every national claim to jurisdiction must accord with standards of international law.[36] In other words, on the international level, penal authority then entails a subjective right to punish in the sense that a state is entitled to declare certain behaviour prohibited and punishable.[37] The principle that states use as basis to exercise jurisdiction is discussed below. When a state exercises this subjective right, it therefore makes use of its right to punish. A state's right to punish in the sense of it having penal authority exists on the international level regardless of the extent to which the state actually makes use of this right. This also implies that a state can have a lawful power to punish according to its national law, but lack penal authority according to international law.[38] However, within these normative boundaries set by international law, it is up to every state to decide to which extent and based on which criminal policy considerations it wishes to make use of its penal authority.[39]

The exercise of criminal jurisdiction of states may manifest through prescriptive, adjudicative and enforcement forms of jurisdiction. States cannot have adjudicative and enforcement jurisdiction if it has not prescriptive jurisdiction. But for this study because of relevancy my focus would be only on the adjudicative jurisdiction and what principle and basis can use sates to ascertain adjudicative jurisdiction and try and punish an individual for violation their of criminal law (prescriptive jurisdiction).

The jurisdiction exercised by the judiciary is typically denoted by the terms '*adjudicative' or 'adjudicatory' jurisdiction,* which refer to a State's jurisdiction 'to subject persons or things to the process of its courts or administrative tribunals.'[40] Where a State imposes its laws logically we can presume that it also wants to have these laws enforced even if it perceptive

[35] Ibid
[36] Ibid
[37] Ibid 25
[38] Ibid
[39] Ibid
[40] Cerderic Ryngaert, 'The Concept of Jurisdiction in International Law' 7

jurisdiction extends extra-territorially. Unlike prescriptive jurisdiction dictate the reach of a state's criminal law Adjudicative jurisdiction refers to the jurisdiction of the courts and pertains to the defendant's anticipation of being stand before the courts of the State in question. States may have legitimate prescriptive jurisdiction over a situation on the basis of a permissive principle, but lack adjudicative jurisdiction. This could be because of that prescriptive and adjudicative jurisdiction does not coincide, *e.g.*, when the defendant has no contacts with the State.[41]

Here we have to be aware of as the Court held in the *Lotus* case, even though, states have jurisdiction to prescribe their laws extraterritorially, they are not entitled to enforce their laws outside their territory, 'except by virtue of a permissive rule derived from international custom or from a convention,'[42] An offender may be out of the territory of the state that claims adjudicative jurisdiction due to either he escaped form the territory of the state after the commission of the crime or he was in abroad during the commission of the crime. The consensus in international law is that a state does not have any obligation to surrender an alleged criminal to a foreign state, as one principle of sovereignty is that every state has legal authority over the people within its borders. Such absence of international obligation and desire of the right to demand such criminals of other countries has caused a web of extradition treaties or agreements to evolve and international cooperation will be required, *e.g.*, to bring about the presence of the presumed perpetrator by means of extradition.[43] Such cooperation is not always forthcoming, which explains why States have sometimes resorted to extraterritorial enforcement measures, arguably in violation of international law.[44] Most countries in the world have signed bilateral extradition treaties with most other countries. But at the same time it is prudent to note that no country in the world has an extradition treaty with all other countries

This type of jurisdiction is the main concern of this study in this section. It concerns the activities of judicial bodies when deciding their respective competences and when applying and interpreting norms created by the legislature. By exercising judicial jurisdiction, the state

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[41] Ibid 8

[42] Lotus case n 35

[43] Cerdric Ryngaert, "The Concept of Jurisdiction in International Law' 7

[44] E.g., Adolf Eichmann was kidnapped in Argentina by Israeli secret agents, without the consent of the territorial State, and charged with 'crimes against the Jewish people' and 'crimes against humanity' under the Nazis and Nazi Collaborators (Punishment) Law of August 1, 1950, but such actions have usually met with considerable protest by other States.), see, Attorney General v. Adolf Eichmann available at file:///C:/Users/dan/Downloads/[United_Nations]_Selected_Decisions_of_the_Human_R(b-ok.cc).pdf , see, Peter Malanczuk, Akehurst's (n33) 111

in practice enforces its claim to penal authority as established on the legislative level. The fact that a national court may adjudicate on an offence committed abroad then implies that the court has jurisdiction over the offence.

It is important to bear in mind that the question of how far a state may extend its penal authority (*i.e.* the state's subjective right to punish) differs from the question of to what extent a state actually lays claim to penal authority.[45] Criminalisation in the sense of prescriptive jurisdiction, however, only implies the creation of abstract prohibitive norms.

Since criminal law is full of 'why' for the sake of this study it is important to limit the question to the specific aspect of criminal jurisdiction that has an involvement of foreign elements which has relevance with this study. The question can frame as: Why should states claim a right to punish acts committed abroad? According Helenius, in most legal systems, the concrete applicability of individual prohibitive norms is only established through provisions on the "scope of applicability of the national criminal law", *(i.e.* what is commonly referred to as the provisions on criminal jurisdiction).[46] Consequently, the applicability of individual prohibitive norms has to be examined in connection to the question of national criminal law's scope of application as a whole. This means by enacting rules on criminal jurisdiction, the state also determines the frames in which the abstract prohibitive norms can be applied *in concreto*.

Thus, since the prescriptive jurisdiction concerns on the extent to which the national legislator claims the right to criminalize certain behaviour and subject persons in addition to the national legislator's claim on the state's right to criminal acts, the concept of jurisdiction may also refer to the national judiciary's competence to apply criminal norms as stipulated by the national legislator.[47]

That means norms that prescribed on the legislative level also have to be implemented on the judicial level.[48] Due to the state enact the criminal law hoping that it will enforce it through the authority of national judiciary's exercise of judicial authority norms that prescribed by the legislator also have to be implemented on the judicial level. This is because the penal threats

[45] D. HELENIUS, (n 30) 28
[46] Ibid
[47] Ibid 29
[48] Ibid

should be more than a mere symbolic function and it must also be possible to implement them in practice.

The state establishes its penal authority by enacting legislation on the scope of application of its criminal law.[49] In this sense, judicial authority has to be understood as an abstract form of state authority to institute legal proceedings. The rules on which national court is actually competent in the concrete case are often found in national procedural legislation, and these rules should therefore not be confused with rules on the state's penal authority.[50] . On the judicial level, one can without doubt claim that the concrete enforcement of norms pertaining to acts committed abroad always has a more substantial impact as regards the relationship between states as well as between states and individuals.[51] Consequently, the state's exercise of judicial authority over extraterritorial acts always requires further consideration and balancing of interests.[52] Thus, even though the state's penal and judicial authority is in principle congruent, it is essential that these elements are analysed separately.

2.3. Criminal jurisdiction over international crimes: Normative boundaries for the state's criminal jurisdictional authority

Here by international crimes mean crimes that have trans-boundary effect commonly stated as trans-boundary crimes including the international crimes stated under the Rome statute. Since the exercise of criminal jurisdiction affect interests and sovereignty of other states, the national legal order has to take into account potential international issues that arise as a result. Thus, the state's criminal jurisdiction is, nonetheless, co-determined by standards of international law. Though, criminal jurisdiction is of a matter of domestic concern, the importance of these jurisdictional principles on which each jurisdiction based is that they are accepted by all states and international community as being consistent with international law. Conversely, attempts to exercise jurisdiction upon another ground would be run the risk of not being accepted by another states.[53] In other words, the normative boundaries for the state's penal authority are found in international law. This means that, though states are at liberty to determine the base for each of their criminal jurisdiction's claim but at the same

[49] Ibid
[50] Ibid
[51] Ibid
[52] Ibid
[53] Shaw N. Malcolm, *International Law,* (6th ed. Cambridge University Press, New York 2008) 652 ff.

time they should also depend on the international principle in order to accepted by other states too. Therefore, for a state to adjudicate international crimes, the question of whether or not the state has penal authority not only has to be answered through the national legislation, but also reference to the international law is necessary.

Similarly according Shaw "today, it is largely agreed upon that states may not, however, extend their criminal jurisdiction to acts committed abroad merely at their own discretion and that this issue is, in some way, governed by international law."[54] The fundamental basis is fairly formulated as follows: "States may only exercise extraterritorial jurisdiction to the extent that this does not infringe upon the sovereignty of other states."[55]

Therefore, it can be concluded that the relationship between the double jeopardy protection at the international level and the power of sovereignty that can manifest by jurisdiction is invers. In other terms when states wants to exercise their power vastly and choose to retain their sovereign power they may goes against the granting of protection of double jeopardy for a person that has been tried and sentenced in foreign courts on the same crime. In effect individuals may try repeatedly for the same crime by more than one state. To the contrary when state give greater value to the individual's right they grant protection of double jeopardy to the persons who has been already tried and sentenced in foreign court for the same crime and in effect surrender some of their sovereign rights to enforce their law. Thus, the next question that should be answered is whether it would not be possible to find a middle course that reconcile these two normative tensions (i.e. one the protection of human rights particularly the defendant right against to be subject repeated trial and the sovereign right of the state particularly to enforce its law) and strives to take both into account would be assessed in the following sub section if there is any?

2.4. Multiple Jurisdiction and the Prohibition of Double jeopardy

A fundamental question for any double jeopardy protection in relation to the main objective of this study is, whether different sovereigns successively may try and prosecute for the same criminal activity without violating the double jeopardy rule? And can the Ethiopian courts exercise criminal jurisdiction over a person convicted in foreign courts without contradicting constitutional principle of prohibition against double jeopardy? In this subsection I will

[54] Ibid 31

[55] Ibid

discuss a theory called jurisdictional theory that developed by professor Colengelo and the U.S dual sovereignty doctrine turn by turn and under chapter four I will make comparison with the Ethiopian concept whether this theory feet to the Ethiopian case or not.

In this case we can take the U.S. federal systems as Example in order to show how the U.S. courts try to solve the problem of double jeopardy through development of the so called dual sovereign doctrine According this doctrine "when a defendant in a single act violates the (peace and dignity) of two sovereigns by breaking the laws of each, is assumes as he has committed two distinct 'offences."[56] Therefore, according to the U.S Courts, because "by one act (the defendant) has committed two offences, for each of which he is justly punishable", no violation of the prohibition on double jeopardy results from successive prosecutions by different sovereigns, In other words, the defendant is not being prosecuted twice for the same "offence" if another sovereign successively prosecutes for the same act even if the second sovereign prosecutes using a law identical to that used in the first prosecution.[57]

For purposes of the dual sovereignty doctrine, the U.S. Supreme Court has tried to pour some content into the word of sovereign. Accordingly the court ascertaining the key to dual sovereigns "turns on whether the two prosecuting entities draw their authority to punish the offender from distinct sources of power."[58] Thus, according this doctrine "the sovereignty of two prosecuting entities for the purpose of prohibition of double jeopardy is determined by the ultimate source of the power under which the respective prosecutions were undertaken."[59] Therefore, if there are two "ultimate sources of power," there are two sovereigns, and consequently there can be two prosecutions without violating the prohibition on double jeopardy. In other terms two states can prosecute successively to a defendant for single crime since both are sovereign to enact a law of their own.

Since the Court without explaining it simply tells us what the *features* of such power are by stating that: "Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other."[60] Colongelo raise a question, what does "ultimate source of power" mean? Thus, according him and his theory "an entity is

[56] Colangelo, Double Jeopardy and Multiple Sovereigns (n 10) 779
[57] Ibid
[58] Ibid 780
[59] Ibid
[60] Ibid

"sovereign" when it has the power to *independently* determine what shall be an offense, and to punish such offenses."[61] And when it exercises these powers, it exercises its own sovereignty, not that of other sovereigns. Accordingly, multiple prosecutions attend multiple sovereigns because as discussed above "foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code."[62] thus from this analysis we can conclude that the power to determine and enforce law is really the legal concept of jurisdiction,[63] and that "ultimate source of power" is really an autonomous lawgiver (i.e. an entity entitled to enact a law to its subject) with independent jurisdiction to prescribe (prescriptive jurisdiction) and enforce law (adjudicative jurisdiction).

According to Colengelo for the purpose prohibition of double jeopardy, we can take the concept of sovereignty means as jurisdiction. Jurisdiction both functionally and conceptually informs the notion of sovereignty. This is due to functionally it is a legal term for power.[64] If a court or legislature has no jurisdiction over you, it means it has no power over you. Here is where international law helps out the analysis.

The sovereign's unique lawgiving voice is what gives rise to its power independently to determine offenses and to punish them; in other words, what makes it sovereign within the meaning of the dual sovereignty doctrine is enacting and enforcing the law. To cast this all in the Supreme Court's terminology then, "ultimate source of power"[65] represents the law-speaker or lawgiver; the lawgiver has the power "independently to determine what shall be an offense"[66] or to exercise prescriptive jurisdiction, which authorizes its power "to punish such offenses"[67] or to exercise adjudicative and enforcement jurisdiction.

2.5. As applied to the International Legal System

This Part adapts to the international legal system the argument that sovereignty in the double jeopardy context really means independent jurisdiction to prescribe and apply law according

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[61] See discussion on sovereignty, section 2.2.1
[62] Ibid
[63] see discussion on forms of jurisdiction, section 2.2.2
[64] See BLACK'S LAW DICTIONARY 867 (8th ed. 2004). http://www.republicsg.info/Dictionaries/2004_Black%27s-Law-Dictionary-Edition-8.pdf accessed on December 12, 2018
[65] J Colangelo, Double Jeopardy and Multiple Sovereigns (n 5) 782
[66] Ibid
[67] Ibid

the jurisdictional theory developed by professor Colengelo. In this case there are two jurisdictions that exercised by each state (i.e. national and international jurisdiction).

A. National Jurisdiction

National jurisdiction springs from independent entitlements of each individual state vis-à-vis other states in the international system to make and apply its own law principally, from entitlements over national territory and persons. We might think of national courts exercising national jurisdiction and applying national law in the international system. According the jurisdictional theory, to borrow the example used by Colengelo as it is: "State *A* has jurisdiction over State *A* territory because State *A* is "sovereign" over its territory."[68] In other term for a state to have jurisdiction within its territory is the decisive manifestation of its sovereignty. At the same time if state has no jurisdiction to specific territory it is not sovereign in relation to that territory. Hence according the theory "….the regularly invoked combination is "sovereign jurisdiction" and hence the circularity: sovereign = jurisdiction = sovereign again within the meaning of the dual sovereignty doctrine."[69]

According D' Amato to avoid too much confusion, "instead of calling these entitlements "sovereign" entitlements we can call them "national" entitlements."[70] Thus repeating the above example here would be, State *A* has jurisdiction over State *A* territory because of State *A*'s national entitlement, as recognized by international law, over its territory. Accordingly, the jurisdictional theory gives us this equation "…national entitlement = national jurisdiction = sovereign within the meaning of the dual jurisdictional theory."[71] For the purpose of criminal jurisdiction the national jurisdiction/national entitlement can be summarised as, subjective territorial jurisdiction, objective territorial jurisdiction, active personality jurisdiction and passive personal jurisdiction.[72] Therefore, if states are trying and punishing for the same crime an individual that has been tried and sentenced in foreign court it doesn't consider as they violate the principle of prohibition of double jeopardy. This is due to, since the state that successively prosecute the defendant has independent national jurisdiction to try and prosecute to the violators of its law, it shouldn't be refrain from exercising this entitlement by the prior criminal proceeding that conducted in foreign country. In other terms

[68] Ibid 791

[69] Ibid

[70] J. Colangelo, "Double Jeopardy and Multiple Sovereigns (n 10)

[71] Ibid

[72] Shaw N. Malcolm, *International Law,* (6th ed. Cambridge University Press, New York 2008), 650 ff.

the state should enforce its law by its enforcer organ (i.e. the court) in case of individual violate it not by others.

B. International/ Universal Jurisdiction

International jurisdiction, on the other hand, derives from a state's shared entitlement along with all other states as members of the international system to enforce international law. In short, two different kinds of entitlements authorize two different kinds of jurisdiction (i.e. national and the other international).

While each base of national jurisdiction just described relies upon some nexus to a national entitlement of the state claiming jurisdiction, which authorizes and circumscribes the reach of that state's national law giving authority in relation to other states, there is another base of jurisdiction in international law that requires no nexus at all. This is what we called universal jurisdiction. According to this doctrine, "the very commission of certain crimes denominated universal under international law produces jurisdiction for all states irrespective of where the crimes occur or which state's nationals are involved.[73] The category of universal crime began long ago with piracy"[74]

For instance, justifying Israel's jurisdiction in the famous *Eichmann* case over war crimes and crimes against humanity committed before the state of Israel even existed, the Israeli Supreme Court explained: "International law enforces itself by authorizing the countries of the world to mete out punishment for the violation of its provisions, which is effected by putting these provisions into operation either directly or by virtue of municipal legislation which has adopted and integrated them."[75] Furthermore, Spain's Constitutional Court made the point emphatically when it upheld universal jurisdiction over crimes committed in Guatemala by Guatemalans against Guatemalans, and having no link to Spain. In its reasoning to justify prosecuting the perpetrators it states as follows:

> "The international prosecution which the principle of universal justice seeks to impose is based exclusively on the specific characteristics of the crimes which are

[73] Leila Nadya Sadat, 'Universal Jurisdiction: Myths, Realities, and Prospects: Redefining Universal Jurisdiction' (2001), 35 NEW ENG. L. REV. 241- 246

[74] J. Colangelo, Double Jeopardy and Multiple Sovereigns (n 5) 796

[75]Israelv. Eichmann (1962) Isr SC 16(1) 2033,.http://www.internationalcrimesdatabase.org/Case/192/Eichmann/ accessed on 8, 1, 2019, see also, Peter Malanczuk, AKEHURST'S (n33) 111

subject to it, where the damage (as in the case of genocide) transcends the specific victims and affects the International Community as a whole."[76]

The Court emphasized that:

"…the prosecution and punishment of universal crimes constitute not just a shared commitment but also a shared interest of all States, and the legitimacy of this jurisdiction, as a consequence, does not depend on particular interests of each of the States . . . and is not configured around links of connection founded on particular state interests."[77]

Depending on how their domestic laws view international law, states often must legislatively implement or "transform" this international legal power of universal jurisdiction into their national laws so that they might exercise it in domestic courts.[78] But what is important is that Ethiopia, or any other state, cannot unilaterally define its universal jurisdiction in relation to other states, that is to say, the crimes giving rise to such jurisdiction again, that is exclusively a matter of international law.[79]

The exercise of universal jurisdiction by states through their courts depends fundamentally on the application of the substantive law of universal prescriptive jurisdiction.[80] And this substantive law, or the definitions of universal crimes, is a matter of international law. Although universal jurisdiction is a customary international law, the most accurate and readily available definitions of universal crimes appear in treaties, which largely embody the customary definitions.[81] The takeaway for the present study is that universal jurisdiction is foundationally different from national jurisdiction. Its jurisdictional anchor for states, or source of prescriptive jurisdiction, is distinctly *international* i.e., the international legal system's interest in suppressing certain international crimes no matter where they occur and whom they involve.

Therefore based on the foregoing analysis of the international law of jurisdiction, professor Colangelo lays down three basic rules of international double jeopardy. It is important to

[76] Colangelo, "Double Jeopardy and Multiple Sovereigns (n10)
[77] Ibid
[78] J. Colangelo, 'The Legal Limits of Universal Jurisdiction', (2007) 47 VA. J. INT'L L. at 172–73, 149
[79] J. Colangelo, "Double Jeopardy and Multiple Sovereigns (n 10)
[80] Ibid
[81] J Colengelo, The Legal Limits of Universal Jurisdiction" 47 AV. J. INT' LL. 149 (2007) 169-89

make clear that the term international double jeopardy used here stands for the issue of double jeopardy that arise on criminal jurisdiction that shared by more than two states on a single crime in other terms in the trans-national crimes. These three rules will be used to analyse the Ethiopian case in this study under chapter four. Accordingly the theory develops three rules of international double jeopardy to justify successive prosecution of defendant by more than two states without violating the principle of double jeopardy protection and put as follow:[82]

1. The first rule is "a national prosecution applying and enforcing a national law does *not* erect a bar to successive prosecutions by other states with national jurisdiction over the crime in question"; similarly,
2. The second rule is "a national prosecution applying and enforcing a national law that incorporates an international legal prohibition on a universal crime does *not* erect a bar to successive prosecutions by other states with national jurisdiction over the crime in question"; *however*,
3. The final rule is "a national prosecution applying and enforcing a national law that incorporates an international legal prohibition on a universal crime *does* erect a bar to successive prosecutions that rely only upon international (i.e., universal) jurisdiction" that is, to successive prosecutions that lack a recognized national basis for jurisdiction or nexus to the crime and would be prohibited in the absence of universal jurisdiction.

[82] J Colengelo, double jeopardy and multiple sovereign: A jurisdictional theory (n10) 797

CHAPTER THREE

THE SCOPE OF PROTECTION OF DOUBLE JEOPARDY: UNDER THE ICCPR

International and regional treaties paint a clearer picture as to the protection against double jeopardy. It has been enshrined in a number of international human rights agreements, including the United Nations International Covenant on Civil and Political Rights (ICCPR).[83] It is also found in various regional human rights agreements, including the ECHR,[84] the American Convention on Human Rights,[85] and the revised Arab Charter on Human Rights.[86] In addition, the protection against double jeopardy exists in international humanitarian law, such as in the 1949 Geneva Convention III Relative to the Treatment of Prisoners of War.[87] In this chapter the discussion is limited to ICCPR since it is impossible to discuss all instruments and its significance for the main objective of this study according article 13(2) of the FDRE constitution.

This sub section endowed to examine what is the scope of article 14 (7) of the covenant and its relation to the discussion in the previous chapter in particular and Ethiopian principle of protection of double jeopardy?

3.1. International Covenant on Civil and Political Rights: Article 14(7)

To start from the aspects of international law, the 72 signatories and 166 parties to the International Covenant on Civil and Political Rights recognise, under Article 14 (7) states: “No one shall be liable to be tried and punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”[88]

[83] International Covenant on Civil and Political Rights, art. 14(7), opened for signature Dec. 16, 1966, S. Exec. Doc. E 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].
[84] Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 4, Nov. 22, 1984, Europ. T.S. 117 (entered into force Nov. 1, 1988) [hereinafter ECHR].
[85] American Convention on Human Rights, art. 8(4), July 18, 1978, 1144 U.N.T.S.123.
[86] Arab Charter on Human Rights, art. 19, Aug. 5, 1990.
[87] Geneva Convention Relative to the Treatment of Prisoners of War, art. 86, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].
[88] ICCPR art. 14(7)

The insertion of phrase "….in accordance with the law and penal procedure of each county" in this treaties show that, at the very least, states agree that the protection against double jeopardy protects against successive prosecutions by a single sovereign.[89]

Therefore, as the language of the provision seems to suggest, the prohibition on double jeopardy applies only within "each" state's judicial system. The drafting history of the provision explicitly supports this interpretation and stated as "…it was pointed out that a State would be free to try, in accordance with its laws, persons already sentenced for the same offence by the courts of another country." [90] and the quasi-judicial Human Rights Committee, whose job is to interpret and implement the Convention,[91] has made clear that the scope of Article 14(7)'s double jeopardy protection is limited to multiple prosecutions by one state.[92] This means a State would be free to try, in accordance with its laws, persons already sentenced for the same offence by the courts of another country. This is due to as stated in the above discussion, every state are sovereign to enact and enforce its law independently that stated as national entitlement in the preceding chapter.

In relation to this interpretation we can take a good example that the leading Committee ruling on the issue involved a complaint by an Italian citizen who had been convicted in Switzerland of money laundering and was then prosecuted for the same offense in Italy. In this particular case, the complaint alleged that the successive Italian prosecution violated Article 14(7)'s double jeopardy bar.[93] But to the contrary the Italian government rejected this idea of "international *non bis in idem*" and argued that Article 14(7) instead "must be understood as referring exclusively to the relationships between judicial decisions of a single State and not between those of different States."[94]

In response to the argument of both sides the Committee agreed in language mirroring the theory that developed by professor Colangelo that already discussed above. Stating that "article 14, paragraph 7, of the Covenant does not guarantee *non bis in indem* with regard to

[89] Ibid

[90] See MARC J. BOSSUYT, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1987), 316, available at https://search.library.utoronto.ca/details?4576526

[91] See Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 302.

[92] A.P. v. Italy, Communication No. 204/1986, Report of the Human Rights Comm., 43d Sess., supp. No. 40, U.N. Doc. A/43/40 (1988); A.R.J. v. Australia, Communication No. 692/1996, Human Rights Comm., U.N. Doc. CCPR/C/60/D/692/1996 (July 28, 1997)

[93] A.P. v. Italy, U.N. Doc. (n 157) 1-2.3.

[94] Ibid 5.3

the *national jurisdictions* of two or more States. The prohibition of double jeopardy in this covenant is limited only to as adjudicated in a given state."[95] In other word a person will not get guarantee against double jeopardy in a state even if he has been prosecuted in a foreign court for the same crime. Subsequent Human Rights Committee decisions also have affirmed this interpretation,[96] and it has been adopted as well by cases in national courts interpreting the Covenant.[97] This interpretation is followed by states in domestic court decision. For example the U.S for the defendant's argument that the double jeopardy provision of the ICCPR barred his successive prosecution by Southern District of Florida because he had been convicted in Colombia for the conduct alleged in the indictment, the appellate court in justifying retrial of a person stated:[98]

> "……the bar against successive prosecutions in Article 14(7) is only for those individuals who have "already been finally convicted or acquitted in accordance with the law and penal procedure of each country." art. 14(7) (emphasis added). Thus, a successive prosecution is barred only when the accused is tried under the same law and criminal procedure. Intuitively, this would only happen when the second prosecution takes place in the same country. Clearly, then, a state party could try an individual under its law even though the individual has already been prosecuted for the same conduct under another party state's criminal code. …… the HRC, the body charged under the ICCPR with monitoring its implementation, has spoken on this issue and has endorsed the view that "article 14, paragraph 7 does not guarantee non bis in idem with regard to the national jurisdictions of two or more States."

This limited scope of application of prohibition of double jeopardy is stated in "regional human rights instruments also. For instance article 4 of protocol 7 to the ECHR states as follows: "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."[99] Furthermore, the Council of Europe's Explanatory Report has made clear that Article 4

[95] Id 7.3

[96] See A.R.J. v. Australia, U.N. Doc. CCPR/C/60/D/692/1996, pra. 6.4. available at http://www.hrdp.org/files/2014/03/21/A.R_.J_v_._Australia_.pdf

[97] Anthony J. Colangelo, 'Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory' (2009), Q, 86 WASH. UNIV. L. REV 769, 806-807

[98] Duarte Acero V United States available at https://caselaw.findlaw.com/us-11th-circuit/1082336.

[99] ECHR, art. 4.

applies to successive prosecutions by a single sovereign.[100] Similarly article 86 to the Geneva Convention III states that, “No prisoner may be punished more than once for the same act of the same charge.”[101] Does it apply only to multiple punishments occurred out by one state party or does it attach across multiple states is a question that should ask in relation to this study. In other words, what is the scope of application of double jeopardy protection or does this convention recognize international double jeopardy protection or only national?

In order to reach at correct conclusion in relation to this issue it is important to see the drafting history of this particular article. Looking at the drafting history of Article 86 was meant to address the abuses committed during World War II, when states would increase punishment in response to a defendant exercising his or her right to appeal or petition a sentence.[102] Viewed within the circumstances of its adoption, Article 86 is meant to bar successive prosecutions by a single sovereign.[103] This is because of that the right of appeal is only exercised in a single states legal system not between states. The “abuses” are referenced in an additional paragraph proposed by the Sub-Committee on Penal and Disciplinary Sanctions, elaborating that “the punishment inflicted at the first trial shall not be increased as the result of an appeal or a similar procedure.”[104] Thus, it appears that Article 86 was intended to protect against additional punishment being heaped on as a result of exercising one’s right to “appeal or petition from any sentence,” a right which is guaranteed by Article 106.[105] Consequently, the provision relates only to multiple punishments exacted by one state party.[106]

Coming to the discussion made in the chapter two especially to the jurisdictional theory, the argument under this theory, “each state as an independent lawgiver may exercise its national jurisdiction to apply and enforce its own laws”[107] is coincide with the ICCPR, ECHR and humanitarian laws scope of protection of double jeopardy.

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[100] Council of Europe, Explanatory Report to Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, http://conventions.coe .int/Treaty/en/Reports/Html/117.htm

[101] Geneva Convention Relative to the Treatment of Prisoners of War art. 86, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. (hereinafter stated as, Geneva Convention Relative to the Treatment of Prisoners of War)

[102] Ibid

[103] Anthony J. Colangelo, “Double Jeopardy and Multiple Sovereigns (n 99) 769-809

[104] Commentary to convention III; See, 2A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 326, 501

[105] Geneva Convention Relative to the Treatment of Prisoners of War, art. 106.

[106] J. Colangelo, “Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory”, 86 WASH. U. L. REV. (2009). P. 769, 806-807

[107] Anthony J. Colangelo, ‘Double Jeopardy and Multiple Sovereigns (n 147)

3.2. Determination of Jurisdictional Priority

3.2.1. National Laws

The determination by states with universal jurisdiction laws to give primacy to states with national jurisdiction occurs through a number of devices, including the law itself, judicial construction of the law, and prosecutorial discretion (which is often purposely incorporated into the universal jurisdiction law to guarantee such primacy).[108]

3.2.2. Treaty Law

Looking at some of treaties incorporating international crimes reveals, or at least strongly indicates, a jurisdictional hierarchy according to which states with national jurisdiction have priority over states with only universal jurisdiction. For instance looking at the provisions normally contains a series of paragraphs directing states to establish jurisdiction[109] gives jurisdictional priority to States with what we have been calling national jurisdiction that is, states having some connection to the crime based on territoriality, nationality, or national defence than states with no such link or depend only on universal jurisdiction.

This means national jurisdiction states have priority over universal jurisdiction states are the prior notice provisions. These provisions require a state party with custody over the accused to "immediately notify" the states with national jurisdiction, and, if the circumstances warrant a preliminary inquiry into the case, to "promptly report its findings to the said national jurisdiction States and to indicate whether it intends to exercise jurisdiction."[110] According colengelo the provisions consequently signal which states have strong jurisdictional interests,

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[108] Anthony J. Colangelo, Double Jeopardy and Multiple Sovereigns (n 147). 830

[109] See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5(1) Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85]; Convention for the Suppression of Unlawful Seizure of Aircraft, art. 4(1), Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S.; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, art. 5(1), Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177; International Convention Against the Taking of Hostages, art. 5(1), Dec. 17, 1979, T.I.A.S. No. 11081, 1316 U.N.T.S 205; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, art. 6(1),(2), Mar. 10, 1988, 1678 U.N.T.S. 221 International Convention for the Suppression of Terrorist Bombings, art. 6(1),(2), Dec. 15, 1997, S. TREATY DOC NO. 106-6, 2149 U.N.T.S. 284 ;International Convention for the Suppression of the Financing of Terrorism, art. 7(1), (2), Dec. 9, 1999, 39 I.L.M. 270 [hereinafter Financing Convention]; International Convention for the Suppression of Acts of Nuclear Terrorism, art. 9(1),(2), annexed to G.A. Res. 59/240, U.N. Doc. A/RES/59/240 (Feb. 24, 2005), 44 I.L.M. 815 (2005) [hereinafter Nuclear Terrorism Convention]; United Nations Convention Against Corruption, art. 12(1),(2), G.A. Res. 58/4 (Oct. 31, 2003), 43 I.L.M. 37 (2004) [hereinafter Corruption Convention]; International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, art 9(1), G.A. Res. 44/34, art. 10, U.N. Doc. A/RES/44/34 (Dec. 4, 1989); International Convention for the Protection of All Persons from Enforced Disappearance, art 9(1), U.N. Doc. E/CN.4/2005/WG.22/ WP.1/REV.4 (Sept. 23, 2005)

[110] Torture Convention, (n 111), art. 6(4).

i.e., states with national jurisdiction, and offer the opportunity to those states to request extradition before another, universal jurisdiction state exercises jurisdiction. It should be noted also that Dicta in a Joint Separate Opinion from a recent case in the International Court of Justice involving a claim of universal jurisdiction further supports the view that states with national jurisdiction take priority over states with only universal jurisdiction.[111]

In all, state practice accompanied by what appears to be an emerging sense of *opinio juris* indicates that states consider a good faith prosecutorial effort by a national jurisdiction state to foreclose the possibility of a successive prosecution by states with universal jurisdiction. Again, the jurisdictional theory explains why and, "there appears a strong trend among states with universal jurisdiction laws to give primacy to states with national jurisdiction."[112] In this respect, universal jurisdiction operates as a subsidiary or complementary jurisdiction to national jurisdiction.

3.3. Sovereign interest to enforce its law Vs. individual's right against multiple prosecution: Solving the problem

The operation and significance of a ne bis in idem rule is intertwined with the exercise of stat's criminal jurisdiction in international law as stated above. The effect of the multiplicity of jurisdictional principle by international law that has been discussed above also is create, in many cases concurrent jurisdiction of two or more states o exercise jurisdiction against a suspect for the same offence or actions. In the absence of any hierarchy of jurisdictional claims that would privilege or trump a particular jurisdictional has basis over competing bases an individual may encounter with multiple prosecution that affect their right that known as prohibition against double jeopardy.

Therefore, the central normative tension in this case is between the ability of sovereigns to protect their interests through the enforcement of their criminal laws and the rights of individuals to be free from multiple prosecutions for the same criminal activity. The former is, the ability of states under international rules that allowing with independent jurisdiction successively to prosecute for acts that harm important entitlements over national territory and motivates to adopt laws that permit retrial and/or sentenced of a foreign tried person. The second is individuals protection from the harm that emanate from repeated trial and state with

[111] J. Colangelo, "Double Jeopardy and Multiple Sovereigns(n 99)

[112] Ibid

all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. this problem also intensified with the discussion that we made above the prohibition of double jeopardy is limited within a single state and does not extend among states.

Here it is prudent to bear in mind that, just because successive prosecutions by different sovereigns are permitted it does not mean that they are required. Though ICCPR provision that dealt above and the human right committee's interpretation provide that different sovereigns *may* prosecute successively for the same crime where they have independent jurisdiction. But this does not mean that they must or that successive prosecutions are even desired to take place. The law simply reserves for sovereigns the power of successive prosecution if they want to exercise it. There may be very good political or policy reasons why they might choose not to. And in fact, consideration of some of these reasons has been systemically built in to the international law through different doctrines. As a practical matter this may minimize the effect of multiple trial and prosecution. Hence, in this section I will try to mention some important points that may contribute greatly contribution to the case at hand.

3.3.1. Jurisdictional Reasonableness

The jurisdictional theory that dealt above enriches international doctrine by inviting a reasonableness analysis of a successively prosecuting nation-state's jurisdiction. As can be collected from the overview of permissive principles of prescriptive jurisdiction, States can invoke a variety of jurisdictional grounds to address one and the same situation. Moreover, a multitude of States can potentially claim jurisdiction on the basis of the perceived trans-boundary effects of just one act. Inevitably, this may give rise to international friction. Unfortunately, international law has not yet come up with a rule that could resolve conflicts arising from overlapping, *prima facie* lawful jurisdictional claims.[113] There is no rule giving priority to the 'most interested' or 'affected' State, although it may appear logical to give the territorial State, given the territorial anchoring of the law of jurisdiction, first right of way.[114]

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[113] Cedric Ryngaert, 'The Concept of Jurisdiction in International Law', 10

[114] Ibid stated at 46

In light of the potential for overlapping and possibly clashing jurisdictional assertions, a meta-rule of jurisdictional restraint or reasonableness may seem to be appropriate.[115]

This rule of reason implies that,

> …. while a jurisdictional assertion based on one of the permissive principles is presumptively valid, is will only be lawful if it exercised *reasonably*, *i.e.*, after State courts and regulators have balanced the different interests involved in a transnational situation before establishing their jurisdiction, and quite probably applying their own law.[116] Ultimately, the rule of reason aims at identifying the State with the strongest connection, in terms of contacts or interests, with the situation. While the rule of reason has been hailed as a 'shift from a focus on power to a focus on interests' as regards extraterritorial jurisdiction; however, in practice, a rule of reason is difficult to objectively apply.[117]

For example the U.S. put this jurisdictional limitation on its Restatement on Foreign Relations Law that provides that "a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."[118] Chief among the factors for determining reasonableness are: "the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has a substantial, direct, and foreseeable effect upon or in the territory;"[119] "connections, such as nationality, residence, or economic activity, between the regulating state and the person . . . responsible for the activity to be regulated (the defendant), or between that state and those whom the regulated activity is designed to protect (the plaintiff/victim);"[120] the "importance of regulating" that particular activity to regulating state; the "justified expectations that might be protected or hurt by the regulation;" the interests of, and "likelihood of conflict" with, other states; and traditions of the international system.[121]

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[115] Ibid, stated at 49

[116] Cedric Ryngaert, 'The Concept of Jurisdiction in International Law', 11

[117] Ibid, stated at 51

[118] Anthony J. Colangelo, Double Jeopardy and Multiple Sovereigns (n 99) Stated at. 407

[119] Ibid Stated at. 408

[120] Ibid Stated at. 409

[121] Ibid 845

Therefore, the reasonableness of jurisdiction may mitigate the effect of double trial and/or punishment by different states due to jurisdictional overlap in single criminal act over the same suspected of offence in one hand and on the other hand it gives for states to exercise their sovereign power to determine in their internal affairs and take a measure in extra-territorial acts that affect their interest through enacting law and enforce it as far as it meets the reasonableness requirement.

3.3.2. Subsidiarity in the law of jurisdiction

In a variation on the jurisdictional rule of reason, it is suggested here that States, after hearing the views of other States, and arguably also foreign persons and businesses potentially subject to extraterritorial regulation, should refrain from exercising jurisdiction when another State is, in light of its contacts with the situation, better placed to bring its laws to bear, *unless* the latter State's failure to do so harms the *global interest*, and multilateral regulation and supervision are absent.

3.3.3. Ne bis poena in idem

If a country is at necessity to try and prosecute successively a person that has been prosecuted in a foreign court and choose to retain the power to prosecute a principle *ne bis poena in idem* that related to *ne bis in idem* comes in to picture. This principle provides that sentencing and penalties already served or paid by an accused for the same offence or set of facts should be discounted in the imposition of any subsequent penalty relating to the same offence or facts.[122] Since the principle of *ne bis poena in idem*, take in to account the foreign court's decision and impose less restriction on a state's sovereign power of in force its law than the full operation of a ne bis in idem rule; it may have importance on reducing the ordeal that occur to the defendant due to multiple prosecution by different states on the same crime. The principle may, therefore, mitigate the effect of harshness of a refusal to recognise the full protection of double jeopardy by all stated that have jurisdiction on a single crime and preserve the sovereign power to enforce its law.[123]

According Gerard Conway this principle is generally recognised in the civil law tradition as applicable by domestic courts passing sentence in a case where there has already been a

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[122] Gerard Conway, 'Ne bis in idem in International law', (2003) International Criminal Law Review **3:** 226

[123] C. Van Den Wyngaert and G. Stessens, 'The International Ne Bis In Idem Principle: Resolving Some of the Unanswered Questions', (1999) 48 International & Comparative Law Quarterly 779

foreign penal judgement.[124] Clearly, *ne bis poena in idem* represents less of an infringement on states' sovereignty than would recognition of a full international *ne bis in idem* principle, whereby states would entirely forego their jurisdiction in a given case. The principle is more flexible in that national courts can fashion their own approaches to recognising that a penalty has already been served for an offense that need not necessarily be in a simple arithmetical fashion of deducting the prior sentence from any subsequent sentence. Finally, in conclusion to determine the relationship of double jeopardy protection and state's jurisdictional power, it is necessary to summarize the above discussion on sovereignty, criminal jurisdiction and double jeopardy. A state is sovereign and sovereignty can be stated in terms of a power to regulate its affairs with the exclusion of any external intervention. This power could be manifested among others by enacting law and enforce it particularly criminal law. While states exercise their power a now a days due to interconnectedness of the globe and increase of trans-national crimes a jurisdictional overlap may cause. In effect of the multiplicity of jurisdictional principle by international law two or more states may entitle to exercise judicial jurisdiction against a single suspect for the same offence. In the absence of any hierarchy of jurisdictional claims that would be privilege or trump a particular jurisdictional bases over competing bases of jurisdiction under the international law; the normative value of human rights particularly the defendants right that protect him from successive trial and conviction may fall its value.

On the other hand establishing international double jeopardy protection for the sake of human right protection may contradiction with the concept of sovereignty. The international instruments limit the scope of double jeopardy within a single state's jurisdiction. Therefore, it is clear that the relationship among these to important normative value (i.e. human right particularly prohibition of double jeopardy and sovereignty particularly criminal jurisdiction) is inverse. This is due to, on the one had strict application of criminal jurisdiction may endanger the human right specially the defendant's right that secure him from successive trial and on the other hand application of international double jeopardy protection may endanger states sovereignty by prohibiting criminal jurisdiction on matters that they are concerned and interested more.

Hence, it is important to explore mechanisms that minimize the successive trial and prosecution while state exercise their criminal jurisdictions; at the same time that preserve

[124] Gerard Conway, "Ne bis in idem in International law", International Criminal Law Review **3:,** (2003.), p. 227

state's power to enforce their law that could be manifested by claiming criminal jurisdiction. Though states are not under obligation to leave individual from trying and prosecuting by the mere reason that they are previously tried and/ or convicted by other country but they use different mechanisms to minimize the effect of double trial and prosecution by different state for the same crime or criminal act. Therefore, in order to balance the normative tension and inverse relation of protection of double jeopardy and criminal jurisdiction it is advised states should take in to consideration the reasonableness, and subsidiarity of their jurisdiction. In addition it is advised to apply the principle of ne bis poena in idem once they prefer to successively prosecute the defendant.

CHAPTER FOUR

APPLICATION TO THE ETHIOPIAN CRIMINAL JUSTICE SYSTEM

So far I have discussed that the jurisdictional theory of double jeopardy supplies a useful analytical vehicle for understanding the concept of retrial of foreign sentenced persons. This study tries to analyse what would be the scope of prohibition of double jeopardy under the Ethiopian criminal justice system. Accordingly the international human rights instrument in general and article 14(7) of ICCPR in particular discussed. So far my arguments until now have been largely descriptive.

In this chapter the significance and implications of the ICCPR's interpretation and the theory that has been discussed in the preceding chapters to the constitutional principle of prohibition of double jeopardy will be examine. Further I give answer to the questions that were raised at the proposal of this study such as; can the Ethiopian courts retry a person that has been already tried in foreign court without contradiction the constitutional principle of prohibition of double jeopardy or not? If the answer is affirmative what is the justification behind allowing successive prosecution? How this could be goes in line with the constitutional grantee against double jeopardy? And mechanism that the Ethiopian courts can take from the above discussion to minimize the negative effect on the defendant's right against repeated prosecution that arise from restrictive interpretation of prohibition of double jeopardy? Following restrictive interpretation does not mean that Ethiopian courts necessarily will exercise that power to vindicate their interests. Thus, in this chapter a focus what would be the implication of the discussion held in the previous chapters to the Ethiopian criminal justice system?

4.1. The Ethiopian Criminal Justice System: The Legal framework of Prohibition of Double Jeopardy

4.1.1. The Scope of the prohibition of Double Jeopardy

In the Ethiopian legal system since the protection against double jeopardy is constitutional right, to understand the scope of this principle it is important to start from the constitution itself and application to the above discussion particularly the scope of double jeopardy under article 14(7) of ICCPR to which Ethiopia is a party. The intended effect of article 9 (4) of the

Constitution is, in all its practice, Ethiopia must respect and protect the rights of individuals as they stand under international human rights regimes. Article 13(2) of the Constitution also provides that the fundamental rights and freedoms recognised under Chapter 3 of Constitution shall be interpreted in a manner conforming to the UDHR, the ICCPR and ICESCR and other international instruments adopted by Ethiopia. This means in case of interpretation is needed; to ensure maximum enjoyment of human rights those rights enshrined under chapter three of the constitution should be interpreted in line with international law particularly the human rights covenants.

To begin with the constitution, article 23 of the constitution provided “No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquired in accordance with the criminal law and procedure”; which cannot be understanding its scope of application (either the protection is limited within the Ethiopian jurisdiction or extends among states too) unless we read cumulatively with other articles stated in the constitution that are supplemented each other with this provision and other laws that enacted by the legislature to enforce this particular provision and at the same time interpretation of the cassation decision of the federal supreme court relating to this issue if there is any. Thus, hereunder the discussion will be rounded all these as well.

When we begin from the constitution particularly chapter three of the constitution that incorporate human rights provisions, regarding the human right provisions interpretation, it provides as follows; “the fundamental rights and freedoms specified in this chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Convention on Human Rights and International Instruments adopted by Ethiopia.”[125]

Regarding interpretation of article 23 the Federal Supreme Court Cassation bench on the case between student Hagos Woldemichael and Atsbi Woreda Public Prosecutor in Tigray region stated:[126]

> “…….Regarding the interpretation and scope of limitation of article 23 of the constitution for the disputing matters based on article 13 sub 2 of the constitution international human rights conventions ratified by Ethiopia especially with

[125] See article 9(2) of the FDRE Constitution

[126] Hagos Weldemichae V. Atsbi Woreda Public prosecutor Tigray, file No 72304, Vol. 13, June, 18 2004, p308

international civil and political rights convention article 14(7) its content, interpretation and scope of application is necessary to be considered……….”[127]

Saying this, when the court analyzes the scope of application of double jeopardy in the same decision it added: “if a certain government’s law enforcer charge for an individual and final verdict is given through litigation of a court it shall not make a charge and prosecute him on the same criminal matter”. The explanation of the court is compatible with the above discussed jurisdictional theory as well with the interpretation of human rights committee of ICCPR of article 14 (7) of ICCPR. Particularly the phrase “government of a certain country” in relation with scope of application, it should be perceived by giving due emphasis. Though one may encounter with difficulty to understand the scope of article 23 of the constitution by reading the provision but when he try to interpret it in accordance the human rights interpretational rule, means in line article 14/7 of ICCPR (that stated ….in accordance with the law and penal procedure of each country) and the human rights interpretation to this phrase, it would be clear that its scope is not international rather domestic. This means the prohibition of double jeopardy is limited only for a person that he has been already tried and got final judgment by the Ethiopian courts. In other words this principle doesn’t give protection against successive trial or/and punishment to a person who tried in foreign court.

In relation to this the academicians interviewed by the author as to the scope of this constitutional right stated: according to Dejene Girma (PhD) the scope of application of this provision is only related to the decisions given by Ethiopian courts but it is not applicable for criminals sentenced in foreign country.[128] When he explains his reasons why he arrived on this conclusion he stated that: firstly despite article 23 of the constitution has not phrase like the ICCPR’s provision that make clear its scope of application, basically since the constitution is supreme law enacted to control Ethiopian laws and institutions it is clear that the article regarding double jeopardy is applicable in regard of a person who has been final judgment is given by Ethiopian courts according to Ethiopian law. The other interviewee Mr.

[127] translated by the author

[128] Interview with Dr Dejene Grma Janka (PhD) lecturer at Ethiopian civil service University institute of federalism and legal studies Addis Ababa, Ethiopia (June 24, 2018), at Civil Service University Ethiopia Addis Ababa(translated by the author) [here in after interview with Dejene]

Mussie Mezgebo[129] stated that, the scope is limited to a person tried and punished or acquitted by Ethiopian court.

According to him the justification for this is because every state may have different interest that could be manifested by the difference on the base and emphasis to each of criminal jurisdiction discrepancy on the type and extent of penalty for each crime. Thus, a state may not be satisfy by foreign court's decision on a single criminal act that affect its interest either on the categorization of the act as certain crime or the extent of penalty or both. At the same time every state is sovereign to enact and enforce law to prohibit certain act that contravenes its culture, moral or interest at the international relation. Saying this he finalize by stating that, this is the scenario where human rights limited by criminal jurisdiction. This is more or less the same reason as the jurisdictional theory.

Therefore, the scope of application of double jeopardy is constitutionally granted only to the extent of individual's prosecuted in Ethiopian courts. It doesn't apply for persons tried and sentenced in foreign courts. But this limitation is not applied for all types of crimes rather for the crimes that Ethiopia has principal jurisdiction. The Ethiopian criminal law classifies Ethiopian court's criminal jurisdiction as principal and subsidiary for the sake of prohibition of double jeopardy. The following sub sections will deal this classification and its effects on foreign sentence and double jeopardy.

4.1.2. The Effects of Foreign Sentence

If we conclude that the scope of the constitutional principle of prohibition of double jeopardy is limited only to persons tried by Ethiopian courts in accordance the Ethiopia criminal law and criminal procedure law the next question would be what will be the effect of foreign sentence in relation to prohibition of double jeopardy? According to the Ethiopian Criminal Code regarding the effects of criminal judgments given by foreign courts are stated in two ways. The first one is stated under article 16 of the Criminal Code in which Ethiopia has principal jurisdiction whereas, the second is also provided under article 20 of the criminal code when Ethiopia exercises subsidiary jurisdiction on a certain crime. In this part it is important to see separately these effects that are specified independently based on the type of crime and their accomplishment in order to help us to get answer for the next issue how the

[129] Interview with Mr Mussie Mezgebo lecturer at Ethiopian civil service University institute of federalism and legal studies (24, 9 2018), at Civil service University Addis Ababa, Ethiopia (translated by the author) [here in after interview with Mussie]

Ethiopian legal system attempt to reconcile the normative value of rights (i.e. defendant's right from double jeopardy and the Ethiopian sovereign right to enforce its criminal law).

A. On Principal Jurisdiction (Article 16 of the code)

A person who read article 16 for the first time may raise a question "whether this article violate the constitutional right that prohibit double jeopardy or not? Graven stated that retrying of foreign sentenced person by no means contrary to article 2(3)[130] of the penal code. As to him this is because the rule non bis in idem prohibit a person being punished twice of the same offence, but not being tried twice.[131] Though this argument seems sound according the 1957 penal code but not in article 2(5) of the 2004 Ethiopian revised criminal code, since this article prohibit not only double punishing rather double trial as well. This provision stated "Nobody shall be tried or punished again ……..by a final decision in accordance with the law." Furthermore, article 23 of the FDRE constitution also prohibited both double trial and double punishment.

Dejene on his hand book on Ethiopian criminal code; looks article 16 of the code as an exception to article 2(5) of the same code[132] but he left it with no justification as to the need of this exception though he make clear his justification in his interview with the author in this study as mentioned above. He also raises a question that, by critical reading article 16(1) one may wonder why the code does tends to give more privilege to foreigner than to Ethiopia.[133] For this issue he tries to justify by the notion of delegation. According to him for those persons who are envisaged under article 12 of the code that cannot be tried in Ethiopian because they are foreigners who have taken refuge in foreign country and whose extradition cannot be obtained. In this case according article 12 of the code the Ethiopian authorities can request the authority of foreign countries in which the offender takes refuge to try them thereby delegating their power.[134]

This is prudent decision because once a foreigner escape from Ethiopian jurisdiction after committing a crime though he was subject to Ethiopian principal jurisdiction at least for two reasons it would be better to delegate to the foreign court to prosecute him/her, if extradition

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[130] P. Graven, *An Introduction to Ethiopian Penal Law*, (faculty of law Haile Selassie I University Addis Ababa, Ethiopia1965) p. 44 (here in after Graven)
[131] Ibid
[132] Dejene Girma, *A Handbook on the Criminal Code of Ethiopia,* (Addis Ababa, Ethiopia 2013), 10
[133] Ibid 11
[134] Ibid

cannot be obtained. One, since the offender is foreigner he may not be return to Ethiopia once he knows that he is wanted by the Ethiopian authority for criminal prosecution. Second if the offender flees to his/her country after the commission of the crime since states are against extraditing their citizen it is better to delegate to see justice.

Hence, if these persons are tried in accordance with the request or other measure are taken by the authorities requested in relation these persons, Ethiopian authorities must accept the consequences of their trial or other measures, taken by the authorities requested as logical consequence of the act of delegation. Therefore, for legal purposes, these persons are regarded as though they were tried in Ethiopia.[135] This emanates from the doctrine of agent principal relation that whatever actions taken by the agent is taken as performed by the principal as far as the agent done his/her action with in the ambit of the delegated power. But for a citizen if states are not willing to extradite their citizen logically it is true that at the same time they are not willing to request delegation to the foreign country to prosecute their citizen. That's why the legislature limits the request of delegation if the offender is foreigner. The law will wait hem/her till his/her return to Home County. By any means if the offender found within the Ethiopian territory, now the Ethiopian authority by using its enforcement power (i.e. arresting) will bring him/her to the court for trial. As per the criminal code provision the court may be tried him despite he has been tried in foreign court for the same crime and the defendant may not raise double jeopardy defence. Therefore, the issue here is does this amount to double jeopardy or not?

Dejene Girma regarding this issue he said; to answer this question the fundamental point that should be taken in to consideration is, what is the meaning of double jeopardy? According to the law for the matter a certain individual is prosecuted or released freely he/she should not be tried or prosecuted gain. If this is not, the legal proceeding that is going to be undertaken again is known as Double Jeopardy.[136] Despite this is stated as a principle it does not mean that it has no exception. The provision stated under article 16 of the criminal Code is one of the exceptions provided for. The constitution laid clear prohibition but it is mandatory to know the scope of application of this provision. Does this prohibition is for the criminal decision passed in Ethiopia or include decisions given by foreign court too? Is an issue that should be taken in to consideration?

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[135] Ibid

[136] Interview with Djene (n130)

Then he said that for the prosecution and trial undertaken in Ethiopia without any question the constitution puts the prohibition of double jeopardy not to retry again for the same crime. But does this prohibition include for a person tried and/or punished in foreign courts? this can be disputable. If our answer for this question affirmative according to Dejene Girma: generally speaking we may conclude that article 16 of the Criminal Code contradicts with constitution. However if our answer is negative, means it does not include criminal proceedings held in foreign courts; we may conclude, the constitutional and criminal law provisions are going to be in consistency.[137] If we take the second option it means that when a person tried in foreign court raise article 130 (2) (b) of the criminal procedure code as preliminary objection for his retrial in Ethiopian court; the public prosecutor can cite article 16 (1) and (2) of the criminal code to oppose his defense and the court also should accept this. But having this in mind, the other thing that should be taken in to consideration is being tried and prosecuted in foreign court cannot be a ground not to be tried and sentenced again is not in all matters, rather only for the matters stated in article 16(1) of the criminal code that Ethiopia has principal jurisdiction.

Article 16 sub 1 states “Where a criminal who is subject to “Ethiopia's principal jurisdiction” (Arts. 11, 13, 14 (1) and 15 (2)) has been sentenced in a foreign country, “he may” be tried and sentenced again on the same charge” in Ethiopia”, if he is found in Ethiopia or was extradited to it. On this matter he can be prosecuted and punished again. This means an individual that has been already tried and sentenced in abroad he can only be retry in Ethiopia when he commits only these crimes enumerated under these articles. These articles elaborated that Ethiopian principal jurisdiction; the purpose and meaning of this principle is discussed hereunder.

Then in general terms, if we conclude that article 16 is double jeopardy what would be the justification for this would be answered in line the previous chapters’ discussion. Graven tries to put the justification of retrial of offenders that tried and sentenced or acquitted abroad. He stated as follows: “A new trial is justified because the offenders was previously tried by a court which either had only subsidiary jurisdiction or had not at all”, in trying the offenders, especially in cases mentioned in arts. 13 and 15(2) the same interest in view as an Ethiopian court would have had”[138] here Graven tries simply to justify for the second trial in the view of the criminal jurisdictional issue, he did not discuss as to its relation to human right

[137] Ibid

[138] Graven (n132) 45

perspective that is prohibition against double jeopardy. Here it can be take the term "criminal jurisdiction" as sovereign power to enact and enforce criminal law. This is similar as colenglo stated an entity is "sovereign" when it has the power *independently* to determine what shall be an offense and to punish such offenses and according the previous discussion for the double jeopardy purpose we can take the concept of sovereignty means as jurisdiction.

Then the next question that should be discussed is, whether the executed sentence abroad is irrelevant at all once retrial is ordered or not? According the principle of ni bis poena in idem when the offender return to Ethiopia or extradited to Ethiopia after having tried abroad and the Ethiopian court decide to retry of the offender it should applies article 16 (3) of the code. Accordingly, a new trial will not necessarily be held; since Ethiopian court may be satisfied with the sentence passed in the foreign country and may renounce instituting new proceedings".[139] This implies that in certain cases a new trial may not be held in Ethiopia if the offender was sentenced abroad to a penalty equal to, or higher than, what would be inflicted under Ethiopian law.

But for this argument one may raise a question, how do we know the exact penalty that would be inflicted by the Ethiopian courts unless trial is taking place, since the legislature puts vast discretion between the lower and upper sentence for each crime and the exact amount of punishment is leave to court to be determine case by case and this will also possible only if trial is held. But it is clear that when the offender sentenced and penalized abroad equal or greater than the upper limit that put by the legislator in the violated provision; it is obvious trial is not necessary. Once trial is held then after the court determine the exact amount of punishment the court should be deduct the penalty that have been served abroad.[140] This takes us to the other line of argument; article 16 of the criminal code is not pure double jeopardy.

Mussie states that strictly speaking the effect of this article is continuation of punishment. This **means though there may be double** trial but not double punishment. While the court order punishment it shouldn't be start from the scratch.[141] Accordingly if the punishment that has been served in abroad is lesser than what would be serve in Ethiopia the court should only order to serve the remaining part. To give and illustration when the defendant served five years imprisonment abroad but sentenced seven years by the Ethiopian court after trial is

[139] Ibid

[140] see article 16 (3) of the federal democratic republic Ethiopia revised criminal code 2004 (here under stated as criminal code)

[141] Interview with Mussie (n131)

conducted, the court should order for the remaining two years since the defendant served five years imprisonment abroad. Dejene also agree with this argument and stated the defendant may jeopardize as for as trial concerned but as to punishment it is about checking the extent of appropriateness of the extent of punishment based on the purpose and object of the criminal code.[142]

Regarding the deduction of penalty another issue may rise. What if the type of sentence imposed abroad and in Ethiopia is different nature? For instance what would be the case if the defendant's punishment was in terms of fine abroad but imprisonment in Ethiopia or vice versa or in terms of public service by the foreign court but imprisonment or fine by the Ethiopian court? Or what if the punishment served abroad is simple imprisonment but the Ethiopian court pass rigorous imprisonment? What if flogging is executed abroad, in terms of what kind of punishment should this punishment consider in order to reduction of foreign served sentence? In this case it is logical to take form and nature of punishment passed by the Ethiopian courts as base to change either fine to punishment or vice versa. This is because as discussed above since the retrial is ordered due to the foreign court's t subsidiary jurisdiction or not at all, it is reasonable and logical to take the punishment that passed by Ethiopian court which has principal jurisdiction and greater meaningful connection as base for reduction purpose. But here it is important to bear in mind that a further study is needed to the Ethiopian law as to the change and conversion of punishment form fine to imprisonment and vice versa, from simple imprisonment to rigorous and vice versa, form compulsory labor to fine or others. As to the retrial of foreign sentenced person concerned form the above discussion it is possible to conclude that the scope of prohibition of double jeopardy is limited only to the persons tried by Ethiopian court in accordance to the Ethiopian criminal law and criminal procedure law. This is in line the international instruments concept of double jeopardy and jurisdictional theory that discussed in the preceding chapters. But this exception is limited only to the criminal jurisdictions that Ethiopia has principal jurisdiction. Ethiopian court will have principal jurisdiction on the criminal bases that stated under articles 11, 13, 14 (1) and 15 (2).

[142] Interview with Dejene (n130)

I. Principal Jurisdictions and Double Jeopardy

i. Territorial Application

Article 11 of the Criminal Code which is found under the sub section entitled as Crimes Committed on Ethiopian Territory under paragraph one provided as "This Code shall apply to any person whether a national or a foreigner who has committed one of the crimes specified in this Code on the territory of Ethiopia." This means anybody irrespective of that whether he/she is an Ethiopian citizen or not if he is found committing either of the crimes stated in the criminal code as far as the crime is committed in Ethiopian territory, the Ethiopian courts shall have a jurisdiction to try and punish the offender.

However, when the criminal escaped and take refuge in a foreign country; according to the criminal law, the Ethiopian authorities may the defendant to be tried by the court of the country where he got asylum. But it is important to note here that, the issue of requesting to be tried in abroad is something to be taken as optional and only applied if the offender is foreigner and his extradition cannot be obtained.[143] According to article 12 of the code the Ethiopian government firs should request for extradition of the offender form which he take refuge. Why the Ethiopian authority request for trial of the offender by the foreign court could be for two reasons. Once the offender flee from Ethiopian territory since he/she may not have socio-economic necessity bigger than the danger of prosecution that he will encounter up on his return) he/she may not return to Ethiopia to escape from prosecution. This means the Ethiopian court will not have chance to try and prosecute the offender this is due to, as discussed above for a state to exercise judicial jurisdiction the existence of the offender within it territory is necessary. Therefore for Ethiopia it is better to delegate to the state where the offender found to try rather than keeping silent and free the offender from appearing before justice at all. The second reason could be as discussed in the balancing of the normative tension between double jeopardy that emanate from multiple criminal jurisdiction and sovereign's right to enforce its law, jurisdictional reasonableness (i.e. when Ethiopian connection with the crime is minimal) and subsidiarity (when the foreign courts (i.e. where the offender takes refuge) in a better place to apply its law than Ethiopian court, unless the foreign court's failure to do so harm the global interest.

[143] Article 12 (1) of criminal code

It is very important to see here that whether there are/is preconditions that should be followed before the Ethiopian authority request to try the offender by delegation to the court where the offender taken refuge; since clarifying this has importance for the discussion of the effect of foreign judgments that discussed hereunder. As per sub article 1 of article 12 to request trial by delegation two requirements should be fulfilled. These are:

One is, if the offender is foreigner. The phrase “Where a foreigner….”[144] gives a clue the offender for whom trial is requested delegation should be foreigner. This means if the offender a citizen of Ethiopia delegation should not be requested even if a request for extradition is rejected. Second, the phrase “….his extradition cannot be obtained….”[145] tells us, before resorting to request of delegation request for extradition should be sought. These two requirements are cumulative. For example if the criminal is Ethiopian national despite the request of extradition is rejected, the authority is not allowed to request delegation to the country to try the offender. If the request has got acceptance and it passed by court process and final decision is given the question that what would be the effect of this is going to be discussed in the section titled the effect of foreign judgments hereunder.

ii. The Principle of Quasi-Territoriality (Protective Principle)

Despite article 11 provides that the Ethiopian principal jurisdiction is confined to the crimes committed within Ethiopian territory, 13 provides exception for this assertion. Based on this, even though the crime is perpetrated in abroad but if this criminal act breaches the Ethiopian interest and exposed it to danger, the Ethiopian court can have direct jurisdiction to punish the criminal. This is because, if the criminal act of a certain person exposed the country to a danger this country whose interest is affected and exposed to danger despite the act is committed in abroad Ethiopia will have nexuses with the crime and attain jurisdiction to punish the criminal since its security is endangered. Therefore, according to article 13 for the crime committed in abroad if it breaches articles 238-270, 355-374 against the security and unity of Ethiopian government, in its legal institutions or fundamental interests or in its money, the Ethiopian courts will have principal jurisdiction to try and punish the offender. But if it is not related with this the Ethiopian courts will not have principal jurisdiction. This principle like the above stated principle it has close relation with sovereign independence. Due to this the Ethiopian sovereign integrity of its money printing, security, unity, legal

[144] See, Article 12 (1) of criminal code
[145] Ibid

institutions and fundamental interests is/should be protected by enactment and enforcement laws relating to this.

When this crimes are committed, in order to establish a charge and punish the criminal, despite the crime is committed out of Ethiopia it considers as if is committed in Ethiopia and as provided in articles 13 and 16 of the criminal code the Ethiopian courts shall have jurisdiction.

Despite a crime is committed out of Ethiopia, according to the principle of quasi-territoriality the criminal can be judged according to the Ethiopian criminal law (i.e. unassailable rights of Ethiopian for crimes committed in abroad). The 15 (2) Ethiopian government member of the defense of force crimes committed in abroad are subject to the Ethiopian principal jurisdiction stipulated as stipulated under article 15(2) of the code.

B. On the subsidiary jurisdiction (article 20)

Article 16 specifies the effects of decisions made in foreign countries with regard to offences committing that Ethiopia's has principal jurisdiction. It has been seen that a discharge, acquittal or conviction abroad is no bar to the proceedings being initiate in Ethiopia, provided that where a new sentence is passed; the term of sentence served abroad will be deducted from such new sentence. Article 20 specifies the effects of decisions made abroad with regard to offence committing on which Ethiopia's has subsidiary jurisdiction, which the effects are quite different.

Ethiopian courts may exercise their subsidiary jurisdiction only insofar as no action has been taken against the offender in a foreign court where the crime committed or other state. This is because for Ethiopia it may be perfectly reasonable to prosecute if the defendant is not already been prosecuted by another states that have greater connection than it and since in this case Ethiopia will have a strong and enough interest to see justice done by prosecuting the defendant and this will create reasonable connection under international law. But it the defendant has been prosecuted abroad since Ethiopia is not vested with principal jurisdiction, she can but submit to the decision made abroad. This is what stated in article 20 of the cade. But here it is important to bear in mind that when Ethiopia is prohibited from exercising her subsidiary jurisdiction, she may nevertheless ensure the enforcement of the sentence passed abroad if the convicted person is found in Ethiopia and such sentence has not been served or fully served or remitted by pardon or amnesty, and its enforcement is not barred by limitation

under either the foreign law or Ethiopian law and third requirement is the state where the sentence was passed does not request the convicted person's extradition, or such requisition is dismissed.[146]

II. Subsidiary Jurisdiction and Double Jeopardy

i. Principle of Nationality

This principle is focused on the applicability of Ethiopian law in the time of when the Ethiopian citizens are parties to crimes committed in abroad either as victim or offender. When its national commits crime it is called active personality principle; and when the crime is committed on the person called as passive personal principle. While the first one has a concept of an individual for the rights and protection that given by his/her country the national should be abide to his national law which is an obligation whereas the secondly is a right that one national give protection to his/her citizen. This principle is provided in article 18 of the Criminal law.

ii. Universal Jurisdiction

Because of the gravity of the crime and its effect on the international community, according to this principle all nations will attain jurisdiction to punish the perpetrators wherever the crime committed and irrespective of have a connection with the crime. Due to this states prefer subsidiary jurisdiction rather take it as principal jurisdiction. Based on this the criminal code under the sub section titled subsidiary jurisdiction in article 17(1) stated as "a crime against international, law or an international crime, specified in Ethiopian legislation, or an international treaty or a convention to which-Ethiopia has adhered;" or a crime against public health or morals specified in Articles 525,599,635,636,640 or 641 of this Code shall be liable to trial in Ethiopia in accordance with the provisions of this Cod unless a final judgment has been given after being prosecuted in the foreign country.

This means if a person committed either of the above mentioned crimes wherever out of Ethiopian jurisdiction he/she can be prosecuted in Ethiopia unless he/she prosecuted in foreign court and got final decision. Probably if the country in which the crime is committed or other country which have universal jurisdiction try and give final judgment he/she cannot

[146] Criminal code article 20 (2)

be try in Ethiopia for the second time. In other word if he charged for the same crime again in Ethiopia the defendant may raise the defense of double jeopardy as per article 132 of the criminal procedure code.

Based on the above discussion it is clear that, Ethiopia divided its criminal jurisdiction as principal and subsidiary. This classification depends on the meaningful connection that Ethiopia has either with the crime, with the offender, victim or without any connection but the gravity and effect of the crime. However, as discussed in chapter two as Ethiopia provided nexus for a certain crime similarly other country for the same crime may claim to have jurisdiction based on other connections or universal jurisdiction.

It is during this time the retrial of persons that already had been sentenced in foreign court comes in to picture. This will happen, when the Ethiopian court wants to retry the offender for the same crime that already has been tried and final judgment rendered in foreign court. Thus, following this demand two contradicting ideas (Ethiopian sovereign power to enforce its criminal law and the right of the defendant not to be subject for repeated trial and punishment) will arise. To put this in other way, for example if criminal is sentenced in other country for a crime he/she committed outside the territory of Ethiopia or within the Ethiopian territory but abscond for a time, if this individual is found in Ethiopian territory, whether this defendant may try and prosecute for the same crime based on other jurisdictional base or not? This issue as provided in chapter one is the centripetal point of this study. Then on the forthcoming section this issue will be examine in line with the discussion made in chapter two and three particularly in line with international law and practice and also according the three rules of double jeopardy found on the jurisdictional theory developed by professor Colenglo.

4.2. Application of jurisdictional theory

To examine whether the Ethiopian double jeopardy rule is in conformity with the jurisdictional theory it is important to see the Ethiopian double jeopardy rule that has been already discussed with the three rules of double jeopardy that derived from this doctrine that have been already discussed above.

To apply each rules of the international double jeopardy to the Ethiopian criminal justice system's rule of double jeopardy it is important to show with illustrations:

Illustration I: Suppose an Ethiopian national is alleged to have committed crime of torture against a citizen of Kenya and flee to Kenya. In this particular case both Ethiopia and Kenya have jurisdiction to prosecute the perpetrator of torture. To the Ethiopian courts the base of jurisdiction is territorial but to Kenyan court their base is personal. If the Kenyan court prosecuted to the defendant based on its national law, up on his return or extradition the Ethiopian court will not bare from prosecuting him again, since it has national or territorial jurisdiction over the crime of torture committed in its territory according to article 11 of the criminal code. In other term Ethiopia has principal jurisdiction on this crime because of its commission in its territory and should retain its power to enforce its law irrespective of prosecution is held in foreign country for the same crime. The essence of articles 16 (1), (2) and 11 goes with this rule of international double jeopardy.

Illustration II: Now suppose that the Kenyan court prosecuted the defendant based on its national law that enforce and apply its national law that incorporated international legal prohibitions on universal crime (i.e. torture that stated under CAT which explicitly provides for jurisdiction over torture committed outside the Kenya, assuming that Kenya is party to CAT) here again according the second rule of international double jeopardy, the Ethiopian court will not bar to prosecute again the defendant since the act of torture is committed within Ethiopian territory and this will confer principal jurisdiction according article 11 of the criminal code and gives right to successive prosecution by its courts.

Illustration III: However unlike the above two rules, if the crime of torture is committed in Somali and prosecution held either in Somali based on national jurisdiction or Kenya based on Universal jurisdiction the Ethiopian court will not successively prosecute the defendant up on his presence on its jurisdiction based on Universal jurisdiction that derived from being party to CAT. This is true even during the commission of the crime Ethiopians are victim of the crime. This is due to first for Ethiopia to prosecute successively the defendant based on universal jurisdiction is not just, since the Ethiopian interest to see justice as the international community is vindicate by the previous prosecution. Second it is also unjust for Ethiopia to prosecute again the defendant only by the mere fact of its citizen was victim of the torture. Once he tried by foreign country it presumes that for Ethiopia to see justice is vindicate by the previous prosecution. Cumulative reading of article 17 (1) (a) and article 20 of the criminal code dictates this rule.

Here it is important to aware of that the Ethiopian national/ principal jurisdiction is not limited to crimes committed within its territory. As stated above it extends to crimes targeted to Ethiopia's safety, integrity, its institutions, essential interests or currency also. This is due to there is no country in the world than Ethiopia that will be harmed by the act of these crimes. Therefore the term of "national jurisdiction" should also include this scenario and it should be understand as limited to crimes committed within Ethiopian territory and rule I and II of the international double jeopardy will also apply to this case according articles 14 and 16(1) of the criminal code.

Finally since article 16 (1) stated "….he "may be" tried and sentenced again on the same charge in Ethiopia, if…." and this shows us the subsequent trial and sentence of foreign tried person depends on the discretion of the court, the remaining issue is under what requirements should the Ethiopian courts apply its criminal jurisdiction over persons tried in foreign courts? In other words what criteria/parameter should the court apply in order to decide retrial and punishment or release free to the defendant? From the above discussion it is possible to put the following criteria:

1. Meaningful Connection: if Ethiopia has principal jurisdiction in which greater meaningful connection other than other countries will have; retrial and prosecution should be ordered.
2. Subsidiarity: if there is other country that should give priority than Ethiopia to enforce its law than Ethiopia. In other term if Ethiopia has only subsidiary jurisdiction to the crime the court should refrain from ordering retrial and issue disposal of the case unless the defendant is not tried in the foreign country.
3. The amount of penalty that passed and executed abroad: the court before proceeding to the merit of the case at the hearing stage should see the amount of punishment served abroad. If the defendant punished abroad greater than what the legislator put as upper limit for the specified crime in the law, the court should not order retrial whereas if sentenced below, it should order retrial.
4. Deduction of punishment: here double jeopardy may not about retrial rather in strong connotation also re-punishment. Once the court order retrial and proceed to the merits of the case; first it should fix the exact amount of punishment then deduct the punishment that has been undergone abroad. If the result is null or the defendant serve more punishment in abroad then the court should announce release of the defendant.

Whereas if the punishment passed by the court is greater than the punishment undergone in the foreign country then the defendant will serve the remaining.

5. Shielding the accused: in the crime that Ethiopia has subsidiary jurisdiction especially on universal jurisdiction, when the criminal judgment handed down in a foreign state were not conducted imperially, independently or in a manner designed to shield the accused from international criminal responsibility the Ethiopian court shall order retrial.

Chapter Five

Conclusion

Conclusion

The Ethiopian courts can try and sentence a person that has been already tried and sentence in foreign country as far as it has principal jurisdiction over the crime. This is due to the limited scope of the principle of prohibition of double jeopardy. This protection that enshrined under article 23 of the FDRE constitution is limited only to persons tried by Ethiopian courts in accordance of the Ethiopian criminal law and criminal procedure law. This interpretation is in line with article 14(7) of ICCPR. But the limitation of this rule is not absolute it is only applicable to the crimes that Ethiopia have principal jurisdiction. For those crimes which Ethiopia attain subsidiary jurisdiction the scope of double jeopardy rule is broad and a person will have grantee against successive trial by Ethiopian court once a final judgment has been rendered by foreign court on the same crime.

The Ethiopian criminal justice system tries to compromise/balance the two normative interests at times. On the one hand by retaining its power to retrial of a person that has been tried by foreign courts to the crimes that Ethiopia have principal jurisdiction it retains its sovereign interest to enforce its law. In other words it tries to protect its interest at the international world by punishing a person who found against its interest by contravening of its law. On the other hand by limiting this sovereign right to crimes which it has only principal jurisdiction and follow the principle of ne bis poena in idem for punishment due emphasis to the human rights in general and defendant's right against successive trial and punishment in particular is given.

Therefore, to achieve these courts should examine the legislator's intention carefully in preserving the court's jurisdiction (power) for the successive trial and sentencing of a person once tried in foreign country and their constitutional responsibility and duty to respect and enforce human right provisions in general and the prohibition of double jeopardy in particular according to article 13(1) of the constitution. To achieve this Ethiopian court may apply *inter alia* the rule of international double jeopardy developed by jurisdictional theory, jurisdictional priority and jurisdictional subsidiarity. If the court believes that successive retrial is necessary to protect the Ethiopia interest the principle of *ne bis poena in idem* that stated under article 16(3) of the criminal code should apply.

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