



College of Law and Governance Studies

School of Law

The Adequacy of Ethiopian Criminal Laws in Regulating Crimes against Humanity and Implications

A Thesis Submitted to Addis Ababa University School of Law in Partial Fulfillment of the Requirements for the Award of the Degree of LL.M in Public International Law

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Addis Ababa

December, 2022

Declaration

I, Simon Tesfaye, hereby declare that this thesis is my original work and has not been presented for a degree in any other university. All the materials used in this work are duly acknowledged.

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Approval Sheet by the Board of Examiners

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Acknowledgement

Most of all, I'd like to thank God the Almighty, for giving me strength and vigor to withstand the hard days that passed in my life.

Then, my deepest appreciation goes to my advisor Dr. Wondwossen Demissie for providing me with the most valuable and constructive comments which greatly helped me to successfully accomplish my work. I'm very lucky to work with such knowledgeable man with humble personality.

I'm also very grateful to my mother Desti (emeye) and my father's surrogate Serik (gash) for investing your everything in me. I'd not have reached where I am now had it not been for your unreserved support and encouragement. My siblings: dani, Hani, Muse and Abi should not also be left unmentioned. You were special for me.

I also am greatly indebted to my love Enkuye, whose persisting love helped me to accomplish this work.

My thank also goes to my friends who were by my side when I needed them. Though difficult to name all of them, my friends Abera, Mekuanint, Misael, Getu, Gechere, Yishak and Eyob need special mention.

Last but not least, I want to express my gratitude to those who in one way or another lent me their hand in the process of carrying out my work. Specially, I am indebted to W/ro Zewde, the secretary of the post-graduate program for providing me with supporting letters when I needed one. I'm also thankful to the staff of the Ministry of Justice for their warm welcome and willingness to cooperate whenever I visited their office. Workers of the Ministry such as Ato Mihiretu and Ato Filmon need special mention here. I also owe to w/t Mahlet, the Librarian of the HoPR for providing me with relevant materials.

Thank you all!

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List of Abbreviations

Art. Article

ATCA Alien Tort Claims Act

CAH- Crimes against Humanity

CIL- Customary International Law

EHRC Ethiopian Human Rights Commission

FDRE- Federal Democratic Republic of Ethiopia

ILC- International Law Commission

No. Number

Proc. Proclamation

UN- United Nations

Vol. Volume

Abstract

CAH is one of the most atrocious international crimes which shocked the conscience of mankind. It is, thus, believed by the international community that it is necessary to prohibit the commission of such monstrous crime and prosecute as well as punish whenever and wherever it materialized. Coming to Ethiopia, there are a number of serious allegations on the commission of CAH as reported by various human rights organizations, be they domestic or international. Despite the presence of numerous accusations as to the commission of CAH here and there in the country, however, the criminal laws currently in existence in Ethiopia are not considered as containing adequate regulatory frameworks dealing with CAH.

This study is, thus, primarily undertaken to assess the adequacy or otherwise of the Ethiopian criminal laws in regulating CAH and implications if the study reveals the inadequacy of the laws. To this end, the study relied on both primary and secondary data sources. The primary sources included: the FDRE Constitution, the FDRE Criminal Code and other pertinent domestic legislations as well as international instruments, interview with an official from the Ministry of Justice and relevant cases. On the other hand, the secondary sources consisted of books, journal articles, magazines, articles from the web and similar others. The researcher used qualitative research method to systematically analyze the data so collected.

The findings revealed that the criminal laws did not consider CAH as a discrete offence. Nor did they define it with a required sufficiency (in a manner complying with its apposite international criminal law understanding). Instead, they unnecessarily blended it with such other crimes as genocide and war crimes. This in effect made, inter alia, prosecution of perpetrators of CAH difficult, if not impossible. Besides, it somehow compromised the goal to maintain national peace and security as well as created a problem in discharging the responsibility to protect populations from CAH. Hence, the country needs to amend these laws so that they could be able to capture the proper notion of the term in question and thus, address this and other similar concerns. Until such time that this is realized, courts can resort to CIL to fill the existing legal lacuna in this regard.

The Adequacy of Ethiopian Criminal Laws in Regulating CAH and Implications

Chapter 1. Introduction

1.1 Background of the Study

Crime against humanity (CAH) is one of the most atrocious international crimes which shocked the conscience of mankind. This is so because such a crime endangered the international community either by its magnitude and savagery or by its torment of a large number of people through the application of a similar pattern.¹

It is, thus, believed by the international community that it is necessary to prohibit the commission of such monstrous crime and prosecute as well as punish whenever and wherever it materialized. The first move in this regard was made when CAH was codified in the Charter of the Nürnberg Tribunal of 1945.² Since then, the concept has been incorporated into a number of Statutes of International Criminal Tribunals, including the Rome Statute of the International Criminal Court.³ Using these various instruments, the international community has prosecuted the perpetrators of this serious crime. On top of international prosecutions, different countries prosecuted the wrongdoers' through their domestic criminal laws in their domestic justice systems.⁴

Coming to Ethiopia, there are a number of serious allegations on the commission of CAH as reported by various human rights organizations, be they domestic or international. For instance, the Human Rights Watch reported in 2005 that the Ethiopian National Defense Force (ENDF)

1 “Crimes against Humanity”, Available at: <https://www.hrw.org/reports/2005/ethiopia0305/10.htm>, accessed on November 24, 2021.

2 “Crimes against Humanity”, Available at: <https://trialinternational.org/topics-post/crimes-against-humanity/>, accessed on November 24, 2021.

3 Crimes against Humanity, (n 1).

4 Kai Ambos, “The Fujimori Judgment: A President’s Responsibility for Crimes against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus”, *Journal of International Criminal Justice*, Vol 9, Issue 1, (March 2011), 137-158.

soldiers perpetrated CAH against the Anuak in the Gambella region.⁵ Such claims have also been heard in recent years following violences and conflicts taking place in different corners of the country. In 2021, the Ethiopian Human Rights Commission (EHRC) concluded that CAH was perpetrated in connection with the violence that followed the assassination of musician Hachalu Hundessa.⁶ The same has been reported in the ongoing armed conflict taking place in Tigray and the neighboring regions of Afar and Amhara.⁷ Despite the presence of numerous accusations as to the commission of CAH here and there in the country, however, the criminal laws currently in existence in Ethiopia do not seem to contain adequate regulatory frameworks dealing with CAH, thereby making prosecution of offenders difficult if not impossible. That seems why the Office of the Attorney General, (renamed now as the Ministry of Justice), found it difficult to charge suspects with CAH despite it is of the belief that the crimes have been committed.

1.2 Statement of the Problem

Even if the FDRE Constitution seems to deal with CAH in its article 28, a close perusal of its sub-articles, particularly the first, suggests otherwise. The first limb of this sub-article appears to refer to the definition of the crime by International Agreements ratified by Ethiopia and other laws.⁸ Nevertheless, there are no criminal laws specifically addressing the crime in question as will be seen in detail later.

⁵ Human Rights Watch, “Targeting the Anuak: Human Rights Violations and Crimes against Humanity in Ethiopia’s Gambella Region”, vol 17, no 3(A), (March 2005).

⁶ Ethiopian Human Rights Commission, “መንግስት ያለ አይመስልም ነበር”, An Investigation report on the human rights violations that took place in Oromia region due to security deterioration following the assassination of artist Hachalu Hundessa, (January 2021).

⁷ EHRC and the United Nations Office of the High Commissioner for Human Rights (OHCHR), Joint Investigation Report on Alleged Violations of Human Rights in the Context of the Conflict in Tigray Region, (November 2021); EHRC Report on Violations of Human Rights and International Humanitarian Law in Afar and Amhara Regions of Ethiopia, (March 2022).

⁸ This, we can infer from the phrase in article 28/1 of the Constitution which reads: “...so defined by International Agreements ratified by Ethiopia and other laws of Ethiopia...”.

On the other hand, the second limb of this particular provision makes CAH the collection of genocide, summary executions, forcible disappearances or torture.⁹ This is troublesome as it equates such an independent crime with the afore-mentioned acts. Of course, forcible disappearances or torture could amount to CAH provided that the requisite contextual elements and individual circumstances for the commission of same are fulfilled. Nevertheless, it is untenable to regard CAH and the acts mentioned above as being one and the same in the international criminal law understanding of CAH.

Given the fact that there exists a legal lacuna in the criminal laws of Ethiopia in regulating CAH, judges are mandated to fill in gaps by referring to CIL as CAH does have such a status.¹⁰ However, Ethiopian courts do not have the culture to apply international treaties ratified by Ethiopia let alone CIL.¹¹

1.3 Research Questions

The study seeks to respond to the following questions:

- How adequate are the Ethiopian laws in regulating CAH?
- What will ensue if they happen to be inadequate?
- How can such inadequacy be filled?

1.4 Objectives of the Study

The study generally aims at discussing the sufficiency or otherwise of rules dealing with CAH in Ethiopia and the repercussions thereof. More specifically, it intends to:

⁹ In this regard, one can have a look at the same provision mentioned in the foregoing footnote which goes as: "...such as genocide, summary executions, forcible disappearances or torture..."

¹⁰ Robert Dubler and Matthew Kalyk, *Crimes against Humanity in the 21st Century: Law, Practice and Threats to International Peace and Security*, (2018), 638 ff.

¹¹ Wondwossen Demissie, "A critical Gap in the Ethiopian Human Rights Commission's Report on Crimes against Humanity", 16 January 2021, Available at: <https://www.thereporterethiopia.com/article/acritical-gap-ethiopian-human-rights-commissions-report-crimes-against-humanity>, accessed on June 14, 2021.

- Examine the independent nature and unique feature of CAH by coming up with the elements defining the crimes as provided for in the Rome Statute;
- Figure out whether or not the Ethiopian criminal laws came up with detailed rules addressing such an independent nature and unique feature of CAH;
- Explicate the problems that follow in case the said laws fail to sufficiently regulate the crimes in question; and
- Suggest the ways-out to tackle these problems.

1.5 Significance of the Study

The research will have importance in giving an insight as to the problem in question as well as the solutions to do away with such problem. It will also serve as a reference for researchers who are interested to probe further in the area.

1.6 Research Methodology

It is axiomatic that what called for this study is the alleged inadequacy of the Ethiopian criminal laws in regulating CAH and the different problems ensuing therefrom. It is, thus, imperative to examine the sufficiency or otherwise of the criminal laws in dealing with CAH first. Accordingly, I will assess whether or not the relevant laws recognized the independent nature of CAH as well as defined it with a required sufficiency (in a manner complying with its international criminal law understanding). To this end, I will make use of the definition of CAH as provided for in the Rome Statute. The reason why the Rome Statute is selected is because its definition of CAH is believed to reflect CIL.

Thus, it is necessary to first ascertain whether or not the definition of CAH under the Rome Statute reflects CIL. I will then try to find out whether or not Ethiopian criminal laws sufficiently acquiesce with the purported CIL definition of CAH under the said Statute. If the laws are found to be insufficient based on the analysis, I will then point out problems resulting from such inadequacy. This will be followed by suggestion of solutions to the already identified problems.

In doing so, I will be using data collected from both primary and secondary sources. The primary sources include: pertinent legislations, be they domestic or international, cases relevant to the

topic in discussion and an interview to be conducted with a concerned official from the Ministry of Justice (on the issue of the prosecutability of CAH in Ethiopia). On the other hand, secondary sources consist of writings on the subject-matters to be covered under the different headings within the research. These include: books, journal articles, magazines, articles from the web and similar others.

1.7 Scope of the Study

This study will be carried out being confined to the very themes of the research, i.e., the adequacy or otherwise of rules governing CAH under the Ethiopian criminal laws and the consequences thereof. The major legal instruments that will be treated include the FDRE Constitution and the FDRE Criminal Code.

1.8 Organization of the Study

The study will be divided into five chapters each of which is further sub-divided into various sections and sub-sections. The first of these is an introductory chapter which gives readers an insight as regards the study which is going to be undertaken. It includes, among others, the background of the study, the research problem, the research questions, objectives of the study and the research methodology.

The second chapter is a chapter wherein conceptual and theoretical matters are contained. This chapter begins with a historical development under international law of the rules governing CAH. Then follows the definition of the term CAH. In this section, each defining elements of the term in question will be addressed succinctly. To this end, I chiefly resort to the Rome Statute and its interpretative guide (the elements of crimes). Besides, I will use relevant judgments as well as scholarly writings wherever and whenever appropriate. What comes next is a section exploring the CIL status of CAH.

The third chapter assesses the adequacy or otherwise of the criminal laws of the country in regulating CAH. In so doing, the chapter identifies, in its first part, whether or not the definition of CAH in the Rome Statute has attained a CIL status as it is the instrument to be resorted to in the assessment process. The second part, on the other hand, examines the adequacy or otherwise of the criminal laws in governing CAH in light of the stipulation of the term in question within the Rome Statute provided that it reflects CIL. The third part on its part, indicates the option to

be taken in case the criminal laws are found to be inadequate based on the analysis to be conducted.

What comes in the fourth chapter is a discussion of the implications of the inadequacy of the laws (provided that the result of the examination of same in the preceding chapter shows so). Then follows chapter five, which is the last chapter of the research. This is the place where the subsequent discussions will be concluded and recommendations forwarded.

Chapter 2 Conceptual Framework

2.1 Origin and Development of CAH under International Law

Under traditional international law, the conduct of a state vis-à-vis its own citizens was regarded to fall within the purview of its domestic jurisdiction.¹² Accordingly, states were not held liable by then even if they commit atrocious crimes against their nationals for doing so was reckoned as meddling with their sovereignty.¹³ This notion came to an end courtesy to the codification of CAH in the Charter of the Nürnberg Tribunal for the very first time.¹⁴ The Charter was adopted with a view to trying the unprecedented crimes of Nazi Germany against Jews and other civilian populations in Germany occupied Europe that took place before and during World War II.¹⁵

The Charter defined CAH as: “Murder, extermination, enslavement, deportation, and other inhumane 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 the tribunal, whether or not in violation of the law of the country where perpetrated”.¹⁶ Needless to say, the main reason to incorporate CAH in the Charter was to fill in the gaps which existed in positive international law viz., the law of war, in protecting civilians from atrocities committed by their own states.¹⁷ This can be inferred from such phrases in the definition as ...against any civilian population..., ...before or during the war.... And ...whether or not in violation of the domestic law where perpetrated.¹⁸

¹² Carsten Stahn, *A Critical Introduction to International Criminal Law*, Cambridge University Press, (2019), 52.

¹³ “Crimes against Humanity and the Development of International Law”, Available at: <https://www.nationalww2museum.org/war/articles/crimes-against-humanity-international-law>, accessed on December 2, 2021.

¹⁴ Darryl Robinson, “Defining Crimes against Humanity at the Rome Conference”, *The American Journal of International Law*, vol 93, no 1, (1999), 44.

¹⁵ Crimes against Humanity and the Development of International Law, (n13).

¹⁶ United Nations, Charter of the International Military Tribunal Annex to the Agreement for the Prosecution and Punishment of the major War Criminals of the European Axis (London Agreement), 8 August 1945, Article 6 © Available at: <https://www.refworld.org/docid/3ae6b39614.html>, accessed on December 11, 2021.

¹⁷ CAH and the Development of International Law, (n 13).

¹⁸ *ibid.*

the Nürnberg Charter contained a very important limitation. That is, CAH could not be charged independently of a nexus to other crimes.¹⁹ They had to be linked to war crimes or peace crimes, i.e., warfare.²⁰

This restraint has later been removed through the issuance by the four occupation powers in Germany of Control Council Law No. 10 enacted to govern the judicial punishment of lower-level Nazi perpetrators.²¹ Accordingly, CAH stood on their own as the war nexus was absent from the text. Besides, the Charter widened the scope of the crimes as it comprised additional specific crimes such as imprisonment, rape and torture.²²

In December 1946, the UN General Assembly affirmed the legal principles of the Nürnberg Charter and stated its intention to incorporate them into an international criminal code.²³ To this end, the International Law Commission produced a report on the principles of the Nürnberg Charter in 1950 which enabled it to prepare the draft code of offences against peace and security of mankind in 1954.²⁴ This was followed by the submission of a draft code of crimes against peace and security of mankind in 1991 and another revision in 1996.²⁵ Nonetheless, these have not developed into international instruments.²⁶

Another milestone in the development of CAH emerged with the adoption by the UN Security Council of statutes for the operation of international ad hoc tribunals prosecuting atrocious

¹⁹ Stahn, (n 12).

²⁰ Ibid.

²¹ Control Council Law No. 10, Punishment of Persons guilty of War Crimes, Crimes against Peace and Crimes against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946), Available at: <http://hrlibrary.umn.edu/instreet/ccno10.htm>, accessed on December 11, 2021.

²² Ibid.

²³ CAH and the Development of International Law, (n 13).

²⁴ Robinson, (n 14), 44.

²⁵ Ibid.

²⁶ Ibid.

crimes committed in the former Yugoslavia (ICTY and Rwanda (ICTR) in the 1990's. They represent important recent codifications of the law of CAH.

The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by the Security Council in 1993 to respond to reports of mass atrocities committed in Croatia and Bosnia-Herzegovina.²⁷ The ICTY's jurisdiction encompassed, *inter alia*, trial of CAH. For the purpose of this Statute, CAH are defined as constituting the acts of murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds and other inhumane acts when committed in armed conflict, whether international or internal in character, and directed against any civilian population.²⁸ The list of illegal acts mentioned herein is similar to that of the Control Council Law No. 10. On the contrary, however, it recognized the nexus between enumerated acts and armed conflicts of international or internal character. On the other hand, the ICTY Statute clarifies that discriminatory intent is required only for persecution and not to other inhumane acts of CAH.²⁹

The International Criminal Tribunal for Rwanda (ICTR) was established by the Security Council in 1994 following the Rwandan Genocide.³⁰ The subject matter jurisdiction of the Tribunal included, among others, CAH as provided for in article 3 of the Statute. ³¹ The definition of the crimes herein did not conform completely to the ICTY definition. While the lists of illegal acts remained the same, all the acts required commission with a discriminatory intent to qualify as CAH. Such a requirement has been observed as a significant regression in the development of

²⁷ Leila Nadya Sadat, "Crimes against Humanity in the Modern Age", *The American Journal of International Law*, vol 107, no 2, (2013), 341.

²⁸ Statute of the International Tribunal for the Prosecution of Persons responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia since 1991 (ICTY Statute), Adopted by the Security Council Resolution 827/1993, (May 25 1993), Article 5, Available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalTribunalForTheFormerYugoslavia.aspx>, accessed on December 8, 2021.

²⁹ *ibid.* Art. 5 (H).

³⁰ Statute of the International Criminal Tribunal for the Prosecution of Persons responsible for Genocide and other Serious Violations of International Humanitarian Law committed in the Territory of Rwanda and Rwandan Citizens responsible for Genocide and other such Violations committed in the Territory of Neighboring States between 1 January 1994 and December 31 1994 (ICTR Statute), Adopted by the Security Council Resolution 955/1994, (8 November 1994).

³¹ It defined CAH as constituting "the acts of murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds and other inhumane acts when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds".

the definition of CAH.³² In another respect, however, the ICTR definition is more progressive than its ICTY counterpart. That is, its definition did not make mention of armed conflict as a result of which CAH are delinked from war, be it internal or international.³³ Instead, it required the acts to be committed as part of a widespread or systematic attack.

Then came another major instrument namely, the Statute of the International Criminal Court, (the Rome Statute) which played a remarkable role in the further development and refinement of the concept of CAH. The Rome Statute, currently adhered to by 123 countries, expanded the list of individual conducts to include a variety of sexual crimes as well as enforced disappearance and apartheid.³⁴ Furthermore, the Statute expanded the grounds on which persecution can be committed.³⁵ What is more, it settled two long disputed aspects of the definition of CAH. First and foremost, it has done away with the nexus requirement connecting CAH with armed conflict, be it an international or internal character.³⁶ Second, the Statute limited the requirement of discriminatory intent to the act of persecution alone.³⁷

2.2 CAH as Defined by the Rome Statute

Article 7 of the Statute defines CAH. It states that: “CAH means 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”.³⁸ From the foregoing definition, one can dissect the following three elements as constituting CAH. They are: I. Conduct, II. Context and III. Individual circumstances. Each of these elements will be treated one at a time here below as follows.

³² Margaret Guzman, “The Road from Rome: the Developing Law of Crimes against Humanity”, *Human Rights Quarterly*, vol 22, (2000), 351.

³³ *ibid.*

³⁴ CAH and the Development of International Law, (n 13).

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ Rome Statute of the International Criminal Court (ICC), Done at Rome on 17 July 1998 and entered into force on 1 July 2002, United Nations, Treaty Series, vol 2187, no 38544, Art. 7(1).

2.2.1 Conduct

By conduct, we are referring to any of the illegal acts mentioned in the Statute the commission of which constitutes CAH given the fact that the contextual elements and the individual circumstances are met. There are eleven conducts enumerated in the Statute ten of which are specific and the other one generic. The specific conducts include: I. Murder, II. Extermination, III. Enslavement, IV. Deportation or forcible transfer of population, V. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, VI. Torture, VII. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, VIII. 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, IX Enforced disappearance of persons and X the crime of apartheid.³⁹ The rest is named generic for the fact that it does not specify any inhumane act as do others. Instead, it expands the list by allowing the inclusion of any other inhumane act to the enumerated conducts provided that it is of a similar character and intentionally causes great suffering, or serious injury to body or to mental or physical health.⁴⁰

2.2.2 Context

In order for the afore-mentioned inhumane acts to be regarded as CAH, they have to be committed in the context of a widespread or systematic attack directed against any civilian population. It is this essential element that distinguishes CAH from domestic crimes. The following three components can be considered to form part of this contextual element. These are: the presence of attack, the character of the attack and the object of the attack. This can be gathered from the phrase: ...widespread or systematic attack directed against any civilian population... in Art. 7(1). Each of them will be discussed succinctly here below.

³⁹ *ibid.* Art. 7(1) (a-j).

⁴⁰ *ibid.* Art. 7(1) (k).

2.2.2.1 Attack

The existence of an attack is the first component of the contextual element of CAH. Attack, within the meaning of the Rome Statute, refers to a course of conduct involving the multiple commission of the afore-mentioned inhumane acts against the civilian population.⁴¹ A question worth raising at this juncture is, why a threshold of multiplicity of acts?

It is so done with the intention of excluding single/isolated acts or aggregated isolated incidents from the definition of CAH.⁴² In this connection, there is one significant question which remained the subject of debate in many literatures. That is, is an attack confined to the commission of multiple acts? Said otherwise, does an attack exclude one act with multiple victims?

This question has been answered divergently. The first group asserted that attack is not basically about the number of acts but the magnitude of the damage caused by the act/s in question. In this respect, for instance, the ILC stated that an attack may be widespread either because of the cumulative effect of the series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.⁴³ This line of argument has been followed by various tribunals to which the Blagojevic Trial⁴⁴ and the Blaskic trial⁴⁵ are mentionable.

On the other hand, the other group held the opposite view asserting that a single act does not amount to an attack. This view was mainly propounded by the ICTY Trial Chamber in Tadic. To this end, it stated that: the very nature of the criminal acts in respect of which competence is conferred upon the International Tribunal by article 5, that they be directed against any civilian

⁴¹ *ibid.* Art. 7(2) (a).

⁴² Simon Chesterman, "An Altogether Different Order: Defining the Elements of Crimes against Humanity", *Duke Journal of Comparative and International Law*, vol 10, (2000), 316.

⁴³ Report of the International Law Commission on the work of its 48TH session (ILC Report), 6 May - 26 July 1996, UN gaor, 51st sess, Supp. 10, UN Doc. A/51/10, (12 November 1996), 47.

⁴⁴ The *Prosecutor v Blagojevic and Jokic* (Trial Judgment), Case No. IT-02-60-T, International Criminal Tribunal for the former Yugoslavia (ICTY), (17 January 2005), [545].

⁴⁵ The *Prosecutor v Tihomir Blaskic* (Trial Judgment), Case No. IT-95-14-T, International Criminal Tribunal for the former Yugoslavia (ICTY), (3 March 2000), [206].

population, ensures that what is to be alleged will not be one particular act but instead, a course of conduct.⁴⁶

Such a split of views is also sustained in the jurisprudence of the ICC thereby leaving the ambiguity on the matter unsolved. While the ICC Pre-Trial Chamber II in the Kenya authorization decision appeared to open the way for the acceptance of the first position by citing with apparent approval the statement of the ILC,⁴⁷ the Trial Chamber in Bemba Gombo averred its view in support of the second group noting that the term course of conduct imposed a quantitative threshold that required ‘more than a few’, several or many acts.⁴⁸

An attack can occur in times of peace and does not need to take place in or as part of an armed conflict.⁴⁹ This ensures that large-scale atrocities committed by governments against their own population can be classified as CAH.⁵⁰

2.2.2.2 Character of the Attack

Article 7(1) of the ICC stipulates the character of the attack , requiring it to be a widespread or systematic. The requirement here is disjunctive in which case the attack needs to meet either widespreadness or systematicity. This component provides a further fundamental dimension of the material requirement which serves to exclude small scale, random or isolated acts from the classification into CAH. No categorical threshold is set for determining the character of the attack. Hence, it has to be determined on a case-by-case basis.

⁴⁶ The *Prosecutor v Duško Tadić* (Decision on the Form of the Indictment), IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), (14 December 1995), [11].

⁴⁷ Decision Pursuant to Article 15 of the Rome Statute on the *Authorization of an Investigation into the Situation in the Republic of Kenya* ICC-01/09, International Criminal Court (ICC), (31 March 2010), [95].

⁴⁸ The *Prosecutor v Jean-Pierre Bemba Gombo*, Judgment Pursuant to Article 74 of the Rome Statute (Trial Chamber III DECISION), ICC-01/05-01/08-3343, International Criminal Court (ICC), (21 March 2016), [150].

⁴⁹ International Criminal Court (ICC), *Elements of Crimes*, (2011), ISBN No. 92-9227-232-2, 5.

⁵⁰ Robinson, (n 14), 46.

To begin with, a widespread attack is generally accepted to mean a large-scale action with a significant number of victims.⁵¹ This definition may imply that an attack may either cover a large geographical area or a large number of victims. In this regard, the ILC text suggests that it is better to focus on the number of victims. This can be inferred from its statement which asserted that the requirement that inhumane acts be committed on a large-scale basis is to mean that the acts are directed against the multiplicity of victims.⁵²

On the question of which element (the geographical scope or the number of victims) should be given precedence in assessing the widespreadness of an attack, the ICC did have divergent views in its early days. While some of the pre-trial chambers took the existence of large number of victims into account to determine widespreadness, others required large geographical coverage to do same.⁵³ However, later decisions appear to have adopted a more qualified position in which case the widespread element refers to both the large-scale nature of the attack and the number of victims. Accordingly, they dictated that the assessment is neither exclusively quantitative nor geographical but must be carried out on the basis of individual facts.⁵⁴

On the other hand, a systematic attack is defined as an attack carried out on the basis of a pre-conceived plan resulting in the repeated or continuous commission of inhumane acts.⁵⁵ From this definition, we can surmise that the element of systematicity displays features like organized nature, pre-conceived plan, regular patterns etc. in the acts of violence. In contrast to random occurrence of violence.⁵⁶ Accordingly, a systematic attack becomes the issue of international concern because of its patterns of control, direction and intensity.

⁵¹ See for example, ILC Report at note 43.

⁵² *ibid.*

⁵³ Robert and Matthew, (n 10), 716-17.

⁵⁴ *ibid.*

⁵⁵ ILC Report, (n 43)

⁵⁶ International Criminal Law Guidelines, "Crimes against Humanity", (2017), 13.

2.2.2.3 Object of the Attack

Object of the attack is someone against whom the attack is directed. From the definition of CAH in the Rome Statute, we can understand that any civilian population is the object of the attack.⁵⁷ The phrase “any civilian population” is suggestive of the fact that any crime, (with the exception of persecution), can be perpetrated against any civilian without they being targeted on the basis of nationality, ethnicity, religion, gender, and similar other stuffs.⁵⁸ While the attack must target any civilian population, it is not exclusive to civilians.⁵⁹ Meaning, the presence of non-civilians within the targeted population would not deprive that population or area of its civilian character provided that the civilian population is the primary target.⁶⁰

In order to say that a given attack is directed against a civilian population, it must be proved that the attack has been committed pursuant to or in furtherance of a state or organizational policy in addition to the civilian character of the victims.⁶¹ a policy should be understood in the broader sense covering acquiescence, toleration or sponsorship of either a state or an organization with sufficient defacto power in the territory in question.⁶² While states traditionally used to be the entities in possession of institutional capacity and resources to organize an attack against a civilian population, large scale attacks against civilians have now moved outside the domain of governments.⁶³ That is why the ICC Statute contained the phrase: “pursuant to or in furtherance of a state or organizational policy”.⁶⁴

⁵⁷ The ICC Statute, (n 38), Art. 7(1) cum Art. 7(2) (a).

⁵⁸ Compare persecution in Art. 7(1) (h) with the remaining conducts.

⁵⁹ International Criminal Law Guidelines, (n 56).

⁶⁰ *ibid.*

⁶¹ The ICC Statute, (n 38), Art. 7(2) (a).

⁶² Robert and Kalyk, (n 10), 613.

⁶³ International Criminal Law Guidelines, (n 56), 12.

⁶⁴ See Art. 7(2) (a) of the ICC Statute.

In so far as the authors of a policy (the state or organization) are concerned, two points are worth discussing. The first relates to the question of which level of government should adopt a policy in order for it to be attributable to the state? In other words, does the policy necessarily need to originate from the highest government organ for it to be regarded as a state policy? In this connection, the ICC has reflected a position to the effect that a state policy does not necessarily need to have conceived at the highest level of the state machinery. The majority in the ICC Pre-Trial Chamber in the Kenya authorization decision stated that a policy adopted by regional or even local organs of the state could satisfy the requirement of a state policy.⁶⁵

The second has to do with an inquiry as to what an organization is meant by. The meaning of the term organization has been subjected to a great deal of interpretations. While some define it narrowly as constituting only state-like entities, others give it a broader meaning to include an association of persons with an established structure provided that the organization is capable of committing widespread or systematic attack. On this issue, the position of the ICC seems to incline to the second understanding of the term.

For instance, the majority of ICC Pre-Trial II in the Kenya authorization held the view that the formal nature of the group and the level of its organization should not be the defining characteristic.⁶⁶ This in effect meant that the organization in question does not necessarily need to be a state-like entity. The Chamber thus held that the proper distinction between those organizations that fall within article 7 of the Rome Statute and those that do not is based on whether or not the group has the capability to perform acts which impinge on basic human values.⁶⁷ It, therefore, found out that the determination of a given group's capacity to perform such acts has to be made on a case-by-case basis by taking, *inter alia*, the following factors into account:

- Whether the group is under a responsible command, or has an established hierarchy,

⁶⁵ (ICC) Kenya Authorization Decision, (n 47), [89].

⁶⁶ *ibid.* [90].

⁶⁷ *ibid.*

- Whether the group possesses the means to carry out a widespread or systematic attack against a civilian population,
- Whether the group exercises control over part of a territory of the state concerned,
- Whether the group has criminal activities against the civilian population as its primary target, and
- Whether the group is part of a larger group which fulfills some or all of the above mentioned criteria.⁶⁸

The Chamber stated that these factors do not constitute a rigid legal definition and do not need to be exhaustively fulfilled.⁶⁹ The approach of the majority in the Kenya authorization decision to the effect that an organization need not be a state-like entity has generally been followed by different ICC Chambers, they adopted different formulations as regards the relevant test though. The Pre-Trial Chamber I in the Katanga Confirmation decision,⁷⁰ the Pre-Trial Chamber II in the Bemba Gombo Confirmation decision,⁷¹ the Trial of Katanga⁷² and the Trial of Bemba Gombo⁷³ are mentionable in this regard.

What does a policy to commit an attack require?

As per the elements of crimes, which serves as the interpretative guide of the Rome Statute, a policy to commit an attack requires the state or organization to actively promote or encourage

⁶⁸ *ibid.* [93].

⁶⁹ *ibid.*

⁷⁰ *The Prosecutor v Germain Katanga*, Decision on the Confirmation of Charges (Pre-Trial Chamber I Decision), ICC-01/04-01/07-717, International Criminal Court (ICC), (30 September 2008), [396].

⁷¹ *The Prosecutor v -Pierre Bemba Gombo*, Decision Pursuant to Article 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (Pre-Trial Chamber II Decision), ICC-01/05-01/08-424, International Criminal Court (ICC), (15 June 2009), [81].

⁷² *The Prosecutor v Germain Katanga*, Judgment Pursuant to Article 74 of the Rome Statute (Trial Chamber II Decision), ICC-01/04-01/07-3436-TENG, International Criminal Court (ICC), (7 March 2014), [1119].

⁷³ (ICC) *The Prosecutor v Bemba Gombo*, (n 48), [158].

such an attack against a civilian population as a matter of principle.⁷⁴ Such a policy may, in exceptional circumstances, be inferred from a deliberate failure to act by a state or organization.⁷⁵ However, it specifies that the deliberate failure must be a consciously taken to encourage the attack, and it cannot be inferred only from the absence of any action by the state or organization.⁷⁶

2.2.3 Individual Circumstances

These are situations which have to do with the nexus requirement of an alleged conduct with the contextual element (the objective element) and the mental element of an alleged offender (the subjective element). To begin with the first, i.e., the nexus requirement, it seeks to ensure that the underlying acts mentioned in Art. 7/1 (A-K) are perpetrated as part of a widespread or systematic attack against civilian population. Hence, an accused can only be liable for a CAH where there is an objective link between his alleged conduct and the attack in question. This is intended to exclude any crimes that are unrelated to the attack.⁷⁷

As to the question when acts of the accused form part of an attack, a number of ad hoc tribunals⁷⁸⁷⁹⁸⁰⁸¹ responded in the following way. Acts of the accused form part of an attack if, by their nature, aims, characteristics or consequences are objectively part of the attack and are liable to have the effect of furthering that attack. In so doing, they clarified that an act of the accused need not share all the characteristics of the attack to be regarded as part thereof. Besides, they

⁷⁴ Elements of Crimes, (n 49).

⁷⁵ *ibid.*

⁷⁶ *ibid.*

⁷⁷ International Criminal Law Guidelines, (n 56).

⁷⁸ *The Prosecutor v Dragoljub Kunarac and others (Appeal Judgment)*, IT-96-23 and IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), (12 June 2002), [99]-[100].

⁷⁹ *The Prosecutor v Dusko Tadic (Appeal Judgment)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), (15 July 1999), [248].

⁸⁰ *The Prosecutor v Jean-Paul Akayesu (Trial Chamber I Judgment)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), (2 September 1998), [579].

⁸¹ (ICTY) *Blagojevic Trial*, (n 44), [547].

stated that it is not a must for the act of the accused and the main attack to concur in time and place. Thus, what matters most is the presence of a sufficient connection between the two (the act of the accused and the main attack).

This same approach has been adopted by various ICC chambers⁸²⁸³⁸⁴ which held that the acts of the accused are reckoned as forming part of the attack if and when they are committed in furtherance of the relevant attack, in consideration of their nature, aims and consequences of such acts. Accordingly, a question whether or not a given act or omission of an accused is part of the attack under consideration is of a factual nature which has to be assessed on a case-by-case basis.

On the other hand, the mental element of CAH is found in Art. 7/1 and 7/2 (A) of the ICC Statute.⁸⁵ This element is said to have been satisfied when the perpetrator is aware of the existence of a widespread or systematic attack directed against a civilian population and is cognizant of the fact that his conduct forms part of that attack.⁸⁶

When do we say the perpetrator has knowledge of the attack?

In this regard, different ad hoc tribunals⁸⁷⁸⁸ held that a person is regarded to have knowledge of the attack when he is on familiar terms with the broader or overall context in which his acts took place. He need not know the details of the attack. Nor is he required to share the purpose/s or goal/s of the attack.

82 (ICC) Katanga Confirmation, (n 70), [400].

83 (ICC) Bemba Gombo Confirmation, (n 71), [86].

84 (ICC) Kenya Authorization, (n 47), [98].

85 See the phrases ...with knowledge of the attack... in Art. (7)(1) and ...pursuant to or in furtherance of a state or organizational policy... in Art. (7)(2) (a) of the ICC Statute.

86 Elements of Crimes, (n 49).

87 (ICTY) Blagojevic Trial, (n 44), [548].

88 The Prosecutor v Dragomir Milosevic (Trial Judgment), IT-98-29/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), (12 December 2007), [918].

The same holds true for the ICC Statute. Accordingly, it will suffice to establish the perpetrator's knowledge of the broader context within which his acts took place in order to prove his knowledge of the attack. In view of this, the EOC stated that this element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the state or organization.⁸⁹ Instead, this mental element is said to have been satisfied if it is proved that the perpetrator has intended to further an already mounted widespread or systematic attack against a civilian population.⁹⁰

⁸⁹ Elements of Crimes, (n 49).

⁹⁰ *ibid.*

2.3 The CIL Status of Prohibition of CAH

To start with, CIL refers to international obligations arising from established international practices in contrast to obligations emanating from formal conventions and treaties.⁹¹ And as such, CIL results from a general and consistent state practice backed by the element of *opinio juris sive necessitatis* (following a given practice from a sense of legal obligation).⁹²

Thus, a question worth probing at this point in time is, did the prohibition of CAH attain such a status? There is a consensus among public international law experts that the prohibition of CAH has attained a CIL status. Writing on this issue, Robert and Kalyk stated that states generally view as uncontroversial the proposition that the prohibition on states and individuals committing CAH is a norm of CIL that cannot be derogated from under any circumstances.⁹³ This, they say is clearly observable from the formulation of the definition of CAH under various international instruments as being without any defense, as trumping domestic law and as applying notwithstanding a person's official status.⁹⁴

It goes without saying that CAH are contrary to the basic considerations of humanity and intrinsic worth of the human person. In this connection, Judge Cassese noted that CAH are particularly odious offences that they constitute a serious attack on human dignity or grave humiliation or a degradation of one or more human beings.⁹⁵ It is in this sense that the prohibition of CAH has been identified as one category of norms attaining CIL status.

The formal genesis of a CIL norm prohibiting CAH is traceable to the Charter of the Nürnberg Tribunal. The Charter identified the said crime as a very serious crime of an international concern thereby prohibiting its commission in any manner whatsoever. To this end, it stated that the presence of a provision in the domestic law permitting the commission of CAH is no

91 "Customary International Law", Available at: https://www.law.cornell.edu/wex/customary_international_law, accessed on February 9, 2022.

92 *ibid.*

93 Robert and Kalyk, (n 10), 640-43.

94 *ibid.*

95 Antonio Cassese, *International Criminal Law*, (2003), Available at: <https://etlib.org/book/5232726/bcde63>, accessed on February 10, 2022.

excuse.⁹⁶ Besides, it provided that the perpetrator of such offence is not exonerated from his criminal liability by citing obedience to a superior order as a defense.⁹⁷ In view of this, the International Military Tribunal at Nürnberg regarded the drafting as well as adoption of the Charter as an expression of opinion of the conscience of the world to justify prosecution of offences within its jurisdiction, including CAH.⁹⁸

A more general statement of *opinio juris sive necessitatis* is found with the first session of the UN General Assembly in 1946. In that session, the General Assembly, expressing the collective will of the international community, affirmed the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal (the Nürnberg principles).⁹⁹ By affirming those principles, the General Assembly, which consisted of 55 member states by then, clearly intended to express its approval of and support for the general concepts and legal constructs of criminal law that could be derived from the Charter and that had been set out, either expressly or implicitly, by the International Military Tribunal.¹⁰⁰ Translated into law-making terms, this approval and support meant that the world community had robustly set in motion the process for turning the principles at issue into general principles of customary law binding on member states of the whole international community.¹⁰¹

The Nürnberg principles affirmed by the General Assembly have considerably influenced the development of international criminal law. To be more specific, the principle concerning prohibition of CAH is contained in a more elaborated manner in the various international

96 Charter of the Nuremberg Tribunal, (n 16), Article 6©.

97 *ibid.* Art. 8.

98 “Nazi Conspiracy and Aggression: Opinion and Judgment”, Available at: https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Nazi-opinion-judgment.pdf, accessed on February 10, 2022.

99 UN General Assembly, Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, 11 December 1946, A/RES/95, Available at: <https://www.refworld.org/docid/3b00f1ee0.html>, accessed on February 10, 2022.

100 Antonio Cassese, “Introductory Note on the Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal”, Available at: https://legal.un.org/avl/ha/ga_95-I/ga_95-I.html, accessed on February 10, 2022.

101 *ibid.*

instruments in a way showing consistent state practice in the area. For example, the Draft Code of Offences against the Peace and Security of mankind,¹⁰² the Statute of the ICTY,¹⁰³ the Statute of the ICTR,¹⁰⁴ the Draft Code of Crimes against the Peace and Security of mankind,¹⁰⁵ the Rome Statute¹⁰⁶ and the Statute for the SCSL¹⁰⁷ clearly prohibit CAH.

On top of that, the customary law status of the Nürnberg Charter, which contained among others, prohibition of CAH, was expressly noted by the United Nations Secretary-General on his report which was drawn pursuant to paragraph 2 of Security Council resolution 808 (1993).¹⁰⁸ This was also confirmed by the Trial Chamber opinion and judgment on the case of Tadic.¹⁰⁹ What is more, the ICTY, in its other decision of 2003, reflected the *opinio juris* that the prohibition of CAH is a norm of CIL by considering CAH as a universally condemned offence which is of concern to the international community as a whole.¹¹⁰

Besides, various national and regional courts resorted to and recognized the CIL status of the Nürnberg Principles. Mentionable in this regard are: I. The Supreme Court of Canada in the case between *R. v. Finta*, II. The Israeli Supreme Court in the case between Attorney General of Israel v. Eichmann, III. Court of Bosnia and Herzegovina in the case between the prosecutor v. Ivica Vrdoljac and IV. The European Court of Human Rights in the case between *Kolk and Kislyiy v.*

¹⁰² Draft Code of Offences against the Peace and Security of mankind, adopted by the International Law Commission in 1954, Art. 2(11).

¹⁰³ See article 5 of the ICTY Statute.

¹⁰⁴ See Article 3 of the ICTR Statute

¹⁰⁵ Draft Code of Crimes against the Peace and Security of mankind, adopted by the International Law Commission in 1996, Art. 18.

¹⁰⁶ See Article 7 of the Rome Statute.

¹⁰⁷ Statute of the Special Court for Sierra Leone, (14 August 2000), Art. 2.

¹⁰⁸ Cassese, (n 100).

¹⁰⁹ *ibid.*

¹¹⁰ The Prosecutor v Dragan Nikolic, (Decision on Interlocutory Appeal Concerning Legality of Arrest), IT-94-2-AR73, International Criminal Tribunal for the former Yugoslavia (ICTY), (5 June 2003).

Estonia.¹¹¹ In light of the adoption of various international instruments prohibiting and punishing CAH, and of the case law on the matter, it can now safely be concluded that CAH is a crime proscribed by CIL.

¹¹¹ Cassese, (n 100).

Chapter 3

Assessing the Adequacy of Ethiopian Criminal Laws in Regulating CAH

This chapter is devoted to the examination of the adequacy or otherwise of Ethiopian criminal laws in dealing with CAH. This will be done by comparing the relevant criminal legislations of our country to article 7 of the Rome Statute which regulates CAH. The reason why the Rome Statute definition of CAH is selected for the purpose of comparison here is the statute's supposed codification of CIL through its provisions on CAH. This being the case, the first exercise will be examining whether or not the provisions of the Rome Statute on CAH reflect CIL.

3.1 Do the provisions of the Rome Statute on CAH reflect CIL?

In defining CAH pursuant to the Rome Statute under the preceding chapter, we have identified three elements as constituting CAH. These are: I. Conduct, II. Context and III. Individual circumstances. The current exercise of identifying the CIL status of the RS provisions on CAH will, therefore, be in order on the basis of these constituent elements.

3.1.1 Assessing the CIL Status of Conducts mentioned in the Rome Statute

There are eleven conducts enumerated in the Rome statute as giving rise to CAH provided that they are committed as part of a widespread or systematic attack directed against a civilian population with knowledge of the attack. They are: I. Murder, II. Extermination, III. Enslavement, IV. Deportation or forcible transfer of population, V. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, VI. Torture, VII. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, VIII. 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, IX Enforced disappearance of persons, X the crime of apartheid and XI other inhumane acts of a similar character.¹¹²

¹¹² See Art. 7(1) (a-k) of the ICC Statute.

The question then is, which of these conducts attained a CIL status? To begin with, the first formal document criminalizing CAH, I.E., the Nürnberg Charter, considered six of the above mentioned eleven conducts namely: murder, extermination, enslavement, deportation, persecution and other inhumane acts as constituting CAH.¹¹³ The Control Council Law No. 10, which came into being next to the Nürnberg Charter, expanded the number of conducts by adding arbitrary imprisonment, torture and rape into the list.¹¹⁴ The successive instruments that came afterwards viz., the ICTY Statute¹¹⁵ and the ICTR Statute¹¹⁶ likewise criminalized these nine conducts in their entirety to constitute CAH. Moreover, the various ad hoc tribunals set up by virtue of these instruments have also tried perpetrators of these conducts for committing CAH.¹¹⁷ What is more, the UN Draft Code on the Peace and Security of Mankind of 1996 also regarded these conducts as establishing CAH.¹¹⁸ The prevalence of an extensive consensus on this very matter can without doubt be taken As an indication of the fact that these conducts have crystalized into CIL in terms of constituting inhumane acts making up CAH.

Apart from the afore-mentioned conducts, there are other offences which the Rome Statute added for the first time into the list of illegal acts making up CAH. The first ones are the sexual offences of enforced prostitution, forced pregnancy, enforced sterilization, sexual slavery and sexual violence provided for in article 7(g) of the Statute.¹¹⁹ It is unclear whether the first three categories of the sexual offences enumerated above have attained the status of CIL. Various reasons could have accounted for such uncertainty. For instance, at the Rome Conference, forced pregnancy was the most controversial aspect of the definition of the sexual offences owing to the opposition particularly from the Middle Eastern states and the Holy See as they reckoned such a

¹¹³ Art. 6© of the Nuremberg Charter.

¹¹⁴ See art. II © of the CCL.

¹¹⁵ Art. 5(a-i) of the ICTY Statute.

¹¹⁶ Art. 3(a-i) of the ICTR Statute.

¹¹⁷ Robert and Kalyk, (n 10), 761 ff.

¹¹⁸ See art. 18 of the 1996 UN Draft Code of Crimes.

¹¹⁹ Robert and Kalyk, (n 10), 859.

crime as condoning abortion.¹²⁰ As to the crime of enforced sterilization, which may well have its origins in the way in which Nazi doctors experimented on Jewish victims in Auschwitz and Ravensbruck, Schabas noted that such experiments were not sexual and as such the inclusion of the provision within the sexual offences may not be appropriate.¹²¹

The remaining two sexual offences namely: sexual slavery and sexual violence are deemed to have attained the status of CIL. To begin with sexual slavery, despite not being a specific crime in the ICTY Statute, it has been discussed by the ICTY as well as by various UN commentators and committees in the context of enslavement.¹²² On the basis that it is a species of enslavement, the SCSL and the EAC have considered the crime of sexual slavery and held it to be a crime proscribed by CIL.¹²³ The crime of any other form of sexual violence was first set out in the Rome Statute. In a like manner as in sexual slavery, however, it was dealt with the ad hoc tribunals as a species of other inhumane acts.¹²⁴ Accordingly, the crime is properly considered to be proscribed as a CAH under CIL at least since the ad hoc tribunals in the 1990s.¹²⁵

Another new addition to the list of conducts constituting CAH is enforced disappearance provided for in article 7(1) (I) of the Rome Statute. The notion of enforced disappearance developed as a particular violation of a human right and a crime in the 1980s in response to the practices of Latin American governments during the so-called 'Dirty Wars'.¹²⁶ In 1983, the OAS General Assembly declared that enforced disappearance constitutes a CAH.¹²⁷ The Parliamentary

¹²⁰ *ibid.* 877.

¹²¹ William Schabas, *The International Criminal Court: a Commentary on the Rome Statute*, (2010), as cited by Robert and Kalyk in note 783, 174.

¹²² Robert and Kalyk, (n 10), 870.

¹²³ *ibid.*

¹²⁴ *ibid.* 880.

¹²⁵ *ibid.*

¹²⁶ *ibid.* 927.

¹²⁷ *ibid.*

Assembly of the Council of Europe made the same declaration in 1984.¹²⁸ Despite these pronouncements, the normative status of the crime remained unclear until the first instance of binding law, i.e., Inter-American Convention on the forced disappearance of persons, came into being in 1994.¹²⁹ This convention required each state to proscribe as criminal the practice of enforced disappearance.¹³⁰ It further contained an extradite or prosecute provision and eliminated any statute of limitations.¹³¹ The crime of enforced disappearance appeared for the first time as one of the offences included within the definition of CAH in the 1996 ILC Draft Code.¹³² The Rome Statute followed the same suit of the Draft Code thereby making the crime among the list of conducts constituting CAH.

The process of including the crime into the Statute was not an easy task; however. That is because its inclusion met a fierce resistance from many states. Despite this resistance, however, the crime ultimately managed to be included in the Statute at the request of a number of Latin American countries which endured all its evils.¹³³

Coming to the CIL status of enforced disappearance as a CAH, we observe differing views. Some commentators contend that the inclusion of the crime in the ICC Statute does not indicate the statute's codification of existing CIL. To this end, they capitalize on the lack of agreement regarding the inclusion of the said crime in the ICC Statute.¹³⁴ On the other hand, a number of courts have reached to an opposing conclusion. For instance, the court of Bosnia and Herzegovina in *Rašević and Todović* held that the 1994 convention indicated that the

¹²⁸ *ibid.*

¹²⁹ *ibid.*

¹³⁰ Inter-American Convention on the Forced Disappearance of Persons, 9 June 1994, 33 I.L.M. 1529 (1994), art. IV.

¹³¹ *ibid.* arts. 5-7.

¹³² See art. 18(i) of the UN Draft Code of Crimes.

¹³³ Robert and Kalyk, (n 10), 928.

¹³⁴ Cassese's International Criminal Law (3rd ed, Oxford University Press: Oxford, 2013), as cited by Robert and Kalyk in note 1090, 108.

crime was established under CIL prior to the ICC.¹³⁵ Similarly, the EAC in Habre found that the crime is now enshrined in CIL as it is undeniably proscribed by the ICC Statute as well as the 2006 UN Convention for the Protection of all Persons from Enforced Disappearance.¹³⁶

Yet another conduct introduced by the Rome Statute to constitute CAH is the crime of Apartheid laid down in art. 7(1) (j) cum art. 7(2) (h) of the Statute.¹³⁷ Apartheid was proscribed as an international crime by virtue of the 1973 Apartheid Convention which entered into force in 1976.¹³⁸ The convention got support from only two segments of the international community viz., developing states and Eastern European countries.¹³⁹ The Western World totally rebuffed the convention owing to the looseness of the definitions of the crime as a result of which no western country has become a state party to the convention.¹⁴⁰ This being the case, the inclusion of the crime in the ICC Statute sparked a heated debate at the Rome Conference. After series of twists and turns, however, the crime finally got included in the ICC Statute with a consensus definition that was different from and more stringent than that in the Apartheid Convention.¹⁴¹

Such glaring disagreement between states on the meaning and contents of the crime led some scholars to believe that apartheid is not a crime under CIL. For instance, Cassese wrote that: "...There is therefore a case for maintaining under CIL apartheid, although probably prohibited as a state delinquency, is not however regarded as a crime entailing the criminal liability of individuals".¹⁴² Others such as Bassiouni have disagreed with this assertion. As for him, even if

¹³⁵ Robert and Kalyk, (n 10), 929.

¹³⁶ *ibid.*

¹³⁷ *ibid.* 938.

¹³⁸ Cassese, (n 95), 25.

¹³⁹ *ibid.*

¹⁴⁰ *ibid.*

¹⁴¹ Robert and Kalyk, (n 10), 939.

¹⁴² Cassese, (n 95), 25.

the Rome Statute was the first of the various formulations to specifically include apartheid as a crime within the meaning of CAH, this provision does not give rise to claims of insufficient specificity.¹⁴³ This, he states, is because the crime of apartheid is well-established and defined as an inhumane act within the meaning of CAH in international law. To this end, he cites a number of international instruments which referred the crime of apartheid to as an inhumane act namely: the Apartheid Convention of 1973, the Convention on the Non-applicability of Statutory Limitations to war crimes and CAH, various UNGA resolutions condemning the practices and policies of apartheid as CAH, Security Council resolutions regarding the crime of apartheid and its continued expansion as a threat to international peace and security and the 1996 Draft Code of Crimes against the Peace and Security of mankind.¹⁴⁴ From this it follows that the CIL status of the crime of apartheid remains contentious.

3.1.2 Assessing the CIL Status of the Contextual Element of CAH under the Rome Statute

As per the Rome Statute, the afore-mentioned conducts will be considered as CAH if and only if they are committed in the context of a widespread or systematic attack directed against a civilian population. Accordingly, the presence of attack, the character of the attack (widespread or systematic) and the object of the attack (the attack to be directed against any civilian population) are the three components forming part of the contextual element. In this section, therefore, an attempt will be had to examine whether or not this contextual element has attained a CIL status.

Let's begin the exercise by taking the first component, i.e., the existence of attack. Attack was taken as one of the basic components in defining CAH prior to the Rome Statute. Both statutes of the ICTY and the ICTR included attack in their definition of CAH. The various tribunals established pursuant to these statutes have also defined CAH taking this important element into account. For instance, the ICTY in *Kunarac et al* held that it is a must to show the presence of attack so as to establish the commission of CAH.¹⁴⁵ Similarly, the ICTR in *Akayesu*, considering

¹⁴³ Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application*, (2011), 445 ff.

¹⁴⁴ *ibid.*

¹⁴⁵ *The Prosecutor v Dragoljub Kunarac and others (Trial Judgment)*, IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001, [410].

the presence of attack as a key element in describing CAH, defined it as an unlawful act of the kind enumerated in article 3 (a) to (i) of the statute.¹⁴⁶

Attack, within the meaning of the Rome Statute, refers to a course of conduct involving the multiple commission of the inhumane acts mentioned in the Statute against the civilian population. This has been described as a campaign or operation carried out against the civilian population. Such requirement of multiplicity of acts is aimed at excluding single or isolated acts or aggregated isolated incidents from the definition of CAH.¹⁴⁷ This position of the ICC Statute has been upheld by different chambers of the ad hoc tribunals. For instance, the ICTR Trial Chamber in Kayishema and Ruzindana defined attack as the event in which the enumerated crimes must form part, noting that within a single attack, there may exist a combination of the enumerated crimes, e.g. murder, rape and deportation.¹⁴⁸ In a like manner, attack has been defined as a course of conduct involving the commission of acts of violence in the ICTY Trial Chamber in Naletilic and Martinovic.¹⁴⁹

As has been clarified by the elements of crimes, attack can occur in times of peace and does not need to take place or form part of an armed conflict.¹⁵⁰ Thus, an attack is regarded by virtue of the Rome Statute as being independent and distinct from the concept of armed conflict. The question is, does this assertion of the Rome Statute reflect CIL? Going back to the Nürnberg Charter, CAH could not be charged independently of a nexus to war crimes.¹⁵¹ The nexus between armed conflict and CAH that existed at Nürnberg was described as part of the original understanding which disappeared sometime after 1945.¹⁵² The question then is, when did this

¹⁴⁶ (ICTR) Akayesu (Trial Judgment), (n 80, [581].

¹⁴⁷ See discussions on chapter 2 above.

¹⁴⁸ The Prosecutor v Clément Kayishema and Obed Ruzindana (Trial Judgement), ICTR-95-1-T, International Criminal Tribunal for Rwanda (ICTR), 21 May 1999, [122].

¹⁴⁹ The Prosecutor v Mladen Naletilic and Vinko Martinovic (Trial Judgement), IT-98-34-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 31 March 2003, [233].

¹⁵⁰ Elements of Crimes, (n 49).

¹⁵¹ See the phrase '...in execution of or in connection with any crime within the jurisdiction of the tribunal...' in art. 6© of the Nuremberg Charter.

¹⁵² William Schabas, "Unimaginable Atrocities: Justice, Politics and Rights at the War Crimes Tribunals", (2014), 59.

nexus requirement disappear for CAH in custom? The Control Council Law No. 10, which came immediately after the Nürnberg Charter, enabled the prosecution of CAH without a requirement of nexus with armed conflict.¹⁵³

Yet again, the 1950 ILC Nürnberg Principles revitalized the requirement that the underlying acts of CAH be connected to aggressive wars.¹⁵⁴ Besides, the formulation of CAH in the 1951 Draft Code of Offences maintained the requirement of the armed conflict nexus.¹⁵⁵ The definition of CAH in the 1954 Draft Code of Offences did not, however, follow the essence of the 1951 version on the nexus issue.¹⁵⁶ By the same token, the 1968 Convention on the Non-applicability of Statutory limitations referred acts mentioned under the Nürnberg Charter to as CAH whether committed in time of peace or in time of war.¹⁵⁷

These twists and turns under the various international instruments concerning CAH created confusion as regards the material time when the link between CAH and armed conflict disappeared under CIL. For instance, the ECHR, in the *Kolk and Kislyiy v. Estonia*, opined that international law did not require a nexus with an armed conflict for CAH In 1949.¹⁵⁸ Cassese criticized the decision of the Chamber arguing that the link with the war was an indispensable element for prohibited acts of CAH before 1949. In his view, it is only later, in the 1960s, that a general rule gradually began to evolve prohibiting CAH even when committed in time of

153 Art. II©.

154 Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 29 July 1950, Art. VI©.

155 Draft Code of Offences against the Peace and Security of Mankind, adopted by the Third Session of the International Law Commission, May 16 to July 27 1951, Art. 2(10).

156 Draft Code of Offences, (n 102).

157 Convention on the non-applicability of Statutory Limitations to War Crimes and CAH, 26 November 1968, Art. 1(b).

158 *Kulk and Kislyiy v Estonia*, (European Court of Human Rights Fourth Section), Application No. 23052/04, (17 January 2006).

peace.¹⁵⁹ By contrast, the Grand Chamber of the ECHR in the 2008 *Korbely v. Hungary* case held that the link of CAH with an armed conflict may no longer have been relevant by 1956.¹⁶⁰

The UN Secretary-General on its part considered that the nexus with an armed conflict was not required for CAH under CIL in 1993. In its 1993 report on the establishment of the ICTY, the Secretary-General held that the nexus with an armed conflict is not required for punishable acts constituting CAH under CIL.¹⁶¹ Nevertheless, he proposed that interpreting article 5 of the draft Statute of the ICTY, (which was adopted without any modification by the UN Security Council), should be made by restricting the crime to an armed conflict, whether international or internal in character.¹⁶² This apparently incongruous view of the Secretary-General gets clarity when looking at the 1995 *Tadic Appeals Chamber Decision*. In the view of the Chamber, offences with no connection to an armed conflict constituted CAH under CIL in 1993.¹⁶³ Accordingly, the Chamber stated that the requirement of the nexus with an armed conflict in article 5 of the ICTY is relevant to establish jurisdiction over CAH committed in armed conflicts or linked geographically and temporally with an armed conflict.¹⁶⁴ With this, the Chamber seemed to imply that a nexus with an armed conflict for CAH under the ICTY Statute is not a substantive but a jurisdictional requirement.

Subsequent ICTY cases have also upheld the view of the Appeal Chamber that there was no nexus between CAH and an armed conflict in CIL. For instance, In *Kunarac et al*, the Appeal Chamber stated that the requirement [committed in armed conflict] contained in article 5 of the Statute is a purely jurisdictional prerequisite which is satisfied by proof that there was an armed

¹⁵⁹ Antonio Cassese, “Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law: The Kulk and Kislyiy v Estonia Case before the ECHR”, *Journal of International Criminal Justice*, vol 4, (2006), 410-418, 413.

¹⁶⁰ *Korbely v Hungary*, (Merits and just Satisfaction, Grand Chamber), Application No. 9174/02, (19 September 2008), [82].

¹⁶¹ Report of the Secretary General pursuant to Paragraph 2 of Security Council Resolution 808/1993, 3 May 1993, 47.

¹⁶² Yudan Tan, “The Rome Statute as Evidence of CIL”, *International Criminal Law Series*, 2213-2724, vol 16, (2021), 164.

¹⁶³ *The Prosecutor v Dusko Tadic* (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction), IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, [140]-[141].

¹⁶⁴ *ibid.* [142].

conflict and that objectively the acts of the accused are linked geographically as well as temporally with the armed conflict.¹⁶⁵ In *Kordic and Cerkez* the Trial Chamber, reiterating the Appeals Chamber decision in *Tadic* that averred the absence of a nexus requirement between CAH and an armed conflict under CIL, stated that article 5 requires nothing more than the existence of an armed conflict at the relevant time and place for the International Tribunal to have jurisdiction.¹⁶⁶ The same has been pronounced by the Trial Chamber in *Naletilic and Martinovic* which stated that the jurisdiction of the Tribunal pursuant to article 5 of the Statute only comprises such acts of an accused that were committed in armed conflict.¹⁶⁷

Apart from these significant decisions by various ad hoc tribunals on the subject-matter, international instruments regulating CAH have also done away with the nexus requirement prior to the adoption of the Rome Statute. Mentionable in this regard are the 1994 ICTR Statute¹⁶⁸ and the 1996 UN Code of Crimes against the Peace and Security of mankind.¹⁶⁹ To sum up, even if there exists a confusion regarding the time when the customary rule of CAH was modified by dismissing the armed conflict nexus, it is reasonable to argue that the nexus requirement was removed, at the very latest before the 1998 Rome Conference.

Article 7(1) of the ICC Statute requires the attack to be widespread or systematic in character. The requirement here is disjunctive in which case the attack needs to meet either widespreadness or systematicity. This component provides a further fundamental dimension of the material requirement which serves to exclude small scale, random or isolated acts from the classification into CAH. This similar requirement on the character of the attack was stipulated under the 1994

¹⁶⁵ (ICTY) *Kunarac et al* (Appeal Judgment), (n 78), [83].

¹⁶⁶ *The Prosecutor v Dario Kordic and Mario Cerkez* (Trial Judgement), IT-95-14/2-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 26 February 2001, [23].

¹⁶⁷ (ICTY), *Naletilic and Martinovic* (Trial Judgment), (n 149), [233].

¹⁶⁸ See art. 3 of the Statute.

¹⁶⁹ See art. 18 of this Draft Code.

ICTR Statute¹⁷⁰ and the 1996 Draft Code of Crimes against the Peace and Security of mankind.¹⁷¹

Besides, it was considered to be vital in defining CAH by a number of ad hoc tribunals. For instance, the Trial Chamber in Naletilic and Martinovic pronounced that the attack must be either widespread or systematic in nature.¹⁷² In so doing, it distinguished the accused's act from the attack in which case it required only the latter to have such character.¹⁷³ The same has been reiterated by the ICTY Trial Chamber in Kunarac et al.¹⁷⁴ In the same vein, the ICTR ad hoc tribunals maintained the requirement that the attack must possess the character of widespreadness or systematicity. For instance, the Akayesu Trial Chamber emphasized that the attack must contain one of the alternate conditions of being widespread or systematic. This, it stated, is the requirement under CIL.¹⁷⁵ The same has been reiterated by the Trial Chambers of Kayishema and Ruzindana,¹⁷⁶ Rutaganda,¹⁷⁷ Musema,¹⁷⁸ Bagilishema,¹⁷⁹ Semanza¹⁸⁰ and Niyitegeka.¹⁸¹ This broader consensus in the international jurisprudence on the matter under

¹⁷⁰ See art. 3 of the Statute.

¹⁷¹ See the phrase "...when committed in a systematic or a large-scale manner..." on the chapeau of article 18 of the Draft Code.

¹⁷² (ICTY), Naletilic and Martinovic (Trial Judgment), (n 149), [236].

¹⁷³ *ibid.*

¹⁷⁴ (ICTY), Kunarac et al (Trial Judgment), (n 145), [431].

¹⁷⁵ (ICTR), Akayesu (Trial Judgment), (n 80), [579].

¹⁷⁶ (ICTR), Kayishema and Ruzindana (Trial Judgment), (n 148), [123].

¹⁷⁷ The Prosecutor v Georges Anderson and Nderubumwe Rutaganda (Judgement and Sentence), ICTR-96-3-T, International Criminal Tribunal for Rwanda (ICTR), 6 December 1999, [68].

¹⁷⁸ The Prosecutor v Alfred Musema (Judgement and Sentence), ICTR-96-13-T, International Criminal Tribunal for Rwanda (ICTR), 27 January 2000, [203].

¹⁷⁹ The Prosecutor v Ignace Bagilishema (Trial Judgment), ICTR-95-1A-T, International Criminal Tribunal for Rwanda (ICTR), 7 June 2001, [77].

¹⁸⁰ The Prosecutor v Laurent Semanza (Judgement and Sentence), ICTR-97-20-T, International Criminal Tribunal for Rwanda (ICTR), 15 May 2003, [328].

¹⁸¹ The Prosecutor v Eliezer Niyitegeka (Judgment and Sentence), ICTR-96-14-T, International Criminal Tribunal for Rwanda (ICTR), 15 May 2003, [439].

discussion could be taken as an indication of the fact that this particular element has attained a CIL status.

From the definition of CAH under the Rome Statute, we can surmise that any civilian population is the object of the attack. This element has been contained in the Nürnberg Charter as well as all subsequent relevant international instruments. Thus, there is no way that its CIL status could be contested. As per the Rome Statute, in order to say that a given attack is directed against a civilian population, it must be committed pursuant to or in furtherance of a state or organizational policy.¹⁸² The element of policy in the definition of CAH was first explicitly mentioned in the Rome Statute. Hence, at this juncture, assessment of its CIL status is vital.

To begin with, the drafting history of the Nürnberg Charter and the pronouncements of the Nürnberg Tribunal underscored the focus on the policy of atrocities and persecutions against civilian populations also described as a “policy of terror” and a “policy of persecution, repression and murder of civilians”.¹⁸³ For instance, the Military Tribunal in the Justice case expressly stated that only criminals who consciously participated in systematically government organized or approved procedures would be punished for CAH.¹⁸⁴ Likewise, the Tribunal in Ministries held that governmental participation is a material element of CAH.¹⁸⁵ This policy element has subsequently been reflected in the works of the ILC, ICTY decisions and writings of international publicists.¹⁸⁶ The ILC Draft Code of Crimes requires that all CAH must be instigated or directed by a government or by any organization or group. It, therefore, noted that it is this direction or instigation which gives the act its great dimension and makes it a CAH.¹⁸⁷ The ICTY, on its part, when interpreting the phrase “directed against any civilian population”, confirmed that there must be some form of a governmental, organizational or group policy to

¹⁸² The ICC Statute, (n 38), Art. 7(2) (a).

¹⁸³ Robinson, (n 14), 48-49.

¹⁸⁴ Tan, (n 162), 177.

¹⁸⁵ *ibid.*

¹⁸⁶ Robinson, (n 14), 49.

¹⁸⁷ *ibid.*

commit these acts.¹⁸⁸ Writing on the issue, Cherif Bassiouni also notes that the policy element is the crucial characteristic of CAH giving these otherwise domestic crimes the requisite international element.¹⁸⁹

Besides, various national courts prosecuting CAH before 1998 confirmed the policy requirement for CAH. The French Court of Appeal in the Barbie case stated that CAH within the meaning of article 6© of the Nürnberg Charter are inhumane acts and acts of persecution committed by the state pursuing a policy of ideological supremacy in a systematic way against individuals.¹⁹⁰ Other jurisdictions have also considered the policy element as being requisite in defining CAH. They include: the Dutch Supreme Court in the Menten case, the Iraqi High Tribunal in the Al-Dujail case, Columbia and Chile in the Pinochet cases and the Canadian Supreme Court in the Finta case.¹⁹¹ All these authorities indicate that evidence of practice and opinions at the international and national levels support policy as an element of CAH. Thus, it is fair to conclude that the stipulation of the Rome Statute in this respect is indicative of CIL.

3.1.3 Assessing the CIL Status of Individual Circumstances

Individual circumstances are situations which have to do with the nexus requirement of an alleged conduct with the contextual element (the objective element) and the mental element of an alleged offender (the subjective element). The first sub-element seeks to ensure that the underlying acts mentioned in Art. 7(1) (a-k) of the Rome Statute are perpetrated as part of a widespread or systematic attack against a civilian population. This sub-element has been expressly enshrined in the ICTR Statute which came into being prior to the Rome Statute.¹⁹²

Additionally, various ad hoc tribunals dealing with the subject-matter have emphatically stated that such element must be present in order to hold the accused liable for committing CAH. For

¹⁸⁸ *ibid.*

¹⁸⁹ Bassiouni, (n 143), 10.

¹⁹⁰ Tan, (n 162), 177.

¹⁹¹ *ibid.* 178.

¹⁹² See the phrase "...as part of a widespread or systematic attack..." in article 3 of the Statute.

instance, the ICTY in Naletilic and Martinovic stated that the acts of the accused must not be isolated but form part of the attack.¹⁹³ As per the Tribunal, a nexus is said to exist between the acts of the accused and the attack when the act, by its nature or consequence, objectively be part of the attack.¹⁹⁴ The same has been recapped in the Trial Chamber of Kordik and Cerkez.¹⁹⁵ The ICTR also maintained the view that CAH must have been committed as part of a widespread or systematic attack directed against any civilian population.¹⁹⁶

By virtue of the ICC Statute, the second sub-element viz., the mental element, is said to have been fulfilled when the perpetrator is aware of the existence of a widespread or systematic attack directed against a civilian population and is cognizant of the fact that his conduct forms part of that attack.¹⁹⁷ Even if this mental element is explicitly mentioned in the Rome Statute for the first time, various ad hoc tribunals of the ICTY and the ICTR have taken it into account in defining CAH. For instance, the Blaskic Trial Chamber found that the perpetrator must knowingly participate in a widespread or systematic attack against a civilian population.¹⁹⁸ To this end, the Chamber stated, the accused must first have knowledge of the general context in which his acts occur and then of the nexus between his action and that context.¹⁹⁹ This view has

¹⁹³ (ICTY), Naletilic and Martinovic (Trial Judgment), (n 148), [234].

¹⁹⁴ *ibid.*

¹⁹⁵ (ICTY), Kordik and Cerkez (Trial Judgment), (n 166), [33].

¹⁹⁶ (ICTR), Akayesu (Trial Judgment), (n 80), [578]-[579].

¹⁹⁷ Elements of Crimes, (n 49).

¹⁹⁸ (ICTY), Blaskic (Trial Judgment), (n 45), [244].

¹⁹⁹ *ibid.* [247].

been confirmed by the ICTY tribunals of Jelusic,²⁰⁰ Kunarac et al²⁰¹ and Kordik and Cerkez²⁰² and the ICTR Trial Chambers of Kayishema and Ruzindana²⁰³ and Niyitegeka.²⁰⁴

As regards the required level of perpetrator's knowledge, it will suffice under the Rome Statute to establish the perpetrator's knowledge of the broader context within which his acts took place in order to prove his knowledge of the attack.²⁰⁵ The same degree of knowledge is applied by the ad hoc tribunals as well. For instance, the ICTY in the Krnojelac Trial Chamber, stating that the accused must know that there is an attack directed against the civilian population and he must know that his acts are part of that attack, or at least take the risk that they are part thereof, held that this does not entail knowledge of the details of the attack.²⁰⁶ The same has been maintained by the Appeals Chamber in Kunarac et al.²⁰⁷

To summarize, we can glean from the foregoing discussion that virtually all of the elements of CAH contained in the Rome Statute have attained a CIL status. It is only in respect of the CIL status of a few inhumane acts namely, apartheid, enforced disappearance, forced pregnancy, enforced sterilization and forced prostitution that a dispute exists. Thus, it is reasonable to assess Ethiopian criminal laws' conception of CAH in reference to those RS provisions of CAH attaining CIL status as they could be applicable thereto in case the criminal laws to be discussed are found to be inadequate In dealing with CAH.

²⁰⁰ The Prosecutor v Goran Jelusic (Trial Judgement), IT-95-10-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 14 December 1999, [56].

²⁰¹ (ICTY), Kunarac (Appeal Judgment), (n 78), [102].

²⁰² (ICTY), Kordic and Cerkez (Trial Judgment), (n 166), [85].

²⁰³ (ICTR), Kayishema and Ruzindana (Trial Judgment), (n 148), [133]-[134].

²⁰⁴ (ICTR), Niyitegeka (Trial Judgment), (n 181), [442].

²⁰⁵ Elements of Crimes, (n 49).

²⁰⁶ The Prosecutor v Milorad Krnojelac (Trial Judgement), IT-97-25-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 March 2002, [59].

²⁰⁷ (ICTY), Kunarac (Appeal Judgment), (n 78), [102].

3.2 CAH under the Ethiopian Criminal Laws

As part of CIL, prohibition of CAH imposes an obligation on the whole world to prevent the commission of CAH and prosecute and punish offenders in case it is committed. As Ethiopia is no exception to this, it bears an obligation to give effect to this prohibition. To fulfill this obligation, therefore, the country is expected to have in place a full-fledged legislation criminalizing CAH in its strictest sense. With this in mind, this section attempts to examine the extent to which CAH is regulated under the Ethiopian criminal laws. Let's begin the exercise by having a look at the 1957 Penal Code.

3.2.1 CAH under the 1957 Penal Code

The title of article 281 of the 1957 Penal Code contained CAH and genocide together. The full content of this provision reads:

Art. 281. Genocide; CAH

Whosoever, with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, organizes, orders or engages in, be it in time of war or in time of peace:

A) killings, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever; or

B) measures to prevent the propagation or continued survival of its members or their progeny; or

C) the compulsory movement or dispersion of peoples or children, or their placing under living conditions calculated to result in their death or disappearance, is punishable with rigorous imprisonment from five years to life, or, in cases of exceptional gravity, with death.

The title of this provision referred to both the word 'genocide' and the term 'CAH' separated through the use of a semi-colon. The framing of the caption in such a manner created contention as to how the provision should be interpreted. Some writers argued that nothing has been expressed in the provision about CAH except the mere inclusion of it as an explanation to the crime of genocide.²⁰⁸ Yet others contended that the provision was intended to govern both genocide and CAH.²⁰⁹

208 Debebe Hailegebriel, "Prosecution of Genocide at International and National Courts", LL.M Thesis, Kampala: Makerere University, (2003), 19.

However, the close perusal of its entire content suggests otherwise. The provision in question is more or less based on Art. II of the Genocide Convention with some minor differences.²¹⁰ This can be gathered from the constitutive elements of the crime of genocide set forth in the mentioned provision of the Penal Code namely, I. Provision of a special intent to destroy in whole or in part a national, ethnical, racial, or religious groups, II. Confinement of the scope of protection to the defined groups and III. Restriction in the modes of committing the crime in the same manner as the Genocide Convention.

The fact that article 281 of the Penal Code was a provision that domesticated article II of the Genocide Convention has also been confirmed by Ethiopian courts. In particular, as underlined by the FSC in the Special Prosecutor Office (SPO) v. Colonel Mengistu Hailemariam et al in reference to the provision in question, the Convention is the source of the Ethiopian law on genocide.²¹¹ The Genocide Convention, which the above provision of the Penal Code is based on, governs the crime of genocide but not CAH. Thus, the mere fact that the title of Art. 281 of the Penal Code contained CAH without incorporating the constitutive elements thereof should in no way lead to the conclusion that CAH was recognized as an independent crime therein.

The caption of Art. 281 of the Penal Code has also created practical confusions. The phrase ‘CAH’ appeared together with the term ‘genocide’ in all of the SPO indictments against the Derg officials referring to the alleged violation of article 281 of the Penal Code. For instance, in SPO V. Colonel Mengistu Hailemariam et al, the SPO charged the defendants, among other things, for committing genocide and CAH under Art. 281 of the 1957 Penal Code.²¹² In challenging the charge brought by the SPO against the defendants during preliminary objection,, the defense lawyers argued that while article 281 of the 1957 Penal Code contains both the commission of

209 D. Haile, Accountability for the Crimes of the Past and Challenges of Criminal Prosecution: the Case of Ethiopia, Leuven Law Series, as cited by Debebe Hailegebriel in note 66 of his afore-mentioned thesis.

210 The differences between the Penal Code and the Genocide Convention consist of the inclusion of political groups in the list of protected groups as well as enumeration of peoples as targets of forcible transfer in Art. 281 of the former law as opposed to Art. II of the latter.

211 Tadesse Simie, *Prosecution of Core Crimes in Ethiopia, Domestic Practice visa-`vis International Standards*, (2021), 201.

212 *ibid.* 198.

genocide and CAH, the SPO charge based on the same provision did not differentiate between acts that constituted the commission of genocide and those that constituted CAH.²¹³

Responding to such objection, the SPO agreed with the defense that article 281 of the 1957 Penal Code refers to the commission of genocide and CAH. However, it made it clear that its second charge and the acts under it referred to the commission of genocide, which it explained was the most appalling CAH.²¹⁴ The Central High Court, before which the case was instituted, ruled in favor of the SPO by dismissing the preliminary objection raised by the defense. In doing so, it reasoned that the phrase ‘CAH’ in the title of article 281 of the 1957 Penal Code is clearly an elucidation of the term ‘genocide’ rather than representing an independent crime under the sub-articles of the same provision.²¹⁵

Even if genocide is suggested as the ultimate CAH as we saw above, the two crimes remain legally distinct. First, genocide and CAH have a different mens rea. While the perpetrator of a genocidal offence must intend to destroy all or part of a protected group, the perpetrator of a CAH needs to only be aware of the existence of a widespread or systematic attack directed against a civilian population and of his part therein.²¹⁶

Second, the range of underlying offences which may qualify as genocidal is more restricted in scope than those that may qualify as CAH.²¹⁷ All underlying genocidal offences must at least have the potential, even if remotely, to contribute to the complete or partial destruction of the victim’s group. CAH do not require such a potential. Nor do they need to affect the group of which the victim is a member.²¹⁸ Hence, crimes of somewhat lesser gravity such as

213 Girmachew Alemu, “The Anatomy of Special Prosecutor v Colonel Mengistu Hailemariam et al 1994-2008”, *International Journal of Ethiopian Studies*, Spring/Fall 2009, vol 4, no ½ (Spring/Fall 2009), 1-53, 13.

214 *ibid.* 14.

215 *ibid.* 17-18.

216 “Genocide and Crimes against humanity”, Available at: <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199207541.001.0001/acprof-9780199207541-chapter-26>, accessed on March 7, 2022.

217 This can be understood by comparing Art. 2 of the Genocide Convention cum Art. 6 of the ICC Statute *visa-vis* Art. 7 of the ICC Statute.

218 Genocide and CAH, (n 216).

imprisonment or deportation may constitute CAH, but not in principle genocide.²¹⁹ This being the case, a wider range of underlying offences may qualify as CAH than as genocide.

Third, whereas CAH may, in principle, be committed against any member of a civilian population regardless of his nationality, ethnicity, race, or religion, genocidal offences can only be committed against individuals who belong to specifically protected groups characterized by their national, ethnical, racial, or religious identity. The scope of those protected under the genocide prohibition is therefore more narrowly circumscribed than under the prohibition against CAH.²²⁰

From the foregoing, we can understand that the definition of CAH transcends the definition of genocide in terms of the scope of protection and the material acts constituting the crime.■ Thus, the stipulation of ‘genocide’ being lumped together with ‘CAH’ under article 281 of the Penal Code and the consequent interpretation of these two distinct crimes as being similar is problematic. For one thing, it narrows down the definition of CAH only to include groups and acts listed in the mentioned provision. And for the other, it makes genocide and CAH to be viewed as one and the same in contrast to international criminal law which treats them as discrete crimes.

3.2.2 CAH under the FDRE Constitution

This Constitution came into force in 1995. Article 28 of the Constitution is entitled “CAH”. As per sub-article 1 of this provision CAH is stipulated as:

1. Criminal liability of persons who commit CAH, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearances or torture shall not be barred by statute of limitation. Such offences may not be commuted by amnesty or pardon of the legislature or any other state organ.

As can be grasped from the above provision, the Constitution does not define what CAH is meant by. Of course, it is not required to come up with such detail as a constitution is expected to

²¹⁹ *ibid.*

²²⁰ *ibid.*

contain somewhat general formulations which reflect important policy directions of a given country. Accordingly, the Constitution tries to explain CAH in reference to international agreements ratified by Ethiopia and other laws thereof. This can be gathered from the phrase “...CAH, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia...”.

In spite of this stipulation, there is no convention dealing separately with CAH. Unlike genocide and war crimes, CAH evolved through CIL. The only multilateral treaty that deals with CAH is the Rome Statute. Even if the Statute was adopted in 1998 and came into force in 2002, Ethiopia has not yet ratified it. Besides, there is no law in the Ethiopian legal framework which governs CAH as shall be dealt with later. Hence, the reference of the Constitution to international agreements ratified by Ethiopia and other laws of Ethiopia is devoid of clarity.

What is more, the afore-mentioned provision regards CAH as an agglomeration of serious violations of human rights. In particular, it considers CAH as a collection of genocide, summary executions, forcible disappearances or torture. This fact has been reflected by the discussants of the Constituent Assembly while dealing with the draft article 28 of the Constitution. In particular, w/ro Aregash Adane, the chair-person of the Committee on Human and Democratic Rights, described that article 28 of the Constitution is formulated in a manner that considers CAH as serious violations of human rights perpetrated against human beings in breach of different human rights instruments ratified by Ethiopia and other laws of the country. Accordingly, she stated that torture, forcible disappearances and summary executions have been provided as CAH.²²¹

Emboldening her position, Ato Alemseged Gebreamlak, member of the Assembly, stated that CAH consist of a wide-range of human rights violations as enumerated in page 63 of the explanatory note on the draft constitution. He explained that the list included, among others, destruction in whole or in part of individuals belonging to a given religious, racial, national or ethnic group, denial of humane treatment to a given population thereby causing its demise, and causing great sufferings to human beings on the basis of the afore-mentioned grounds. Having said that, he asserted that the Committee on Human and Democratic Rights provided CAH by

221 A Discussion conducted by the Constituent Assembly on the Draft Article 28 of the Constitution, (November 17 1994), vol 2, Minute numbers 000104-000113.

picking three major criminal acts from numerous others namely: I. torture, II. Forcible disappearances and III. Summary executions.²²²

It goes without saying that CAH consists of acts that amount to serious violations of human rights. Nevertheless, the mere collection of such serious human rights violations in and of itself does not give rise to CAH. Thus, the inhumane acts, torture and enforced disappearances in our case, could amount to CAH if and only if they are perpetrated fulfilling the elements of CAH we saw in the preceding chapter.²²³ Regardless of such fact, the FDRE Constitution is devoid of the elements constituting CAH. Hence, the way by which CAH is provided for by the Constitution is incongruous with what has been enshrined under the international jurisprudence.

3.2.3 CAH under the FDRE Criminal Code

The FDRE Criminal Code came into force on 9th May 2004 by replacing the long-lived Penal Code of 1957. The Criminal Code removed the expression ‘CAH’ from the title of its provision on genocide under Art. 269 although it uses the same phrase in Art. 44 to refer to both genocide and war crimes.²²⁴ This seems to have support by the explanatory notes which stated that concerning the naming of the provision, which was previously referred to as ‘genocide; CAH’, the phrase ‘CAH’ is now deleted. The reason is that ‘genocide’ is one of the CAH and that article 269 and the following articles are concerned with crimes that are CAH.²²⁵ By referring to CAH as including crimes from article 269-280, the explanatory notes to the Criminal Code were apparently using the phrase ‘CAH’ as synonym to the phrase ‘fundamental crimes against international law’ employed by the code as the title of chapter II of its book III to designate genocide and war crimes.²²⁶

²²² *ibid.*

²²³ Whereas, genocide and summary executions are distinct international and domestic crimes respectively.

²²⁴ Article 44/1 of the FDRE Criminal Code equates CAH to genocide and war crimes as it cross-refers to articles 269-274 of the Code in referring to CAH.

²²⁵ Explanatory notes on the Final Draft of the FDRE Criminal Code, (April 2004), 140.

²²⁶ *ibid.*

We have already identified that genocide and CAH are distinct crimes under international law. Accordingly, we reproached the 1957 Penal Code for needlessly lumping the two crimes together. This same criticism holds true for the current criminal code as well for it blends CAH with genocide and war crimes which are discrete crimes under international law. In order to avoid redundancy, let's here briefly deal with the relationship of CAH with those of war crimes.

At Nürnberg, where CAH was first prosecuted, it was necessary to prove a link between a conduct that was said to constitute CAH and war crimes. This was done for the reason that CAH were reckoned by then as new categories of crimes and linking them to other categories of crimes such as war crimes which were considered to be better established under international law was thought to weaken accusations of ex-post-facto law in relation to CAH.²²⁷ However, the concept of CAH began a life of its own when the nexus requirement disappeared through time. Of course, the law of war still plays a significant role in the determination of the concept of 'civilian population' in CAH. Today, three major elements in the respective definitions of war crimes and CAH distinguish the two categories of crimes.

The first relates to the context within which each crime is committed. War crimes may only be committed during an armed conflict. Accordingly, a war crime requires a material link, (a nexus between the criminal act of the accused and the armed conflict). Whereas, CAH can be committed both in time of peace and of war. And hence, the nexus requirement is not relevant for these crimes.²²⁸

CAH must, however, be committed in the context of a widespread or systematic attack directed against a civilian population. There is no such requirement for a war crime. An isolated act could, therefore, qualify as a war crime, but not as a CAH.²²⁹ The second has to do with the

227 „War Crimes and Crimes against Humanity”, Available at: <https://oxford.universitypressscholarship.com/view/10.1093/acprofoso/9780199207541.001.0001/acprof-9780199207541-chapter-24>, accessed on March 7, 2022.

228 Ibid.

229 Ibid.

persons protected under each regime. Whereas CAH may only be committed against civilians, most war crimes may be committed against both civilians and enemy combatants.²³⁰

What comes third is their difference in respect of the scope of the underlying offences. A war crime consists of a particular violation of the laws or customs of war which entail individual criminal responsibility. By convention or custom, the laws of war provide relatively a large number of prohibitions which, if breached, could entail individual criminal responsibility.²³¹ On the other hand, the range of underlying offences which could constitute CAH appear to be more limited in scope than those which could amount to war crimes as: I. The underlying offences for CAH share a relatively high level of gravity (not always met by certain categories of war crimes) and II. They protect a more limited set of fundamental interests than may be the case under the laws of war.²³² This being the case, the FDRE Criminal Code's position of considering these separate crimes as one and the same is not in line with international criminal law.

In summary, the FDRE Criminal Code did not give specific recognition to CAH. Nor has it provided the definition and constitutive elements thereof and penalties thereto. Instead, it erroneously regarded genocide and war crimes as being one and the same with CAH.

3.3 The Need to Apply CIL Rules pertaining to CAH

As we saw in the preceding sections, Ethiopia is devoid of legislations regulating CAH in the proper sense of the term. There is, thus, a legal lacuna in this regard. When thing of such sort happens, judges have a mandate to fill in gaps by referring to rules of CIL concerning CAH. That is to say, CIL becomes topical in the domestic context in areas where international treaty norms are missing or not binding on the state or have become obsolete or the issue is not incorporated in the domestic legal framework.²³³

²³⁰ Ibid.

²³¹ Ibid.

²³² Ibid.

²³³ Hannes Vallikivi, "Domestic Applicability of CIL in Estonia", *Juridica International* VII, (2002), 1.

According to an empirical investigation carried out by Verdier and Versteeg, CIL rules are in principle directly applicable without legislative implementation in virtually all states.²³⁴ For example, courts in the United Kingdom have long considered CIL to be directly applicable by courts.²³⁵ Similarly, the constitutions of many states enshrined the automatic incorporation of CIL into the domestic legal sphere, though they differ in the designation of the term in question. Mentionable in this regard are: the Constitutions of South Africa,²³⁶ Germany,²³⁷ Greece,²³⁸ Portugal,²³⁹ Italy²⁴⁰ and the Russian Federation.²⁴¹

Coming to Ethiopia, however, there is no constitutional provision addressing the question of CIL forming part of the domestic law. Such silence of the constitution has in a way led some to believe that CIL is not part of the national law and hence its domestic application is not tenable. For them, the domestic application of all sources of international law, to which CIL is no exception, is determined by the domestic legal system of individual states.²⁴²

Yet for others, including this writer, the lack of formal reference to CIL by the constitution is non-consequential. This is because CIL is binding on all states irrespective of the states' consent thereto without a need for an enabling domestic law.²⁴³ The only instance in which states will not

²³⁴ Pierre-Hugues Verdier and Mila Versteeg, "International Law in National Legal Systems: an Empirical Investigation", *The American Journal of International Law*, vol 109, (2015), 528.

²³⁵ *ibid.*

²³⁶ Constitution of the Republic of South Africa, (1996), art. 232.

²³⁷ Constitution of Germany, (1949), art. 25.

²³⁸ Constitution of Greece, (1975), art. 28(1).

²³⁹ Constitution of Portugal, (1976), art. 8(1).

²⁴⁰ Constitution of Italy, (1947), art. 10.

²⁴¹ Constitution of the Russian Federation, (1993), art. 15(4).

²⁴² Getachew Assefa, "The Place of International Law in the Ethiopian Legal System", in Zeray Yihdego, Melaku Gebeye and Fikremarkos Merso's eds., *Ethiopian Year Book of International Law*, (2016), 66.

²⁴³ Takele Seboka, "The Monist-Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia", *J. Eth. L.*, Vol 23, No 1, (2009), 154.

be bound by customary rules is when they have dissented from the start of that custom.²⁴⁴ This stance has been backed by the decision of the US Supreme Court in the *Paquete Habana*. In this case, the court acknowledged that international law is part of the US law and must be ascertained and administered by the courts of justice of appropriate jurisdiction.²⁴⁵ More specifically, it upheld the domestic applicability of CIL by further clarifying that CIL could be binding even when no treaty or legislation codified that law.²⁴⁶ This judicial acceptance of CIL has also been maintained in later decisions of US courts in the cases of *Filartiga v. Pena-Irala*, *Kadic v. Karadzic* and *Doe v. Islamic Salvation Front*. In all the three cases, the court relied on the “law of nations” and CIL to hold that individuals bringing claims under ATCA have a right to use U.S. courts to enforce norms of international law.²⁴⁷

Even more, CAH have attained the status of *jus cogens* norm.²⁴⁸ The term “*Jus cogens* norm” means “the compelling law” and, as such, a *jus cogens* norm holds the highest hierarchical position among all other norms and principles.²⁴⁹ As a result of this, *jus cogens* norms are deemed to constitute an *obligatio erga omnes* – obligation owed to the international community as a whole. As such, these obligations are non-derogable in times of war as well as peace.²⁵⁰ The legal obligations which arise from CAH attaining this status consist of: the duty to prosecute or extradite, the non-applicability of statutes of limitations, the non-applicability of any immunity of *ratione materiae* or *ratione personae* up to and including heads of states, the non-applicability of the defense of obedience to superior orders, and universality of jurisdictions.²⁵¹ This being the

244 Malcolm N. Shaw, *International Law*, Sixth ed, (2008), 91.

245 Kathleen M. Kedian, “CIL and International Human Rights Litigation in United States Courts: Revitalizing the Legacy of the *Paquete Habana*”, *William & Mary Law Review*, vol 40 (1998-1999), Issue 4, (Apr. 1999), Article 6, 1398.

246 *ibid.*

247 *ibid.* 1406.

248 Cherif Bassiouni, “International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*”, *Law and Contemporary Problems*, vol 59, no 4, (1996), 68.

249 *ibid.* 67.

250 *ibid.* 65.

251 *ibid.* 65-66.

case, the Ethiopian government has an erga omnes obligation to give effect to the provisions of the Rome Statute relating to CAH which have attained CIL in its domestic spheres.

Chapter 4

Implications of the Inadequacy of Ethiopian Criminal Laws in Regulating CAH

As has been outlined in the preceding chapter, the notion of CAH in Ethiopia is ill-understood. This can be observed from the glaring fact of unnecessarily blending CAH with such other crimes as genocide and/or war crimes. Accordingly, CAH lacked independent recognition by the criminal legislations of the country let alone being properly defined compliant with its apposite meaning under international law. Such lacunae under the law have numerous implications some of which will be dealt with herein under. These will be concerned with the effects of the inadequacy in fighting impunity, maintaining national peace and security and discharging the responsibility to protect populations from CAH.

4.1 Implications of the Inadequacy in Fighting Impunity

To start with, CAH constitutes jus cogens.²⁵² A jus cogens principle or a peremptory norm, as sometimes referred to, is a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ CIL rules.²⁵³ Such norms are non-derogable and have overriding character.²⁵⁴ As a consequence of that normative status, such norms impose on states ‘obligatio erga omnes’ – an obligation owed to the international community as a whole.²⁵⁵ One such obligation states are duty-bound to comply with is the duty to prosecute perpetrators of CAH and thus fight impunity.²⁵⁶

252 ICTY jurisprudence, for example, recognized that a norm prohibiting CAH is peremptory norm of international law which is of a non-derogable or overriding character. *The Prosecutor v Kupreskic and others* (Trial Judgment), IT-95-16-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 January 2000, [520].

253 Linderfalk U, “The Legal Consequences of Jus Cogens and the Individuation of Norms”, *Leiden Journal of International Law*, (2020), 1.

254 (ICTY) *The Prosecutor v Kupreskic et al.*, (N 254).

255 Bassiouni, (n 248), 65.

256 *ibid.*

Having seen the extent to which CAH is incorporated in the Ethiopian criminal legislations, the following question is worth raising at this point in time. Is it really possible to prosecute perpetrators of CAH and thus, fight impunity using the law as it stands?

In answering this question, some may contend that it is possible to prosecute perpetrators of CAH under the existing legal framework. The likely option that they could cite in this connection is the possibility of prosecuting offenders of CAH using the clear stipulations under the FDRE Criminal Code on the crimes of genocide and war crimes. The possible reason for them to believe so is their tendency of considering the three crimes as virtually the same. As has been clarified in section 3.2 above, CAH was historically linked with these two crimes. Nevertheless, through time it evolved into a crime possessing its own distinct features separating it from the other two crimes. Accordingly, CAH is currently viewed as a discrete international crime because of its distinguishing contextual elements as well as the requisite individual circumstances.²⁵⁷

This being the case, it is a must for the Criminal Code to contain a separate and specific provision criminalizing CAH with a strict adherence to the definition and elements of same under international criminal law to prosecute suspects for committing same. Otherwise, an attempt to prosecute perpetrators of CAH using such other provisions of the Criminal Code would amount to the violation of the principle of legality. This is so because as per the notion of legality, for a certain act to be punished, such act must be clearly proscribed as well as punishment due for its commission/omission should clearly be provided in the law at the time it was committed.²⁵⁸

The question then is, did the inadequacy of the criminal laws on CAH put real life challenges in prosecuting offenders of CAH? Before directly addressing this question, it is imperative to first quest whether or not the prosecution office found out cases involving CAH. As per an official from the Ministry of Justice, “those crimes committed targeting civilians based on such grounds as ethnicity, religion, political affiliation, etc. could in the majority of cases fall under the

²⁵⁷ See section 3.2.

²⁵⁸ See Art. 2(1) of the FDRE Criminal Code.

category of CAH.²⁵⁹ The official cited the case of Getachew Assefa et al as evincing this fact. Thus, I asked the official what the government has been doing when it comes across cases of CAH. In his response, he stated that: “...We are forced to charge alleged perpetrators of these crimes using other ordinary crimes contained within the various criminal legislations for lack of provisions proscribing CAH in the Criminal Code.”²⁶⁰ For instance, Getachew Assefa and others have been accused of committing the crime of grave corruption pursuant to articles 407 of the Criminal Code and 9 of Proclamation No. 881/2015, he added.”²⁶¹ Hence, I will succinctly examine whether this case contains elements of CAH with a view to quest why the prosecution did not prepare a charge for CAH using CIL.

The case Getachew Assefa et al was filed before the Federal High Court in 2011 E.C. under the criminal file no. 198/2011. The charge contained 46 counts brought against 26 defendants all of whom were staff members of the former national security, Immigration and refugees affairs authority (currently known as national Intelligence and security service). Thirty-seven of the 46 counts contained in the charge namely counts 1-4, 6-18, 20-21, 23-24, 26-30, 32-34, 36-40, 42-43 and 45-46 have been proved with sufficient evidence of the prosecution.²⁶² In all these counts, the defendants are accused of committing such acts as unlawful imprisonment and torture which fall under the list of acts constituting CAH. The court ruled that the defendants who have been accused under the above counts have unlawfully seized, imprisoned and carried out investigations against victims mentioned in the counts.²⁶³ Besides, it found out that the 5th, the 7th, the 11th, the 13th, the 14th, the 15th, the 16th, the 17th, the 18th, the 19th, the 22nd, the 23rd and the 24th defendants have beaten and tortured victims under various counts.²⁶⁴

259 Interview with ato Mihiretu Kumilachew, Director-general of the Trans-national and Organized Crimes Directorate at the Ministry of Justice, held on February 2022.

260 *ibid*

261 *ibid*.

262 The Federal Attorney General v Getachew Assefa and others, Ruling by the Federal High Court, Lideta Division Criminal Bench, Presided by: Judges Pitsersen Ambaw, Dejene Bersisa and Biruk Ayalew, 270.

263 *ibid*. 278.

264 *Ibid*. 281 ff.

The next thing worth inquiring into is whether or not the afore-mentioned illegal conducts took place in the context of a widespread or systematic attack directed against a civilian population. Thus, the first step in this regard is to identify the presence of an attack. It is remembered that an attack is described in principle as a course of conduct involving the multiple commission of the afore-mentioned inhumane acts against a civilian population.²⁶⁵ Hence, the question is, was there a multiple commission of such inhumane acts by the defendants?

As can be gathered from the charge which has been proved by the prosecutorial evidence,²⁶⁶ the defendants have committed these inhumane acts in a series of campaigns carried out in Amhara, Oromia, Addis Ababa and SNNPR regions. In these mentioned places, the defendants forcibly seized civilians and unlawfully detained them in hidden prison cells provided for this purpose. Then and there, the defendants sternly tortured the detainees with a view to compulsorily procuring information from them and making them their secret agents. This way, they have caused serious bodily injury on a number of victims. These facts are indicative of the presence of an attack, which is crucial for the commission of CAH.

Article 7(1) of the Rome Statute requires the attack to be widespread or systematic. A widespread attack is generally accepted to mean a large-scale action with a significant number of victims.²⁶⁷ This definition may imply that an attack may either cover a large geographical area or a large number of victims. On the other hand, an attack is said to be systematic when it displays features like organized nature and regular pattern.²⁶⁸

Coming to the case at hand, the attack they committed displayed features of both being widespread and systematic. It was widespread in that it had a wider scope in terms of its geographical coverage as well as it affected a large number of civilians. As far as the geographical coverage is concerned, the attack took place in Bahir Dar and Gondar towns of the Amhara region, Nekemte, Jima, Shashe Mane and Bishoftu of the Oromia region and Hawassa

²⁶⁵ See section 2.2.2.1.

²⁶⁶ Ruling by the Court, (n 262).

²⁶⁷ See section 2.2.2.2.

²⁶⁸ *ibid.*

of the SNNPR, not to mention Addis Ababa. In relation to the number of victims, the information provided in the charge shows that a large number of civilians have been affected by the attack. In some instances, many civilians were caught and taken to the detention centers in a single occasion. A case in point is the 2006 E.C. mass incarceration of many civilians on the allegation that they were about to commit terrorist attacks at Addis Ababa Stadium in the match between Ethiopia v Nigeria.

What is more, as per the facts contained in the charge, the attack exhibited the character of systematicity. In all the above mentioned places, the victims were hunted in a similar fashion. That is, they were spied and caught on the ground that they were suspected of committing economic related crimes, having relation with religious fundamentalists and working in collaboration with such political parties as Patriotic Ginbot 7 and OLF which were proscribed terrorists by then. This way, they were compulsorily held and were taken to the detention centers established by the institution in the afore-mentioned places.

On top of the attack being required to be widespread or systematic, it is a must that it should be directed against a civilian population in order for it to be regarded as CAH. An attack is reckoned to be directed against a civilian population where it is committed pursuant to or in furtherance of a state or organizational policy. In principle, a policy to commit an attack requires the state or organization to actively promote or encourage the commission of such an attack. Exceptionally, however, such a policy may be inferred from a deliberate failure by the state or organization to act.²⁶⁹ The policy need not originate from the highest government organ in order for it to be attributable to the state. Accordingly, a policy adopted by a regional or local organ of the state could qualify as a state policy.²⁷⁰

Coming to the case under discussion, it seems to meet this requirement as well. For one thing, the victims of the attack were innocent civilians who did not take part in any violent activities whatsoever. And for the other, the attack was perpetrated pursuant to or in furtherance of a state policy. As can be gathered from the charge which has been proved by the prosecutorial

²⁶⁹ See section 2.2.2.3.

²⁷⁰ *ibid.*

evidences,²⁷¹ the attack was committed using the structure of NISS, a state security apparatus. NISS was established with the aim of providing quality intelligence and reliable security service throughout the country so as to protect and safeguard national security interest.²⁷² To this end, it is legally authorized among other things, to provide the necessary intelligence service and evidence to the concerned bodies.²⁷³

Contrary to such authorization, however, the institution, through its staffs, carried out such acts as forcefully holding suspects, unlawfully detaining them and torturing them while in detention which are all illegal. To this end, a secret organization which enables them to reconnoiter, forcefully seize and put civilians in detention centers was established within the institution and led by the director-general of the institution. Such organization had its own secret prison cells in various sub-cities in Addis Ababa and in the regions mentioned earlier. These secret prison cells had their own administrator who is answerable to the director-general and facilitates the conducts being carried out there. All expenses of these prison cells were covered from the budget of the institution. Since the attack was organized, led and directed by an organization which uses the resources, budget, man power etc. of the institution, all the inhumane acts committed are attributable to the institution. The institution, with no doubt, is a government organ. Thus, a policy adopted by this institution to commit the inhumane acts on civilians could satisfy the requirement of a state policy.

The final requirement of CAH is the existence of individual circumstances. These are situations which have to do with the nexus requirement of an alleged conduct with the contextual element and the mental element of an alleged offender. The nexus requirement seeks to ensure that the underlying acts are perpetrated as part of a widespread or systematic attack against a civilian population. Hence, an accused can only be liable for a CAH where there is an objective link between his alleged conduct and the attack in question.²⁷⁴ On the other hand, the mental element

²⁷¹ Ruling by the court, (n 262), 263 ff.

²⁷² Proclamation No. 804/2013, A Proclamation to Re-establish the National Intelligence and Security Service, 23 July 2013, 19th year no. 55, Art. 6.

²⁷³ *ibid.* Art. 7(5).

²⁷⁴ See section 2.2.3.

is said to have been satisfied when the perpetrator is aware of the existence of a widespread or systematic attack directed against a civilian population and is cognizant of the fact that his conduct forms part of that attack.²⁷⁵

The question is, do the facts in the charge exhibit the presence of individual circumstances? The counts which have been proved by the prosecutorial evidence state that the accused engaged in the attack by taking part in the secret organization established for this purpose with full knowledge and intention of doing so. This can be attested from the following facts. All the accused are staffs of the institution.²⁷⁶ Accordingly, they pretty much know that the institution within which they are working is not legally authorized to hold suspects, detain as well as interrogate/investigate them. Nevertheless, they willfully joined in the organization established to forcefully hold suspects, unlawfully detain them and commit acts of torture on them knowing that doing so is illegal.²⁷⁷ What is more, they took part in the broader attack, (some by organizing, leading and supervising and others by directly engaging in the commission of the inhumane acts) in a manner that furthers the policy to commit such attack as a result of which their act could be deemed to be part of the broader attack.

To sum up, the foregoing brief discussion indicates that the case “Getachew Assefa et al” contains elements that show the commission of CAH. Hence, CAH are indeed concrete challenges that need government’s intervention mainly by way of punishing perpetrators of these monstrous crimes. As has been said time and again, the criminal laws do not contain adequate provisions on CAH enabling the government to prosecute offenders of the crime as such.

The best way-out to make liable the perpetrators of CAH in Ethiopia is, thus, applying CIL. With this in mind, I asked the interviewee why they did not resort to CIL rules on CAH to prosecute perpetrators of CAH as in the case above. He cited two reasons for not making use of CIL in order to prosecute perpetrators of CAH. The first has to do with the issue of domestication. In this regard, he stated that the Constitution says nothing regarding the domestic application of

²⁷⁵ *ibid.*

²⁷⁶ Ruling by the Court, (n 262).

²⁷⁷ *ibid.* 276 ff.

CIL as opposed to what it enshrines in respect of treaties. Given the silence of the constitution on this matter, therefore, it is impossible to apply CIL.²⁷⁸

As has been tried to be expounded in section 3.3 above, the silence of the constitution should not be taken as a bar in the domestic application of CIL. Because the application of a given rule attaining CIL status does not require the consent of states.²⁷⁹ What is more, CAH have attained the status of a *jus cogens* norm. A *jus cogens* norm imposes *erga omnes* obligations on states from which no derogation is allowed. One such obligation is the duty to prosecute.²⁸⁰ Hence, Ethiopia cannot relieve itself from discharging this obligation of it by using the inadequacy of its legal framework on CAH as an excuse. Thus, it has to bring offenders of this atrocious crime to justice by applying CIL.

On top of this, even those who argue that domestic application of CIL as generally being not tenable acknowledge the possibility of using CIL in criminal matters. In particular, Getachew wrote that: “Unlike the constitution, the Criminal Code of Ethiopia makes many references to non-treaty sources of international law in relation to the criminalization and punishment of certain conduct. Thus, article 17 of the Code states that a crime against international law, an international crime specified in Ethiopian legislation, or international treaty or a convention which Ethiopia has ratified committed outside of Ethiopia could be subject to a trial in Ethiopia unless a final judgment has been given after being tried in a foreign country. The broad reference to crimes against international law and international crime in article 17 applies to any acts criminalized by any one of the sources of international law. This shows that sources of international law other than treaties are made part of the Ethiopian criminal law.”²⁸¹

This, he bolsters by mentioning other provisions of the Criminal Code that refer to international law in its entirety as well which include: articles 74, 242, 263, 270, 279 and 280. Then he went on to state that: “...The foregoing discussion on the relevant provisions of the Criminal Code

²⁷⁸ *ibid.*

²⁷⁹ See section 3.3.

²⁸⁰ *ibid.*

²⁸¹ Assefa, (n 242), 65.

reveals that in so far as criminal matters are concerned non-treaty sources are generally an integral part of Ethiopian law. As such, criminal law related non-treaty sources of international law have direct domestic effect in Ethiopia. They can be invoked by litigants before the courts and interpreted by the judiciary.”²⁸² This thus adds another force to the justification of using CIL so as to prosecute perpetrators of CAH.

Another concern raised by an interviewee regarding the difficulty of applying CIL is the nature of CIL. In this connection, he stated that CIL is unwritten and evolves over time. This being the case, determining the scope of CAH in CIL remains difficult, thus making the issue of its application very complicated.²⁸³

In fact, the nature of CIL brought about contentions as regards its use and application in domestic courts. Writing on this matter, Kedian stated that: “The ambiguities inherent in defining and using CIL have sparked heated debates regarding its use, particularly in international human rights claims in domestic courts. On one side of the debate are those who maintain that U.S. courts have a responsibility to enforce and uphold international law, and should continue to do so even when deciding a claim requires the courts to make difficult CIL findings.”²⁸⁴ On the other side are critics who argue that the ambiguities of CIL are too great, that U.S. courts lack the authority to find CIL, and that letting them do so offends federalism and principles of separation of powers.”²⁸⁵

From these two competing views, this writer favors the first one. Of course, establishing CIL norms requires time, as it needs exploring international and domestic courts’ decisions, scholarly writings, pertinent international instruments etc. Given the extensive resources, huge man power and immense expertise the government has at its disposal, the difficulty of doing so should not be a hindrance in the application of CIL. Besides, the government’s duty of fighting impunity by punishing offenders of CAH is non-derogable in any situation whatsoever as a result of which it

²⁸² *ibid.*

²⁸³ Interview with ato Mihiretu, (n 259).

²⁸⁴ Kedian, (n 245), 1397.

²⁸⁵ *ibid.* 1398.

cannot be absolved from such obligation of it using the mentioned ground as a justification for its failure.²⁸⁶ Fortunate enough, as we saw earlier, the Rome Statute incorporated CAH in a manner that reflects CIL.²⁸⁷ This in a way simplifies the difficult task of identifying the scope and content of CAH under CIL. Thus, it is advisable to use the Statute's provision on CAH in order to prosecute perpetrators of the crime.

4.2 Implications of the Inadequacy in the Maintenance of Peace and Security

The specific purpose of the criminal law is set out in article 1 of the FDRE Criminal Code. In particular, paragraph 1 of the said article states the purpose as follows. "The purpose of the Criminal Code of Federal Democratic Republic of Ethiopia is to ensure order, peace and the security of the state, its peoples, and its inhabitants for the public good". The provision embodies ensuring order, peace and security of the state and the people of the country as its ultimate end to be achieved. The second paragraph mentions the type of activities it aims to take up in order to achieve the purpose set forth in the first paragraph. Accordingly, I. declaration of forbidden conducts and provision of appropriate punishments with a view to preventing the commission of crimes, II. Punishing offenders and taking suitable reform measures whenever a crime is committed and III. Providing measures to prevent the commission of further crimes are the activities aimed at achieving the purpose laid down in the Criminal Code.

It is axiomatic that CAH jeopardize national security and stability. As such, they fume a new crisis or exacerbate an already mounted one. As studies reveal, they tend to occur in countries with some degree of instability or crisis.²⁸⁸ Unless nipped in the buds, the crimes and their consequences can spill over into neighboring countries by, for example, creating or reinforcing tensions between groups that are defined along religious or ethnic lines rather than by national borders.²⁸⁹ That is why the United Nations Security Council has stated in several of its

²⁸⁶ Bassiouni, (n 248), 65.

²⁸⁷ See section 3.1.

²⁸⁸ United Nations Framework of Analysis for Atrocity Crimes, (2014), 2.

²⁸⁹ *ibid.*

resolutions that serious and gross breaches of human rights constitute threats to international peace and security.²⁹⁰ The preamble to the Rome Statute of the International Criminal Court states as well that international crimes, to which CAH is no exception, threaten the peace, security and well-being of the world.²⁹¹ This assertion receives support from the context requirements of CAH, which relate to magnitude and scale.²⁹² That is why the United Nations War Crimes Commission put CAH as endangering the international community or shocking the conscience of mankind, either by their magnitude and savagery or by their large number of torment on civilians or by the fact that a similar pattern was applied at different times and places.²⁹³

From the foregoing, we can easily understand how vicious CAH are in terms of endangering not only national peace and security, but also international one. As we saw earlier, the purpose of the Criminal Code is protection of the peace and security of the state and its inhabitants. The mechanism it employed to accomplish this purpose of it is declaration of the criminal acts alongside their respective punishments with a view to preventing the commission/omission of the acts and imposing punishments and taking other pertinent measures whenever the crimes materialize. To everyone's dismay, the Criminal Code fails to criminalize and punish CAH which are the major threats of peace and security. Of course, it is possible to prosecute the inhumane acts constituting CAH as ordinary crimes as the case may be. Nevertheless, conviction for an ordinary crime does not convey the same moral condemnation as compared with being convicted for CAH and does not necessarily involve severe punishment. **Because of the situation mentioned, the deterring effect will likely become lesser.**

Besides, there is a probability that perpetrators of ordinary crimes may not be prosecuted, for instance, due to lapse of time, holding of immunities etc. Hence, the Code's aim of creating a safer environment in which citizens can live with peace and tranquility by punishing offenders may be compromised owing to its failure to criminalize CAH.

²⁹⁰ *ibid.*

²⁹¹ See paragraph 3 of the preamble of the Rome Statute.

²⁹² Stahn, (n 12), 53.

²⁹³ United Nations War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War, as cited by Carsten Stahn in 'A Critical Introduction to International Criminal Law' at note 336, (1948), 179.

4.3 Implications of the Inadequacy in the Fulfillment of the State's Responsibility to Protect

CAH is an atrocity crime that is considered to be the most serious crime against humankind. As such, it involves large-scale and/or systematic commission of an attack directed against a civilian population which results in the significant loss of human life, not to mention the physical, psycho-social and psychological damages and trauma. Accordingly, the acts associated with CAH are believed to affect the core dignity of human beings, in particular the persons that should be most protected by the states, both in times of peace and in times of war.²⁹⁴ This, therefore, transformed them to being the concern of international community as a whole.²⁹⁵

In response to this ferocious crime, thus, the world's community enunciated its commitment to take up the responsibility to protect populations from atrocity crimes, including CAH. This commitment has been expressed at the UN World Summit Outcome Document of 2005. In this document, Heads of State and Government affirmed their responsibility to protect their own populations from atrocity crimes such as CAH and accepted a collective responsibility to encourage and help each other uphold this commitment.²⁹⁶ They also declared their preparedness to take timely and decisive action, in accordance with the UN Charter and in cooperation with relevant regional organizations, when national authorities manifestly fail to protect their populations.²⁹⁷

According to this notion, the primary responsibility to protect populations from CAH lies on every state. To this end, states are required to suppress and prevent CAH targeting their population. The responsibility of states to prevent CAH is fulfilled, in part, by efforts to punish such crimes which serve as means to dissuade and prevent future crimes.²⁹⁸ The effective

²⁹⁴ Framework of Analysis, (n 269).

²⁹⁵ Robert and Kalyk, (n 10), 595.

²⁹⁶ UN General Assembly World Summit Outcome (2005), un Doc. A/RES/60/1, 60th sess, 8th plen mtg (16 September 2005) ('2005 World Summit Outcome'), Agenda Items 46 and 120, [138].

²⁹⁷ *ibid.* [139].

²⁹⁸ UN General Assembly, Question of the punishment of war criminals and of persons who have committed CAH, 15 December 1969, A/RES/2583, Available at: <https://www.refworld.org/docid/3b00f1d258.html>, Accessed on 2 July 2022.

prosecution of these crimes, thus, requires having in place a well-developed legislation proscribing CAH in the fullest and strictest sense.

The full incorporation of CAH into Ethiopian law is, therefore, a key for the successful accomplishment of this task. As opposed to this, however, there are some who opine that Ethiopia would be able to prosecute offenders of CAH by focusing on the underlying/predicate offences.²⁹⁹ This call of focusing on predicate offences is futile for at least two reasons.

First, several of the underlying acts of CAH are unknown in Ethiopian law. Apartheid, torture, enforced disappearance, internal displacement, deportation, extermination and persecution are not criminalized as discrete offences.³⁰⁰ Second, focusing on the prosecution of predicate offences of CAH disregard's the crime's fundamental notions and origin. Predicate offences such as murder, rape and grave willful injury are ordinary crimes. CAH are more serious international crimes in terms of gravity and harm, and carry unique contextual elements, such as the attack being widespread or systematic, which are not required for any of its predicate offences. By criminalizing such horrendous crimes, the international community tries to safeguard the world's peace, security and well-being. The government's role in prosecuting CAH is, therefore, to act not only on behalf of the victims but also the international community.³⁰¹ This cannot be fulfilled when the offence is mischaracterized and prosecuted as an ordinary crime that carries purely national interests.³⁰²

299 Tadesse Simie, "Prosecuting CAH in Ethiopia: Where is the Law?", (21 June 2022), Available at: <https://issafrica.org/iss-today/prosecuting-crimes-against-humanity-in-ethiopia-where-is-the-law>, Accessed on July 10, 2022.

300 Ibid.

301 Ibid.

302 Ibid.

Chapter 5

Conclusion and Recommendations

5.1 Conclusion

CAH is one of the horrendous crimes that shocks the conscience of every human being. It was proscribed for the first time in positive ICL in the Nürnberg Charter in order to penalize Nazi criminals for their horrific deeds committed during WW II. Since then, the concept of CAH and its defining elements got developed in international law and jurisprudence. In particular, the ICTY and the ICTR played a pivotal role in such a process. The contemporary definition of the term that reflects CIL is contained in the ICC Statute.

This research assessed whether or not Ethiopian criminal laws adequately contained the notion of CAH as reflected under CIL. The 1957 Penal Code, the FDRE Constitution and the FDRE Criminal Code were the ones the discussion focused on. While the 1957 Penal Code did nothing more than putting the term as a caption in its article 281, the FDRE Constitution regarded it simply as an agglomeration of gross human rights violations. The FDRE Criminal Code did not contain any provision criminalizing CAH as a discrete offence even if it came into being after much development of the concept in international law. This has resulted from the trend of unnecessarily equating CAH with the crimes of genocide and war crimes.

This can be inferred, for instance, from Art. 44 of the Code which uses the term ‘CAH’ to refer to both genocide and war crimes’. The explanatory notes to the Code explain this further by saying that article 269 and the following articles are concerned with crimes that are CAH. By referring to CAH as including crimes from article 269-280, the explanatory notes were apparently using the phrase ‘CAH’ as synonym to the phrase ‘fundamental crimes against international law’ employed by the code as the title of chapter II of its book III to designate genocide and war crimes. That seems why the drafters did not include a separate provision in the Code dealing with CAH.

From this inadequacy of the criminal laws on CAH ensued a number of problems. They include: difficulty to prosecute persons alleged of committing CAH, impact in the maintenance of peace

and security of the country, etc. In order to do away with these and similar other problems, the following points of recommendation are worth considering.

5.2 Recommendations

- Raising the understanding on CAH by key stakeholders: From the foregoing discussions, what we can learn is that the concept of CAH is ill-understood in Ethiopia even among the key actors. For instance, the framers as well as drafters of the constitution understood it as a mere collection of serious human rights violations. That is what is reflected in the constitutional making process, by, for instance, the members of the Constituent Assembly. Of course, CAH involves the commission of serious inhumane acts. But what makes CAH what it is is the contextual element within which it is committed along with the existence of the required individual circumstances. Hence, such gap of properly understanding the concept of CAH must be filled in order for it to get included in future amendments of the criminal laws in its proper context.
- Amending the Laws: Ethiopia has an erga omnes obligation to prosecute and punish offenders of this horrendous crime. This obligation is non-derogable in any circumstances whatsoever. The current criminal laws do not enable it to penalize offenders of CAH per se. Hence, the government should amend both the Constitution and the Criminal Code to contain CAH in a manner consistent with the international law definition of the term so that it will be able to discharge its commitment.
- Using CIL: As it stands, the criminal laws are insufficient in dealing with CAH. There is, thus, a legal lacuna in this regard. This lacuna of the laws can best be filled by applying CIL rules concerning CAH. Of course, some people (including my interviewee from the Ministry of Justice), do not see this as a tenable option. As for them, the silence of the Constitution as regards domestication of CIL stands on the way of its domestic application. However, since CIL is a law which applies irrespective of the will of states, it does not need the blessing of a state by way of an enabling legislation. What is more, the Criminal Code authorizes the domestic application of international law in criminal matters to which CIL is a part.

References

1. Books and Articles

- Antonio Cassese, Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law: The Kulk and Kislyiy v Estonia Case before the ECHR, *Journal of International Criminal Justice*, Vol 4, (2006), 410-418.
- Antonio Cassese, *International Criminal Law*, (2003).
- Carsten Stahn, *A Critical Introduction to International Criminal Law*, Cambridge University Press, (2019).
- Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application*, (2011).
- Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, *Law and Contemporary Problems*, vol 59, no 4, (1996).
- Darryl Robinson, Defining Crimes against Humanity at the Rome Conference, *The American Journal of International Law*, vol 93, no 1, (1999).
- Getachew Assefa, The Place of International Law in the Ethiopian Legal System, in Zeray Yihdego, Melaku Geboye and Fikremarkos Merse's eds., *Ethiopian Year Book of International Law*, (2016).
- Girmachew Alemu, The Anatomy of Special Prosecutor v Colonel Mengistu Hailemariam et al 1994-2008, *International Journal of Ethiopian Studies*, Spring/Fall 2009, vol 4, no ½ (Spring/Fall 2009), 1-53.
- Hannes Vallikivi, Domestic Applicability of CIL in Estonia, *Juridica International VII*, (2002).
- Kai Ambos, The Fujimori Judgment: A President's Responsibility for Crimes against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus, *Journal of International Criminal Justice*, Vol 9, Issue 1, (March 2011).
- Kathleen M. Kedian, CIL and International Human Rights Litigation in United States Courts: Revitalizing the Legacy of the Paquete Habana, *William & Mary Law Review*, vol 40 (1998-1999), Issue 4, (Apr. 1999), Article 6.
- Leila Nadya Sadat, Crimes against Humanity in the Modern Age, *The American Journal of International Law*, vol 107, no 2, (2013).
- Linderfalk U, The Legal Consequences of Jus Cogens and the Individuation of Norms, *Leiden Journal of International Law*, (2020).
- Malcolm N. Shaw, 'International Law', Sixth ed, (2008).
- Margaret Guzman, The Road from Rome: the Developing Law of Crimes against Humanity, *Human Rights Quarterly*, vol 22, (2000).
- Pierre-Hugues Verdier and Mila Versteeg, International Law in National Legal Systems: an Empirical Investigation, *The American Journal of International Law*, vol 109, (2015).
- Robert Dubler and Matthew Kalyk, *Crimes against Humanity in the 21st Century: Law, Practice and Threats to International Peace and Security*, (2018).
- Simon Chesterman, An Altogether Different Order: Defining the Elements of Crimes against Humanity, *Duke Journal of Comparative and International Law*, vol 10, (2000).
- Tadesse Simie, Prosecution of Core Crimes in Ethiopia: Domestic Practice visa-`vis International Standards, (2021).

- Takele Seboka, The Monist-Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia, J. Eth. L., Vol 23, No 1, (2009).
- William Schabas, The International Criminal Court: a Commentary on the Rome Statute, (2010), as cited by Robert and Kalyk in note 783.
- William Schabas, Unimaginable Atrocities: Justice, Politics and Rights at the War Crimes Tribunals, (2014).
- Yudan Tan, The Rome Statute as Evidence of CIL, International Criminal Law Series, 2213-2724, vol 16, (2021).

2. Domestic Legislations and International Instruments

- Proclamation No. 1/1995, The Federal Democratic Republic of Ethiopian Constitution, 23 August 1995, 1st year No. 1.
- Proclamation No. 414/2004, the Criminal Code of the Federal Democratic Republic of Ethiopia, 9 May 2005.
- Proclamation No. 804/2013, A Proclamation to Re-establish the National Intelligence and Security Service, 23 July 2013, 19th year no. 55.
- Constitution of Germany, (1949).
- Constitution of Greece, (1975).
- Constitution of Italy, (1947).
- Constitution of Portugal, (1976).
- Constitution of the Republic of South Africa, (1996).
- Constitution of the Russian Federation, (1993).
- Control Council Law No. 10, Punishment of Persons guilty of War Crimes, Crimes against Peace and Crimes against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946), Available at: <http://hrlibrary.umn.edu/instreet/ccno10.htm>, accessed on December 11, 2021.
- Convention on the non-applicability of Statutory Limitations to War Crimes and CAH, 26 November 1968.
- Draft Code of Crimes against the Peace and Security of mankind, adopted by the International Law Commission in 1996.
- Draft Code of Offences against the Peace and Security of Mankind, adopted by the Third Session of the International Law Commission, May 16 to July 27 1951.
- Draft Code of Offences against the Peace and Security of mankind, adopted by the International Law Commission in 1954.
- Inter-American Convention on the Forced Disappearance of Persons, 9 June 1994, 33 I.L.M. 1529 (1994).
- Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 29 July 1950.
- Rome Statute of the International Criminal Court (ICC), Done at Rome on 17 July 1998 and entered into force on 1 July 2002, United Nations, Treaty Series, vol 2187, no 38544.
- Statute of the International Criminal Tribunal for the Prosecution of Persons responsible for Genocide and other Serious Violations of International Humanitarian Law committed in the Territory of Rwanda and Rwandan Citizens responsible for Genocide and other such Violations committed in the

Territory of Neighboring States between 1 January 1994 and December 31 1994 (ICTR Statute), Adopted by the Security Council Resolution 955/1994, (8 November 1994).

- Statute of the International Tribunal for the Prosecution of Persons responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia since 1991 (ICTY Statute), Adopted by the Security Council Resolution 827/1993, (May 25 1993), Available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalTribunalForTheFormerYugoslavia.aspx>, accessed on December 8, 2021.
- Statute of the Special Court for Sierra Leone, (14 August 2000).
- UN General Assembly World Summit Outcome (2005), un Doc. A/RES/60/1, 60th sess, 8th plen mtg (16 September 2005) ('2005 World Summit Outcome'), Agenda Items 46 and 120.
- UN General Assembly, Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, 11 December 1946, A/RES/95, Available at: <https://www.refworld.org/docid/3b00f1ee0.html>, accessed on February 10, 2022.
- UN General Assembly, Question of the punishment of war criminals and of persons who have committed CAH, 15 December 1969, A/RES/2583, Available at: <https://www.refworld.org/docid/3b00f1d258.html>, Accessed on 2 July 2022.
- United Nations, Charter of the International Military Tribunal Annex to the Agreement for the Prosecution and Punishment of the major War Criminals of the European Axis (London Agreement), 8 August 1945, Available at: <https://www.refworld.org/docid/3ae6b39614.html>, accessed on December 11, 2021.

3. Cases

- Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya ICC-01/09, International Criminal Court (ICC), (31 March 2010).
- Korbely v Hungary, (Merits and just Satisfaction, Grand Chamber), Application No. 9174/02, (19 September 2008).
- Kulk and Kislyiy v Estonia, (European Court of Human Rights Fourth Section), Application No. 23052/04, (17 January 2006).
- The Federal Attorney General v Getachew Assefa and others, Ruling by the Federal High Court, Lideta Division Criminal Bench, Presided by: Judges Piteresen Ambaw, Dejene Bersisa and Biruk Ayalew.
- The Prosecutor v Alfred Musema (Judgment and Sentence), ICTR-96-13-T, International Criminal Tribunal for Rwanda (ICTR), 27 January 2000.
- The Prosecutor v Blagojevic and Jokic (Trial Judgment), Case No. IT-02-60-T, International Criminal Tribunal for the former Yugoslavia (ICTY), (17 January 2005).
- The Prosecutor v Clément Kayishema and Obed Ruzindana (Trial Judgement), ICTR-95-1-T, International Criminal Tribunal for Rwanda (ICTR), 21 May 1999.
- The Prosecutor v Dario Kordic and Mario Cerkez (Trial Judgement), IT-95-14/2-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 26 February 2001.
- The Prosecutor v Dragan Nikolic, (Decision on Interlocutory Appeal Concerning Legality of Arrest), IT-94-2-AR73, International Criminal Tribunal for the former Yugoslavia (ICTY), (5 June 2003).
- The Prosecutor v Dragoljub Kunarac and others (Appeal Judgment), IT-96-23 and IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), (12 June 2002).

- The Prosecutor v Dragoljub Kunarac and others (Trial Judgment), IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001.
- The Prosecutor v Dragomir Milosevic (Trial Judgment), IT-98-29/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), (12 December 2007).
- The Prosecutor v Dusko Tadic (Appeal Judgment), IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), (15 July 1999).
- The Prosecutor v Dusko Tadic (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction), IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, [140]-[141].
- The Prosecutor v Duško Tadic (Decision on the Form of the Indictment), IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), (14 December 1995).
- The Prosecutor v Eliezer Niyitegeka (Judgment and Sentence), ICTR-96-14-T, International Criminal Tribunal for Rwanda (ICTR), 15 May 2003.
- The Prosecutor v Gean-Pierre Bemba Gombo, Decision Pursuant to Article 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (Pre-Trial Chamber II Decision), ICC-01/05-01/08-424, International Criminal Court (ICC), (15 June 2009).
- The Prosecutor v Georges Anderson and Nderubumwe Rutaganda (Judgement and Sentence), ICTR-96-3-T, International Criminal Tribunal for Rwanda (ICTR), 6 December 1999.
- The Prosecutor v Germain Katanga, Decision on the Confirmation of Charges (Pre-Trial Chamber I Decision), ICC-01/04-01/07-717, International Criminal Court (ICC), (30 September 2008).
- The Prosecutor v Germain Katanga, Judgment Pursuant to Article 74 of the Rome Statute (Trial Chamber II Decision), ICC-01/04-01/07-3436-TENG, International Criminal Court (ICC), (7 March 2014).
- The Prosecutor v Goran Jelasic (Trial Judgement), IT-95-10-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 14 December 1999.
- The Prosecutor v Ignace Bagilishema (Trial Judgement), ICTR-95-1A-T, International Criminal Tribunal for Rwanda (ICTR), 7 June 2001.
- The Prosecutor v Jean-Paul Akayesu (Trial Chamber I Judgment), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), (2 September 1998).
- The Prosecutor v Jean-Pierre Bemba Gombo, Judgment Pursuant to Article 74 of the Rome Statute (Trial Chamber III Decision), ICC-01/05-01/08-3343, International Criminal Court (ICC), (21 March 2016).
- The Prosecutor v Kupreskic and others (Trial Judgment), IT-95-16-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 January 2000.
- The Prosecutor v Laurent Semanza (Judgement and Sentence), ICTR-97-20-T, International Criminal Tribunal for Rwanda (ICTR), 15 May 2003.
- The Prosecutor v Milorad Krnojelac (Trial Judgement), IT-97-25-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 March 2002.
- The Prosecutor v Mladen Naletilic and Vinko Martinovic (Trial Judgement), IT-98-34-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 31 March 2003.
- The Prosecutor v Tihomir Blaskic (Trial Judgment), Case No. IT-95-14-T, International Criminal Tribunal for the former Yugoslavia (ICTY), (3 March 2000), [206].

4. Reports

- EHRC and the United Nations Office of the High Commissioner for Human Rights (OHCHR), Joint Investigation Report on Alleged Violations of Human Rights in the Context of the Conflict in Tigray Region, (November 2021).
- EHRC Report on Violations of Human Rights and International Humanitarian Law in Afar and Amhara Regions of Ethiopia, (March 2022).
- Ethiopian Human Rights Commission, “መንግስት ያለ አይመስልም ነበር”, An Investigation report on the human rights violations that took place in Oromia region due to security deterioration following the assassination of artist Hachalu Hundessa, (January 2021).
- Human Rights Watch, “Targeting the Anuak: Human Rights Violations and Crimes against Humanity in Ethiopia’s Gambella Region”, Vol 17, no 3(A), (March 2005).
- Report of the International Law Commission on the work of its 48TH session (ILC Report), 6 May - 26July 1996, UN gaor, 51st sess, Supp. 10, UN Doc. A/51/10, (12 November 1996).
- Report of the Secretary General pursuant to Paragraph 2 of Security Council Resolution 808/1993, 3 May 1993.

5. Articles from the Web and others

- “Crimes against Humanity and the Development of International Law”, Available at: <https://www.nationalww2museum.org/war/articles/crimes-against-humanity-international-law>, accessed on December 2, 2021.
- “Crimes against Humanity”, Available at: <https://trialinternational.org/topics-post/crimes-against-humanity/>, accessed on November 24, 2021.
- “Crimes against Humanity”, Available at: <https://www.hrw.org/reports/2005/ethiopia0305/10.htm>, accessed on November 24, 2021.
- “Customary International Law”, Available at: https://www.law.cornell.edu/wex/customary_international_law, accessed on February 9, 2022.
- “Genocide and Crimes against humanity”, Available at: <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199207541.001.0001/acprof-9780199207541-chapter-26>, accessed on March 7, 2022.
- “Nazi Conspiracy and Aggression: Opinion and Judgment”, Available at: https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Nazi-opinion-judgment.pdf, accessed on February 10, 2022.
- “War Crimes and Crimes against Humanity”, Available at: <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199207541.001.0001/acprof-9780199207541-chapter-24>, accessed on March 7, 2022.
- A Discussion conducted by the Constituent Assembly on the Draft Article 28 of the Constitution, (November 17 1994), vol 2, Minute numbers 000104-000113.
- Antonio Cassese, Introductory Note on the Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, Available at: https://legal.un.org/avl/ha/ga_95-I/ga_95-I.html, accessed on February 10, 2022.
- Debebe Hailegebriel, “Prosecution of Genocide at International and National Courts”, LL.M Thesis, Kampala: Makerere University, (2003).

- Explanatory notes on the Final Draft of the FDRE Criminal Code, (April 2004).
- International Criminal Court (ICC), Elements of Crimes, (2011), ISBN No. 92-9227-232-2.
- International Criminal Law Guidelines, “Crimes against Humanity”, (2017).
- Tadesse Simie, “Prosecuting CAH in Ethiopia: Where is the Law?”, (21 June 2022), Available at: <https://issafrica.org/iss-today/prosecuting-crimes-against-humanity-in-ethiopia-where-is-the-law>, Accessed on July 10, 2022.
- United Nations Framework of Analysis for Atrocity Crimes, (2014).
- Wondwossen Demissie, “A critical Gap in the Ethiopian Human Rights Commission’s Report on Crimes against Humanity”, 16 January 2021, Available at: <https://www.thereporterethiopia.com/article/acritical-gap-ethiopian-human-rights-commissions-report-crimes-against-humanity>, accessed on June 14, 2021.

6. Interview

- Interview with ato Mihiretu Kumilachew, Director-general of the Trans-national and Organized Crimes Directorate at the Ministry of Justice, held on February 2022.