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CRIMES AGAINST HUMANITY IN THE ETHIOPIAN CRIMINAL JUSTICE

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Declaration

I, Meku Degu, declare that this thesis titled 'Crimes Against Humanity in the Ethiopian Criminal Justice' is my own original work. This thesis has not been submitted for a degree in any other University or Organization and all materials employed in the thesis have been dully acknowledged.

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Signature.....

Date.....

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ACRONYMS

Art	Article
AC	Appellate Chamber
CAH	Crimes Against Humanity
ECCC	Extraordinary Chamber in the Court of Cambodia
ECHR	European Court of Human Rights
FDRE	Federal Democratic Republic of Ethiopia
IACtHR	Inter American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IMT	International Military Tribunal
ITMTEF	International Military Tribunal for the Far East
NGO	Non-Governmental Organization
NISS	National Information and Security Service
No	Number
OLF	Oromo Liberation Front
PTC	Pre-Trial Chamber
Para	Paragraph
SCFS	Special Court for Seirra Leone
SPO	Special Prosecutor's Office
TC	Trial Chamber
UN	United Nations
UNSC	United Nations Security Council

ABSTRACT

Crimes against humanity have existed since time immemorial. However, they were criminalized by the International Military Tribunal for the first time. The International Criminal Tribunal for the Former Yugoslavia Statute, the International Criminal Tribunal for Rwanda Statute and other UN monitored special and extraordinary tribunal statutes provided for crimes against humanity. The Rome Statute has also provided for crimes against humanity as core international crimes in an effort to fight impunity. Crimes against humanity are not defined in Ethiopian criminal laws. Ethiopia is not a party to the Rome Statute. But some acts committed in Ethiopia constitute what is to be understood as crimes against humanity under international law. Fighting impunity from crimes against humanity based on customary international law and direct application of international law by domestic courts of Ethiopia is hardly possible. So, Ethiopia needs to come up with solutions that help fight impunity from crimes against humanity.

CHAPTER ONE

INTRODUCTION

1.1. Background of the Study

Crimes against humanity (CAH) are old crimes equal in age with humanity itself.¹ CAH are one of the international crimes recognized by international criminal law like the International Criminal Court (ICC) Statute (the Rome Statute).² The Statute of ICC, the Statutes of International Criminal Tribunal for the Former Yugoslavia (ICTY), the Statutes of International Criminal Tribunal for Rwanda (ICTR), the Constitutive Acts of mixed tribunals in Cambodia, Sierra Leone, East Timor, Kosovo and Bosnia Herzegovina have provisions addressing CAH.³ The Rome Statute, which established the permanent international criminal court, provides for extended definition for CAH, though the words and phrases contained in it are still contested.⁴ The definition of CAH is fluid, indeed.⁵

There are recent ongoing efforts by established scholars to codify CAH convention; and it is hoped that the instrument, the draft CAH convention prepared by the scholars, will at least serve as a template for a convention and the states will eventually see the light and adopt a CAH treaty.⁶

Ethiopia has criminal justice system which stipulates crimes and the way they are handled. Out of the international crimes, the criminal justice system of Ethiopia defines and punishes war

¹ Cryer et al, *Introduction to International Criminal Law and procedure* (2nd edn, Cambridge University Press, 2010) 230.

² Rome Statute of the International Criminal Court (adopted on 17 July 1998, entered in to force on 1 July 2002) Treaty Series, Vol 2187, No 38544 (hereafter ICC Statute).

³ M. Cherif Bassiouni, 'Crimes Against Humanity: the Case for a Specialized Convention' (2010) 9(4), Washington University Global Studies Law Review 578, 579.

⁴ ICC Statute, Art. 7.

⁵ See the definition given to it under the ICTY, ICTR, ICC Statutes and in the IMT Charter.

⁶ Charles Chernor Jalloh, 'What Makes A Crime Against Humanity A Crime Against Humanity' (2013) 28(2) American University International Law Review 281, 283.

crimes and genocide, but it nowhere recognizes CAH.⁷ Moreover, unlike most of African Countries which became parties to the ICC Statute, Ethiopia is not a party to the Statute.⁸

There are cases that show the commission of CAH in Ethiopia, but prosecuted for a different crime. Prosecutor vs. Abdulkadir Muhammed et al⁹ and Prosecutor vs. Getachew Assefa et al¹⁰ are few of the cases that have facts which could constitute CAH, but the defendants were prosecuted for different crimes other than CAH. So, under the contemporary criminal justice system of Ethiopia it seems difficult, if not impossible, to prosecute and punish CAH.

1.2. Statement of the Problem

International criminal law is believed to be the result of twentieth century.¹¹ In the end of the twentieth century and at the beginning of twenty first century the world determined to end impunity for perpetrators of grave crimes including CAH that threaten peace, security and wellbeing of the world.¹² But, Ethiopia is not on board in the international effort to end impunity.¹³ Nor Ethiopia has domestic law that criminalizes CAH and punishes perpetrators. It is tough to fight impunity in Ethiopia based on the written laws.

Moreover, even if it is claimed that CAH are core international crimes prohibited by international custom and there is universal jurisdiction for CAH, custom based CAH lack precision and clarity. This will create problem of legality of the law and eventually Ethiopian domestic courts will find it difficult to adjudicate cases involving CAH by directly applying

⁷ See the Criminal Code of the Federal Democratic Republic of Ethiopia (FDRE) (2005), Proclamation No.414/2004 (herein after Criminal Code). The criminal laws of Ethiopia scattered in different proclamations do not contain provisions that define and criminalize CAH.

⁸ Ethiopia is not a signatory and a ratifying founding member to the Rome Statute. Ethiopia does not become party to the ICC Statute after it came in to force too. See 'States Parties to the Rome Statute of the International Criminal Court' WIKIPEDIA available at <<http://en.m.wikipedia.org/wiki/States>> last visited on 17 May, 2020.

⁹ Federal High Court of FDRE, Case No 01392, Criminal File No 87/87.

¹⁰ Federal High Court of FDRE, Lideta Circuit 3rd Criminal Bench, File No 232249 (pending).

¹¹ George P. Fletcher and Jens David Ohlen, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case' (2005) 3 Journal of International Criminal Justice 539, 541.

¹² Preamble of ICC Statute, para 2, 4.

¹³ 'States Parties to the Rome Statute of the International Criminal Court' WIKIPEDIA available at <<http://en.m.wikipedia.org/wiki/States>> last visited on 17 May, 2020.

international customary law. Therefore, even if CAH are being committed in Ethiopia, there is practical problem of prosecuting and punishing perpetrators for CAH.

1.3. Objective of the Research

The main objective of the thesis is to analyze CAH and its place in the criminal justice of Ethiopia, via examining the legal framework of CAH under international law. The thesis expounds the need to have domestic mechanisms of prosecuting and punishing CAH.

1.4. Research Questions

The thesis has the following central question. Where is the place of CAH in the Ethiopian criminal justice system? The following specific questions follow:

- What are the aspects of CAH?
- Do the laws of Ethiopia accommodate CAH?
- How domestic cases that allegedly have elements of CAH are/were addressed in Ethiopia?

1.5. Significance of the Study

CAH are one of the core international crimes.¹⁴ International prosecution for international crimes before ICC is conducted as a gap filling task because international crimes are in principle prosecuted and tried domestically by domestic courts.¹⁵ It is significant to assess the place CAH has under the Ethiopian justice system. Ethiopia is neither a party to the ICC Statute nor it has incorporated regulations that condemn and punish CAH in its domestic criminal law. The thesis advocates that Ethiopia should come up with a way out that would enable it to prosecute CAH. This would in effect help policy makers and legislatures to come up with appropriate decision. The thesis will help as basis for further research on the area.

¹⁴ Julie Pasch, 'State Obligation to Punish Core International Crimes and The Proposed Crimes Against Humanity Convention' in Morten Bergsmo and SONG Tianyin (eds), *On the Proposed Crimes Against Humanity Convention* (FICHL Publication Series No 18, 2014) 201.

¹⁵ ICC Statute, Arts. 1, 17(1)(a).

1.6. Research Methodology

The research is going to be a doctrinal legal research for it will be worked out within the laws, cases, books and articles in the area. Accordingly, the research would use domestic laws, domestic cases, international laws and international cases in the area. It will also utilize books, articles and other relevant documents.

It would also be a comparative doctrinal legal research for it compares the domestic criminal laws of Ethiopia against the internationally established laws and customs of CAH. As part of the comparison, both domestic and international cases are utilized. The thesis will discuss some domestic cases in an effort to show how cases having elements of CAH are entertained by domestic courts of Ethiopia.

The Federal Democratic Republic of Ethiopia (FDRE) Constitution, other relevant laws and policies of the country will be used as domestic primary sources whereas judicial decisions and literature as domestic secondary sources. The thesis will use international treaties, customary international laws, and general principles of law as primary sources of international law whereas it will use judicial decisions and scholarly works as secondary sources of international law.¹⁶

1.7. Literature Review

Jean Graven said CAH date back to the time of antiquity.¹⁷ The war crimes trial of Sir Peter Von Hagenbach in 1474 before 28 judges is claimed to be a landmark trial and valued as an embryonic strand of CAH prosecution.¹⁸

Basak Cali underscored that CAH constitute one of the international crimes covered under international criminal law.¹⁹ He added that international criminal law attaches direct criminal liability in respect to international crimes proper, including CAH.²⁰

¹⁶ The Statute of the International Court of Justice (1945) (herein after ICJ Statute), Art. 38.

¹⁷ Cryer et al (n 1) 230.

¹⁸ Gregory S. Gordon, 'The Trail of Perer Von Hagenbach: Reconciling History, Historiography, and International Criminal Law' 1. Electronic copy available at <http://ssrn.com/abstract=2006370>.

¹⁹ Basak Cali(ed), *International Law for International Relations* (Oxford University Press 2010) 259.

²⁰ Ibid 259.

Morten Bergsmo et al wrote that there has been an apparent flourishing of international criminal law that regulates and addresses CAH by establishing and funding ad hoc tribunals and the ICC.²¹

Cryer et al asserted that it is only in the last seven decades the international legal prohibition on CAH has emerged.²² They also maintained that the law of CAH was initially created to fill certain gaps in the law of war crimes, but many parameters were left undefined; however, the recent increase in the application of international criminal law has produced a fruitful interplay between international instruments, jurisprudence and commentaries, seems leading to a more coherent picture of CAH.²³

Julie Pasch confirmed that unlike Genocide and War Crimes, which are regulated by the Genocide Convention and the Hague Conventions respectively, there is no single convention governing CAH.²⁴

Sean D. Murphy wrote that several states welcome the inclusion of an obligation to adopt national laws on CAH.²⁵ He added that states also expressed their support for the approach taken by the United Nations Law Commission on command responsibility, inapplicability of superior order defense, and the inapplicability of statutes of limitations.²⁶

Ethiopia included the inapplicability of statutes of limitations clause in its Constitution regarding CAH, though it discussed nothing more about CAH.²⁷ No other domestic law regulates CAH in Ethiopia.

²¹ Morten Bergsmo, Emiliano J. Buis and Nora Helene Bergsmo, 'Setting a Discourse Space: Correlation Analysis, Formation, Concepts, and Legally Protected Interests in International Criminal Law' in Morten Bergsmo and Emiliano J. Buis (eds), *Philosophical Foundations of International Criminal Law: Correlating Thinkers* (Torkel Opsahl Academic EPublisher Brussels Publication Series No 34, 2018) 4.

²² Cryer et al (n 1) 230.

²³ Ibid.

²⁴ Julie Pasch (n 14) 201.

²⁵ Sean D. Murphy, 'Third Report on Crimes Against Humanity' (2017) George Washington Law School Publications and Other Works 5 available at <<http://scholarship.law.gwu.edu/faculty-publications>> last accessed on 14 March, 2020.

²⁶ Ibid.

²⁷ The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No.1/1994 (herein after the FDRE Constitution) Art. 28(1).

Marshet wrote CAH were not independently recognized with its peculiar features under the Penal Code and the new Criminal Code nowhere expressly addressed CAH.²⁸ But his work did not explore all the relevant laws and policies of Ethiopia. He did not discuss custom based CAH against the laws of Ethiopia and the principle of legality. He did not examine domestic and international cases and the way how cases involving CAH are being entertained by domestic Courts.

Girmachew asserted the importance of prosecuting and punishing grave human rights violation;²⁹ and he asserted that silence of domestic laws cannot bar the prosecution of CAH.³⁰

1.8. Scope of the Study

The scope of this whole study is limited to analyzing the laws and cases relating to CAH in Ethiopia and under international law and discussing existing literature. It does not cover all the case law associated to CAH under international law. Nor all domestic cases that could constitute CAH are dealt. Institutional and procedural issues related to CAH are out of the scope of this work. It only tries to assess the legal issues that helps answer the research question and in doing so the thesis proposes a working definition of CAH for Ethiopia.

1.9. Structure and Outline of the of the Study

The research has five chapters. The first chapter is the introduction. The second chapter deals with aspects of CAH. The third chapter digests CAH in the law of Ethiopia. It examines whether the justice system of Ethiopia has a place for the prosecution and punishment of CAH. Chapter four is about exemplifying the gap by illustrating domestic cases. The last chapter provides conclusion and suggests recommendation.

²⁸ Marshet Tadesse, *Prosecution of Politicide in Ethiopia: The Red Terror Trials*, vol 18 (International Criminal Justice Series Asser Press 2018) 103, 105.

²⁹ Girmachew Alemu, 'Apology and Trials: The Case of the Red Terror Trials in Ethiopia' (2006) 6(1) African Human Rights Law Journal 64, 68.

³⁰ Ibid 74.

CHAPTER TWO

ASPECTS OF CRIMES AGAINST HUMANITY

2.1. Origin of Crimes against Humanity

The history of crimes date back to the time of antiquity for the crime itself starts to exist since human beings started to exist.³¹ An early codification of the idea of CAH came via the Martens Clause of the Fourth Hague Convention, which referred to the 'laws of humanity and the dictates of public conscience'.³² The phrase 'crimes against humanity', however, was used just after World War I, on 28 May, 1915, when the governments of the allied nations, France, Great Britain, and Russia, condemned the actions of their enemy Ottoman Turkey against Armenians as 'crimes against civilization and humanity'.³³ While the Treaty of Versailles did not include a definition of CAH, a Commission formed to look into responsibilities for acts during the war found that Germany and her allies had violated the dictates of humanity and the laws of humanity, making them liable to criminal prosecution.³⁴ However, the US representative objected to the references to the laws of humanity on the grounds that these were not yet precise enough for criminal law.³⁵

It was with the establishment of International Military Tribunal at Nuremberg (IMT or the Nuremberg Tribunal) and the International Military Tribunal for the Far East at Tokyo (IMTFE or the Tokyo Tribunal) the principle according to which individuals acting on behalf and with the protection of their state can be held personally accountable for crimes they committed in breach of international criminal law; until then subject to few exceptions foreign national courts, due to

³¹ Cryer et al, *Introduction to International Criminal Law and Procedure* (Cambridge University Press 2014) 230.

³² Christopher Roberts, 'On the Definition of Crimes against Humanity and Other Widespread and Systematic Human Rights Violations' (2017) 20(1) *University of Pennsylvania Journal of Law and Social Change* 3.

³³ Mohamed Elwa Badar, 'From Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes against Humanity' (2004) 5(1) *San Diego International Law Journal* 77, 78.

³⁴ Egon Schwelb, 'Crimes Against Humanity' (1946) 178(23) *British Year Book of International Law* 180, 181.

³⁵ Christopher Roberts (n 32) 4.

the principle of state sovereignty and non-intervention, were not allowed to sit in the judgment of individuals who had acted as a state representative.³⁶

There has been an apparent flourishing of international criminal law since the early 1990s through the establishment of ad hoc, mixed, extraordinary and permanent courts by a variety of constitutive acts. States pioneered in creating and maintaining unique war crimes jurisdictions, international, internationalized and national, and by collectively settling the legal facility of the ICC, beginning it, financing it and tempering positively with it.³⁷

More recently International Military Tribunals constitutive acts have incorporated CAH; this can be noticed in the constitutive acts of ICTY³⁸, ICTR³⁹, the Special Court for Seirra Leone (SCFS)⁴⁰, Extraordinary Chambers in the Court of Cambodia (ECCC)⁴¹ and ICC.⁴² CAH is also adjudicated as a human rights violation before regional human rights courts.⁴³ The origins of

³⁶ Paola Gaeta, 'International Criminal Law' in Basak Cali (ed), *International law for International Relations* (Oxford University Press 2010) 260, 261.

³⁷ Morten Bergsmo, Emiliano J. Buis and Nora Helene Bergsmo, 'Setting a Discourse Space: Correlational Analysis, Foundational Concepts, and Legally Protected Interests in International Criminal Law' in Morten Bergsmo and Emiliano J.Buis (eds), *Philosophical Foundations of International Criminal Law: Correlating Thinkers* (Torkel Opsahl Academic EPublisher Brussels Publication Series No 34, 2018) 4.

³⁸ The Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993) SC Regulation 827 Art. 5 (herein after ICTY Statute).

³⁹ The Statute of the International Criminal Tribunal for Rwanda (8 November 1994) SC Regulation 955 Art. 3 (herein after ICTR Statute).

⁴⁰ Special Court for Seirra Leone (established by the Agreement between the United Nations and the Government of Seirra Leone and the Special Court for Seirra Leone Statute) (adopted on 16 January 2002) Art. 2.

⁴¹ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (with the inclusion of amendments as promulgated on 27 October 2004) NS/RKM/1004/006 Art.5.

⁴² ICC Statute, Art. 7.

⁴³ European Court of Human Rights has adjudicated on CAH, using customary international law and through the application of alternate offences that are prescribed within its Statute. See ECHR, *Korbely v. Hungary*, Grand Chamber, Judgment, Application no.9174/02, 19 September 2008; see also ECHR, *Kolk and Kislyiy v. Estonia*, Fourth Section, Decision as to the Admissibility, Application no. 23052/04 and 24018/04, 17 January 2006. See also Inter American Court of Human Rights (IACtHR), *Almonacid Arellano et al v. Chile*, Preliminary objections, Merits, Reparations and Costs, 26 September 2006.

CAH have historical, political, and legalistic dimensions; and it is due to the need of human community to stop or reduce human casualties on the occasion of political clashes or disagreements.⁴⁴

2.2. Definition of Crimes against Humanity

An international crime is such an act universally recognized as criminal, which is considered a grave matter of international concern and cannot be left within the exclusive jurisdiction of the state that would have exclusive jurisdiction control over it under ordinary circumstances.⁴⁵

Crimes against international law including CAH are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.⁴⁶

CAH were conceived of as a sort of 'umbrella' notion, to be applied if necessary to fill the lacuna left by the notion of war crimes, subject however to an important limitation; these crimes had to be linked to perpetration of war crimes, or crimes against peace.⁴⁷

CAH was first defined by the London Charter establishing the Nuremberg Tribunal as murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of IMT, whether or not in violation of the domestic laws of the country where the crime is perpetrated.⁴⁸ This definition of CAH limits the scope of the crimes only to war time or to the time imminently before the war, so that there is no CAH in peace time. It has to be committed against civilian population, which may be reasonably taken as a tacit reflection to show intensity and scale. There is no other qualitative requirement set by the provision.

⁴⁴ Brian Dube, 'Understanding the Contents of Crimes against Humanity: Tracing its Historical Evolution from the Nuremberg Charter to the Rome Statute' (2015) 9(5) African Journal of Political Science and International Relations 183.

⁴⁵ Hostage Case, US Military Tribunal, Nuremberg, 1948.

⁴⁶ Jo Stigen, 'Introduction to International Law' (2015) Oslo 17 available at < <http://www.uio.no> > last accessed on 17 May, 2020.

⁴⁷ Paola Gaeta (n 36) 268.

⁴⁸ Charter of the International Military Tribunal 1945, Art. 6(c).

The Statute of ICTY conceptualized CAH as the crime of murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial, and religious grounds, and other inhuman acts against civilian population committed during armed conflict.⁴⁹ Relative to the definition of CAH given by the Charter of IMT, the definition under the ICTY Statute changed the phrase 'committed before or during war time' by 'committed in armed conflict', beyond this the two definitions are mainly similar.

The ICTR Statute defined CAH as murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial, and religious grounds and other inhuman acts when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.⁵⁰ The ICTR Statute has defined CAH as a systematic or widespread attack that can be committed both in times of war and in times of peace against civilian population on national, political, ethnic, racial and religious grounds. Compared to the former two definitions given to CAH, the ICTR Statute added the element of widespread or systematic attack and the grounds for the attack; it adds qualities in the contents of CAH.

All of the definitions given by the above Charter and Statutes are relative to the specific goal they were to address because they all were meant to establish ad hoc tribunals that have specific and time bound goals, just in order not to leave some individuals who committed grave atrocities unpunished. And the precedence the tribunals established by these constitutive acts left is many folds and it nurtured the jurisprudence of international criminal law.

Currently the definition of CAH is provided for under the Rome Statute of the ICC.⁵¹ The definition of CAH was the object of intense negotiations at the Rome Conference for the establishment of the ICC, since there were numerous delegations who wished to retain the requirement of the link with an armed conflict, although this position was eventually defeated.⁵²

⁴⁹ ICTY Statute, Art. 5.

⁵⁰ ICTR Statute, Art. 3.

⁵¹ ICC Statute, Art. 7(1).

⁵² Paola Gaeta (n 36) 268.

The Rome Statute defined CAH under Art. 7(1) as:

.....any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;*
- (b) Extermination;*
- (c) Enslavement;*
- (d) Deportation or forcible transfer of population;*
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;*
- (f) Torture;*
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;*
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;*
- (i) Enforced disappearance of persons;*
- (j) The crime of apartheid;*
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*

Hence, the notion of CAH encompasses acts such as murder, extermination, torture, rape, persecution and all other inhuman acts of a similar character committed with awareness of the attack as part of a widespread or a systematic attack directed against any civilian population.⁵³

The definition of CAH provided under the ICC Statute has two elements; the subjective or contextual element which shows the mental element and quality of the crimes and the objective element that shows the specific acts that underlie the crimes. Even though there were intense

⁵³ United Nations Human Rights, Office of the High Commissioner, 'Democratic Republic of Congo (1993-2003)' UN Mapping Report 1 available at <<http://www.ohchr.org>> last accessed on 25 February, 2019.

debates on the scope of the subjective or contextual element of CAH during the 1998 negotiations for the creation of the permanent ICC, the definition of state or organizational policy, one of the subjective elements, contained in Article 7(2)(a) of the Rome Statute does not resolved.⁵⁴

The underlying acts or objective part of CAH includes acts like murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or severe deprivation of physical liberty, torture, rape and other sexual offenses, persecution, enforced disappearance, apartheid and other inhuman acts; and the contextual or subjective element of CAH consists of attack, policy, object of the attack, character of the attack, nexus and mens rea.⁵⁵

The ICC statute has included the meaning of most of the underlying acts or the objective parts which constitute CAH.⁵⁶ Intentionally inflicting conditions of life, among other things, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population constitutes extermination.⁵⁷ The ICC Statute has defined enslavement as the practicing of any or all the powers associated with ownership right over a person and it includes the exercise of this power during the course of trafficking in persons.⁵⁸ Forceful removal of the persons concerned by expulsion or other coercive acts from the place in which they are lawfully confine, without grounds permitting such act under international law fulfills the criteria for deportation or forcible transfer of population as per the same Statute.⁵⁹ Torture is defined by the Statute as maliciously causing of harsh pain or suffering; which could be either physical or mental, up on an individual who is the custody or confinement of the accused; excepting pain or injury arising only from, inherent in or incidental to, lawful sanctions.⁶⁰ The illegal restriction of a woman made pregnant by force, with the purpose of changing the ethnic made up of any

⁵⁴ Charles Chernor Jalloh, 'What Makes a Crime against Humanity a Crime against Humanity' (2013) 28(2) American University International Law Review 381, 382.

⁵⁵ Center for International Law Research and Policy, 'International Criminal Law Guidelines: Crimes Against Humanity' (2017) Case Matrix Center, Belgium available at <<http://www.casematrixnetwork.org/cmn-knowledge-hub/guidelines-manuals-and-reports/>> last accessed on 9 June 2019.

⁵⁶ ICC Statute, Art. 7(2).

⁵⁷ ICC Statute, Art. 7(2)b.

⁵⁸ ICC Statute, Art. 7(2)c.

⁵⁹ ICC Statute, Art. 7(2)d.

⁶⁰ ICC Statute, Art. 7(2)e.

population or doing out other blatant violations of the law of nations, the interpretation of which without prejudicing national laws relating to pregnancy, defines forced pregnancy.⁶¹ Persecution is defined as the malicious and harsh denial of basic rights in violation of international law due to the identity of the group or the set.⁶² The crime of apartheid includes cruel deeds of a nature similar to those shown in paragraph 1 of Article 7 of the Statute, done in the circumstance of an institutionalized governance of systematic suppression and domination by one racial group over any other racial group or groups and done with the goal of sustaining that regime.⁶³ Enforced disappearance of persons is defined as the custody, detention or abduction of persons by, or with the permission, back up or knowledge of, a government or a political institution, go after by a decline to give cognizance to that divesting of liberty or to provide information on the destiny or whereabouts of those persons, with the goal of taking away them from the protection of the law for an extended period of time.⁶⁴

The same Statute has also lubricated the meaning of one of the contextual or subjective element found in the definition of CAH. It defined attack directed against any civilian population as a sequence of action involving the many fold or multiple commission of deeds provided in paragraph 1 against any civilian population, pursuant to or in advancement of a state or organizational policy to perpetrate such offence.⁶⁵ Beyond this the Statute failed to define the rest elements of the contextual part or the subjective element of CAH.⁶⁶

The jurisprudence of international tribunals has helped in clarifying, conceptualizing and defining the undefined contextual elements of CAH. State or organizational policy has been interpreted as not isolated, random acts of individuals but rather result of a deliberate attempt to target a civilian population with some form of policy to commit it.⁶⁷

⁶¹ ICC Statute, Art. 7(2)f.

⁶² ICC Statute, Art. 7(2)g.

⁶³ ICC Statute, Art. 7(2)h.

⁶⁴ ICC, Statute. Art. 7(2)i.

⁶⁵ ICC Statute, Art. 7(2)a.

⁶⁶ See the whole provision of Art. 7 of the ICC Statute.

⁶⁷ ICTY, Prosecutor v Tadić, TC II, Opinion and Judgment, Case No. IT-94-I-T, 7 May 1997, para 653. See also ICC, Prosecutor v Bemba, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016, para. 159.

Civilian could be understood as individuals who are not combatants or who are not members of the armed forces.⁶⁸ Or more broadly it could be conceived as a person who is not taking part in active hostilities; which is inclusive of combatants who are not in active duty.⁶⁹

The ICC Trial Chamber in Katanga interpreted that widespread represents the large scale nature of the attack and systematic reflects the organized and the non-incidental nature of the attack.⁷⁰

Regarding mens rea element it suffices that the act of the accused formed part of the widespread attack and the accused know it; it is not important to prove what motivated the accused committed the act and it is not also a must that the accused need to share the goal of the attack.⁷¹

2.3. Sources of the Law of Crimes against Humanity

Generally, CAH are one of the international crimes, which are emerged in the post 1945 era due to the rise of individual criminal responsibility under international law; and CAH fall under the category of international criminal law and it is one of the international crimes.⁷² The sources of international law in general are provided under Article 38(1) of the Statute of the International Court of Justice. As per this relevant law treaties, international custom, general principles of law, the decisions of international courts and writings of established publicists form sources of international law.⁷³ From the perspective of CAH the sources of international law is made up of national law which constitutes national legislation and national jurisprudence and international law that consists of treaties that define international crimes, treaties creating international courts and tribunals like the statutes of IMT, IMTFE, ICTY, ICTR and ICC, customary international law including those that become jus cogens, general principles of law both international general principles of law and domestic general principles of law, jurisprudence of international tribunals

⁶⁸ Customary International Humanitarian Law, Rule 5.

⁶⁹ Additional Protocol II 1977 of the Geneva Conventions, August 12, 1949 (adopted on 8 June 1977), 1125 UNTS 17512, Art. 13(2).

⁷⁰ ICC, *Prosecutor v Katanga*, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para 1123.

⁷¹ *Ibid*, 1125.

⁷² Malcolm N. Shaw, *International Law* (6th edn, Cambridge University Press, 2008) 397.

⁷³ ICJ Statute, Art. 38(1).

including the International Court of Justice (ICJ), ICTY, ICTR and ICC and teachings of highly qualified publicists.⁷⁴

2.4. Individual Legal Personality for Crimes against Humanity

Traditionally, it has been only states which were subjects of international law; only states have been endowed with international legal personality; however, since the aftermath of World War II, via the 1945 London Agreement for the Prosecution and Punishment of War Criminals, natural persons become subjects of international law and get international legal personality.⁷⁵ Therefore, since the end of World War II individuals get international legal personality with regard to prosecution and punishment for international crimes. Then after prominent international criminal tribunal statutes including the Statutes of ICTY, ICTR and ICC recognized individuals as having international legal personality capable of being prosecuted and punished for international crimes including CAH before international tribunals.⁷⁶

2.5. The General Principle of Crimes against Humanity under the ICC Statute

2.5.1. The Principle of Legality

The principle of legality aims at preventing the prosecution and punishment of an individual from acts while he reasonably believed to be lawful act at the time of their commission.⁷⁷ In the Nuremberg Trail the defendants claimed protection based on the principle of *nullum crimen sine lege*, but the Nuremberg Military Tribunal held that in such circumstances the attacker should understand that his acts are wrong and to the extent it is unjust to punish him, it would be unjust if his wrong were allowed to go unpunished and it would be absolute absurdity to suggest that the *ex post facto* rule could be applied for international laws including international custom and treaty.⁷⁸ The defendants must know that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression; it would

⁷⁴ Jo Stingen, 'Introduction to International Criminal Law' (27 January 2014) 3 available at <<http://www.uio.no>> last accessed on 7 April 2018)

⁷⁵ Elias Bantekas and Susan Nash, *International Criminal Law* (Cavendish Publishing Limited, 2nd edn, London, 2003) 4

⁷⁶ The Statute of ICTY, Arts. 1, 5, the Statute of ICTR, Arts. 1, 3, the Statute of ICC, Arts. 1, 7

⁷⁷ Jo Stingen (n 74) 5.

⁷⁸ 'Trails of War Criminals before the Nuremberg Military Tribunals' (1951) III, Control Council Law No 10, United States Government Printing Office, 974-978.

appear that the maxim of the principle of legality has no application to the present facts; in principle non requirement of written law.⁷⁹

An important concern during the time of vesting jurisdiction to ICTY was the applicability of *nullum crimen sine lege* principle, deliberation on it led to the ruling that the ICTY should only apply principles of international humanitarian law which are part of customary international law.⁸⁰

The Secretary General of UN concluded that the grave breaches of provisions of the Geneva Conventions 1949; the 1907 Hague Convention (IV) on the Laws and Customs of War; the 1948 Genocide Convention; and the 1945 Charter of the Nuremberg Tribunal formed part of customary international law.⁸¹

The principle of legality is one of the general principles of CAH recognized as *nullum crime sine lege* and *nulla poena sine lege* under Articles 22 and 23 of the Rome Statute. Hence fore, a person can only be responsible for CAH if the act in question amounts to CAH within the jurisdiction of the ICC.⁸² The meaning and definition of CAH shall be strictly construed and cannot be extended by analogy; and in case of ambiguity the benefit of doubt shall be for the accused or convicted person.⁸³ But this should not be interpreted against the characterization of any conduct as CAH under international law independent of the Rome Statute.⁸⁴ The principle of legality extends up to punishment and a person convicted for CAH may only be punished in accordance with the Statute.⁸⁵

2.5.2. The Non-retroactivity Ratione Personae Principle

The meaning of the principle entails the rules of treaties and local criminal laws implementing international criminal law which establishes a certain act as CAH shall not apply for conducts

⁷⁹ Ibid.

⁸⁰ See R. Zacklin, 'Some Major Problems in the Drafting of the ICTY Statute' (2004) 2(2) Journal of International Criminal Justice, 360.

⁸¹ Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), S/25704 para 35.

⁸² ICC Statute, Art. 22(1).

⁸³ ICC Statute, Art. 22(2).

⁸⁴ ICC Statute, Art. 22(3).

⁸⁵ ICC Statute, Art. 23.

which are committed before that law comes into force.⁸⁶ According to Article 24 of the Rome Statute no person is criminally responsible for conduct which is committed prior to the entry into force of the Statute. Even if the applicable law is changed prior to a final decision, the law more favorable for the accused shall be applied.⁸⁷

2.5.3. The Principle of Individual Criminal Responsibility

Individual persons are individually responsible and liable for CAH he/she committed within the jurisdiction of the ICC.⁸⁸ The Charters of the Nuremberg and Tokyo International Military Tribunals allows collective criminal responsibility for membership in criminal organization while the ICTY and ICTR case law jurisprudence produced the joint criminal enterprise doctrine.⁸⁹ The ICC Statute established individual criminal responsibility.

2.5.4. The Principle of Exclusion of Jurisdiction

According to this principle a person who is below the age of 18 during the commission of the crime cannot be tried for CAH before the ICC and ICC does not have jurisdiction.⁹⁰

2.5.5. The Principle of Irrelevance of Official Capacity

Article 27 of the Rome Statute provides the principle of equality whereby all persons are equal before the Statute and the law applies equally to all persons. The same provision specifically provides that official capacity as Head of State or Government, membership in a government or parliament, being an elected representative or a government official in no case exempts a person from criminal responsibility under the Statute; nor it be taken as a ground for mitigation of sentence; nor immunities under international or national law shall bar ICC from exercising jurisdiction over such a person.⁹¹

⁸⁶ Sergey Sayapin, 'the General Principles of International Criminal Law in the Criminal Code of the Republic of Kazakhstan' [2018] Asian Journal of International Law 3.

⁸⁷ ICC Statute, Art. 24(2).

⁸⁸ ICC Statute, Arts. 25(1), 25(2).

⁸⁹ Sergey Sayapin (n 86) 3. The joint criminal enterprise doctrine allows the prosecution of each members of the group and considers each member as individually responsible for the actions of the group committed within the common plan and purpose.

⁹⁰ ICC Statute, Art. 26.

⁹¹ ICC Statute, Art. 27.

2.5.6. The Principle of Responsibility of Commanders and Other Superiors

The ICC Statute makes military commanders or persons effectively acting as a military commander and superiors criminally responsible for CAH which fall within the jurisdiction of the Court committed by forces under the effective command and control or effective authority and control of the commander and superior respectively as a result of failure to exercise control over such force or subordinates.⁹² The Statute explicitly makes responsible commanders and superiors where the military commander or the superior new or ought to have known the force or the subordinate were committing or about to commit such crimes and the military commander or the superior failed to take all necessary and reasonable measures to prevent or stop the commission of the crime, respectively.⁹³

2.5.7. The Principle of Non-applicability of Statute of Limitations

CAH reject statute of limitation and the jurisdiction of ICC is not subject to any statute of limitations.⁹⁴

2.5.8. The Mental Element Principle

An individual person is criminally responsible and liable for prosecution and punishment for CAH within the jurisdiction of ICC if and only if he has committed the material elements of the crime with intent and knowledge.⁹⁵ Intent refers in relation to conduct, the person means to engage in the conduct; in relation to a result, the person means to cause that consequence or is aware that it will occur, with awareness the circumstance exists or a consequence will occur.⁹⁶

2.5.9. The Principle of Excluding Criminal Responsibility

The Statute of ICC has addressed the issue of criminal irresponsibility and legitimate defenses.⁹⁷ Persons who suffer from a mental disease which takes away his capability to appreciate the nature of his conduct or his capacity to control his or her conduct; persons in a state of

⁹² ICC Statute, Art. 28.

⁹³ ICC Statute, Art. 28.

⁹⁴ ICC Statute, Art. 29.

⁹⁵ ICC Statute, Art. 30(1).

⁹⁶ ICC Statute, Arts. 30(2), 30(3).

⁹⁷ ICC Statute, Art. 31.

intoxication whose capacity is taken away; a person that acts in defense of himself or herself or another person; and persons who committed the alleged criminal act because of duress resulting from a threat of imminent death or serious bodily injury against that person or another person are not criminally responsible.⁹⁸ However, mistake of fact or mistake of law cannot be a ground of excluding criminal responsibility unless the mistake negates the mental element required for the crime.⁹⁹ Similarly superior order and prescription of law shall not relieve a person of criminal responsibility.¹⁰⁰

2.6. Jurisdiction for Crimes against Humanity under International Law

Jurisdiction in general represents the power of a state to regulate or exercise power upon individual, legal person, and property and it reflects the principles of state sovereignty, equality of states and non-interference in domestic affairs.¹⁰¹ As far as international criminal law is concerned it entails the power of international tribunals to try and determine international criminal cases against individuals.

There are internationally accepted jurisdictional principles for adjudicating criminal matters.¹⁰² The first principle of jurisdiction is the territorial principle which seizes jurisdiction for a state if the crime is committed within the territorial jurisdiction of that state irrespective of the nationality of the accused and/or the victim.¹⁰³ The second source of jurisdiction for a state court is the nationality principle which gives power to a state court if the national of that state commits the crime without regard to the place or state where the crime is committed.¹⁰⁴ The other principle for jurisdiction is the passive personality principle which enables a state to claim jurisdiction to try a person for crimes committed abroad which have affected or will affect the citizens of the particular state.¹⁰⁵ Whereas the protective principle enables a state to exercise

⁹⁸ ICC Statute, Art. 31(1).

⁹⁹ ICC Statute, Art. 32.

¹⁰⁰ ICC Statute, Art. 33.

¹⁰¹ Malcolm N. Show, *International Law* (6th edn, Cambridge University Press, 2008) 645.

¹⁰² Ibid 652.

¹⁰³ Ibid 653 – 659.

¹⁰⁴ Ibid 663.

¹⁰⁵ Ibid 664.

jurisdiction over alien who has committed an offense abroad, that specifically prejudice the security of the state.¹⁰⁶

The other famous principle of jurisdiction is the universality principle (universal jurisdiction) which gives every state jurisdiction to try particular offenses for the offense is regarded as prejudicial to the international community as a whole.¹⁰⁷ As per the Princeton Principles, universal jurisdiction is criminal jurisdiction based solely on blatantly inhuman nature of the crime, without regard to the place it is committed, the nationality of the alleged offender, and the nationality of the victim or any other connecting factor to the state exercising jurisdiction.¹⁰⁸ Simply put, it is the jurisdiction of a state to prosecute and punish foreigners who commit crimes abroad against foreigners.¹⁰⁹ The rationale behind the universal principle is the notion that certain offenses are very harmful to international interests so that every state are entitled to prosecute and punish the offender, regardless of the nationality of the offender and the place of the commission of the offense.¹¹⁰ And universal jurisdiction would allow for any state the trail of CAH committed by anybody anywhere in the world.¹¹¹ It is, therefore, a criminal jurisdiction based on the heinous nature of the crime.

Universal jurisdiction for the prosecution and punishment of international crimes has got prominence and momentum after World War II due to the establishment of the International Military Tribunal and the adoption and enforcement of conventions including the Geneva Conventions of 1949.¹¹²

¹⁰⁶ Ibid 666 – 667.

¹⁰⁷ Ibid 668.

¹⁰⁸ The Princeton Principles on Universal Jurisdiction, Princeton University, (2001) New Jersey, Principle 1(1) (here after the Princeton Principle).

¹⁰⁹ Luc Reydams, *Universal Jurisdiction, International and Municipal Legal Perspective* (Oxford University Press 2003) 1.

¹¹⁰ Mary Robinson, 'Foreword', *the Princeton Principles on Universal Jurisdiction* (Princeton University Press 2001) Princeton 16.

¹¹¹ Xavier Philippe, 'the Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?' (2006) 88 *International Review of the Red Cross* 377.

¹¹² Ibid 378.

The ICC Statute recognized the universality jurisdiction for prosecution of CAH on a complementarily basis.¹¹³ ICC seizes jurisdiction on a complementarily basis because it could not have jurisdiction unless the state at issue is unwilling or unable to carry out the proper investigation or prosecution.¹¹⁴

The universal jurisdiction is recognized in the preamble of ICC Statute as 'aut dedere out judicare' principle, 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'.¹¹⁵

According to Article 13 of the Statute of the ICC, there are three ways by which cases come to the attention of the ICC. One when a state party refers a situation to the Prosecutor when one or more crimes within the jurisdiction of the Court seem to have been committed.¹¹⁶ Two, when the Security Council, acting under Chapter 7 of the Charter of the United Nations, refers the situation to the Prosecutor.¹¹⁷ Three, when the Prosecutor, himself, initiated an investigation in respect of the crimes stipulated in the Statute.¹¹⁸

With regard to *ratione personae*, the ICC Statute is clear that it applies only with respect to natural persons, individuals.¹¹⁹ And the Court exercises its jurisdiction, on the active personality principle, if the perpetrator of the alleged crime is a national of a state party or a state which has

¹¹³ Preamble of the ICC Statute, para. 4, 6. Complementarity principle of jurisdiction is a way of seizing jurisdiction by courts as a complementary (back up) to the court which has legally established prior jurisdiction over the matter when the latter fails to exercise its power. With regard to the ICC, it entails the power of ICC to exercise jurisdiction when national legal systems fail to do so. See Britta Lisa Krings, 'The Principle of 'Complementarity' and Universal Jurisdiction in International Criminal Law: Antagonists or Perfect Match?' (2012) 3, *Goettingen Journal of International Law*, 737-763.

¹¹⁴ ICC Statute, Art. 17(a).

¹¹⁵ ICC Statute, para 4.

¹¹⁶ ICC Statute, Art. 13(a).

¹¹⁷ ICC Statute, Art. 13(b).

¹¹⁸ ICC Statute, Art. 13(c).

¹¹⁹ ICC Statute, Art. 25(1) See also Markus Wagner, 'The ICC and its Jurisdiction- Myths, Misperceptions and Realities' (2003) 7 *Max Planck Yearbook of United Nations Law*, 409, 481.

accepted its jurisdiction.¹²⁰ But, if the ICC seizes jurisdiction by referral of the Security Council, there is no such nationality requirement and it has unlimited personal jurisdiction.¹²¹

As far as *ratione territory* of the ICC is considered, literally ICC has jurisdiction if the alleged crime was committed on the territory of a state party or if the alleged crime is committed on board on the water or air, if the vessel or aircraft fly the flag of a state party or is registered in a state party.¹²² Some people argued that it seems ICC has no jurisdiction over the individual if the individual committed the crime within the territory of a non- state party or if he is a national of a non-state party unless ICC seized the case by the referral of the Security Council.¹²³

The ICC Statute takes a clear position regarding jurisdiction *ratione temporis* and specifically declares that it has jurisdiction only to crimes committed after entry in to force of the Statute.¹²⁴ Therefore, if a country becomes party to the Statute after it entered in to force, the Court will exercise jurisdiction with regard to that country only in respect of the crimes committed after the time of entry in to force of the Statute for that state, unless that state made declaration under the same Statute.¹²⁵

The Lotus principle, a general principle of law, does not prohibit states to collectively establish an international jurisdiction applicable to non-party state nationals too as far as there does not exist prohibitive conventional or customary rule of international law for the emerging and growing international law requires a permissive legal environment, that appreciates states to experiment new forms of collective or universal jurisdiction.¹²⁶ CAH are odious crimes under international law.¹²⁷

¹²⁰ The ICC Statute, Art. 12(2)(b). See also Markus Wagner, 'The ICC and its Jurisdiction- Myths, Misperceptions and Realities' (2003) 7 Max Planck Yearbook of United Nations Law, 409, 481.

¹²¹ Markus Wagner, 'The ICC and its Jurisdiction- Myths, Misperceptions and Realities' (2003) 7 Max Planck Yearbook of United Nations Law, 409, 483.

¹²² The ICC Statute, Art. 12(2)(a).

¹²³ Markus Wagner (n 121) 486.

¹²⁴ The ICC Statute, Art. 11(1).

¹²⁵ ICC Statute, Arts. 11(2), 12(3).

¹²⁶ Michael P. Scharf, 'The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position' (2001) Case Western Reserve University School of Law Scholarly Commons Faculty Publications, 73, 74.

¹²⁷ The Princeton Principles, Principle 2(1).

During the Rome Diplomatic Conference for the creation of the ICC no one attending the conference has disputed the existence of universal jurisdiction under customary international law for CAH.¹²⁸ Further the Chairperson of the Rome Diplomatic Conference has underscored that 'the ICC Statute was not to create new substantive law, but only to include crimes already prohibited under international law'.¹²⁹ The crimes under the jurisdiction of ICC including CAH were considered by most nations and writers as jus cogens norms, which gives rise to erga omnes obligations.¹³⁰ CAH are included in the list of crimes subject to universal jurisdiction.¹³¹ Therefore, it is now broadly accepted that CAH are subject to universal jurisdiction.¹³²

¹²⁸ Michael P. Scharf (n 126) 77.

¹²⁹ Ibid 79.

¹³⁰ Ibid 80.

¹³¹ Ibid 83.

¹³² Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (1992) 510-27.

CHAPTER THREE

CRIMES AGAINST HUMANITY IN THE LAWS OF ETHIOPIA

3.1. The Constitution of FDRE and Crimes against Humanity

The justice system of Ethiopia is addressed under Chapter nine of the FDRE Constitution, which established a judiciary with a federal set up.¹³³ There are Federal Courts and Regional Courts that exercise judicial power with respect to matters assigned to them by this Constitution and other laws.¹³⁴ The FDRE Constitution does not create a strict dual court structure due to the cassation power clause of the Federal Supreme Court over regional matters and the delegation power of the Regional Supreme and High Courts on federal matters.¹³⁵ The Constitution provides fundamental human rights, the nature of which is universal and indivisible, which get constitutional protection and guarantee. Fundamental human rights include, among others, the right to life, right to liberty, right to security, prohibition against inhuman treatment, right to equality and non-discrimination; the systematic or widespread, organized and policy-based violation of which in the form of attack with knowledge may amount to CAH, if the violation can be explained in the form of acts like rape, murder, torture, extermination, enslavement, deportation, imprisonment and persecution.¹³⁶

Article 28 of the FRDE Constitution is captioned with CAH. The provision is ordinarily meant to provide prohibitive constitutional ruling on statutes of limitation and amnesty or pardon for the crimes stipulated in the provision.¹³⁷ However, this provision has incidentally defined CAH as crimes so defined by international agreements ratified by Ethiopia or by other laws of Ethiopia, such as genocide, summary execution, forcible disappearance or torture.¹³⁸ According to this Article, crimes like genocide, torture, summary execution and forcible disappearances are CAH and this conception of CAH as broad crimes that includes genocide under its ambit is in

¹³³ FDRE Constitution, Art. 78.

¹³⁴ FDRE Constitution, Art. 79 and the Federal Courts Establishment Proclamation No. 25/96 and the amendments there to.

¹³⁵ FDRE Constitution, Art. 80(3).

¹³⁶ FDRE Constitution, Arts. 13- 27, ICC Statute, Art. 7(1).

¹³⁷ FDRE Constitution, Art. 28(1).

¹³⁸ FDRE Constitution, Art. 28(1).

discordance to the internationally established conception of CAH.¹³⁹ However, summary execution, forcible disappearance and torture, if committed within the scale and intensity provided under international law for CAH, can constitute CAH and they can be considered as the underlying acts for CAH.¹⁴⁰ The drafters and promulgators of the Constitution of FDRE understood CAH as a broad concept that includes genocide under it because the minutes or preparatory documents of the FDRE Constitution make it clear that the FDRE Constitution does not exhaustively listed CAH, it merely exemplifies and take account of crimes defined under international law to which Ethiopia is a party¹⁴¹ and it can be said the drafters and promulgators were not familiar with the concept of CAH as developed under international law. Therefore, though it has vagueness, it can be argued that CAH have constitutional basis in Ethiopia and they are prohibited as crimes, even if its content left undefined.

The Constitution of FDRE provides for international agreements in different provisions and treaties form part of the domestic law of the country; however, it does not talk about international law in general or customary international law in particular.¹⁴² International laws in general and customary international laws in particular, therefore, are not recognized by the Constitution.

3.2. The Criminal Law of Ethiopia and Crimes against Humanity

The Penal Code of the Empire of Ethiopia, under Article 281 provides for a topic which says 'genocide; crimes against humanity;' however, the detail of the provision is mainly similar to what is provided under Article 269 of the Criminal Code of FDRE and under the Convention on the Prevention and Punishment of the Crime of Genocide as genocide.¹⁴³ Therefore, what is provided under Article 281 of the Penal Code of the Empire of Ethiopia is the crime of genocide,

¹³⁹ ICC Statute, Arts. 6, 7.

¹⁴⁰ Center for International Law Research and Policy, 'International Criminal Law Guidelines: Crimes against Humanity' (February 2017) Case Martix Center, Belgium, available at <<http://www.casematrixnetwork.org/cmnn-knowledge-hub/guidelines-manuals-and-reports/>> accessed 9 June 2019.

¹⁴¹ The Minutes of Constitutional Congressional of Ethiopia, (2005) 2, 107.

¹⁴² The FDRE Constitution, Arts. 9(4), 28(1), 51(8), 55(12).

¹⁴³ The Convention on the Prevention and Punishment of the Crime of Genocide, 1948, Arts. 1, 2, and Criminal Code of FDRE, Art. 269.

and the title of the provision may be perceived as an expression of genocide as one type of CAH or as a lack of clarity in the meaning of CAH. The Penal Code of the Empire of Ethiopia, 1957, is repealed since 9 May 2005.¹⁴⁴

The general principles provided for under the Criminal Code of the Federal Democratic Republic of Ethiopia apply to all regulations and special laws that provide for crimes unless otherwise expressly provided in the special law or regulation.¹⁴⁵

Among the criminal laws of Ethiopia, it is the Criminal Code of 2004, under Book III, Title II, that provides for the crimes in violation of international law.¹⁴⁶ However, the provisions contained in this title do not provide for CAH; there is no provision that defines and penalizes CAH; and out of the international crimes, the provisions of the Criminal code define, criminalize and put punishment only for genocide and war crimes.¹⁴⁷ The preparatory document of the Criminal Code regarding genocide does not help in understanding, criminalizing and defining CAH because it merely provides genocide as only one kind of CAH and it elucidates the need to delete the phrase 'crimes against humanity' which was alternatively provided for genocide under Art. 281 of the Penal Code of the Empire of Ethiopia.¹⁴⁸ Nowhere else in this Criminal Code CAH is defined.¹⁴⁹ Rather the Criminal Code recognized acts like rape, murder, unlawful imprisonment, which are underlying acts for CAH, as ordinary crimes, not as CAH.¹⁵⁰ Nor there exists other criminal law special regulation or proclamation that defines and punishes CAH in Ethiopia.¹⁵¹ As a way out from this lacuna, Marshet proposed the direct application of the ordinary crimes provided in the Criminal Code and alternatively directly availing to international

¹⁴⁴ Criminal Code, No. 2(a). 'No.' refers to the number provided under Proclamation No. 414/2004 before the Articles of the Criminal Code start, it is one of the provisions of proclamation No. 414/2004 that come before the main Criminal Code.

¹⁴⁵ Criminal Code, para two of Art. 3.

¹⁴⁶ Criminal Code, Arts. 269-283.

¹⁴⁷ Criminal Code, Arts. 269-283.

¹⁴⁸ The Preparatory document of the Criminal Code, 143,144.

¹⁴⁹ See the Criminal Code.

¹⁵⁰ See the Criminal Code.

¹⁵¹ The FDRE Attorney General Office has consolidated all the laws and regulations of Ethiopia since the 1942 and as per the best efforts of this author there is no special law that defines and criminalizes CAH.

criminal law that criminalizes CAH by domestic courts but he confesses that the second alternative (approach) is not widely utilized in Ethiopia.¹⁵²

To enhance and promote contemporarily and clarity and to fill basic gaps in the criminal justice system, which covers criminal investigation and prosecution, rapid and fair trial process, judicial role independence and decision-making process, among others, the FDRE Government has come up with a Criminal Justice Policy in 2011.¹⁵³

The Policy sets the road map of criminal justice process from crimes prevention to enforcement of punishments and it establishes the roles and functions of institutions and individuals involved in it.¹⁵⁴ This Policy has set a strategy that enables the criminal justice system to function in compliance with international laws, conventions, and international cooperation objectives which are made part of Ethiopian laws pursuant to the Constitution.¹⁵⁵ The Policy has also covered issues of international cooperation and it underscores the necessity of international cooperation in criminal charges laid before international courts, as far as it is in concordance with the international laws and principles accepted by the country or by agreements or by the laws of Ethiopia.¹⁵⁶

3.3. Criminal Jurisdiction in Ethiopia

The rules governing criminal jurisdiction in the justice system of Ethiopia are provided in the 2004 Criminal Code of Ethiopia.¹⁵⁷ Classification of jurisdiction of Ethiopian courts is based on the place of commission of the crime, the nationality of the accused or the nationality of the victim and the kind of the offence.¹⁵⁸

¹⁵² Marshet Tadesse, *Prosecution of Politicide in Ethiopia, The Red Terror Trials* vol 18 (Intl Criminal Justice Series, Asser Press 2018) 106.

¹⁵³ The Federal Democratic Republic of Ethiopia Criminal Justice Policy (2011) 1, 3.

¹⁵⁴ See The Federal Democratic Republic of Ethiopia Criminal Justice Policy, (2011).

¹⁵⁵ Ibid 8.

¹⁵⁶ Ibid 38, 39.

¹⁵⁷ Criminal Code, Arts. 11-22.

¹⁵⁸ Criminal Code, Arts. 11-22.

The Criminal Code of the FDRE adopted a principal subsidiary jurisdictional dichotomy.¹⁵⁹ Under principal jurisdiction, the criminal law of Ethiopia adopts the territorial principle of jurisdiction and accordingly the criminal law of Ethiopia applies to every person, except those who enjoy immunity under international law,¹⁶⁰ who has committed any of the crimes specified in the Code on the territory of Ethiopia.¹⁶¹

The protective principle of jurisdiction as one type of principal jurisdiction is also recognized since the Criminal Code applies to any person who committed one of the crimes against Ethiopia, its safety or integrity, its institutions, and its essential interests or currency.¹⁶² The other scenario whereby Ethiopian Courts exercise principal jurisdiction relates to crimes committed in a foreign country by member of the Ethiopian Defense Forces. Article 15 of the Criminal Code of FDRE provides that when member of Ethiopian Defense Forces commits crimes in military capacity against the ordinary laws of a foreign country and take refuge to Ethiopia, he shall not be extradited and he will be tried by Ethiopian courts under Ethiopian law.¹⁶³ However, as stipulated in Article 15(2) of the FDRE Criminal Code in cases whereby the members of the Defense Force committed crimes against international law, he will remain subject to national law and be tried under the provision of this Code.

The other type of jurisdictional basis of Ethiopian courts is subsidiary jurisdiction.¹⁶⁴ The nationality and passive personality principles of jurisdiction are recognized as subsidiary sources of jurisdiction by the FDRE Criminal Code.¹⁶⁵ The Criminal Code of FDRE applies to any Ethiopian national who committed a crime abroad or against any person who committed a crime abroad against Ethiopian national provided that the act is criminal under both Ethiopian law and

¹⁵⁹ Criminal Code, Arts. 11-22.

¹⁶⁰ See the Vienna Convention on Diplomatic Relations 1961 and Vienna Convention on Consular Relations 1963.

¹⁶¹ Criminal Code, para one of Art. 11(1), Art. 11(2).

¹⁶² Criminal Code, Art. 13.

¹⁶³ Criminal Code, para two of Art. 15(1), Art. 21(2)

¹⁶⁴ Criminal Code, Arts. 13-20.

¹⁶⁵ Criminal Code, Art. 18(1).

the law of the state where it is committed and it is of sufficient gravity under the law of Ethiopia to justify extradition.¹⁶⁶

Universal jurisdiction as a sort of subsidiary jurisdiction is recognized under Article 17 of the FDRE Criminal Code because a crime against international law or an international crime specified in Ethiopian law or international treaty to which Ethiopia is a party and those crimes against public health or moral are subject to trial in Ethiopia wherever the crimes are committed and whosoever commits it. This provision gives jurisdiction for Ethiopian courts to adjudicate crimes against international law. Therefore, Ethiopian courts have jurisdiction to try cases of CAH if one happens before it irrespective of the person who commits it and the place where it is committed.

Although the Criminal Procedure Code of Ethiopia does have some provisions addressing territorial jurisdiction, it does not provide rule regarding universal jurisdiction.¹⁶⁷ There is no provision in the Criminal Procedure Code of Ethiopia providing for universal jurisdiction.

Since Ethiopia is a federation having regional states and a Federal Government,¹⁶⁸ it is decisive to determine the criminal jurisdiction of the Federal Government and regional states. The provisions of the FDRE Constitution on the powers and functions of the Federal Government and regional states do not provide for or regulate criminal jurisdiction matters.¹⁶⁹ However, Article 55 of the Constitution, which provides for powers and functions of the federal legislature, under sub-Article 5 provides that it has the power to enact penal code and states legislature have the residual power to enact penal law in areas which are not specifically covered by the federal penal legislature. Article 80(1) of the Constitution says the Federal Supreme Court shall have the highest and final judicial power on federal matters, and since the Criminal Code of FDRE, which contains penal provisions related to international law, is enacted by the House of Peoples Representatives of Ethiopia, it can be said that matters of penal nature associated with

¹⁶⁶ Criminal Code, Art. 18(1).

¹⁶⁷ The Criminal Procedure Code of Ethiopia, Proclamation No 185/1961. Running through the provisions of the Criminal Procedure Code does not help as far as universal jurisdiction is concerned.

¹⁶⁸ FDRE Constitution, Art. 50(1).

¹⁶⁹ FDRE Constitution, Arts. 51, 52.

international law are federal matters and only Federal Courts of Ethiopia have jurisdiction over it.¹⁷⁰

The law that provides for the establishment of the Federal Courts of the FDRE specifically provides cases relating to international treaties and/or offences relating to the law of nations or international law fall within the jurisdiction of the Federal Courts.¹⁷¹ Hence fore, if CAH, which are offences relating to or against the law of nations, come to the attention of Ethiopian Courts, they fall within the jurisdiction of Federal Courts of Ethiopia and only Federal Courts of Ethiopia can adjudicate it.

3.4. Proposing Working Definition of Crimes against Humanity for Ethiopia

This thesis proposes a working definition of CAH for Ethiopian because domestic criminal law does not define it. Under international law, CAH have been given different definitions by different statutes and constitutive acts and it faced great uncertainty and fluctuation.¹⁷² Among these definitions, the definition given to it by the ICC Statute has got the participation and blessing of many nations.¹⁷³ Many states incorporate the definition of CAH provided for under the ICC Statute in to their national laws.¹⁷⁴ It is also claimed that the definition of CAH provided for under Article 7 of the ICC Statute is regarded as having the status of customary international law.¹⁷⁵ Therefore, the thesis uses the definition of CAH provided for under the ICC Statute as the working definition of CAH. The thesis understands CAH as is provided for in the Statute.

¹⁷⁰ FDRE Constitution, Arts. 55(1), 80(1), the Criminal Code, Arts. 269-283.

¹⁷¹ Federal Courts Establishment Proclamation No 25/1996, Arts. 3(1), 4(3).

¹⁷² See Charter of the International Military Tribunal 1945, Art. 6(c), Statute of ICTY 1993, Art. 5, Statute of ICTR 1994, Art. 3, and ICC Statute, Art. 7(1).

¹⁷³ Darryl Robinson, ' The Draft Convention on Crimes Against Humanity: What to do with the Definition?' in Morten Bergsmo and SONG Tianying, eds, *On the Proposed Crimes Against Humanity Convention* (FICHL 2014) 103.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

3.5. Direct Application of International Law by Domestic Courts of Ethiopia to Prosecute and Punish Crimes against Humanity

The domestic law of Ethiopia does not define CAH. There is no specialized convention covering specifically CAH.¹⁷⁶ However, the ICTY Statute, the ICTR Statute, the mixed tribunals established by UN in Cambodia, Sierra Leone, East Timor, Kosovo and Bosnia Herzegovina contain CAH provisions within their statutes.¹⁷⁷

The ICC Statute has provisions on CAH.¹⁷⁸ But, Ethiopia is neither a signatory nor a party to the ICC Statute and the Statute does not form part of the domestic law of Ethiopia.¹⁷⁹ Therefore, Ethiopian courts cannot have jurisdiction and mandate to try cases of CAH by the operation of international treaty or convention. Ethiopia has to incorporate clear provision that defines and punishes CAH in to its domestic law, therefore.

Until such time Ethiopian courts are expected to apply international customary law to fill the gap. Thence, direct application of international law by domestic courts of Ethiopia may be considered as an alternative to prosecute CAH. Under this scenario the source of criminal sanction and jurisdiction for Ethiopian domestic courts to try cases of CAH is customary international law, the other binding international law.¹⁸⁰ Article 38(1) of the Statute of ICJ provides international custom, as evidence of a general practice accepted as law, as source of international law. And Ethiopia is a party to the Statute of ICJ ipso facto because it is a signatory

¹⁷⁶ M. Cherif Bassiouni, 'Crimes Against Humanity: the Case for a Specialized Convention' (2010) 9 Washington University Global Studies Law Review, 582, 583.

¹⁷⁷ Ibid 580, 582.

¹⁷⁸ ICC Statute, Arts. 5(b), 7.

¹⁷⁹ States Parties to the Rome Statute of the International Criminal Court WIKIPEDIA available at <http://en.m.wikipedia.org/wiki/States>>-Parties to the Rome Statute, last accessed on 17 May, 2020.

¹⁸⁰ Laurence R. Helfer, 'Customary International Law: An Instrument of Choice Perspective' (2016) 37(4) Michigan Journal of International Law 563, 564.

member of the United Nations Charter.¹⁸¹ Customary international law, once established as a norm, binds all states, so long as they do not persistently object its formation.¹⁸²

Although the rules derived from customary international law are imprecise and vague¹⁸³ and due to that it seems inconsistent with the principle of legality,¹⁸⁴ CAH are considered as jus cogens norms by most states.¹⁸⁵ Thence, CAH are prohibited under international customary law.¹⁸⁶ Furthermore, even though there are otherwise arguments too,¹⁸⁷ broadly speaking CAH are crimes of universal jurisdiction.¹⁸⁸ On the top it, the Nuremberg principles recognized the fact that domestic law does not impose a penalty for an act which constitutes CAH under international law does not relieve the person who committed the crime from responsibility under international law.¹⁸⁹

There is no evidence that shows Ethiopia was persistently objecting the prohibition or criminalization of CAH and its inclusion in the list of crimes with universal jurisdiction during its formation and inclusion.¹⁹⁰ To the reverse, the Transitional Government of Ethiopia showed

¹⁸¹ The Charter of United Nations (1945) Art. 93(1). The Charter shows the list of founding signatory nations and Ethiopia is on board.

¹⁸² Michael P. Scharf, 'Accelerated Formation of Customary International Law' (2014) Case Western University School of Law Scholarly Commons 309.

¹⁸³ Yudan Tan, 'the Identification of Customary Rules in International Criminal Law' (2018) 34(2) Utrecht Journal of International and European Law 92-110 available at <<http://doi.org/10.5334/ujiel.434>> last visited on 17 May 2020.

¹⁸⁴ Ibid 92-110.

¹⁸⁵ Michael P. Scharf, 'the ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position' (2001) Case Western Reserve University School of Law Scholarly Commons Faculty Publications, 80.

¹⁸⁶ Ibid 79.

¹⁸⁷ Ibid 116.

¹⁸⁸ See Michael P. Scharf, 'the ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position' (2001) 64 Case Western Reserve University School of Law Scholarly Commons Faculty Publications 68-117. Ambassador Scheffer and Morris argue that a treaty cannot provide jurisdiction with respect to nationals of non-party states so that there is no universal jurisdiction with regard to international crimes including CAH.

¹⁸⁹ Report of the International Law Commission U.N.G.A.O.R.V. SUPP. (A/1316) 11-14 (1950) 'Principle II in Human Rights Watch/ Africa, Ethiopia: Reckoning Under the Law' (December 1994) 6 (4).

¹⁹⁰ In international law custom binds states and states are under obligation to obey the custom established unless otherwise they have shown that they were persistently objecting the formation of the custom; in which case states

its commitment to bring to justice those responsible for serious violations of international law, to which CAH is one, in a letter addressed to the UN Assistant Secretary General for human rights in 1994.¹⁹¹ Ethiopia is, therefore, under obligation to prohibit, prosecute and punish CAH because the prohibition of CAH and the universal jurisdiction of Ethiopian Courts are established by international custom. Moreover, Ethiopian Courts have undisputed jurisdiction for CAH committed in Ethiopia by the operation of territorial jurisdiction. Consequently, direct application of international law by domestic courts of Ethiopia to prosecute and punish CAH, committed in Ethiopia or elsewhere, is a plausible alternative.

But, the FDRE Constitution, unlike treaties ratified by Ethiopia, does not make international customary laws integral part of the law of the land.¹⁹² Nor the criminal law of Ethiopia defines CAH.¹⁹³ All laws of the Federal Government of Ethiopia should be published in the Negarit Gazeta; and individuals are duty bound to obey it or to take judicial notice only when they are published in the Negarit Gazeta.¹⁹⁴ Unlike treaties, customary international laws are not being ratified by the House of Peoples Representatives of Ethiopia; nor do they get published in the Federal Negarit Gazeta.¹⁹⁵

Principle of legality prohibits us from criminalizing acts which are not precise and well defined by criminal law.¹⁹⁶ The domestic court should also satisfy itself that CAH, as particular offences established by international custom, are well defined by international customary law, and its criminal nature and its approximate gravity to have been sufficiently foreseeable.¹⁹⁷

can claim that they are not bound by the custom and there is no obligation upon them regarding that established custom.

¹⁹¹ Girmachew Alemu, 'Apology and trials: The case of the Red Terror Trials in Ethiopia' (2006) 6(1) African Human Rights Law Journal, 75.

¹⁹² FDRE Constitution, Art. 9(4).

¹⁹³ The Criminal Code has no provision that criminalize CAH. Other special proclamations or regulations do not criminalize it.

¹⁹⁴ Federal Negarit Gazeta Establishment Proclamation No 3/1995, Arts. 2(2), (3).

¹⁹⁵ FDRE Constitution, Arts, 55(12), 57.

¹⁹⁶ Criminal Code, Art. 2.

¹⁹⁷ ICTY *Prosecutor v Vasiljevic*, Judgment (29 November 2002), Case No IT-98-3E2-T, para 201 in Elias Bantekas and Susan Nash, *International Criminal Law* (2nd edn Cavendish Publishing Limited 2003), 6.

So, even if it is said CAH can be prosecuted by domestic courts by directly applying international law for they are prohibited under customary international law and there is universal jurisdiction to prosecute them domestically, its precise meaning and punishment are not set by the criminal law of Ethiopia. Nor there is precedence of prosecution and punishment of CAH by domestic courts via applying international law directly.¹⁹⁸

Therefore, pragmatically speaking, even if there is honest determination to prosecute and punish CAH in Ethiopia by directly applying customary international law that prohibits and punishes CAH, the contemporary criminal justice of Ethiopia cannot enable us to effectively prosecute and punish it, which in effect challenges the effort to end impunity or aggravates impunity.

¹⁹⁸ Marshet Tadesse, *Prosecution of Politicide in Ethiopia: The Red Terror Trials* vol 18 (International Criminal Justice Series Asser Press 2018) 106.

CHAPTER FOUR

EXEMPLIFYING THE GAP: REVIEW OF DOMESTIC CASES

4.1. The Red Terror Trials

The Red Terror trials represent the collective name for the investigation and prosecution of Derg military and security officials by the Special Prosecutor's Office (SPO)¹⁹⁹ and the trials before Ethiopian courts.²⁰⁰ The SPO categorized its accused in to three groups based on the level of participation in the alleged commission of the crimes: top level perpetrators, middle level perpetrators, and low level perpetrators.²⁰¹ Colonel Mengistu et al, Debela Dinsa et al, Legese Asfaw et al, Tesfayie Weldesilassie et al and Melaku Tefera et al fall in the top level perpetrators category for they were top security, intelligence and military leaders and commanders.²⁰² The other two groups represent the middle level civil and military commanders who supervised the orders issued by the first group and material offenders who directly carried out the alleged crimes respectively.

The SPO charged a total of 5,198 individuals of which 2,952 in absentia mainly for genocide, war crimes and alternatively for aggravated homicide and willful grave bodily injury.²⁰³

Special Prosecutor vs. Colonel Mengistu Hailemariam et al. is the leading trial of the Red Terror Trials against Colonel Mengistu and his deputies²⁰⁴ and a brief touch on it nurtures this work. The defendants were charged with public provocation and preparation in violation of Arts. 32(1)(a) and 286(a) of the 1957 Ethiopian Penal Code, genocide in violation of Art. 281 of the Penal Code (alternatively charged for aggravated homicide and grave willful injury in violation of Arts. 522(1)(a) and 538 of the Penal code), unlawful detention in violation of Art. 416 of the

¹⁹⁹ Proclamation No 22/1992 of the Transitional Government of Ethiopia established the Office of Special Prosecutor to establish the truth about the abuses during Mengistu regime and to bring perpetrators to justice.

²⁰⁰ Marshet Tadesse, *Prosecution of Politicide in Ethiopia: The Red Terror Trials* vol 18 (Intl Criminal Justice Series Asser Press 2018) 172.

²⁰¹ Ibid 173.

²⁰² Ibid 173.

²⁰³ Trail Observation and Information Project, 'Ethiopia's Red Terror Trials: Africa's First War Tribunal, Consolidated Summary and Reports from 1996-1999' Compiled by NIHR's Project 1, 8.

²⁰⁴ Girmachew Alemu, 'The Anatomy of Special Prosecutor v. Colonel Mengistu Hailemariam et al (1994-2000)' (2009) 4 the International Journal of Ethiopian Studies, 2.

Penal Code and abuse of power in violation of Art. 414 of the Penal Code.²⁰⁵ The Federal High Court after hearing the arguments and evidences of the parties ruled by majority that most of the accused are guilty of genocide, aggravated homicide, public incitement to commit genocide, abuse of power, and unlawful arrest and detention.²⁰⁶

The SPO did not charge Colonel Mengistu et al for CAH; nor did it include CAH counts in the other Red Terror charges.²⁰⁷ But, the facts that established the charges and the facts ascertained during the trial and conviction of the accused could reasonably fulfill the elements of CAH. There was attack, a course of conduct, a campaign or operation against the victims by the accused as briefed in the Bemba Case.²⁰⁸ The attacks by the accused were based on organizational policy, the state policy to suppress those who were political opponents by organizing hit squads and militia for torturing and killing the latter.²⁰⁹ Plus the attack was not an incidence rather it is systematic and/or widespread for it was organized and conducted for years as established by the ICC Trial Chamber in Katanga.²¹⁰ The Federal High Court established that the attack was against civilians, individuals who were not combatants or were not members of the armed forces.²¹¹ It is proved that the accused committed the attack with knowledge of the attack.²¹² Regarding the underlying acts of crimes against humanity, murder, unlawful detention or severe deprivation of physical liberty, torture in the form of serious injury to the physical and mental health are established in the Red Terror Trials.²¹³ Therefore, it could be safely asserted that CAH were committed during the Red Terror period though the accused in the Red Terror trials were not prosecuted and punished for it.

²⁰⁵ Ibid 3 – 6.

²⁰⁶ Ibid 23.

²⁰⁷ The whole Red Terror prosecutions and trials did not mention CAH because the charges were brought based on domestic criminal laws of Ethiopia rather than international law. See Julie Mayfield, 'the Prosecution of War Criminals and Respect for Human Rights: Ethiopia's Balance Act' (1995) 9 Emory Intl Law Rev, 575-591.

²⁰⁸ ICC, *Prosecutor v Bemba*, PTC II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-424, 15 June 2009, para 75.

²⁰⁹ Girmachew Alemu (n 204) 3 - 6

²¹⁰ ICC, *Prosecutor v Katanga*, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para 1123.

²¹¹ Customary International Humanitarian Law, Rule 5.

²¹² Marshet Tadesse (n 200) 206, 207.

²¹³ Marshet Tadesse (n 200) 209, 210.

4.2. The Trial of Oromo Liberation Front (OLF) Civil and Military Members

There were cases that associated with OLF military and civil members who were brought before the former Central High Court, later named the Federal High Court.

In the case Prosecutor vs. Abdulkadir Muhammed et al the Prosecutor brought four charges against the accused before the Central High Court.²¹⁴ The charges were crime of armed rising or civil war in violation of Arts. 32(1)(a)(b) and 252(1) of the Ethiopian Penal Code against all defendants, crime of genocide in violation of Arts. 32(1)(a)(b) and 281(a) of the Penal Code against all defendants, war crimes in violation of Art. 284(a) of the Penal Code against the first defendant and genocide in violation of Art.281(a) of the Penal Code against the second accused.²¹⁵ The first accused convicted for the crimes of armed rising or civil war and war crimes, the second accused convicted for the crimes of armed rising, genocide and war crimes whereas the third, fourth, sixth and seventh accused convicted for crime of armed rising. The fifth accused had died in prison before the court gave its verdict. This case was prosecuted and tried purely based on domestic laws and the Prosecutor did not charge the accused for CAH while the facts were indicating the commission of CAH. In the case it was established that the acts of the accused were widespread for the subjects of the attack was identified as ascertained in the ICTY Trial Chamber in Kunarac et al;²¹⁶ there were also attacks against civilian population and the acts of the accused formed part of the widespread attack and the accused knew it; and it is not relevant on what motive the accused committed the act nor the accused need to share the goal of the attack.²¹⁷ The underlying acts like murder and torture were also established in the case. Therefore, there was a possibility to establish CAH in this case had there been CAH charges.

Central (Federal) Prosecutor vs. Beyan Ahmed et al (7 defendants) was another case brought before the attention of the Central (latter Federal) High Court against OLF military commanders,

²¹⁴ Federal High Court of FDRE, Case No 01392, Criminal File No 87/87. The case was brought against seven defendants.

²¹⁵ Ibid.

²¹⁶ICTY, *Prosecutor v Kunarac et al.*, TC II, Judgment, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para 432.

²¹⁷ICC, *Prosecutor v Katanga*, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para 1101.

solders and civil member.²¹⁸ The accused were charged both collectively and individually and there were 13 charges of armed rising, genocide, war crimes, piracy and looting during war time and aggravated robbery. After full scale trial, the first, the second, the fourth and the sixth accused were convicted; the first and the fourth accused for armed rising, genocide, war crimes and piracy and looting during war time, the second accused for armed rising, war crimes and piracy and looting during war time whereas the sixth for armed rising and war crimes. The facts ascertained in this case had strands of CAH that squarely fits the contextual elements and the underlying acts for CAH. However, no charges of CAH were instituted against the accused and there was no conviction for CAH.

Prosecutor vs. Ahmednur Ali was a case brought before the Central (Federal) High Court against army leader and the accused was convicted for armed rising and war crimes.²¹⁹ Likewise in Prosecutor vs. Osman Abdela, the accused was convicted for armed rising, genocide and piracy and looting during war time.²²⁰ In Prosecutor vs. Yahya Zekariya, an army leader, the accused was convicted for armed rising and genocide.²²¹ Prosecutor vs. Ibrahim Mohamed et al²²² and Prosecutor vs. Janda Musa²²³ were other cases brought before the Federal High Court for crimes of armed rising, genocide and war crimes.

All these cases had elements that coincide with CAH because as established in Katanga Trial Chamber wherever it is established that it involved such multiple commission of acts, a single event may well constitute an attack within the meaning of article 7(2)(a) of the ICC Statute, provided that the rest elements of that crimes are met.²²⁴ But in all these cases no charge of CAH was brought against the defendants apparently for mere lack of clearly defined domestic criminal rules on CAH.

²¹⁸ Federal High Court of FDRE, File No 03139.

²¹⁹ Federal High Court of FDRE, File No 122/87 Case No 01121.

²²⁰ Federal High Court of FDRE, File No 21/87 Case No 01397.

²²¹ Federal High Court of FDRE, file No 136/87 Case No 00586.

²²² Central Attorney General of the Transitional Government Ethiopia, File No 62/86.

²²³ Central Attorney General of the Transitional Government of Ethiopia, File No 35/86.

²²⁴ ICC, *Prosecutor v Katanga, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014*, para 1101.

The Committee (Study Group), which was established by the House of Representatives of the Transitional Government of Ethiopia, on Bedeno Security Issue reported or suggested that grave crimes were committed by OLF as a decision or justice and the Study Group reported further that the area was under the effective control of OLF but it did not take viable and effective measures to stop it.²²⁵ Based on the report of the Study Group, the House of Representatives of the Transitional Government of Ethiopia ruled that heinous crimes were committed from March 14 to April 10, 1992 in Bedeno by OLF institution (office), and therefore, the House of Representatives concluded, individual members of OLF and OLF itself should be responsible because it had made no effort to stop the crime, to bring perpetrators to justice, and the crimes were committed based on the allegation that victims were supporters of a party other than OLF.²²⁶

This parliamentary ruling crystallizes the allegation that there was a leeway or a possibility to bring CAH charges together with or separately from the above OLF members' charges had that not been for the lack of domestic legal rules that defines, criminalizes and punishes CAH.

4.3. The Prosecution of Welteji Begalo Banjere et al

Prosecutor vs. Welteji Begalo Banjere et al (26 individuals) was a case brought before the Federal High Court.²²⁷ The Federal Prosecutor charged the accused for the crime of attack on the political or territorial integrity of the state in violation of Arts. 32(1)(a), 28(1) and 241 of the FDRE Criminal Code for forcefully displacing more than 3,000 Amharas from Benshangul Gumuz Region Kamashi Zone Yaso Wereda, for killing one man and for physically injuring some others in 2013. From the 1st to the 9th defendants were Kamashi Zone cabinet members charged for meeting, deciding, planning, dividing responsibility and supervising the attack. The 10th accused was charged for commanding and supervising the attack by sitting in Yaso Wereda. The 11th and 12th defendants were charged for propagating the attack and materially participating in the attack in Yaso Wereda by unlawfully detaining and torturing the victims. The 13th and 14th defendants were charged for supervising and supporting the attacks of the material offenders.

²²⁵ The Transitional Government of Ethiopia, House of Representatives 44 Ordinary Meeting Minute on Bedeno Area Security Issue, 26 May 1992.

²²⁶ Ibid.

²²⁷ Federal High Court of FDRE, File No 136699.

From the 15th to 26th accused were charged as material offenders for directly intimidating, physically injuring, torturing and forcefully displacing the Amharas from their vicinity. The facts introduced by the Federal Prosecutor showed that there was organized, policy based, state sponsored, systematic attack against civilian population (Amharas) in the absence of armed struggle²²⁸ and it was also concretized in the charge that underlying acts like murder, deportation or forcible transfer of population and torture were committed by the defendants.²²⁹ Therefore, the offenses of the accused as tabled by the Prosecutor could constitute CAH charges though the Prosecutor did not charge them for CAH since there is no clear domestic criminal law defining and punishing it and direct application of international law by domestic courts is not common and preferable.

4.4. The Prosecution of Former Somalia Regional State President Abdi Mehammed Omar et al

Federal Prosecutor vs. Abdi Mohammed et al (47 individuals) is a pending case before the Federal High Court.²³⁰ This case is about the trial of the former president, nicknamed Abdile, and other top-level officials of the State of Somalia for casualties happened from June to August 2018 in Somalia Region. The Prosecutor instituted a total of 11 charges of armed rising or civil war in violation of Arts. 32(1)(a), (b), 35, 38, and 240(2) of the Criminal Code, aggravated homicide in violation of Arts. 32(1)(a), 35, 38, 240(4) and 539(1)(a) of the Criminal Code, rape in violation of Arts. 32(1)(a), 240(4) and 620(d) of the Criminal Code and arson in violation Arts. 32(1)(a), 35, 38, 240(4) and 494(2) of the Criminal Code.

The 1st accused, otherwise called Abdilie, is alternatively charged for outrage against the Constitution or the Constitutional order in violation of Arts. 32(1)(a) and 238(2) of the Criminal Code. The charges claimed that the 1st accused while acting as the president of the Somalia

²²⁸ ICTY, *Tadic v Prosecutor*, Appellate Court, Judgment, case No. IT-94-1-A, 15 July 1999, para. 113; the decision indicated under customary international law CAH may also be committed in times of peace. See also ICTY, *Prosecutor v Dordevic*, Trial Chamber II, Public Judgment with Confidential Annex (Volume II of II). Case No. IT-05-87/1-T, 23 February 2011, Parra. 1587; see also: ICTY, *Prosecutor v Gotovina et.al.* Trial Chamber I, Judgment (Volume I to II), Case No. IT-06-90-T, 15 April 2011, para 1700.

²²⁹ See the ICC Statute, Art. 7(1).

²³⁰ Federal High Court of FDRE, Lideta Circuit, 1st Anti-Terrorism and Constitutional Bench, File No 231812 (pending).

Regional State planned, organized, financed, armed and ordered 'Hego' members (meaning Somali Youth) to do everything they want, basically to attack non-Somalis, what they called Habeshas. Whereas from the 2nd to the 11th accused are charged for receiving the order of the 1st accused and for propagating, instigating and precipitating the attack while they were top and middle level officials of the Regional State. From the 12th to the 26th accused are charged for materially supporting, instigating and ordering the attack. The rest defendants were charged as material offenders for directly involving in the attack by becoming 'Hego' members and leaders.

As a result of the attack more than 59 people died, more than 266 people bodily injured, more than 14 females raped, many people forcefully displaced and too much property destroyed, as stipulated in the charges. As the Trial Chamber in Tadic confirmed the alleged attacks were committed with state policy.²³¹ No doubt the attacks as alleged in the charges are large in scale and not incidental.²³² The alleged victims are all civilians who are protected by the law of CAH.²³³ The charges also depicted the existence of the underlying acts for CAH like murder, rape, torture in the form of bodily injury, forcible transfer of population in the form of forced displacement and other inhuman acts of a similar nature.²³⁴ The facts stated in the charges showed that the accused have allegedly committed CAH as established under international law or the ICC Statute. The Prosecutor could develop CAH counts against the defendants based on the facts stated in the case. However, it could not do so mainly because there is no domestic law that defines and punishes CAH and direct application of international law has not been preferred probably because of the *nullum crimen sine lege* principle and lack of precedence.

4.5. The Prosecution of Former Senior and Other Officials of the National Information and Security Service of the FDRE

The former senior and other officials of the National Information and Security Service (NISS) of FDRE were suspected for committing crimes in violation of basic human rights including torture and murder and some of whom were arrested by the government and sent to custody in 2018. Both State owned and private print and electronic media reported that they are suspected and detained for crimes of grave human rights violations. It is also in the domain of public notice that

²³¹ ICTY, *Prosecutor v Tadić*, TC II, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para 653.

²³² ICC, *Prosecutor v Katanga*, TC II, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para 1123.

²³³ Cryer et al, *Introduction to International Criminal Law and procedure* (Cambridge University Press 2014) 240

²³⁴ The ICC Statute, Art 7(1).

the Prime Minister of the FRDE Abiy Ahmed (Dr.) declared they were being detained because they were suspected for crimes of systematic, organized and state sponsored grave human rights violations. Even some electronic media broadcasted documentary film, which showed the human rights violations, which include intimidation, painful treatment under custody investigation, torture, unlawful arrest, grave bodily injury and murder. The suspects were under police custody for 6 months and police was conducting its investigation and requesting court for more days in remand (custody) of the suspects for further investigation on the alleged human rights violations crimes.

In May 2019 FDRE Attorney General Office brought formal charges against 26 senior and other officials of NISS before the Federal High Court of Ethiopia.²³⁵ The FDRE Attorney General Office brought 46 counts against the accused. The content of the charges or indictments said that the accused by setting aside their official duties and responsibilities has committed grave human rights violations including painful under custody investigation, unlawful arrest, torture, grave bodily injury and murder against individual victims. The indictments show extensively human rights violations allegedly committed by the accused. The indictments also show how the suspects are organized, their common policy, and the extent and time interval of the attack.

But, surprisingly these formal counts brought against the defendants speak about the crime of corruption for the above crime details. The accused were charged for corruption crimes committed by public servants in breach of trust and good faith. They are charged for abuse of power or responsibility in violation of Articles 407(1)(b) and (c), 407(2) and 407(3) of the FRDE Criminal Code and Articles 9(1)(b) and (c), 9(2) and 9(3) of Corruption Crimes Proclamation No. 881/2015.²³⁶ The details of the counts show underlying acts like torture, murder, imprisonment and other forms of deprivation of physical liberty. The counts also show the widespread, systematic, and organized nature of the attack; and the counts also show the accused did it with knowledge which are not isolated, random acts of individuals but rather result from a deliberate policy-based attempt to target a civilian population as held by the Trial Chamber in

²³⁵ Federal Prosecutor v Mr. Getachew Assefa et al (26 people), (Federal High Court Lideta Circuit 3rd Criminal Bench, File No 232249) (pending).

²³⁶ Criminal charge filed by the Attorney General Office of FDRE on May 7, 2019 under Federal Attorney General Criminal File No 198/2011. See also Corruption Crimes Proclamation No. 881/2015.

Tadic.²³⁷ The crimes allegedly committed by the accused are more likely to show the commission of CAH. But, the Federal Attorney General Office brought its formal charges against the defendants for crimes of corruption. The case is still pending before the Federal High Court of Ethiopia.

The corruption charges against former senior and other officials of NISS for serious violations of human rights which could reasonably constitute CAH showed the seriousness of loophole in the criminal justice of Ethiopia, the weakness of the criminal justice to prosecute individuals for CAH.

In nutshell, the cases examined in the thesis showed the current difficulty, if not, impossibility of prosecuting and punishing CAH in the Ethiopian criminal justice.

²³⁷ ICTY, *Prosecutor v Tadić*, TC II, *Opinion and Judgment*, Case No. IT-94-1-T, 7 May 1997, para 653.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATION

5.1. Conclusion

CAH were being committed since time immemorial. However, it was first recognized after World War I when it was condemned. After World War II the Charter of the International Military Tribunal included CAH and officials of the Nazi regime of Germany prosecuted, tried and punished for it. Then after some decades of stagnation in the development of CAH, it regained momentum with the establishment of ad hoc international tribunals in Former Yugoslavia and Rwanda. The Statutes of ICTY and ICTR included CAH as crimes within the jurisdictions of their respective tribunals and individuals were prosecuted, tried and punished for it. After a long process of negotiations, the Statute of the ICC was adopted in 1998 and it entered in to force in 2002. The Statute of ICC has provisions which address CAH and there are few individuals who are prosecuted for CAH before it.

CAH are one of the international crimes. The meaning of CAH was not a like in the past seven decades. The definition of CAH provided under the ICC Statute, which is believed by some to be a restatement of what it constitutes under customary law, is the most authoritative for it is provided under binding international treaty. The sources of international law in general are also sources of CAH. But due to its nature, national laws and national jurisprudence are also sources of CAH. Individual legal personality and individual criminal responsibility before international court or tribunal, which is a deferral from the traditional international law, are some of the peculiar features of CAH. The general principles that govern CAH are provided under the ICC Statute. It is strongly argued that ICC has universal jurisdiction for CAH because they are heinous crimes prohibited under customary international law and the aim of the Statute is to end impunity. Currently there is majority consensus that CAH are grave international crimes prohibited by international custom and it entails universal jurisdiction and every state should prosecute and punish them irrespective of the place it is committed or the nationality of the offender and the victim. Therefore, states have universal jurisdiction to prosecute and punish CAH. In sum, internationally CAH are now one of the well-established international crimes and there is prosecution and trial for it before international tribunals.

The Constitution of the FDRE has provision lubricated with CAH, but strictly speaking this provision does not unequivocally addresses CAH. The other provisions of the Constitution do not address it directly or as a customary international law for the Constitution altogether disregarded customary international laws while recognizing and integrating international agreements as part of the law of the land. So, the Constitution lacks clarity and sufficiency in addressing CAH.

The criminal laws and regulation of Ethiopia does not know CAH although it has provisions addressing war crimes and genocide. CAH are not defined, criminalized and punished by domestic criminal laws of Ethiopia. However, regarding domestic jurisdiction for CAH, the Criminal Code of the FDRE provides that Ethiopian courts have universal jurisdiction for international crimes in general and CAH in particular. Based on the FDRE Constitution and other relevant laws, it is the federal courts of Ethiopia which have jurisdiction to adjudicate CAH in Ethiopia.

Since there is no domestic law that defines CAH in Ethiopia, the thesis has provided for a possible working definition for CAH. Direct application of international law to prosecute and punish CAH has also been considered. The paper has showed the possibility, plausibility and difficulty of directly applying international customary law to investigate, prosecute, and punish CAH in Ethiopia. It is hardly possible to prosecute and punish CAH by directly applying customary international law.

The thesis has reviewed domestic cases to exemplify the gap in the Ethiopian law for prosecuting and punishing CAH. The cases analyzed reflect the fact that CAH are being committed in Ethiopia, there is no prosecution for CAH and the defendants have been charged for other crimes merely due to lack of domestic criminal rule that defines and punishes CAH. The cases also illustrate absence of practice of directly applying international laws to prosecute and punish CAH in Ethiopia.

Therefore, under the current criminal justice of Ethiopia it is extremely difficult, if not impossible, to prosecute and punish individuals for CAH and end impunity in Ethiopia.

5.2. Recommendation

Based on the findings of this thesis, the writer recommends:

- Ethiopia should revise its Criminal Code of 2004 to include CAH. If revising the Criminal Code is a difficult task, it should alternatively enact a new law that criminalizes CAH.
- Ethiopia is encouraged to become a party to the Rome Statute of the ICC to fight impunity.
- When time comes to amend the Constitution, it is ideal to amend Article 9(4) of the constitution in a way that includes customary international laws as integral part of the law of Ethiopia. Article 28(1) of the Constitution should also be amended in a way that unequivocally addresses CAH.
- If a specialized convention on CAH has come to a reality, Ethiopia would be better off if it becomes party to it.
- Until Ethiopia defines and criminalizes CAH, Ethiopia is recommended to prosecute CAH domestically by directly applying international law, just to choose the lesser evil.
- Further research in the area is also recommended.

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