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**ADDIS ABABA UNIVERSITY**

**COLLEGE OF LAW AND GOVERNANCE STUDIES**

**SCHOOL OF LAW**

**APPRAISAL OF THE ETHIOPIAN LEGAL FRAMEWORK FOR  
PROSECUTION OF INTERNATIONAL CRIMES COMMITTED ABROAD**

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**Appraisal of the Ethiopian Legal Framework for Prosecution of International Crimes Committed Abroad**

**A Thesis Submitted to the School of Law, Addis Ababa University, in Partial Fulfillment of Master of Laws Degree (LLM) in Public International Law**

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**June 2024**

**Addis Ababa**

## Declaration

I **Belayhun Ashenafi** the undersigned, declare that the LLM Thesis comprises my own work. In compliance with widely accepted practices, I have duly acknowledged and referenced all materials used in this work. I understand that non-adherence to the principles of academic honesty and integrity, misrepresentation/fabrication of any idea/data/fact/source will constitute sufficient ground for disciplinary action by the University and can also evoke criminal sanction from the State and civil action from the sources which have not been properly cited or acknowledged.

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## Approval page

This is to certify that this LLM MA thesis titled “**Appraisal of the Ethiopian Legal Framework for Prosecution of International Crimes Committed Abroad**” is written by **Belayhun Ashenafi** as partial fulfillment of the requirements of a LLM in Public International Law. The thesis complies with the regulations of Addis Ababa University and meets the accepted standards with respect to originality and required quality. Therefore, I, the supervisor, approve the thesis for final submission and defense to the University.

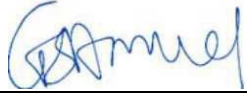
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I, **Belayhun Ashenafi**, hereby declare that this work is original and has not been presented in any other institution before. To the best of my knowledge and belief, I also declare that any source used here has been duly acknowledged and cited.

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## Verification

I, **Mesay Asgedom**, have read this thesis and approved it for examination.

**Advisor: Mesay Asgedom (PHD)**



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## **List of Acronyms**

ACC	African Criminal Court
CAH	Crimes Against Humanity
CIL	Customary International Law
CUD	Collation for Unity and Democratic Party
FDRE	Federal Democratic Republic of Ethiopia
FHC	Federal High Court of Republic of Ethiopia
UJ	Universal Jurisdiction
ICL	International Criminal Law
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
UN	United Nations
UNSC	United Nations Security Council
SPO	Special Public Prosecutor Office

## **Abstract**

*Despite the recognition by states that core crimes pose a threat to the international community and the importance of combating impunity, little attention has been given to the prosecution of such crimes committed abroad, including in Ethiopia. This research aims to explore the prosecution of international crimes committed abroad within the framework of the Ethiopian criminal justice system and point out the substantive and procedural challenges. This research has conducted on both doctrinal and empirical research approaches. Interview with key informants have technically administered and analyzed by using purposive sampling technique to collect relevant data as a primary source. As a secondary sources, the researcher has reviewed relevant literatures and analyzed a variety of documents that are essential for the conduct of the study. Finally, the data gathered from both primary and secondary sources have thematically analyzed. The findings of this research have revealed that the Ethiopian criminal legal frameworks do not address adequately the criminalization, investigation, and cooperation on prosecution of international crimes committed abroad. No thresholds have provided by the legal machinery as to the specific conditions, and underpinning criteria for the application universal jurisdiction in Ethiopia. This thesis also founded that there is an impunity gap emanating from a lack of criminal liability for crime against humanity since it is not criminalized at all. Therefore, the research recommends that the Ethiopian law-making organ enact laws that criminalize crime against humanity. Also, the Criminal Procedure laws of Ethiopia should clearly incorporate specific procedural rules and principles applicable to special investigation, prosecution, proceedings, and international legal cooperation towards prosecution of international crimes committed abroad.*

*Key Words: International Crimes, Universal Jurisdiction, Prosecution, Ethiopia*

# CHAPTER ONE

## INTRODUCTION

### 1.1. Background of the Study

Throughout its history, Ethiopia has contributed to the development of the international legal order and it has laid down its own legacy in fighting against injustice and colonialism in the world.<sup>1</sup> In addition, Ethiopia has been playing an active role in the protection of international peace and security, UN Peace-Keeping mission, and fighting against international crimes.<sup>2</sup> With such leading contributions to the international fora, Ethiopia remained on the frontline of international diplomacy, international legal order, and geo-political strategy.<sup>3</sup> It has also acceded to and ratified a number of international treaties relevant to the field of international crimes although the Rome Statute of the International Criminal Court is a significant exception.<sup>4</sup>

The above facts are also true when we come to international crimes.<sup>5</sup> Ethiopia has pioneered in criminalizing international crimes under its domestic legal system.<sup>6</sup> The 1957 Penal Code contains 14 articles which are devoted to crimes under international law under the title ‘crimes against laws of nations’.<sup>7</sup> The Penal Code included the core crimes of crime against humanity,

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<sup>1</sup>Yirga Gelaw Weldeyes, The battle of Adwa: an Ethiopian victory that ran against the current of colonialism, available at <https://theconversation.com/the-battle-of-adwa-an-ethiopian-victory-that-ran-against-the-current-of-colonialism-132360> accessed 25, October 2022. See Getachew Metaferia, *The Ethiopian Connection To The Pan-African Movement, Historical And Contemporary Third World Developments*, Journal Of Third World Studies, Vol. 12, (1995) 303.

<sup>2</sup> Solomon A. Dersso, Contributor Profile: Ethiopia, available at <https://www.ipinst.org/wp-content/uploads/2020/05/Ethiopia-profile.pdf> accessed 25, November 2022. Ethiopia is the largest troop contributor to UN peacekeeping with over 8,400 uniformed personnel, the vast majority of them serving in Darfur (UNAMID), Abyei (UNISFA) and South Sudan (UNMISS), available at <https://news.un.org/en/gallery/529832> accessed 25, November 2022.

<sup>3</sup>Berouk Mesfin, Ethiopia's Role and Foreign Policy in the Horn of Africa, *International Journal of Ethiopian Studies*, Vol. 6, pp. 87- 113, (2012) 89.

<sup>4</sup>Rome Statute of the International Criminal Court U.N. Doc. 2187 U.N.T.S. 90, entered into force 1 July 2002.

<sup>5</sup>In this thesis, the expressions ‘core crimes’ and ‘international crimes’ are used interchangeably.

<sup>6</sup>The Penal Code of the Empire of Ethiopia of 1957, Proclamation No. 158/ 1957, Extraordinary Issue No. 1, of 1957 of the Negarit Gazeta, 23 July 1957, entered into force 5 May 1958, Article 281-295 (Hereinafter ‘the Penal Code’).

<sup>7</sup>Ibid, Book II, Title II, Chapter 1

genocide and war crimes punishable under Ethiopian legal jurisprudence.<sup>8</sup>As well, it is important to note that the Penal Code contained crimes against humanity and genocide together although these crimes are distinct international crimes with their own material and mental elements.<sup>9</sup>

The 2004 Criminal Code of Ethiopia,<sup>10</sup> which replaced the Penal Code, also criminalizes international crimes<sup>11</sup> with a significant exception to crime against humanity.<sup>12</sup> Regarding jurisdiction on core crimes, the criminal code dictates that prosecution is set to be instituted irrespective of whether such crimes have been committed in Ethiopia or abroad.<sup>13</sup> Indeed, the 2004 Criminal Code of Ethiopia adopts universal jurisdiction concerning international crimes.<sup>14</sup>

Universal jurisdiction can be defined as a jurisdiction which grants jurisdiction to national courts over crimes although the forum state does not have a directly affected interest in relation to the commission of the crime.<sup>15</sup> This principle dictates that national courts may prosecute individuals for serious crimes against international law based on the principle that such crimes harm the international community or international order itself, which individual States may act to protect.<sup>16</sup>

As such, it is invoked in the absence of another jurisdictional links to address the deficiencies of the primarily concerned states and a given state conducts prosecution as a representative of the international community.<sup>17</sup> Hence, the national judiciary will be set in motion against

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<sup>8</sup> Ibid

<sup>9</sup> Debebe Hailegebriel, Prosecution of Genocide at International and National Courts: A Comparative Analysis of Approaches by ICTY/ICTR and Ethiopia/Rwanda, (2003), LLM Thesis, Makerere University, p 19.

<sup>10</sup>The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/ 2004 *entered into force* 9 May 2005, (herein after ‘the Criminal Code’).

<sup>11</sup>Ibid, Book III, Title II, Art 269-280.

<sup>12</sup> The Criminal Code has failed at least to give recognition specifically to crime against humanity as it does not have any provision that deals with such core crime. See Messay Asgedom, The Place of Crimes against Humanity under the Ethiopian Legal System: A Reflection, Bahir Dar University Journal of Law Vol.3, No2 (2013) 412.

<sup>13</sup>Ibid, Art 17.

<sup>14</sup> Ibid.

<sup>15</sup> Malcolm N. Shaw, International Law, Cambridge University Press, Ninth Edition, (2021) 1548.

<sup>16</sup>Aisling O’Sullivan, Universal Jurisdiction in International Criminal Law; The Debate and the Battle for Hegemony, Routledge Research in International Law, (2017) 90.

<sup>17</sup>L. Reydams *Universal Jurisdiction: International and National Perspectives*, Oxford University Press Oxford, (2003) 16.

perpetrators of international crimes irrespective of nationality of the suspect or the place of the commission of such crimes.<sup>18</sup>

Although the Ethiopian criminal justice system adopts the principle of universal jurisdiction for prosecution of international crimes committed abroad, Ethiopia has not enforced such principle so far. The specific elements and thresholds to set in motion of prosecution of core crimes committed abroad, as they appear in the 2004 Criminal Code and other relevant laws, remain unexamined.<sup>19</sup> In addition, the legal, political, diplomatic, and geo-strategic conditions and implications for prosecuting international crimes committed abroad have not been exposed to detailed academic scrutiny.

Under this paper, the writer examined the relevant Ethiopian legal frameworks for prosecution of international crimes committed abroad, analyzes whether the substantive and procedural elements and conditions are sufficient and clear to successfully prosecuting such crimes and to end impunity. Moreover, the thesis explains the scope, prospects and implications of universal jurisdiction as it appears under the Ethiopian criminal justice system for prosecution of core crimes committed abroad.

## **1.2. Statement of the Problem**

Although the international community is struggling to combat commission of international crimes, such crimes are being committed with an increasing rate as the world suffered from many civil wars, ethnic conflicts, international and non-international armed conflicts.<sup>20</sup> Again, states in the world agreed that core crimes are a threat to the international community as a whole<sup>21</sup>, and hence, fighting against impunity of such crimes relies on each state on equal basis

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<sup>18</sup> Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches And The Transnational Prosecution Of International Crime*, American Journal of International Law, (2012) 12.

<sup>19</sup>Ethiopia Human Rights Report, Country Reports on Human Rights Practices for United States Department of State Bureau of Democracy, Human Rights and Labor, 2020, available at <https://www.state.gov/wp-content/uploads/2021/09/ETHIOPIA-2020-HUMAN-RIGHTS-REPORT.pdf> accessed 20, October 2022.

<sup>20</sup> New investigations on core international crimes increase by 44% since 2016, European Union Agency for Criminal Justice Cooperation, 2022, available at <https://www.eurojust.europa.eu/news/new-investigations-core-international-crimes-increase> accessed 02, December 2022.

<sup>21</sup> Ban Ki-Moon, UN Secretary General, Report of The scope and application of the principle of Universal Jurisdiction (29 July 2010) UN Doc A/65/181, Para 9. See also, Aisling O’Sullivan, (n9) p 44.

of maintaining humanity.<sup>22</sup> But, prosecution of international crimes which are committed abroad has been given little attention by States.<sup>23</sup> Majority of the world States do not consider such prosecution as their obligation under the international legal order.<sup>24</sup> As such, the principle of universal jurisdiction is not developed and it has not been harmonized under the legal system of every states.<sup>25</sup> Indeed, such principle remains vague, incomplete and vary in which its content and scope of application is left to the will of individual states.<sup>26</sup>

Due to this, most of the perpetrators of international crimes have not been brought to justice since they managed to get political and diplomatic immunity and legal lacuna shields.<sup>27</sup> As such, prosecution against such culprits is not successful, in many instances, due to various legal barriers, the active role of politics and absence of uniformity on the scope and application of universal jurisdiction.<sup>28</sup>

With the same fashion, Ethiopia is not an exception to this since its legal frameworks on prosecution of international crimes committed abroad are remaining unutilized, incomplete and vague.<sup>29</sup> On the other side, there is lack of literatures as to the adequacy and perspectives of universal jurisdiction as an effort to fighting impunity of core crimes which are committed abroad.

The Ethiopian legal frameworks for prosecuting core crimes committed abroad have not been enforced so far. And, the substantive, procedural and institutional elements have not been subject

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<sup>22</sup> The African Union Model National Law on Universal Jurisdiction Over International Crimes, Decision EX.CL/Dec.708 (XXI) adopted by the 21st Ordinary Session of the Executive Council of the African Union, July 2012 in Addis Ababa, Preamble, Para 1, available at [https://www.un.org/en/ga/sixth/71/universal\\_jurisdiction/african\\_union\\_e.pdf](https://www.un.org/en/ga/sixth/71/universal_jurisdiction/african_union_e.pdf) accessed 12, December 2022. See also, Rome Statute of the International Criminal Court U.N. Doc. 2187 U.N.T.S. 90, entered into force 1 July 2002, Para 4.

<sup>23</sup> Luc Reydam, *Universal Jurisdiction, International and Municipal Legal Perspectives*, Oxford University Press (2003) 86.

<sup>24</sup> Ibid.

<sup>25</sup> Kevin Jon Heller, Frédéric Mégret, Sarah MH Nouwen, Jens David Ohlin, and Darryl Robinson, *The Oxford Handbook Of International Criminal Law*, Oxford University Press, (2020) 266.

<sup>26</sup> Ibid

<sup>27</sup> Amnesty International, *Universal jurisdiction: The challenges for police and prosecuting authorities* (2007) 11, available at <https://www.amnesty.org/fr/wp-content/uploads/2021/07/ior530072007en.pdf> accessed 02, November 2022.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

to academic scrutiny in a comprehensive manner. As discussed above, the Criminal Code entails that Ethiopia can assume universal jurisdiction over international crimes even in a broader range of criminal conducts compared to the international criminal justice system.<sup>30</sup> It is, however, to be noted that there are restrictive qualifying requirements under the Ethiopian criminal law in order to enforce the universal jurisdiction section.

The Criminal Code has provided that prosecution of international crimes under the principle of universal jurisdiction requires prior consultation with the Minister of Justice before instituting proceedings.<sup>31</sup> Here, the role and power of the Ministry of Justice in relation with instituting prosecution of core crimes which are committed abroad is not clear as such. It is not clear from the law whether the Minister of Justice is given discretion to either allow or deny prosecution such crimes based on universal jurisdiction. Moreover, the conditions, implications and requirements to be considered by the Ministry of Justice while deciding on such matters have not been established. As such, this section of the law needs academic exploration in line with the basic essences, scope and principles of universal jurisdiction.

The Ethiopian criminal justice has also precludes trial in absentia as far as the application of universal jurisdiction is concerned.<sup>32</sup> As such, the suspect needs to be present during the trial in Ethiopia.<sup>33</sup> Given the seriousness of international crimes and in line with the values of deterrence effect of prosecutions in general, prohibition of trial in absentia deserves some sort of exploration. In addition, one of the core crimes, crime against humanity has not been criminalized under the Ethiopian laws in clear manner.<sup>34</sup>

On top of the above issues, as the Ethiopian judicial and legal machinery is not tested on prosecution of international crimes committed abroad, exploring the practice, gaps, challenges, prospects and implications of such legal frameworks is the heart of this study.

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<sup>30</sup>Adi Dekebo Dale, *The Principle of Universal Jurisdiction for Massive Human Right Violation of the Past: An International and Ethiopian Perspective*, *Mizan Law Review*, Vol. 13, (2019) 176.

<sup>31</sup>The Criminal Code, (n 10), Art 19(3)

<sup>32</sup>Id, Art 19(1)(b).

<sup>33</sup>Ibid.

<sup>34</sup> Tadesse Simie, *Prosecuting crimes against humanity in Ethiopia: where is the law?* available at <https://issafrica.org/iss-today/prosecuting-crimes-against-humanity-in-ethiopia-where-is-the-law>, accessed on February 9, 2023; DersolegnYeneabat, *Fighting against Impunity in Ethiopia: An Emphasis on Crime against Humanity*, *Beijing Law Review*, 11, 43-63, (2020) 53-56.

### **1.3. Objectives of the Research**

#### **1.3.1. General Objective**

The thesis purports to examine the adequacy of the Ethiopian legal framework for prosecution of international crimes committed abroad.

#### **1.3.2. Specific Objectives**

The specific objectives, *inter alia*, includes to:

- A. To assess the Ethiopian legal frameworks for the prosecution of international crimes which are committed abroad;
- B. To identify the major legal lacunas and barriers under the Ethiopian legal framework to prosecute and ensure justice on core crimes committed abroad; and
- C. To explain the underlying factors of the legal gaps and ambiguities.

### **1.4. Research Questions**

This paper tries to answer the following major research questions:

1. How does the criminal justice system of Ethiopia provide for the prosecution of core crimes committed abroad?
2. What are the legal deficits and challenges under the Ethiopian criminal justice system to prosecute core crimes committed abroad?
3. What are the underpinning factors for the application of universal jurisdiction for core crimes committed abroad?

### **1.5. Methodology of the Research**

The research employed both doctrinal and empirical research approaches. Doctrinal research approach helps to provide a systematic exposition of the legal frameworks of Ethiopia on the prosecution of international crimes which are committed abroad. As such, writer of this thesis doctrinally analyzed, *inter alia*, the 2004 Criminal Code of FDRE, the Ethiopian Criminal Procedure Code, the FDRE Constitution and Proclamations and directives which are relevant on the area of this thesis. In addition, the writer complemented the analysis with the main and relevant regional and international laws, books, journals articles, archives, and internet sources.

On top of the doctrinal approach, the researcher employed a qualitative research approach. The researcher conducted key informant interview with officials and experts of Ministry of Justice, Federal Supreme Court, prominent legal scholars, and experienced researchers on the area in an effort to shed light and compliment the doctrinal research.

While selecting the interviewees, the researcher employed a purposive sampling method. This type of sampling method helps to get interviewees that can provide detailed information and analysis because of their expertise and professional link with the main questions of the research.<sup>35</sup> As such, the researcher selected the interviewees from the above organizations by taking in to account their nearest expertise link and professional responsibility on prosecution of international crimes.

An interview was conducted with two experts each from Ministry of Justice and Federal High Court who are an expert on the subject area. Another interview was also conducted with experts from the remaining offices mentioned above. The number of interviewees from each organization was decided as to their expert knowledge and practical experiences to the intended law and practice.

### **1.5.1. Data Collection Method**

The central question of this research dictates detail expert information and ideas from the key informants. To this end an open-ended question will be employed in order to get detailed answers that will thoroughly address the issues in the research questions. Such open-ended questions will be administered by an unstructured interview method as it encourages the interviewees to talk freely and extensively about the given topic in detailed manner.

## **1.6. Ethical Consideration**

While collecting the data, the researcher will protect and never share all personal and confidential information. The identity of the interviewee will be revealed only based on their informed consent. In addition, during interpretation of the collected data, the researcher will do

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<sup>35</sup>Lee Epstein and Gary King, *The Rules of Inference*, *The University of Chicago Law Review*, (Volume 69, 2002) p.105

the interpretation only based on the raw data that will be collected. As such, the researcher will not impose his personal opinion while interpreting the collected data. All secondary sources, which have been used in this research, are properly recognized and cited.

## **1.7. Significance of the Research**

Prosecution of international crimes by national courts is one of the mechanisms in combating impunity. Therefore, this study may enable us to appraise the key issues in Ethiopian legal framework that may help in rethinking the laws and policies in the intellectual and practical dimensions. In this perspective, the study may have the following major significances.

Academic significance: The findings of the study can be a good resource bearing valuable information and initiate intellectual debate about challenges and gaps in the Ethiopian legal frameworks for prosecuting core crimes committed abroad. This contributes to the knowledge base and scholarly discourse, particularly on the practical application of prosecution of international crimes under the instrumentality of Universal Jurisdiction. As this area needs plenty of legal and policy issues, but poorly researched area, the researcher hopes that it could trigger further research works.

Policy significance: the study may help policy makers to rethink on the importance of making clear policy concerned with effective prosecution of core crimes committed abroad. And also, it will attract attention of law and policy makers and to engage in with further enquiries.

## **1.8. Literature Review**

Different literatures discussed the Ethiopian criminal justice system on prosecution of international crimes. Marshet Tadesse, in his book entitled *“Prosecution of Politicide in Ethiopia: The Red Terror Trials”*<sup>36</sup> analyzed the prosecution of genocide against the *Derg* political group and provide a detailed survey of Ethiopian legal frameworks on international crimes. In 2021, Tadesse Simie published a relatively comprehensive study on prosecution of international crimes in Ethiopia entitled *“Prosecution of Core Crimes in Ethiopia: Domestic*

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<sup>36</sup>Marshet Tadesse Tessema, *Prosecution of Politicide in Ethiopia: The Red-Terror Trials* (The Hague: Asser Printing Press, 2018).

*Practice vis-à-vis International Standards*.<sup>37</sup> The book, which is the result of a PhD research, discusses the legal and judicial situation of Ethiopia on prosecution of core crimes in line with the standards of international criminal law (ICL).

The above two books are devoted on the analysis of the Ethiopian legal framework on prosecution of core crimes which are committed in Ethiopia.<sup>38</sup> As such, the universal jurisdiction section of the Ethiopian legal framework, as it applies to prosecution of core crimes committed abroad, has not been addressed in the books.

There is very little domestic literature about prosecution of core crimes committed abroad in the Ethiopian legal framework. In this regard, it is imperative to look at the manuscript written by Adi Dekebo Dale entitled “*The Principle of Universal Jurisdiction for Massive Human Right Violation of the Past: An International and Ethiopian Perspective*.”<sup>39</sup> Adi has discussed that Ethiopia should enforce its laws of universal jurisdiction and should prosecute alleged crimes which are committed abroad.<sup>40</sup> He argued that the requirement of consultation of the Ministry of Justice before prosecuting blurred the application of universal jurisdiction under the FDRE Criminal Code. Nonetheless, the writer left this issue without exploring what would be the imperative role of the Ministry of Justice in prosecuting such kind of crimes.

Still yet, various official statements about the scope and application of universal jurisdiction were made by the Legal Counselors of Ministry of Foreign Affairs of the Federal Democratic Republic of Ethiopia on the sixth committee of the UN General Assembly.<sup>41</sup> Such statement explained that the criminal law of Ethiopia recognizes universal jurisdiction for international crimes and asserted international cooperation is central for the effective enforcement of the principle of universal jurisdiction.<sup>42</sup> Such statement may give some insight on the application of

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<sup>37</sup>Tadesse Simie Metekia, *Prosecution of Core Crimes in Ethiopia: Domestic Practice vis-à-vis International Standards*, (International criminal law series, 2213-2724; volume 15, 2021)

<sup>38</sup> Ibid

<sup>39</sup>Adi Dekebo Dale, (n8)

<sup>40</sup> Ibid

<sup>41</sup> The United Nations General Assembly, The scope and application of the principle of universal jurisdiction, (Agenda item 86), available at [https://www.un.org/en/ga/sixth/76/universal\\_jurisdiction.shtml](https://www.un.org/en/ga/sixth/76/universal_jurisdiction.shtml), accessed 20, December 2022

<sup>42</sup>Sufian Hussein Mohammed, Legal Counselor Ministry of Foreign Affairs of the Federal Democratic Republic of Ethiopia on The scope and application of the principle of universal jurisdiction, (2019), available at

universal jurisdiction in Ethiopia, but it is concerned only about stating what the law says and no statements beyond.<sup>43</sup>

This evinces a clear legal research lacuna and justifies the conduct of this research. Therefore, this paper goes through exploring the legal frameworks of Ethiopia for the prosecution of international crimes committed abroad by analyzing such laws in light of the jurisprudence of the international criminal justice.

## **1.9. Scope of the Study**

Conceptually, the scope of this thesis is limited to analyzing the relevant domestic legal frameworks of Ethiopia for the prosecution of international crimes committed abroad under the umbrella of the 2004 Criminal Code.

## **1.10. Limitations of the Study**

In Ethiopia, as there are no prosecutions that have been made on core crimes committed abroad so far, this study could not benefit from using practical cases on its implementation that would ensue through time. The researcher also faced financial and internet resource limitations while conducting the research.

Despite the identified limitations, the study provides a clear result based on the analysis of the relevant domestic laws, books, authenticated documents, literature, and opinions gathered through an interview.

## **1.11. Operational Definition of Key terms**

Unless otherwise defined, the following definition, are utilized throughout this thesis.

**Universal Jurisdiction:** This study adopts the definition of universal jurisdiction as an international law principle which allows or requires a state to initiate criminal proceedings in respect of international crimes irrespective of the place of commission of the crime and

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[https://www.un.org/en/ga/sixth/74/pdfs/statements/universal\\_jurisdiction/ethiopia.pdf](https://www.un.org/en/ga/sixth/74/pdfs/statements/universal_jurisdiction/ethiopia.pdf) accessed, 26 December 2022.

<sup>43</sup> Ibid

regardless of any link of active or passive nationality or other grounds of jurisdiction recognized by international law.

**International Crimes:** In a broader sense, international crimes can be defined as a violation of rules that protect values having the status of *jus cogens* which include genocide, war crime, crime against humanity, crime of aggression, apartheid, piracy, slavery and, torture. In this study, international crimes include genocide, war crime, crime against humanity, crime of aggression as defined in the Rome Statute.<sup>44</sup>

## 1.12. Organization of the Research

The research organized as follows: the first chapter devoted to providing background of the problem, framing research questions, and defining the scope and methodology of the research.

The second chapter gives a general theoretical background on universal jurisdiction under the international criminal justice system. The theoretical foundation, scope, elements, governing norms, and principles of universal jurisdiction under the jurisprudence of international criminal law will be discussed. As such, the international practice of universal jurisdiction as it applies to the prosecution of international crimes committed abroad will be dealt with.

The third chapter examines the Ethiopian normative frameworks in administering, investigating, and prosecuting international crimes which are committed abroad. This chapter assesses the extent of coverage of universal jurisdiction of international crimes under the 2004 Criminal Code and other relevant laws. In addition, this chapter analyzes the ambiguities, barriers, and limitations of the criminal justice system of Ethiopia in investigating and prosecuting international crimes committed abroad. And hence, the practical challenges and implications which are caused because of the gaps will also be explored in this section. Finally, the last chapter presents the conclusion of the findings and recommendations sought by the thesis.

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<sup>44</sup> Rome Statute (n 4).

## **CHAPTER TWO**

### **PROSECUTION OF CORE CRIMES COMMITTED ABROAD UNDER THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM**

#### **2.1. Introduction**

In the jurisprudence of international criminal law, holding individuals criminally responsible for international crimes committed abroad before national courts is a growing phenomenon.<sup>45</sup> For this reason, prosecuting Individuals for international crimes committed abroad through the instrumentality of universal jurisdiction is an emerging concept and practical concern that needs a detailed examination. This chapter addresses the historical and emerging notions of prosecuting international crimes committed abroad. As such, the researcher analyzes the defining features of international crimes and the theoretical foundations of universal jurisdiction under the jurisprudence of international criminal law. Thereby, the rationale, underpinning norms, elements, principles, and scope of universal jurisdiction as it applies to the prosecution of international crimes committed abroad discussed. In addition, the challenges, status, and extent of cooperation of states in prosecuting core crimes committed abroad by using universal jurisdiction have also discussed in this chapter.

#### **2.2. International Crimes under the Jurisprudence of International Criminal Law: Overview**

Before discussing the principles of the prosecution of international crimes committed abroad, having a clear understanding of international crime itself is worthwhile. International crimes are

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<sup>45</sup> UN Secretary General Ban Ki-Moon, Report, The scope and application of the principle of Universal Jurisdiction (UN Doc A/65/181, 2010) para. 5, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/467/52/PDF/N1046752.pdf?OpenElement>, accessed 21, July 2023.

considered as heinous criminal acts against mankind<sup>46</sup> that are classified under the Rome Statute as genocide,<sup>47</sup> crimes against humanity,<sup>48</sup> war crimes<sup>49</sup>, and crimes of aggression.<sup>50</sup>

Before the adoption of the Rome Statute, the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Nuremberg Trials, and the Tokyo Trials have all played pivotal roles in the development of international crimes. The ICTY and the ICTR were established by the United Nations Security Council in the 1990s as responses to heinous crimes committed during the conflicts in the former Yugoslavia and the Rwandan genocide, respectively.<sup>51</sup> These tribunals represented a significant paradigm shift in international relations, as they were the first institutions created specifically to prosecute individuals for war crimes, crimes against humanity, and genocide on an international scale.<sup>52</sup>

One of the significant contributions of the ICTY and the ICTR has been the development and clarification of legal principles and definitions of international crimes. These tribunals have interpreted, defined, and expanded upon concepts such as genocide, war crimes, crimes against humanity, and command responsibility.<sup>53</sup> Through their judgments, the tribunals have provided clarity on what constitutes these crimes, establishing important precedents that have influenced subsequent prosecutions and the development of international criminal law.

Looking back to the Nuremberg Trials and the Tokyo Trials, these historic tribunals helped shape the foundation of modern international criminal law.<sup>54</sup> Following World War II, the Nuremberg Trials were held to prosecute high-ranking Nazi officials responsible for war crimes,

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<sup>46</sup> Christopher Soler, *The Global Prosecution of Core Crimes under International Law*, T.M.C. Asser Press, The Hague, The Netherlands [www.asserpress.nl](http://www.asserpress.nl), (2019) 46

<sup>47</sup> Rome Statute, (n 4) Article 6; See also, William A. Schabas, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, Second Edition, (2009) pp.17-21

<sup>48</sup> Rome Statute (n 4) Article 5

<sup>49</sup> *Ibid*, article 7

<sup>50</sup> *Ibid*, article 8; See also, Sergey Sayapin, *The Crime of Aggression in International Criminal Law Historical Development, Comparative Analysis and Present State*, Asser Press, Springer, (2014) pp.38-39.

<sup>51</sup> Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan, Christopher Gosnell And Alex Whiting, *Cassese's International Criminal Law*, Oxford University Press, Third Edition, (2013) 259

<sup>52</sup> *Ibid*

<sup>53</sup> Gideon Boas & William A. Schabas, *International Criminal Law Developments in the Case Law of the ICTY*, *International Humanitarian Law Series*, Volume 6, (2003) 113

<sup>54</sup> Antonio Cassese et al. (n 51) 64

crimes against humanity, and genocide.<sup>55</sup> The trials established the principle of individual criminal responsibility, emphasizing that individuals could be held accountable for their actions, regardless of their official positions.<sup>56</sup>

Likewise, the Tokyo Trials targeted Japanese officials responsible for war crimes and crimes against humanity committed during the same period.<sup>57</sup> These trials further developed the principles of international criminal law and solidified the notion that individuals, including those in positions of power, could be held accountable for crimes committed during times of conflict and aggression.<sup>58</sup>

Collectively, these trials have expanded the global understanding of international crimes, ensuring that individuals who commit such acts are subject to justice. As a result, they have contributed to the development of a more robust framework of international criminal law, providing guidance for future prosecutions and promoting deterrence.

Generally, the establishment of these tribunals has paved the way for the creation of the International Criminal Court (ICC), which established in 2002 as a permanent international criminal tribunal. The ICC builds upon the experiences and principles established by the ICTY, ICTR, Nuremberg Trials, and Tokyo Trials, becoming a crucial institution in the fight against impunity and the promotion of accountability for international crimes.

## **2.2.1. Elements of International Crimes**

### **2.2.1.1. Genocide**

International crimes have their own nature and elements. To start with the crime of genocide, the core essence of the crime lies in the intentional attack against specific protected groups of victims aiming at the partial or total destruction of such groups.<sup>59</sup> As such, it can only be committed against national, ethnic, racial or religious groups. The first element of genocide is

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<sup>55</sup> Yusuf Aksar, *Implementing International Humanitarian Law from The Ad Hoc Tribunals to a Permanent International Criminal Court*, Routledge Taylor and Francis Group Publisher, (2004) 78

<sup>56</sup> Ibid

<sup>57</sup> Madoka Futamura, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy*, Routledge, (2008) 93

<sup>58</sup> Ibid

<sup>59</sup> Carsten Stahn, *A Critical Introduction to International Criminal Law*, Cambridge University Press, (2019) 35

specific intent. Here, the perpetrators must have a clear intention to destroy a specific group, whether through killing, causing serious bodily or mental harm, imposing conditions leading to its physical destruction, or forcibly transferring children.<sup>60</sup> The genocidal actions are the second element of crime of genocide. Acts like mass killings, torture, rape, forced displacement, sterilization, or other measures aiming to limit the group's reproduction or cultural practices are commonly associated with genocide.<sup>61</sup> Moreover, protected groups are the third element of crime of genocide as this crime can only be committed against such groups. Determining the protected groups continues to be a controversial issue. The Genocide Convention and the ICC Statute have provided an exhaustive list of protected groups that includes national, ethnic, racial, and religious groups as.<sup>62</sup> However, some commentators have questioned the continued relevance of such exhaustive lists as the world experienced genocidal attack based on other identities such as political, professional or economic classes.<sup>63</sup>

Besides, determination of group identity became an issue problem in the Rwandan conflict since the Tutsi spoke the same language; they shared the same religion, and common cultural identity. Thus, the ICTR had shifted jurisprudence and determined that ethnicity has to be identified on both perception and self-perception.<sup>64</sup>

#### **2.2.1.2. Crimes Against Humanity**

Crimes against humanity are the second core crime in which they refer to widespread or systematic acts committed against any civilian population, with knowledge of the attack.<sup>65</sup> Such crimes can be committed both in an armed conflict situation and in peacetime. The attack must be widespread and systematic, which means, the attack must be conducted on a large scale and should result in a large number of victims and grave consequences which may include

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<sup>60</sup> Ibid

<sup>61</sup> 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, S.C. Res. 955, 8 Nov. 1994, Art. 2; Convention on the Prevention and Punishment of the Crime of Genocide, 1951, Article II.

<sup>62</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 1021, art 2; Rome Statute, (n 4) Art 6

<sup>63</sup> Carsten Stahn, (n 59) 36

<sup>64</sup> Ibid

<sup>65</sup> Ibid

enslavement.<sup>66</sup> The other element of crimes against humanity is that the victims of the attack are any civilian population.

The *Actus Reus* of crimes against humanity may include, but not limited to; murder, torture, extermination, enslavement, enforced disappearances, rape and sexual violence, sexual slavery, and forced displacement. Such list of acts is not exhaustive in which it includes other inhumane acts that are committed intentionally to cause great suffering, or serious injury to body or to mental or physical health.<sup>67</sup>

### **2.2.1.3. War crimes**

War crimes are the third and oldest category of atrocity crimes that grounded under serious violations of international humanitarian law.<sup>68</sup> Such crimes encompass violations of international humanitarian law during armed conflicts, whether international or non-international. In both international and non-international armed conflicts, there are certain elements that define war crimes.

In international armed conflicts, war crimes encompass a broad range of acts that violate the laws and customs of war. These include targeting civilian populations, indiscriminate attacks, excessive and disproportionate use of force, torture, and inhumane treatment of prisoners of war.<sup>69</sup> The principle of distinction is of utmost importance in determining the legality of actions during armed conflicts.<sup>70</sup> It requires parties to distinguish between civilian and military targets, ensuring that only legitimate military objectives are attacked.

The principle of proportionality is another key element. This prohibits disproportionate attacks and the use of weapons or tactics that would cause unnecessary suffering. In addition, parties must respect the principle of military necessity, meaning that they should only undertake military actions that are necessary to achieve a legitimate military objective.

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<sup>66</sup> H. Van der Wilt, Trafficking in Human Beings, Enslavement Crimes Against Humanity: Unraveling the Concepts, Chinese Journal of International Law (2014) 298

<sup>67</sup> Rome Statute, (n 4) Article 7 (1)

<sup>68</sup> Knut Dormann, Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary, International Committee of the Red Cross, (Cambridge University Press, 2004) 11

<sup>69</sup> Ibid

<sup>70</sup> Kevin Jon Heller, The Nuremberg Military Tribunals and the Origins of International Criminal Law, Oxford University Press, (2011) 191

In non-international armed conflicts, war crimes can occur within the territory of one state, involving either governmental or non-governmental armed groups.<sup>71</sup> The same core elements of war crimes are applicable, although there are variations in the applicable legal framework. Furthermore, individual criminal responsibility is a fundamental element of war crimes. It entails holding individuals accountable for their actions, irrespective of their position or rank. This principle aims to ensure that those who commit war crimes, whether they are lower-ranking soldiers or high-ranking officials, are brought to justice and face appropriate punishment.<sup>72</sup>

### 2.2.2. Salient Features of International Crimes

Looking into the definitions under the Rome Statute, one can explore the salient features of international crimes. First, international crimes are the most serious crimes of concern to the international community because they are group-oriented crimes that possess contextual elements which, in turn, breach *jus cogens* norms.<sup>73</sup> Also, such crimes mainly involve a State either as a perpetrator when such a state is unwilling to counter them or when they are perpetrated by non-state entities, in which case the State is usually unable to counter the crimes.<sup>74</sup> Indeed, international crimes are crimes which are the most serious crimes of concern to the international community as a whole.<sup>75</sup>

The second feature of international crimes is that, they impose a *jus cogens* obligation on states to combat impunity of such crimes via either the complementarity,<sup>76</sup> universal jurisdiction, or the international criminal court.<sup>77</sup> As such, there is a compelling argument that states have a duty to

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<sup>71</sup> Ibid

<sup>72</sup> Ibid

<sup>73</sup> Christopher Soler (n 46) 45; See also, Karstedt. S, Contextualizing Mass Atrocity Crimes: Dynamics of Extremely Violent Society, *European Journal of Criminology*, (2014) 500

<sup>74</sup> Ibid

<sup>75</sup> See the Preamble of Rome Statute, (n 4) paras 4 and 9; See also, Christopher Soler, (n 46), *The Global Prosecution of Core Crimes under International Law*, T.M.C. Asser Press, The Hague, The Netherlands [www.asserpress.nl](http://www.asserpress.nl), (2019) pp. 46-48

<sup>76</sup> Seada Hussein Adem, *Palestine and the International Criminal Court*, Asser Press, (2019) pp. 92-93; See also, Rome Statute (n 4), article 17, 1, and para 10 of its preamble; *Complementarity* is one of the main principles of the Rome Statute regulated under Article 17, Article 1, and Paragraph 10 of its preamble which dictates the ICC functions as a fallback and secondary jurisdiction to be employed when a national jurisdiction is unwilling or unable to investigate and prosecute. It provides an exception to the presumption in favor of domestic prosecution and it reinforces the primary obligation of States to prosecute international crimes (emphasis added).

<sup>77</sup> See, A. Nollkaemper and Van der Wilt, *System Criminality in International Law*, Cambridge University Press, (2009) pp. 127-129

prosecute crimes of genocide, crimes against humanity, war crimes, and acts of aggression.<sup>78</sup> In addition, states are required to establish their legal and institutional frameworks in accordance with the special and complicated nature of international crimes to give effect to the prosecution of these global offenses.<sup>79</sup> Thirdly, international crimes have universal jurisdiction and universal criminal liability.<sup>80</sup> Hence, universal jurisdiction and criminality are the primary international-law vehicles for affirming the idea that international crimes are universal criminal offences.<sup>81</sup>

The fourth characteristic of international crimes is that the absence of domestic national laws that criminalize such crimes at the time of commission may not necessarily prevent the prosecution of international crimes before the courts of law.<sup>82</sup> As such, a given state can retroactively confer on the court retroactive jurisdiction over core crimes; in addition, it may successfully prosecute the perpetrators without violating the notion of non-retroactivity of substantive criminal law.<sup>83</sup> This is so because international or atrocity crimes have attained the status of customary international norms or premonitory norms.<sup>84</sup>

### **2.3. The Principle of Universal Jurisdiction under the International Criminal Justice System**

In its actual base, it is to be noted that the jurisprudence of international criminal law recognizes different forms of criminal jurisdiction. The two broad categorical principles of jurisdiction are territoriality principle and extraterritorial jurisdiction.<sup>85</sup> The territoriality principle of jurisdiction connects the jurisdiction to the place where a crime was committed.<sup>86</sup> On the other hand, the

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<sup>78</sup> Ibid

<sup>79</sup> Morten Bergsmo (ed), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*, Torkel Opsahl Academic Publisher and Peace Research Institute, (2010) pp. 135-137

<sup>80</sup> Aisling O'Sullivan, *Universal Jurisdiction in International Criminal Law, the Debate and the Battle for Hegemony*, Routledge, (2017) 115

<sup>81</sup> Antonio Cassese, *International Criminal Law*, Oxford University Press, (2003) 284

<sup>82</sup> Ibid, (n 59)

<sup>83</sup> Ibid

<sup>84</sup> Ibid

<sup>85</sup> Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law*, Intersentia, (2005) pp. 22-23

<sup>86</sup> Ibid

main forms of extraterritorial jurisdiction are the nationality principle, protective principle, the passive personality principle, and the universality principle.<sup>87</sup>

The principle of universal jurisdiction is established as the basis of jurisdiction in numerous domestic laws and in several international treaties.<sup>88</sup> Unlike the other principles of extraterritorial jurisdiction, the principle of universal jurisdiction requires no specific nexus between the crime and the forum state.<sup>89</sup> Hence, such universal jurisdiction is assumed and exercised solely based on the nature of the crime, without regard to where the crime was committed, the nationality of the perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.<sup>90</sup> As such, this principle recognizes the authority of each state to prosecute international crimes, which due to their specific characteristics, affect the international community as a whole.<sup>91</sup>

Hence, by allowing all states to prosecute international crimes such as genocide, war crimes, crimes against humanity, and, arguably, torture, the principle of universal jurisdiction protects and upholds fundamental values of the international community. Generally, the universality principle for those crimes is rooted in customary international law as an *erga omnes* obligation to fight impunity of international crimes.

### **2.3.1. Theoretical and Legal Foundations of Universal Jurisdiction**

#### **2.3.1.1. Historical Development of Universal Jurisdiction**

The historical development of universal jurisdiction is an appealing and complex topic that spans centuries of legal, political, and humanitarian efforts aimed at ensuring justice for the most heinous crimes committed around the world.<sup>92</sup> Its roots can be traced back to ancient times,

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<sup>87</sup> Malcolm N. Shaw QC, *International Law*, Eighth Edition, Cambridge University Press, University Printing House, Cambridge CB2 8BS, United Kingdom, (2017) 500

<sup>88</sup> Luis Benvenides, *The Universal Jurisdiction Principle: Nature and Scope*, *Anuario Mexicano de Derecho Internacional*, volume I, pp. 19-96 (2001) 57

<sup>89</sup> Morten Bergsmo (ed), Florian Jessberger, Wolfgang Kaleck and Andreas Schueller, *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes: Concurring Criminal Jurisdictions under International Law*, Torkel Opsahl Academic EPublisher, (2010) 235

<sup>90</sup> *Ibid*

<sup>91</sup> Devika Hovell, *The Authority of Universal Jurisdiction*, *The European Journal of International Law* Vol. 29 no. 2, Published by Oxford University Press on behalf of EJIL Ltd (2018) 437

<sup>92</sup> *Ibid*

where some societies recognized the concept of piracy and crimes against humanity and sought to hold individuals accountable.<sup>93</sup> However, it was not until the aftermath of World War II and the Holocaust that the idea gained significant international traction.<sup>94</sup>

In the aftermath of the Second World War, trials involving core crimes were conducted in the international military tribunals which were established under international treaties at Nuremberg and Tokyo. However, many crimes were also prosecuted and punished by the national courts of the Allied States.<sup>95</sup> Hence, in response to the international crimes committed during the WWII, such national prosecutions demonstrated the exercise of universal jurisdiction and this marked a pivotal moment in the development of this principle.<sup>96</sup> Nevertheless, the notion of Universal jurisdiction was still in its arguable form since the 1949 Geneva Conventions uphold the exercise of this principle.

Following the Nuremberg and Tokyo trials, the United Nations (UN) was established, which provided a platform for further developments in universal jurisdiction. The 1948 Genocide Convention and the Geneva Conventions were adopted, which codified the crime of genocide and war crimes and these conventions emphasized the obligation of states to prevent and punish genocide.<sup>97</sup> This convention laid the groundwork for states' recognition of universal jurisdiction over genocide, regardless of territorial or nationality constraints.<sup>98</sup>

In subsequent years, numerous international conventions and treaties were adopted to expand the notion of universal jurisdiction. Since the 1950s, universal jurisdiction has been expanded considerably along with the increase of international treaties prohibiting international crimes and gross human right violations. In this time span, with the development of international human rights law and the resultant conventions, some courts and many legal scholars came to recognize universal jurisdiction as customary international law. For instance, the national courts in USA

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<sup>93</sup> M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, Virginia Journal of International Law. [Vol. 42:1, 2001, 96

<sup>94</sup>Ibid

<sup>95</sup>Yuki Tanaka, Tim McCormack and Gerry Simpson, *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, Martius Nijhoff Publishers, (2010) 149

<sup>96</sup>Ibid

<sup>97</sup>ICRC Database, Customary IHL, Practice relating to Rule 157, Jurisdiction over War Crimes, available at <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule157>, accessed on 17, August 2023.

<sup>98</sup>Ibid

recognized universal jurisdiction in absentia in the Demjanjuk case.<sup>99</sup> In addition, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment called for the criminalization and punishment of torture under national legislation, regardless of where it occurred or the nationality of the perpetrator or victim.<sup>100</sup>

In the 1990s, the development of international criminal and humanitarian law dictated the great concern in ending impunity and establishing accountability for international crimes and gross human rights violations. That is why the ICTY and ICTR, which are *ad hoc* tribunals, were established in that time.<sup>101</sup> Although such tribunals do not incorporate universal jurisdiction, but indirectly these tribunals have made a great impact on the development of this principle.

There are also some prominent cases that sparked jurisprudential attention on universal jurisdiction. In this regard, the Pinochet Case<sup>102</sup> is regarded as one of the important cases in stimulating the development of international criminal law and the application of universal jurisdiction as it symbolized the interest of the international community in ending impunity of individuals who have committed core crimes at any places. Augusto Pinochet was a President of Chile and he was suspected for committing crime of genocide in Chile and arrested in England with the arrest warrant issued by Spain.<sup>103</sup> In this case the most pressing issue was whether Spain can prosecute a crime which had been committed outside its territorial jurisdiction by a foreigner. Hence, the Spanish claim of jurisdiction over the case was based on its national laws

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<sup>99</sup>See, Holocaust Encyclopedia, John Demjanjuk: Prosecution of a Nazi Collaborator, available at <https://encyclopedia.ushmm.org/content/en/article/john-demjanjuk-prosecution-of-a-nazi-collaborator>, accessed on 17, August 2023

<sup>100</sup>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted by General Assembly resolution 39/46 of December 1984 and entry into force 26 June 1987, articles 5-7.

<sup>101</sup>See, United Nations, 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, available at, [https://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf), accessed on 27, August 2023. See also, Marie-Claude Roberge, Jurisdiction of the ad hoc Tribunals for the former Yugoslavia and Rwanda over crimes against humanity and genocide, Cambridge University Press, (2010)

<sup>102</sup> Amnesty International, The Case of General Pinochet, Universal jurisdiction and the absence of immunity for crimes against humanity, available at <https://www.amnesty.org/en/wp-content/uploads/2021>, accessed on 25 July, 2023.

<sup>103</sup> N Roht-Arriaza, The Pinochet Effect: Transitional Justice in the Age of Human Rights (University of Pennsylvania Press Philadelphia 2006)

allowing universal jurisdiction for international crimes such as piracy, genocide, terrorism and hijacking.<sup>104</sup>

The other significant step on the development of universal jurisdiction was the adoption of the ICC Statute which established the International Criminal Court (ICC) in 1998. The ICC is the first permanent international criminal tribunal with jurisdiction over individuals accused of the most serious crimes of international concern, including genocide, war crimes, and crimes against humanity.<sup>105</sup> While the ICC operates on the principle of complementarity, where it steps in only when states are unable or unwilling to prosecute, it serves as a symbol of the international community's commitment to ending impunity for the most heinous crimes.<sup>106</sup>

In addition to international mechanisms, many national legal systems have recognized the principle of universal jurisdiction and have passed legislation to enable the prosecution of individuals who commit serious international crimes. Countries such as Belgium, Spain, and Switzerland have taken a proactive approach in asserting universal jurisdiction and actively pursuing cases involving crimes against humanity and war crimes committed abroad.<sup>107</sup>

## **2.4. Rationale for Universal Jurisdiction**

It is important to note that the idea of universal jurisdiction emerged to address various rationales. Among these, avoid impunity and denying perpetrators should have any safe haven important to prevent those mass human right violations.<sup>108</sup> No doubt, those offences subject to universal jurisdiction affect all States and peoples, and awareness that territorial and nationality States do not always respond fairly and effectively to allegations of international crimes, international law grants all States the right to prosecute international crimes.<sup>109</sup>

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<sup>104</sup>Mitsue Inazumi, (n 63) pp. 83-85

<sup>105</sup> See Isaac Hasson, Extraterritorial Jurisdictions and Sovereign Immunity on Trial: Noriega, Pinchot, and Milosevic, Trends in Political Accountability and Transnational Criminal Law, Boston College International and Comparative Law Review, Vol. 25, Issue 1, (2002) 148

<sup>106</sup> Ibid

<sup>107</sup>Human Rights Watch, Universal Jurisdiction in Europe: The State of the Art, available at <https://www.hrw.org/report/2006/06/27/universal-jurisdiction-europe/state-art>, accessed 29, August 2023

<sup>108</sup> Mitsue Inazumi, (n 63) pp. 25 & 103

<sup>109</sup> Howard Varney, Shenali De Silva, and Alexandra Raleigh, Guiding and Protecting Prosecutors: Comparative Overview of Policies Guiding Decisions to Prosecute, International Center for Transitional Justice, (2019) 25

As noted, the universal jurisdiction principle empowers a state to prosecute offenders even in the absence of any connection between the crime committed and the prosecuting state. The goal of universal jurisdiction is to eliminate impunity and the ability of those who commit such crimes to find refuge in other nations.<sup>110</sup> It is predicated on the idea that some crimes are so serious that they have an impact on the entire world community and that each state has a stake in pursuing justice for them. The goal of universal jurisdiction is to end impunity for such crimes and to keep offenders from finding refuge in other nations.<sup>111</sup>

Furthermore, in case of international humanitarian law, the Geneva Conventions, Protocol I and Additional Protocol I require states to enact laws that provide universal jurisdiction for specific war crimes, known as grave breaches, committed during international armed conflicts, or wars between states.<sup>112</sup> It refers that owing to its rational the introduction of universal jurisdiction advocate by different aspect of laws including in war law.<sup>113</sup>

In addition, universal jurisdiction serves as a "safety net" in cases where the territorial state is unable or unwilling to carry out an efficient investigation and trial, even though it is typically preferable for victims of grave international crimes to seek redress in the courts of the states where the crimes were committed.<sup>114</sup> In the international justice system, officials from more powerful states or those who are protected by powerful states are less susceptible to the wrath of the law than those from weaker governments. Increasing universal jurisdiction is a key way to address this unequal distribution of power in the international justice system.<sup>115</sup>

Nonetheless, some contend that the concept of universal jurisdiction is being abused. Without adequate evidence to support a claim, complaints that intend to cause political humiliation might be filed. But it's important to keep in mind that rather than universal jurisdiction cases, passive

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<sup>110</sup> Ibid

<sup>111</sup>Panakova J, Law and Politics of Universal Jurisdiction, Amsterdam Law Forum, volume 3, No.3 (2011) 49

<sup>112</sup> Ibid

<sup>113</sup> ICRC Explainer: What does International Law say about Universal Jurisdiction for War Crimes Committed in Non-International Armed Conflicts?, Available at <https://reliefweb.int/report/world/icrc-explainer-what-does-international-law-say-about-universal-jurisdiction-war-crimes-committed-non-international-armed-conflicts>; accessed on 20 August 2023.

<sup>114</sup> Basic Facts on Universal Jurisdiction, <https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction>; accessed on 20 August 2023.

<sup>115</sup> Ibid

personality cases those started on the basis of the victim's nationality are the ones that are most usually mentioned as examples of this type of abuse.<sup>116</sup>

## **2.5. The Scope and Application of Universal Jurisdiction under the Jurisprudence of International Criminal Law**

In its actual base, the scope and application of universal jurisdiction have to be dealt with from the perspectives of its source of laws, crimes covered, and conditions for the application of the principle. To this end, separate analysis should be made between the substantive aspect of international crimes as they have developed under customary international law and the procedural aspect, which includes the basis for jurisdiction for such crimes.

States follow different approaches on incorporating international crimes in to their domestic legal systems. Some countries require that laws incorporating international crimes to be enacted by parliament, while others allow courts to rely directly on international treaties and customary international law.<sup>117</sup> For instance, countries like Germany do not apply rules that emanate from customary international law that are not domestically codified, because of a strict adherence to the principle of legality.<sup>118</sup> On the other hand, some common law jurisdictions directly apply customary international law on their approaches to international crimes.<sup>119</sup> In South Africa, for instance direct application of customary international law for the prosecution of international crimes under the domestic law is recognized.<sup>120</sup>

Nonetheless, scholars argued that direct application of customary international law in the prosecution of international crimes could result in a number of disparities, such as disputes as to when specific prohibited conduct passed into customary international law, what constitutes the different elements of the crimes, and what specific penalties to be imposed.<sup>121</sup> With the same

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<sup>116</sup> Ibid

<sup>117</sup> Howard Varney and Katarzyna Zduńczyk, *Advancing Global Accountability: The Role of Universal Jurisdiction in Prosecuting International Crimes*, International Center for Transitional Justice, (2020) 11

<sup>118</sup> Ibid

<sup>119</sup> Ibid

<sup>120</sup> Constitution of the Republic of South Africa, No. 108, (Promulgated: 18 December, 1996), Section 232

<sup>121</sup> Howard Varney and Katarzyna Zduńczyk, (n 94), 12

fashion, the concept of customary international law is unfamiliar to many judges, investigators, and legal practitioners in many States including Ethiopia.<sup>122</sup>

### **2.5.1. Underpinning factors for the Application of Universal Jurisdiction**

A state may prosecute someone for major international crimes under the legal doctrine of universal jurisdiction, regardless of the victim's or offender's country or the location of the crime. As such, it is worth discussing the underpinning factors for the application of universal jurisdiction for core crimes committed abroad.<sup>123</sup> Before claiming universal jurisdiction, states need to have an established legal foundation that can adequately govern the prosecution of international crimes in terms of both substantive and procedural issues. This could come from accepted international legal standards and principles or from state law.

The other condition is seriousness of the crime, the most heinous crimes that are the concern to the world community at large, such as crimes against humanity, war crimes, genocide, and torture are usually reserved for universal jurisdiction.<sup>124</sup> Lack of national jurisdiction also another factor that trigger the application of universal jurisdiction. In situations where the state where the crime was committed is incapable or unwilling to pursue the offenders, universal jurisdiction may be used. This guarantees that such serious crimes are never allowed to go unpunished.

Moreover, the international law impose obligation on states to pursue specific crimes regardless of where they were committed are among the international obligations that states exercising universal jurisdiction must make sure their legal systems comply with. To this end, there should be no discrimination in the application of universal jurisdiction based on nationality, race, ethnicity, or any other characteristic. It guarantees fair and unbiased administration of justice and advances equality before the law. The other underpinning factor for the application of universal jurisdiction is the principle of complementarity. This principle dictates that national legal systems should be supplemented, not replaced, by universal jurisdiction, which is typically

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<sup>122</sup> Ibid

<sup>123</sup> Uche Nnawulezi, Hilary Nwaechefu, Addressing The Principle and Challenges of Enforcement and Prosecution Under Universal Jurisdiction: Charting New Pathways for International Justice, Indonesian Journal of International Law, (Vol. 20 No. 2, pp. 263 – 286) (2023) 273.

<sup>124</sup> Ibid

reserved for extreme circumstances. Hence, states are urged to pursue domestic prosecutions for these offenses wherever feasible.

## **2.6. Scopes of Universal Jurisdiction**

To begin with, there are two approaches in exercising universal jurisdiction. These are universal jurisdiction in absentia and conditional jurisdiction.<sup>125</sup> The first one also referred as absolute universal jurisdiction whereas the latter one can be described as universal jurisdiction “with presence. Universal jurisdiction in absentia exercised when a given state asserts its jurisdiction against a suspect who is not present in the state’s territorial jurisdiction.<sup>126</sup> On the contrary, conditional universal jurisdiction dictates the physical presence of a suspect in that State’s territory seeking to set prosecution against the suspect. Some States adopt conditional universal jurisdiction by considering the practical challenges in investigation and access to evidences and the diplomatic issues that arise between states.<sup>127</sup>

Under absolute universal jurisdiction, a state may assume jurisdiction over suspects accused of international crimes committed abroad regardless of whether or not the accused is in custody or at any rate present in the prosecuting state.<sup>128</sup> Indeed, absolute universal jurisdiction enables national justice machinery to exercise criminal jurisdiction over accused persons without requiring that the person first be present, in the country. In some countries, such exercise of jurisdiction is premised on the failure of the national state to take proceedings, and should therefore not be activated whenever one of those states initiates proceedings.<sup>129</sup>

In fact, conditional universal jurisdiction requires jurisdictional link (presence of the suspect) for initiating prosecution. But, there is a strong disagreement persists among states and legal experts as regards the need for a jurisdictional link to the forum state, in particular the presence of the suspect in the territory of the prosecuting state.<sup>130</sup>

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<sup>125</sup> Ibid, 13

<sup>126</sup> M. Cherif Bassiouni, (n 71) 91

<sup>127</sup> Ibid

<sup>128</sup> Antonio Cassese, Paola Gaeta et al, Cassese's International Criminal Law, Third Edition, Oxford University Press, (2013) 278

<sup>129</sup> Ibid

<sup>130</sup> There is great uncertainty on jurisdictional link as states adopt a variety of links for the assertion of universal jurisdiction and some states, e.g. Spain, consider that absolute universal jurisdiction is allowed for the prosecution

To sum up, deciding whether the criminal legislation of a state can regulate acts committed abroad and when the suspect has never entered the territory of the state is still on divergent views.<sup>131</sup> This broad form of jurisdiction would necessarily imply a corresponding form of enforcement jurisdiction, in which investigation and prosecution can be started without the presence of the accused in the territory of the state. As well, the competent authorities could issue an arrest warrant and circulate it internationally and they can issue a request for extradition if they know where the accused is located.<sup>132</sup> Hence, scholars argue that if the domestic system allows it, a trial in absentia could be held and, in case of a conviction, an extradition for the enforcement of the sentence could be requested.<sup>133</sup>

## **2.7. Challenges on the Application of Universal Jurisdiction**

In a nutshell, challenges on the application of application of universal jurisdiction can be summarized as legal, political, and practical difficulties. Conceptually, there are mixed and skeptic views on scope and application of universal jurisdiction among states and international organizations as well. For instance, the African Union claimed that the current application of universal jurisdiction is politically abused.<sup>134</sup> In addition, AU asserted that it violated sovereignty and territorial integrity’ of the African countries and it suggested the establishment of an international regulatory body with a mandate to handle complaints or appeals arising out of abuse of the principle of universal jurisdiction.<sup>135</sup>

In addition, absence or inadequate laws of States governing international crimes is among the legal obstacles on application of universal jurisdiction. In fact, studies indicate that almost two-thirds of States have laws allowing their courts to assume universal jurisdiction over

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of international crimes. See; UN Secretary-General's Report, *The Scope and Application of the Principle of Universal Jurisdiction*, (2010) 12

<sup>131</sup> Ibid

<sup>132</sup> Ibid

<sup>133</sup> Ibid

<sup>134</sup> African Union, *Observations of the African Union on the Scope and Application of the Principle of Universal Jurisdiction*, (2020) para 4, available at [https://www.un.org/en/ga/sixth/75/universal\\_jurisdiction/au\\_e.pdf](https://www.un.org/en/ga/sixth/75/universal_jurisdiction/au_e.pdf), accessed 25, August 2023.

<sup>135</sup> Charles ChernorJalloh, Ilias Bantekas (eds.), *The International Criminal Court and Africa*; Martin Mennecke, *The African Union and Universal Jurisdiction*, (2017), pp. 10-37, 14.

international crimes.<sup>136</sup> But, most of these States' laws are either failed to cover all the crimes or they don't define international crimes as crimes in the national criminal code and to specify the punishments applicable thereto.<sup>137</sup> Crime against humanity, for instance, is not criminalized and no resultant punishment was specified under the criminal code of Ethiopia (detail analysis will be made in Chapter Three of this thesis).

Lack of mutual legal assistance treaties and agreements on gathering evidence abroad for investigation and prosecution of international crimes is also another problem which hinders exercise of universal jurisdiction. Even, the existing legal assistance treaties have a broad range of grounds of refusal which are inappropriate when core crimes are involved since in such kind of crimes a state is seeking to prosecute on behalf of the international community.<sup>138</sup> Such restricting grounds include double criminality requirements, the political offence exception, *ne bis in idem* and immunities.<sup>139</sup>

In addition, absences of comprehensive mutual legal assistant agreements create difficulties in conducting criminal investigations abroad. For instance, in order to permit investigations the territorial state may require the investigation to be carried out solely by its own authorities or with intricate supervision.<sup>140</sup> Moreover, other state organs in the foreign state may sometimes be unwilling to cooperate for a variety of non-legal reasons, such as a restrictive view of sovereignty, unfamiliarity with international law or state-to-state cooperation, lack of independence or implication in the crimes.<sup>141</sup> Such problems may arise not only in the territorial state, but also in other states where evidence is located.

When we come to the practical challenges on the prosecution of international crimes committed abroad, lack of special investigation and prosecution work force is the core void in many States'

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<sup>136</sup> Christopher Keith Hall, Universal jurisdiction: The challenges for police and prosecuting authorities, Amnesty International Report, (2007) 4. Available at <https://www.amnesty.org/fr/wp-content/uploads/2021/07/ior530072007en.pdf>, accessed 21 August 2023.

<sup>137</sup> Ibid

<sup>138</sup> Ibid, 11

<sup>139</sup> Paola Gaeta and Patryk I. Labuda, Trying Sitting Heads of State: The African Union Versus the ICC in the Al Bashir and Kenyatta Cases in the International Criminal Court and Africa, eds. Charles Chernor Jalloh and Ilias Bantekas, Oxford: Oxford University Press, (2017) 141

<sup>140</sup> Christopher K. Hall, (n 109) 12

<sup>141</sup> Ibid

criminal justice system; especially in African States.<sup>142</sup> The investigation and prosecution of international crimes requires specialized legal technical and practical knowledge among investigators and prosecutors. In addition, investigating and prosecuting crimes committed abroad require skills such as, evidence gathering, interviewing victims of crimes, witness protection, negotiation with stakeholders, and language ability.<sup>143</sup> Lack of political will and interfere of political officials in judicial decision making of prosecuting international crimes are the other challenges.<sup>144</sup> Decisions on whether to investigate or prosecute core crimes committed abroad often requires approval of one or more politicians in most countries as it will be discussed in the following chapter concerning Ethiopia's context.

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<sup>142</sup>Okechukwu Oko, *The Challenges of International Criminal Prosecutions in Africa*, *Fordham International Law Journal*, Volume 31, Issue 2, (2007) 366

<sup>143</sup> *Ibid*

<sup>144</sup> *Ibid*

## CHAPTER THREE

# ANALYSIS OF THE ETHIOPIAN LEGAL FRAMEWORKS ON PROSECUTION OF INTERNATIONAL CRIMES COMMITTED ABROAD

### 3.1. Introduction

It is established in the above sections that international crimes have a universal nature in which each state is affected by them.<sup>145</sup> Due to this nature of core crimes, the jurisprudence of international criminal law imposes an *erga omnes* duty that each country is responsible for prosecuting such kinds of offenses.<sup>146</sup> In doing so, it is not important where the conduct in question took place, who the victims were, or whether any other link with the prosecuting state can be established.<sup>147</sup> This is indeed, based on the basic essence of the principle of customary international law.<sup>148</sup>

Ethiopia is not new in prosecuting and punishing core international crimes which were committed within its territorial jurisdiction.<sup>149</sup> However, as an active member of the international legal order, Ethiopia has not a tangible precedent on the prosecution of international crimes committed abroad. Due to this, the Ethiopian substantive and procedural laws which are devoted

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<sup>145</sup> Antonio Cassese, *International Criminal Law*, Oxford University Press, (2003) 98.

<sup>146</sup> Kevin Jon Heller, Frédéric Mégret, Sarah MH Nouwen, Jens David Ohlin, and Darryl Robinson, *The Oxford Handbook of International Criminal Law*, Oxford University Press, First Edition, (2020) 324.

<sup>147</sup> Babatunde Isaac & Abegunde Babalola, *Investigating and Prosecuting International Crimes Domestically: Rethinking International Criminal Law*, *Global Journal of Politics and Law Research*, Vol.2, No.3, (2014) 68.

<sup>148</sup> Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, Oxford University Press, (2011) 128.

<sup>149</sup> Between 1992 and 2010, Ethiopian courts prosecuted more than five thousand people for the core crimes of genocide and war crimes perpetrated in Ethiopia since 1974. The Dergue trials (1992–2010), known vernacularly as the Red-Terror trials, denote the first instance of prosecution of core crimes (political genocide and war crimes) in Ethiopia as well as in Africa as such. Ethiopia also prosecuted core crimes such as the Anuak- Nuwer trials for the genocidal killing of 32 South-Sudanese refugees (2004–2005), the CUD trials (2005– 2008), and the Oromo-Gumuz trials (2008–2010). See, Tadesse Simie Metekia, *Punishing Core Crimes in Ethiopia: Analysis of the Domestic Practice in Light of and in Comparison, with Sentencing Practices at the UNICTS and the ICC*, *international criminal law review*, (2019) pp. 7 – 14; For more reading on this area, See Girmachew Alemu, ' *Apology and Trials: The Case of the Red Terror Trials in Ethiopia*, *African Human Rights Law Journal*, (2006) pp. 64-68; Marshet Tadesse, (n 36), *Prosecution of Politicide in Ethiopia: The Red Terror Trials*, VOL. 18 (*International Criminal Justice Series*, Asser Press 2018) pp. 133-235.

to govern prosecution of core crimes committed abroad exist with all their untouched ambiguities and lacunas.

Contributing to the effective operation of the universal legal order and protecting its citizens within its jurisdiction from horrendous human rights violations is a fundamental duty of the government of Ethiopia. To carry out this duty, the state shall adopt effective legal safeguards to prevent, mitigate, and remediate adverse human rights violations caused by the commission of international crimes.

As a result, this chapter presents legal arguments, data analysis, presentation, interpretations, and findings. This chapter also deals with relevant legislation to examine the gaps in the laws that govern universal jurisdiction that may give rise to criminal accountability for international crimes. In this regard, this section examines general remarks on the criminalization of international crimes in the Ethiopian legal system in general. Following this, the underpinning conditions of the Ethiopian Criminal law for the application of universal jurisdiction is discussed.

In addition, the major challenges of prosecution of core crimes committed abroad are analyzed in detail in this chapter. Finally, the researcher analyzed the prospect of prosecuting international crimes committed abroad in the Ethiopian criminal justice system.

### **3.2. Core international crimes recognized under the Ethiopian criminal justice system**

Ethiopia was the first country in Africa to ratify the Genocide Convention,<sup>150</sup> which is the first international instrument that regulates and criminalizes international crimes.<sup>151</sup> Ethiopia also pioneered in incorporating the Convention's core crimes into its national laws following the mass codification process that took place in the 1950s and 1960s.<sup>152</sup> But, the incorporated laws have been subjected to criticism in which such laws come up with their own gaps and ambiguities.

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<sup>150</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force 12 January 1951 [Hereinafter: The Genocide Convention].

<sup>151</sup> Ibid

<sup>152</sup> Marshet Tadesse, (n 36) 67

The discussion below deals primarily with the core crimes, namely genocide, war crimes and crimes against humanity, as enshrined and defined under the 2004 Criminal Code, as this Code is the legal basis for the prosecution international crimes committed abroad.

### **3.2.1. Genocide**

The Criminal Code criminalized genocide as a category of crimes in violation of international law. It is defined under the Criminal Code as follows:

Article 269: - Genocide.

Whoever, in time of war or in time of peace, with intent to destroy, in whole or in part, a nation, nationality, ethnical, racial, national, color, religious or political group, organizes, orders or engages in:

- (a) killing, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever or causing them to disappear; 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 twenty-five years, or, in more serious cases, with life imprisonment or death.<sup>153</sup>

The above definition of the crime of genocide under the Criminal Code encompasses different elements such as genocidal acts, protected groups, and intent to destroy protected groups in whole or in part. The individual acts of the crime of genocide are exhaustively listed under the Criminal Code. These acts are: killing members of the target groups, inflicting serious bodily or mental harm to members of the groups, imposing measures to prevent progeny or birth within the group, and compulsory movement and placing of peoples or children under living conditions in order to bring about destruction of such group.<sup>154</sup> The shared commonality of those acts is that

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<sup>153</sup> The Criminal Code (n 10) Article 281.

<sup>154</sup> Ibid.

they are attacks intended for the destruction of the protected groups; which is the intent element of genocide.<sup>155</sup>

The above-mentioned acts of genocide are not defined clearly by the Criminal Code. The threshold of forcible transfer of people and children as a genocidal act has not been demarcated. In fact, it is not clear how a mere forcible transfer of people is regarded as one of the categories of individuals acts of the crime of genocide. In this context, considering a mere compulsory transfer of people as genocide may trivialize the severity of the crime and it is not possible to successfully invoke universal jurisdiction for those areas expanded by domestic laws beyond the *erga omnes* definition of the crime.<sup>156</sup> In a nutshell, the Criminal Code provides the act of forceful transfer of people as one of genocidal acts doubtfully, since a mere forcible transfer of people can also be covered by crimes against humanity. Scholars also argued that inclusion of the term ‘children’ while there is a broader expression of ‘people’ in the provision is doubtful.<sup>157</sup>

The other element of crime of genocide is protected groups. There are about eight protected groups provided under Article 269 of the Criminal Code. But, nowhere in Ethiopian criminal law is a definition provided for any of these protected groups under the Criminal Code. In fact, there are two arguments on the silence of the Criminal Code on the definition of each enumerated protected groups. On the one hand, scholars argue that it is indispensable to construe the meaning of each group on a case-by-case basis and the approach followed by the Criminal Law is plausible.<sup>158</sup> On the contrary, failure to define the specific definition of each enumerated protected groups under the Criminal Code would result in having different and subjective interpretation of the meaning of such protected groups.<sup>159</sup>

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<sup>155</sup> Marshet Tadesse, (n 36) 78.

<sup>156</sup> Ibid.

<sup>157</sup> Id, 79.

<sup>158</sup> Id 85.

<sup>159</sup> Tadesse Simie (n 37) 244.

### 3.2.2. War Crimes

War crimes are one of the international crimes that entail individual criminal responsibility under international criminal law.<sup>160</sup>

In Ethiopia, such crimes are governed under the Criminal Code from Article 270–283 although it cannot be said that all the provisions are entirely devoted to regulate war crimes under its international humanitarian law essence. Interestingly, the Criminal Code resorted to the rules of public international law and international humanitarian conventions to be applicable while governing war crimes.<sup>161</sup> Such approach of referencing international laws is not found in the Criminal Code’s provisions that govern genocide.

Structurally, the Criminal Code does not contain a specific section exclusive to listing war crimes under its section of ‘Crimes in Violation of International Law’. There are offences appeared in other parts of the Code that may fall under the category of war crimes. The improper use of enemy uniforms in time of war as provided under Article 315 of the Criminal Code is the best instance since such act is prohibited and considered as a war crime by the Rome Statute.<sup>162</sup> Consequently, the Criminal Code’s provisions that regulate war crimes are provided in a scattered manner.

Moreover, a closer look at the provisions from Article 270-283 of the Criminal Code reveals that some of the provisions are not actually deal with conduct that could amount to a war crime under international law.<sup>163</sup> For instance, Article 274 prohibits acts of provocation and preparation, and this provision deals with the proscription of acts such as incitement, conspiracy and plan to commit genocide and war crimes as separate offenses as opposed to modes of liability. The relevance of a separate criminalization of these acts is also doubtful, as there is no apparent reason why the provision criminalizes these preparatory acts in connection with certain war

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<sup>160</sup> Karin N. Calvo-Goller, *The Trial Proceedings of the International Criminal Court: ICTY and ICTR Precedents*, Brill Academic Publishers, (2006) 179.

<sup>161</sup> The Criminal Code, (n 10) Article 270.

<sup>162</sup> Regulations Concerning the Laws and Customs of War on Land, The Hague 18 October 1907, Article 23(f); The Rome Statute, (n 4) Article 8(2)(b)(vii).

<sup>163</sup> *Ibid.*

crimes only while it excludes other war crimes such as those listed under Articles 280–283 of the Criminal Code.<sup>164</sup>

Breach of armistice or peace treaty is regarded as a war crime under the Criminal Code.<sup>165</sup> Under international law, such act is considered as a domestic crime or as crime of aggression. Peace treaty results a permanent cessation of hostilities, its breach may be regarded as the start of new war, which should be regulated by rules of international law on the use of force.<sup>166</sup> However, war crimes occur as a result of a serious violation of *jus in bello*, irrespective of whether an armed conflict broke out in violation of use of force or not.<sup>167</sup> As the existence of an armistice does not amount to the restoration of peace or cessation of an armed conflict, its breach may in itself constitute neither a violation of *jus ad bellum* nor of *jus in bello*. On the contrary, a breach of armistice constitutes military crime of insubordination under Ethiopian law.<sup>168</sup> As such, a crime under Article 277 of the Criminal Code does not constitute a war crime as it does not constitute a violation of a rule of international humanitarian law.

### **3.2.3. Crime against Humanity in Ethiopia: How Far is it incorporated?**

Under the jurisprudence of criminal law, the principle of legality is considered a pillar in the administration of all criminal justice processes.<sup>169</sup> This principle has also been articulated with the following two phrases; ‘*nullum crimen sine lege and nulla poena sine lege*’– which mean, nothing is a crime except as provided by law, and no punishment may be imposed except as provided by law, respectively.<sup>170</sup> Such principle of legality, indeed, governs all criminal law jurisdictions whether in the administration of a national, regional, or international criminal law and justice process.<sup>171</sup>

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<sup>164</sup> Ibid.

<sup>165</sup> The Criminal Code (n 10) Article 277.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> Id, Article 298.

<sup>169</sup> Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, Cambridge University Press, ISBN-13 978-0-511-48059, (2009) pp. 11-14.

<sup>170</sup> George P. Fletcher, *1 The Grammar of Criminal Law: American, Comparative, and International Foundations*, Oxford University Press, (2007) 81.

<sup>171</sup>See Mark A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, (2007) 37.

When we come to the criminal laws of Ethiopia, the principle of legality has been incorporated under the Criminal Code,<sup>172</sup> and, it provides that prosecution and punishment of a certain crime cannot be made unless the alleged action or inaction is prohibited and prescribed as a crime by the law.<sup>173</sup> As such, whatever the nature of an act may be, an action or omission has to be prescribed as a prohibited criminal act by law to set in motion any criminal prosecution in Ethiopia.<sup>174</sup>

Discussing the principle of legality under the jurisprudence of international criminal law and domestic criminal laws of Ethiopia is worth noting when we explore the criminality status of crimes against humanity under the Ethiopian legal system.

In a nutshell, Crimes against Humanity are not criminalized under the Criminal Code of Ethiopia.<sup>175</sup> The FDRE Constitution, which is the supreme law of the land, recognizes crimes against humanity as one of the core crimes.<sup>176</sup> However, the Constitution has failed to come up with a clear and adequate characterization of crimes against humanity because of the following two reasons.

First, the Constitution made a blunt reference to the definition of crimes against humanity to international agreements ratified by Ethiopia and other Ethiopian laws.<sup>177</sup> But, this remains vague and inadequate as there is no other domestic implementing or enabling legislation that explicitly criminalizes crimes against humanity with the same label or characterization under Ethiopian laws.<sup>178</sup> As such, since there is no specific law that governs crimes against humanity in the Ethiopian legal framework, the reference of the Constitution to international agreements

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<sup>172</sup> See the Criminal Code (n 10) Article 2. Under this article, the Criminal Code provides that the administration of criminal justice of Ethiopia should be primarily based on the prescription of crimes with their respective penalties and measures applicable to criminals only by the law. And hence, any Court in Ethiopia may not treat a certain act as a crime and impose penalties or measures on act which is not prohibited and prescribed by law respectively (emphasis added).

<sup>173</sup> Ibid.

<sup>174</sup> Ibid.

<sup>175</sup> The Criminal Code doesn't provide any provision which unequivocally criminalized and clearly defined crime against humanity.

<sup>176</sup> Constitution of The Federal Democratic Republic of Ethiopia, (herein after 'The FDRE Constitution), Proclamation No 1/1995, F.E.D. Negarit Gazette, 1st Year No.1, (1995) Art 28(1).

<sup>177</sup> Ibid.

<sup>178</sup> Marshet Tadesse, (n 36) 105.

ratified by Ethiopia and other laws of Ethiopia is vague per se.<sup>179</sup> In addition, as neither international nor regional convention that exclusively deals with crimes against humanity exists, the gap in the Ethiopian legal framework cannot be remedied by resorting to treaty laws.

Second, the way that the FDRE Constitution has crafted crimes against humanity is aberrant from the practice of international jurisprudence. Here, the Constitution has categorized crimes against humanity as it includes genocide, torture, forcible disappearances, and summary execution under the ambit of the same provision.<sup>180</sup> In this perspective, the Constitution considers crimes against humanity as the collection of genocide, torture, forcible disappearances, and summary executions<sup>181</sup> although it is different from those crimes save as little similarities exist among them.<sup>182</sup>

Under the Criminal Code of Ethiopia crime against humanity is not regulated at all. Erroneously, the Criminal Code referred to the term crime against humanity as if it includes the criminal acts provided under Articles 269–274 of the Code.<sup>183</sup> On the contrary, the provision of the Criminal Code from articles 269-274 governs crime of genocide, war crimes, and other transnational organized crimes.<sup>184</sup> Consequently, the expression of crimes against humanity under Article 44 of the Criminal Code is a misnomer at its best.

Generally, although it cannot be argued such stated crimes in the Constitution and the Criminal Code could not be blended with crime against humanity totally, putting these crimes as the constituents of crime against humanity is wrong as far as they are naturally different crimes. Thus, it would be better to provide crime against humanity as a separate crime per the international jurisprudence.

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<sup>179</sup>Messay Asgedom, The Place of Crimes against Humanity under the Ethiopian Legal System: A Reflection, Bahir Dar University Journal of Law Vol.3, No.2 (2013) 414.

<sup>180</sup>Dersolegn Yeneabat, Fighting against Impunity in Ethiopia: An Emphasis on Crime against Humanity, Beijing Law Review, 11, 43-63, (2020) 54.

<sup>181</sup> Ibid.

<sup>182</sup>Messay Asgedom, (n 179) 415.

<sup>183</sup> See the Criminal Code, (n 19), Art. 44.

<sup>184</sup> Ibid, Article 269 governs Crime of Genocide, Article 270 - 272 govern War Crimes, Article 273 governs Pillage, Piracy and Looting, and Article 274 talks about provocation and Preparation on the preceding provisions.

### 3.3. The Prosecution of Core Crimes Committed Abroad under the Criminal Laws of Ethiopia

The jurisprudence of international criminal law has adopted the principle of Universal Jurisdiction as an instrument in dealing with international and transnational crimes. This principle has been recognized and incorporated in various international conventions, regional treaties, and national laws of states.<sup>185</sup> However, it is important to note that there are divergent views on the essence, mode of application, specific elements, and scope of universal jurisdiction,<sup>186</sup> as discussed in Chapter Two of this thesis.

Under the criminal laws of Ethiopia, criminalization of international crimes is guaranteed although crime against humanity is a significant exception. The extraterritorial application of criminal laws in Ethiopia can also be traced with reference to the Criminal Code and the FDRE Constitution. The FDRE Constitution states that international agreements ratified by Ethiopia are an integral part of the domestic law.<sup>187</sup> In addition, human rights protected under the Constitution are to be interpreted based on the principles of the jurisprudence of international human rights law.<sup>188</sup> The Ethiopian criminal justice policy also reaffirmed that the public prosecutor has a primary duty to prosecute crimes of genocide, torture, extra-judicial killing, and enforced disappearance.<sup>189</sup> This policy also states that such prosecution should be made for the public interest, and, any law, decision, or procedure that opposes such prosecution on the above crimes is void *ab initio*.<sup>190</sup> However, the criminal justice policy restricts the type of crimes only to the above listed crimes and excludes other core crimes such as war crimes and crimes against humanity. In addition, it is not clear from the provisions of the policy whether such duty of prosecution is on crimes committed within the jurisdiction of the country or for core crimes

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<sup>185</sup>International treaties that oblige states parties to use universal jurisdiction include: the 1949 Geneva Conventions, the 1973 Convention against Apartheid, the 1984 Convention against Torture, and the 2006 Convention against Enforced Disappearance; See Human Rights Watch, Basic Facts on Universal Jurisdiction: Prepared for the Sixth Committee of the United Nations General Assembly, 2009, available at, [https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction#:~:text=International%20treaties%20that%20oblige%20states,\(not%20yet%20in%20force\)](https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction#:~:text=International%20treaties%20that%20oblige%20states,(not%20yet%20in%20force),), accessed on 02, September 2023.

<sup>186</sup>Ibid

<sup>187</sup> The FDRE Constitution (n 176) Article 9 (4).

<sup>188</sup> Id, Article 13 (2).

<sup>189</sup> የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ የወንጀል ፍትሕ ፖሊሲ, ፍትሕ ሚኒስቴር, (የካቲት, 2003 ዓ.ም) ቁጥር 3.13.

<sup>190</sup> Ibid.

committed abroad. In connection with such scenarios, the Ethiopian criminal laws are not put in to use for prosecution of core crimes committed abroad until this time.

Under the Ethiopian criminal laws, universal jurisdiction is recognized under the Criminal Code as a sort of subsidiary jurisdiction.<sup>191</sup> This jurisdiction has been incorporated for different categories of crimes which, indeed, include international crimes.<sup>192</sup> In the first place, Ethiopia has adopted universal jurisdiction on crime against international law or an international crimes specified in Ethiopian laws or international treaty to which Ethiopia is a signatory.<sup>193</sup> In addition, the Criminal Code has also specified another specific category of crimes which such as human trafficking, drug trafficking, and people smuggling in which Ethiopia can exercise universal jurisdiction.<sup>194</sup> These provisions give jurisdiction for Ethiopian courts to adjudicate international core crimes irrespective of the person who commits such crimes and the place where such core crimes are committed.

On the other hand, despite the above substantive provisions of the Criminal Code on the regulation of universal jurisdiction, it lacks procedural specificity. Although the Criminal Procedure Code of Ethiopia does have some provisions addressing territorial jurisdiction, it does not provide rules regarding universal jurisdiction.<sup>195</sup> As such, there is no provision in the Criminal Procedure Code of Ethiopia devoting to universal jurisdiction. In fact, the draft Criminal Law Procedure and Evidence Code of Ethiopia grants jurisdiction for Ethiopian courts over r crimes committed in violation of international laws.<sup>196</sup> However, this law is silent as to the special investigation and prosecution modalities of core crimes although it provided a special investigation scheme for organized crimes such as corruption, illegal human trafficking and crime of terrorism.<sup>197</sup>

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<sup>191</sup> See the Criminal Code, (n 10) article 17, 18.

<sup>192</sup> Ibid, article 17 (1) (a)

<sup>193</sup> Ibid

<sup>194</sup> Such crimes are categorized as ‘crimes against health or morals’ as provided articles 525, 599, 635, 636, 640, and 641 of the Criminal Code. See the Criminal Code, art 17 (1) (b)

<sup>195</sup> The Criminal Procedure Code of Ethiopia, Proclamation No 185/1961. Running through the provisions of the Criminal Procedure Code does not help as far as universal jurisdiction is concerned.

<sup>196</sup> Criminal Law Procedure and Evidence Code of the Federal Democratic Republic of Ethiopia (Draft), available at <https://www.lawethiopia.com/index.php/volume-3/6604-draft-criminal-procedure-code-ethiopia>, accessed on 27 August 2023, Article 24 (5).

<sup>197</sup> Id, Article 101.

### **3.3.1. Criminal Jurisdiction of Ethiopian Courts on International Crimes Committed Abroad**

Discussing the criminal jurisdiction of Ethiopian Courts helps to clarify while analyzing the main substantive and procedural legal frameworks in investigating and prosecuting international crimes committed abroad. Ethiopia has a federal state structure having regional states and the federal government.<sup>198</sup> Here, the provisions of the Constitution on the powers and functions of the federal government and regional states do not provide for or regulate criminal jurisdictional matters.<sup>199</sup> But, article 55(5) of the Constitution provides that the federal government has the power to enact penal code and state legislatures have the residual power to enact criminal laws in areas which are not specifically covered by the federal penal legislature as such.<sup>200</sup>

The FDRE Constitution provides that the Federal Supreme Court shall have the highest and final judicial power on federal matters.<sup>201</sup> Hence, since the FDRE Criminal Code, which contains criminal provisions related to international law, is enacted by the federal lawmaker, the House of Peoples Representatives, it can be said that matters of penal nature associated with international law are federal matters and only Ethiopia's Federal Courts have jurisdiction over it.<sup>202</sup>

In addition, the Federal Courts establishment proclamation specifically provides that cases relating to international treaties and/or offenses relating to the law of nations or international law fall within the jurisdiction of the Federal Courts.<sup>203</sup> Therefore, international core crimes, which are offenses relating to or against the law of nations according to the Criminal Code, fall within the jurisdiction of the Federal Courts of Ethiopia and only adjudicated by these courts.

## **3.4. Challenges to the Prosecution of Core Crimes Committed Abroad under the Ethiopian Criminal Justice System**

### **3.4.1. Substantive challenges**

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<sup>198</sup> The FDRE Constitution (n 176) art 50 (1).

<sup>199</sup> Ibid, arts, 51, 52.

<sup>200</sup> Ibid, art (55) (5).

<sup>201</sup> Ibid, article 80(1).

<sup>202</sup> Ibid, see generally, The FDRE Constitution (n 176), Arts. 55(1), 80(1); the Criminal Code (n 10) Art. 269-283.

<sup>203</sup> See, the Federal Courts Establishment Proclamation No 25/1996, Arts. 3(1), 4(3).

In its actual base, Ethiopia is yet to enforce its laws on the investigation and prosecution of international crimes committed abroad.<sup>204</sup> As such, inferring the general contexts and practical approaches of the Ethiopian justice machinery would be difficult. Going through the very few laws that govern universal jurisdiction, one can articulate that there are legal lacunas in the application of universal jurisdiction.

In the first place, clear and sufficient procedural laws on the manner and process of prosecution of international crimes committed abroad do not exist.<sup>205</sup> In addition, the criminal code has come up with very restrictive and ambiguous qualifying requirements in setting in motion of prosecution of such crimes. To mention, the requirement of consultation with the Minister of Justice, the prohibition of trial in absentia, and some sort of skepticism on the principle of universal jurisdiction itself will be the main source of uncertainties as far as prosecution of international crimes committed abroad is concerned. Analyzing such issues in the following sections would be important.

#### **3.4.1.1. The Extent of Criminalization of Crime Against Humanity in Ethiopia and the Implications on Prosecution of Core Crimes Committed Abroad**

As stated above, crime against humanity has not been criminalized under the Ethiopian legal system although it is one of the core crimes under international criminal law. This being said, prosecuting this crime in Ethiopia is nearly impossible because of the following reasons. First, prosecution of such crime will result in a violation of the principle of legality as enshrined under the Criminal Code.<sup>206</sup> Second, the specific elements of the crime and its resultant punishment are not defined and provided under Ethiopian criminal laws.<sup>207</sup> Again, it would be contrary to the principle of legality if prosecution is set to be initiated since establishing the anatomy of the criminal act and punishments cannot be done unless the law clearly provides to this effect.<sup>208</sup>

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<sup>204</sup> Face-to-face interview with Mr. Habtamu Haile, (Deputy Director General of Transnational and Organized Crimes Prosecution Department at Ministry of Justice) on 25 August, 2023, Addis Ababa, Ethiopia.

<sup>205</sup> Supra note (n 97).

<sup>206</sup> The Criminal Code (n 10).

<sup>207</sup> Tadesse Simie, 'Prosecuting crimes against humanity in Ethiopia: where is the law?' (Institute for Security Studies, 2022), Available at <https://issafrica.org/iss-today/prosecuting-crimes-against-humanity-in-ethiopia-where-is-the-law>, accessed 25 June, 2023.

<sup>208</sup> Antonio Cassese, (n 67) 145.

The ongoing discourse on prosecution of crime against humanity in Ethiopia has revealed divergence viewpoints and conflicting arguments among researchers. Marshet Tadesse argued that prosecution of crime against humanity in Ethiopia can be made by employing two alternative approaches.<sup>209</sup> According to him, the first way out is adopting '*the Ordinary Crimes Approach*'.<sup>210</sup> In this principle, he argued that most of the individual acts of crimes against humanity, such as, killing, inhumane treatment, deprivation of liberty, and rape are criminalized under the Criminal Code as ordinary crimes. As such, applying domestic crimes to prosecute perpetrators of crimes against humanity would be a solution to fight impunity on crimes against humanity.<sup>211</sup>

The researcher does not agree with this proposition because such ordinary crimes cannot holistically represent the material elements of crime against humanity. To mention some, a widespread and systematic attack is one of the distinguishing elements that define crime against humanity. In case of ordinary crimes, such element is void. Crime against humanity attains the status of international crimes because it is committed with a mass and systematic attack against mankind. And hence, dragging down the heinous nature of crime against humanity to ordinary crimes goes against the very moral essence and severity of the crime.<sup>212</sup> In addition, as the focus of this topic is prosecution of core crimes committed abroad, prosecuting and international crime which is committed abroad by changing the nature of the crime as an ordinary domestic crime will be of below standard and it will create inconsistency in the international law practice in dealing with such core crimes.

The second approach is based up on the *erga omnes* obligations of every state in prosecuting international crimes. Here, it has been argued that absence of a domestic law criminalizing crimes against humanity may not bar the prosecution of such crime since such issue attained the status of customary international law.<sup>213</sup> This approach is relatively feasible, but it has two problems when it comes to prosecution of core crimes committed abroad in Ethiopia. First, the

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<sup>209</sup>Call Interview with Dr. Marshet Tadesse Tessema (lecturer, senior researcher and advisor of transitional justice on 17 Aug 2023. See also, Marshet Tadesse, (n 36) 106

<sup>210</sup> Ibid

<sup>211</sup> Ibid

<sup>212</sup> See the Preamble of the Rome Statute (n 4), para 2.

<sup>213</sup> Ibid, See also, Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, Oxford University Press, (2011) 130

Constitution of Ethiopia, which is the supreme law of the land, has limited the definition of crime against humanity only in reference to international treaties which Ethiopia has signed.<sup>214</sup> Ethiopia is not a signatory<sup>215</sup> of Rome Statute, which is the only international treaty that defined crime against humanity. The other problem is that Ethiopian courts have a very poor culture and experience of applying international laws and principles while entertaining cases. As such, employing customary international law principles and international law precedents is in its infant stage in Ethiopian Courts, and hence, this approach is not self-sufficient *per se*.

Generally, it is at the heart of this thesis that the criminal law doesn't proscribe crimes against humanity, indeed, the phrase 'crimes against humanity' under Article 28 of the Constitution is a misnomer meant to denote international crimes. In addition, reference to the phrase under Article 44 of the Criminal Code is another misconception that refers to the other two core international crimes, genocide and war crimes.

### **3.4.2. Procedural Challenges**

The procedural administration of international crimes committed abroad has not been regulated in Ethiopia. The Criminal Procedure Law of Ethiopia does not provide for special investigation and prosecution procedures for international crimes committed abroad. Even worse, the Draft Criminal Procedure Code of Ethiopia excluded international crimes while it provides an independent section devoted to regulate special investigation and prosecution procedures of Transnational Crimes. As such, special investigation standards of procedural rules for international crimes are lacking under the Ethiopian criminal justice system.

The Ethiopian Criminal Code also provides that prosecution of international crimes is conditioned on the prior consultation of the Minister of Justice of the country.<sup>216</sup> Indeed, the law requires the prosecution to consult with the Minister of Justice before instituting proceedings.<sup>217</sup> However, this provision is not clear *per se* and ambiguous in many respects.

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<sup>214</sup> The Constitution, (n 176) art 28.

<sup>215</sup> Ibid.

<sup>216</sup> The Criminal Code, (n 10) article 19 (3).

<sup>217</sup> Ibid.

In the first place, the researcher argues that putting such kind of restrictive requirements on the prosecution of international crimes committed abroad violates the principle of customary international laws.<sup>218</sup> It has been established in the introduction section of this thesis that combating and prosecuting international crimes is considered an *erga omnes* duty of any state.<sup>219</sup> In the case at hand, the Criminal Code has conditioned and dragged down the *erga omnes* obligation of prosecution of international crimes into a mere probability. In general, setting such criteria for mandatory consultation is against the essence of preemptory norms *ab initio*.

That being said, it is not clear from the law whether the Minister of Justice of Ethiopia is given discretionary power to either allow or prohibit prosecution of international crimes committed abroad.<sup>220</sup> The law is silent in this respect. As a result, two premises can be constructed from this shallow wording of the law. Firstly, it can be argued that the Minister of Justice in Ethiopia has discretionary power either to allow or deny the Ethiopian Justice System on prosecution of international crimes committed abroad. Second, the Minister of Justice may not have such discretionary power in deciding such prosecution. Whatever the intention of the legislatures may be, there are still ambiguities in which the factors and considerations to be considered while dealing and deciding with the prosecution of core crimes committed abroad are not established and clarified by the law. Let us explore the legal flaws one by one.

#### **3.4.2.1. Role and Power of Minister of Justice: Allowing Vs. Prohibiting Prosecution?**

The requirement of consultation under Article 19 (3) of the Criminal Code has blindly leftover the respective powers and procedural manners of consultation as it applies to the application of universal jurisdiction. Indeed, the provision by itself is too general in which it doesn't address whether the Minister of Justice has the power to prohibit or allow prosecution of international core crimes committed abroad.<sup>221</sup>

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<sup>218</sup> See Devika Hovell, *The Authority of Universal Jurisdiction*, *The European Journal of International Law* Vol. 29 no. 2, Published by Oxford University Press, (2018) 434; R. Cryer et al., *An Introduction to International Criminal Law and Procedure* (2010) 51.

<sup>219</sup> Kevin Jon Heller, Frédéric Mégret, Sarah MH Nouwen, Jens David Ohlin, and Darryl Robinson, *The Oxford Handbook of International Criminal Law*, Oxford University Press, First Edition, (2020) 324; Cassese, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, (2003) 589.

<sup>220</sup> *Ibid.*

<sup>221</sup> Habtamu Haile (n 204).

Still, yet, no precedent has been made on this issue on account of the fact that since the issue of prosecuting international core crimes committed abroad have not befallen under the Ethiopian judiciary.<sup>222</sup> As such, such type of blurred expression of the law will create confusion when it comes to the practical application of universal jurisdiction regarding the prosecution of international crimes committed abroad. As a result, it would be of no help in the judicial undertakings aiming at fighting the impunity of international crimes.

Here, it is important to note that states should undertake effective measures, including the adoption or amendment of internal legislation, that are necessary to enable their courts to exercise universal jurisdiction over serious crimes under international law in accordance with applicable principles of customary and treaty laws.<sup>223</sup> In this respect, the above provision of the Criminal Code lacks legal clarity in which it has failed to articulate the specific power of the Minister of Justice with objective conditions.<sup>224</sup>

The other pressing issue regarding the consultation requirement lies with the quest for the specific stage in which consultation with the Minister of Justice is to be made. Prosecution of International Crimes in general and crimes committed abroad in particular has different stages.<sup>225</sup> In a nutshell, communicating and creating a cooperative setting with the country in which an international crime has been alleged to be committed would be the first stage.<sup>226</sup> Due to this, the investigation stages would follow which include establishing facts, collecting reliable evidence, and organizing all legal and factual elements so that a police and public prosecutor can initiate proceedings.<sup>227</sup> In its actual base, the decision to prosecute or not to prosecute a certain ‘criminal’ conduct will be rendered by a public prosecutor after such investigations.<sup>228</sup>

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<sup>222</sup> Ibid

<sup>223</sup> Frank Haldemann And Thomas Unger, *The United Nations Principles to Combat Impunity, A Commentary*, Geneva Academy of International Humanitarian Law and Human Rights, Oxford University Press, (2028) 227

<sup>224</sup> Habtamu Haile, (n 204)

<sup>225</sup> Carsten Stahn, *Fair and Effective Investigation and Prosecution of International Crimes: Inventory and State-of-The-Art: Context, Cluster 1 And Cluster 2, International Nuremberg Principles Academy*, (2011) 20

<sup>226</sup> Habtamu, (n 204)

<sup>227</sup> Interview with Mr. Zelalem Anjilo, (served as vice chief special public prosecutor, and the lead prosecutor in the most cases such as Mengistu et al. and Legesse Asfaw et al), on 11 June 2023.

<sup>228</sup> See *Federal Attorney General Establishment Proclamation, Proclamation No. 943/2016, Federal Negarit Gazette No. 62, 2<sup>nd</sup>, entered in to force on May, 2016*, Article 6(3) (a), (c); ‘The Federal Attorney General shall have the power to cause criminal investigation to be started on cases falling under the jurisdiction of federal courts

When we come to the requirement of consultation with the Minister of Justice of Ethiopia, the Criminal Code, the Criminal Procedure Code,<sup>229</sup> and the draft Criminal Law Procedure and Evidence Code<sup>230</sup> failed to provide at which stage the Minister should be consulted. It is not clear from the law whether consultation has to be made with the Minister of Justice prior to the investigation or after the investigation has been finalized. Investigation of international crimes committed abroad requires mobilization of huge resources in terms of expertized manpower, budget, time, and cooperation schemes.<sup>231</sup> As such, given the thoroughness nature of investigating and prosecuting international core crimes, the undetermined essence and stages of consultation under the Criminal Code will impede the effective administration of the criminal justice system.<sup>232</sup>

#### **3.4.2.2. Objective Criteria to be considered by the Minister of Justice of Ethiopia while deciding on Prosecution of Core Crimes Committed Abroad: The Law is Silent**

Stemming from the ambiguities of the law discussed in the above section, the conditions that will be considered by the Minister of Justice while deciding on the fate of prosecution of international crimes committed abroad are not provided in the law. The law is vague in the sense that it failed to articulate the conditions that determine the decision of the Minister.<sup>233</sup> In an ordinary course of things, the decision on prosecution of criminal acts is based on legal and factual grounds.<sup>234</sup>

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and following up reports to be submitted on ongoing criminal investigations. In addition, it follows the progresses and methods of the investigations to be completed appropriately, orders discontinuation or restart of discontinued investigation on the basis of public interest or when it is clearly known that there could be no criminal liability, ensures that investigation is conducted in accordance with the law, gives the necessary instruction'. The attorney general has also a power to review completed investigation files based on evidence and law and to give no case or closing decision where cumulative requirements that are provided under the Criminal procedure Code are fulfilled (emphases added).

<sup>229</sup> Criminal Procedure Code of Ethiopia, (n 195).

<sup>230</sup> Criminal Law Procedure and Evidence Code of Ethiopia (n 196).

<sup>231</sup> See Noam Lubell, Jelena Pejic and Claire Simmons, *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice*, The Geneva Academy of International Humanitarian Law and Human Rights and International Committee of the Red Cross (ICRC), (2019) pp. 28-30.

<sup>232</sup> Face-to-face interview with the Director on International Legal Cooperation Directorate at the Ministry of Justice) on 25 August, 2023, Addis Ababa, Ethiopia.

<sup>233</sup> Ibid

<sup>234</sup> The Criminal Procedure Code, (n 195), article 42

These grounds are based on *inter alia*, the sufficiency of the evidence to justify a conviction, pardon and amnesty, period of limitation, and, the absence of an accused person.<sup>235</sup>

Coming into international crimes, neither the Criminal Code nor the Criminal Procedure Code provides the conditions to that have be fulfilled so that the Minster of Justice would decide for the application of Universal Jurisdiction for prosecution of such core crimes. The Criminal Procedure Code provides that the Minister of Justice may instruct the public prosecutor not to institute proceedings for the reason of public interest.<sup>236</sup> In addition, it is also provided under the Criminal Procedure Code that the public prosecutor shall institute proceedings in cases affecting the Government contingent upon the instruction of the Minister.<sup>237</sup> However, such conditions provided by the Criminal Procedure Code cannot be applied to cases of prosecution related to International Core Crimes based on the following analysis.

In the first place, the above conditions specified under the Criminal Procedure Code are not clearly defined by the law. The criterion of public interest as it applies to a determining factor for the prohibition of prosecution of international crimes committed abroad is in contradiction with the customary international law principles. Here, the commission of International Core Crimes primarily endangers the very humanity and moral interest of the public in the world.<sup>238</sup> As such, public interest can never be a ground to prohibit the prosecution of such heinous crimes.<sup>239</sup> It has to be noted on the contrary that the rationale of fighting impunity is primarily fallen up on the protection of the general interest of the public at large.<sup>240</sup> In this context the ground of public interest as provided under the Criminal Procedure Code cannot be applied for prosecution of international crimes committed abroad.<sup>241</sup>

The requirement of affecting the government's interest as a condition to institute proceedings is also flawed. The Criminal Procedure Code failed to provide the nature, type, and thresholds of

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<sup>235</sup> Ibid

<sup>236</sup> Ibid, Article 42 (1) (d)

<sup>237</sup> Ibid, Article 42 (3)

<sup>238</sup>D. Devika Hovell, The Authority of Universal Jurisdiction, The European Journal of International Law Vol. 29 no. 2, Published by Oxford University Press on behalf of EJIL Ltd (2018) 425

<sup>239</sup>Ibid

<sup>240</sup>Ibid

<sup>241</sup>Habtamu, (204)

government interest that suffice for instituting proceedings.<sup>242</sup> Even, assuming public interest as a valid ground for the prohibition of prosecution of international crimes, the phrase is vague in that its elements are not defined under the law. In the same fashion, this requirement cannot also be a sufficient ground either to allow or to prohibit prosecution of international core crimes committed abroad. Generally, these grounds of the Criminal Procedure Code cannot be applicable when it comes to the prosecution of international crimes committed abroad.

That being said, it is not clear from the law that the Minister of Justice considers while deciding on prosecution of international crimes committed abroad. As such, the Minister might consider legal, political, diplomatic, and resources, while rendering a decision on the matter. The Minister seems to consider the political implication of prosecution based on universal jurisdiction.<sup>243</sup> If the Justice Minister can prohibit such prosecutions, it portrays Ethiopia as a safe harbor for criminals. Thus, there is a need to clarify the role of the Minister of Justice in this regard. But the law says nothing. Also, article 19(3) of the Criminal Code is not supported by any regulation or directive.<sup>244</sup> This legal lacuna, in turn, creates an ambiguity and confusion on the prosecution of international crimes committed abroad.

### **3.4.3. Challenges Related to Mutual Legal Assistance and Extradition**

Prosecuting international crimes committed abroad is not a simple task. It involves a complicated task concerning investigating facts, allocating evidence, finding witnesses, and securing mutual legal and technical assistance from the country of the place of commission of the alleged crime.<sup>245</sup> This in return requires having a comprehensive domestic legal and institutional system to create a mutual, trusted, and well-established cooperation with other Countries.<sup>246</sup>

With this aim, it is being advocated for the development of mutual legal assistance and for the adoption of a new multilateral treaty to enhance cooperation between States in the investigation

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<sup>242</sup> Ibid

<sup>243</sup> Adi Dekebo Dale, (n 30) 177.

<sup>244</sup> ibid

<sup>245</sup> Network for Investigation and Prosecution of Genocide, Crimes Against Humanity and War Crimes, A 20 Years on Main Developments in the Fight Against Impunity for Core International Crimes in the EU: An Assessment of the Strategy of the Genocide Network to Combat Impunity for the Crime of Genocide, Crimes Against Humanity and War Crimes Within the EU and its Member States, (2022) 17.

<sup>246</sup> Ibid

and prosecution of serious international crimes.<sup>247</sup> As such, the Ljubljana-Hague Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes, and other International Crimes has been adopted.<sup>248</sup>

When we come to Ethiopia, the legal gaps in the criminalization of international crimes and the ambiguities in the application of universal jurisdiction impede cooperation for the investigation and prosecution of international crimes committed abroad.<sup>249</sup> This is because States are concerned with and assess the efficiency of the legal and institutional systems of a country claiming prosecution.<sup>250</sup> When States notice some sort of legal lacunas in the regulation of the alleged crimes at hand, they tend to be less interested in cooperating.<sup>251</sup> As such, a given State might not cooperate in the search of evidence, accessing witnesses, and establishing the facts of the prosecution in general. As discussed above creating mutual and international legal assistance for the investigation and prosecution of international crimes is an emerging principle that is being practiced by different jurisdictions.<sup>252</sup> According to Habtamu<sup>253</sup>, in Ethiopia, such kind of cooperation practice has not been initiated so far and there is no comprehensive initiative or trend on this matter.<sup>254</sup>

Generally, cooperation between states is a crucial matter in dealing with investigating and prosecuting international core crimes committed abroad. Hence, addressing the legal lacunas in

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<sup>247</sup> States Agree New Treaty to Fight Impunity for the Most Serious International Crimes, available at <https://redress.org/news/states-agree-new-treaty-to-fight-impunity-for-the-most-serious-international-crimes/>, accessed on August 25, 2023.

<sup>248</sup> Ibid: This Convention is the result of a decade-long endeavor, known as the Mutual Legal Assistance (MLA) Initiative with the main aim of strengthening the legal framework to fight against impunity in relation to international crimes, by lessening the obstacles national authorities face in gaining access to suspects, witnesses, evidence and assets located beyond their borders. For more reading on this area, see, <https://diplomatie.belgium.be/en/news/new-treaty-enable-cooperation-between-states-fight-against-impunity-most-serious-crimes-thanks-belgiums-efforts>; <https://www.diplomatie.gouv.fr/en/french-foreign-policy/international-justice/news/article/fight-against-impunity-adoption-of-the-convention-on-international-cooperation>

<sup>249</sup>Habtamu (107)

<sup>250</sup> Ibid

<sup>251</sup> Ibid

<sup>252</sup> Bruno de Oliveira Biazatti and Ezéchiél Amani, The Ljubljana – The Hague Convention on Mutual Legal Assistance: Was the Gap Closed?, 2023, available at <https://www.ejiltalk.org/the-ljubljana-the-hague-convention-on-mutual-legal-assistance-was-the-gap-closed/>, accessed on August 25, 2023.

<sup>253</sup> Supra Note (107)

<sup>254</sup> Ibid

the administration of international crimes and flaws in the application of universal jurisdiction shall be the first step. To this end, adopting a clear and transparent policy of cooperation with the relevant states would enhance the cooperation for the aim of fighting against the impunity of international crimes.

### **3.5. Chapter Summary**

This chapter investigated whether the Ethiopian criminal justice framework provided a proper mechanism for dealing with the prosecution of international crimes committed abroad, as well as whether the Ethiopian criminal justice system is fruitful in criminalizing all core crimes. The Ethiopian criminal legal frameworks do not address adequately the criminalization, investigation, prosecution and cooperation of international crimes committed abroad. Such legal lacunas are exhibited in substantive, procedural, and policy frameworks. Although the Criminal Code contains the principle of universal jurisdiction, its practical application is not realistic as it is raveled by restrictive absentia and consultancy requirements. No thresholds are provided by the legal machinery as to the specific conditions, *reason detere*, and underpinning criteria for the application of universal jurisdiction in Ethiopia.

This chapter also found that there is an impunity gap emanating from a lack of criminal liability for international core crimes under the Ethiopian Criminal laws since crime against humanity is not regulated and criminalized at all. Crime against humanity is not defined, criminalized, and punished by the domestic criminal laws of Ethiopia. As such, let alone prosecuting international crimes committed abroad, the Ethiopian criminal legal framework is not adequate, if not impossible, to prosecute crimes against humanity which alleged to have been committed within its domestic jurisdiction.

Further, the procedural administration of international crimes committed abroad has not been regulated in Ethiopia. The Criminal Procedure Law of Ethiopia does not provide for special investigation and prosecution procedures for international crimes committed abroad. Even worse, the Draft Criminal Procedure Code of Ethiopia excluded international crimes while it provides an independent section devoted to regulate special investigation and prosecution procedures of Transnational Crimes. As such, special investigation standards of procedural rules for international crimes are lacking under the Ethiopian criminal justice system.

In general, Ethiopia's aspiration to fight impunity against international crimes committed abroad is stumbling because of a lack of clear and adequate substantive and procedural laws governing the criminalization, investigation, and prosecution of international core crimes committed abroad.

## CHAPTER FOUR

### CONCLUSION AND RECOMMENDATION

#### 4.1. Conclusion

This is the last chapter of the study, provides a summary of the thesis with the researcher's concluding remarks and outlook. The main objective of this study was to analyze the adequacy of the Ethiopian legal framework and to identify the major substantive and procedural challenges for the prosecution of core crimes committed abroad. To achieve this objective, the researcher collected data and examined the substantive, procedural, and policy frameworks that regulate the administration of core crimes committed abroad.

The global community is coming into consensus that international crimes are those horrendous crimes against humanity, considered as crimes committed against the international community. As such, the jurisprudence of international criminal law affirms that every state in the world has an *erga omnes* duty to combat impunity of such crimes. However, states' unwillingness or inability to discharge their international obligations has posed an obstacle on the movement towards fighting impunity against these crimes. This problem is complicated when prosecutions involve on international crimes which has been committed abroad since states follow a divergent approach on the administration of such types of cases.

Likewise, the involvement on combating international crimes committed abroad under the criminal justice system of Ethiopia is at an infant stage. In fact, the principle of universal jurisdiction is not entirely absent from the domain of Ethiopian criminal law. However, this research has founded that the Ethiopian legal framework on prosecution of core crimes committed abroad is not adequate to administer effectively those crimes both on substantive and procedural manners.

Prosecution of international crimes committed abroad involves a range of complicated tasks. It involves multiple issues ranging from sophisticated investigation and fact-finding in a foreign country, establishing mutual legal assistance platforms, and having adequate domestic legal frameworks, which can fit with the international jurisprudence. In addition, political commitment

and allocation of adequate budget are also significant steps for the effective administration of prosecution of international crimes committed abroad.

Thus, the study explored that the evaluation of the Ethiopian legal framework concerning the prosecution of international crimes committed abroad has shed light on numerous deficiencies that impede the effective pursuit of justice in such cases. These shortcomings span various aspects of the legal system, encompassing procedural, substantive laws, mutual legal assistance, extradition agreements, fact-finding processes, application of universal jurisdiction, regulation of crimes against humanity, investigation standards and resources, consultancy requirements, and specialized units for investigation and prosecution.

Beginning with procedural and substantive laws, Ethiopia's current legal framework lacks specific provisions tailored to address the complexities involved in prosecuting international crimes committed abroad. The absence of dedicated legislation not only undermines the efficacy and legitimacy of legal proceedings but also denies justice to the victims of these heinous acts. Without clear guidelines and regulations governing such cases, the successful prosecution of perpetrators becomes a formidable challenge.

Moreover, the absence of robust mutual legal assistance and extradition agreements with other countries poses a significant obstacle to the prosecution of international crimes committed abroad. The lack of established mechanisms for cooperation and information sharing limits the capacity effectively investigate and prosecute transnational crimes. In the absence of strong international partnerships, holding perpetrators accountable and ensuring justice for victims becomes increasingly arduous.

Challenges related to fact-finding further complicate the prosecution of international crimes committed abroad. Gathering evidence across borders, verifying testimonies, and establishing the culpability of suspects require specialized skills and resources that are currently deficient within the Ethiopian legal system. These shortcomings in fact-finding mechanisms hinder the successful prosecution of international crimes and undermine the credibility of legal proceedings.

The ambiguity surrounding the application of universal jurisdiction in Ethiopia adds another layer of complexity to the prosecution of international crimes. The lack of clarity in determining the jurisdiction of Ethiopian courts over crimes committed abroad raises uncertainties regarding the legal basis for prosecuting such cases. The absence of a clear framework for applying universal jurisdiction creates doubt about the extent to which Ethiopian courts can assert authority over international crimes.

Lastly, attempts to prosecute those who commit such serious crimes are made more difficult by Ethiopia's judicial system's lack of laws addressing crimes against humanity. It is difficult to hold people accountable for atrocities perpetrated since crimes against humanity are neither defined or made illegal, leaving a large void in the legal system. To guarantee that justice is done and those who commit international crimes are held responsible for their conduct, it is imperative that these shortcomings are fixed.

## 4.2. Recommendations

Based on the findings of this thesis, the researcher submits the following recommendations:

- The law-making organ of Ethiopia should enact a new and comprehensive law that regulates and criminalizes crime against humanity comprehensively in line with the international criminal law jurisprudence.
- The Draft Criminal Procedure Code of Ethiopia should incorporate specific procedural rules and principles applicable to special investigation, prosecution, proceedings, and international legal cooperation toward the prosecution of international crimes committed abroad.
- For certainty and predictability of mutual cooperation for fact findings, establishing prosecutions, and securing evidence, it is recommended to adopt a comprehensive and specific cooperation policy framework for the prosecution of international crimes committed abroad.
- Ethiopia has to be encouraged to become a party to the Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, and War Crime to enhance its mutual legal assistance and to fight the impunity of international crimes.
- The author of this thesis recommends further research, equipped with more resources and inquiries regarding the essence of prosecution of international crimes which are committed abroad under the Ethiopian criminal justice system.

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### **Interview**

Call Interview with Dr. Marshet Tadesse Tessema (lecturer and senior advisor of transitional justice on 09 August, 2023.

Face-to-face interview Mr. Mesafint Alemayehu, (member of committee of on the reform, legal research, and legal study of Supreme Court) on 12 April 2023, Addis Ababa, Ethiopia

Face-to-face interview with Mr. Habtamu Haile, Deputy Director General of Transnational and Organized Crimes Prosecution Department at Ministry of Justice on 25 August, 2023, Addis Ababa, Ethiopia.

Face-to-face interview with the Director on International Legal Cooperation Directorate at the Ministry of Justice) on 25 August, 2023, Addis Ababa, Ethiopia.

Phone interview with Mr. Zelalem Anjilo, (served as vice chief special public prosecutor, and the lead prosecutor in the most cases such as Mengistu et al. and Legesse Asfaw et al), on 11 June 2023.

## **Annexes**

### **Interview Guide for Ministry of Justice directorate, Public Prosecutors and Judges Experts and Scholars**

1. What are the hurdles for the Ethiopian criminal justice system for effective prosecution of international crimes committed abroad?
  - ✚ Do the existing laws and policies are adequate to address the issues of prosecution of core crimes committed abroad?
  - ✚ Why not have successful prosecutions of international crimes committed abroad by the Ethiopian criminal justice system to date?
2. Does universal jurisdiction is recognized in a way that it can be clearly exercised on the investigation and prosecution of international crimes committed abroad?
3. What type of legal reform and cooperation themes should be introduced in the Ethiopian criminal justice system for effective investigation and prosecution of core crimes committed abroad?