The Place of Crimes against Humanity under the Ethiopian Legal System: A Reflection

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Introduction

Crimes against humanity are among the most heinous forms of international crimes that shock the conscience of mankind. The international community has sporadically prosecuted perpetrators of these crimes since the aftermath of World War II and then after. Apart from international prosecutions, different countries have enacted laws that penalize the commission of such crimes. Some others have applied customary international law to prosecute perpetrators of these crimes. Some years back, Ethiopia has prosecuted former *Derg* officials for their alleged commission of crimes against humanity. This author intends to explore the place of crimes against humanity under the Ethiopian legal system. The paper begins with the exposition of the concept of crimes against humanity and its constitutive elements under customary international law. It then proceeds to specifically explore the place of crimes against humanity under the Ethiopian legal system. Finally the paper draws conclusion.

1. The Concept of Crimes against Humanity

1.1. Evolution and Definition of the Concept

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The traditional bases of crimes against humanity lie in the laws of war. The notion of *law of humanity* entered into an international treaty in *Martin Clause* of the Hague Convention in 1907.[1] The first official employment of the term '*crime against humanity'* was made in 1915, in the joint declaration of the governments of Great Britain, France and Russia in describing the Turkish massacres of Armenians as crimes against humanity and civilization.[2]

Crimes against humanity re-emerged after World War I in 1919 at the Paris Peace Conference which was held and proposed to prosecute those who were alleged to be guilty of offenses against the laws and customs of war or the laws of humanity.[3] The proposal was ultimately rejected for various reasons. After the end of World War II, in 1945 crimes against humanity were incorporated in the Charter of the International Military Tribunal for the Trial of the Major War Criminals (Nuremberg Charter). The Nuremberg Charter was the first positive international law that recognized the prohibition of crimes against humanity. Art 6(c) of the Charter defined crimes against humanity as:

> *murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime*

[1] The Martens Clause states that; in cases not otherwise covered by the convention (Hague convention), the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the *laws of humanity*, and the dictates of the public conscience. See Hague Convention IV Respecting the Laws and Customs of War on Land, 18 Oct. 1907

[2] They proposed a declaration which makes all members of the Turkish Government responsible together with its agents implicated in the massacres. See Antonio Cassese. International criminal law, 2nd ed. Oxford University Press, New York, 2008, p. 101

[3] Ibid 102

> *within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.*

The main reason to incorporate crimes against humanity in the Nuremberg Charter was to fill-in gaps that used to exist in positive international law. The law of war protected civilians in times of war but it did not protect atrocities committed by states against their own citizens. This lacuna dictated the drafters of the Charter to incorporate crimes against humanity. However, the Charter failed to provide a principal distinction between war crimes and crimes against humanity. Crimes against humanity were simply viewed as an extension of the scope of humanitarian law. The Nuremberg Charter represented the first ever attempt to define crimes against humanity and it has really served as a model for subsequent formulation of these category of crimes.[4]

The Control Council Law (CCL) No. 10[5] was the second international instrument that contained a provision which dealt with crimes against humanity. This law added imprisonment, torture and rape to the list of inhuman acts and it further eliminated the requirement of the act and war

[4] See Margaret M. Guzman. "The Road from Rome: The Developing Law of Crimes against Humanity". Human Rights Quarterly, Vol. 22, 2000, 335–403, p. 347 [hereafter in Guzman, The Road from Rome]

[5] This law was enacted in 1945 to provide a uniform legal basis for prosecution in the allied power occupied zones of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal. American, French, and Soviet tribunals applied CCL No. 10 in their respective zones of occupation. Art 2 (1(c)) of the Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, CCL No. 10, 20 Dec. 1945 defined crime against humanity as:

> *Atrocities or offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.*

nexus. After the CCL No. 10 till the establishment of the two *ad hoc* international criminal tribunals in the 1990s there were some developments related to crimes against humanity.[6]

The Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY)[7] and the International Criminal Tribunal for Rwanda (ICTR)[8] are the second milestone for the development of the law of crimes against humanity. They represent important recent codifications of the law of crimes against humanity. The list of illegal acts that constitute crimes against humanity under the ICTY and ICTR Statutes remain the same with that of the CCL No.10.[9]

The ICTY Statute clarifies that discriminatory intent is required only for persecution and not for other inhumane acts of crimes against humanity. This Statute further recognized the nexus between enumerated acts and armed conflict of international or internal character. The ICTR Statute did not conform completely to the ICTY definition. While the lists of illegal acts remain the same, the ICTR Statute requires that these acts be committed as

[6] The 1948 Genocide Convention and the 1954, 1991 and 1996 Drafted Codes of Crimes against the Peace and Security of Mankind of the International Law Commission have some provisions that deal with crimes against humanity.

[7] Art 5 of the ICTY statute provides crimes against humanity: *The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:(a)murder;(b) extermination;(c)enslavement; (d)deportation; (e)imprisonment; (f)torture; (g)rape; (h)persecutions on political, racial and religious grounds;(i) other inhumane acts*.

[8] Art 3 of the ICTR statute provides Crime Against Humanity: *The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes a)Murder; b) Extermination; c) Enslavement; d) Deportation; e) Imprisonment; f) Torture; g) Rape; h) Persecutions on political, racial and religious grounds; i) Other inhumane acts when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds*.

[9] See, Art 2(1(c)) of CCL No. 10, Art 5 of the ICTY Statute and Art 3 of the ICTR Statute

part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious ground. Under this Statute, not only persecution, but all inhumane acts must be committed on discriminatory grounds in order to qualify as crimes against humanity. As Guzman notes this requirement of discriminatory intent represents a significant regression in the development of the concept.[10] In one respect, however, the ICTR definition is more progressive than the ICTY definition. The ICTR definition did not make any mention of armed conflict; it de-linked crimes against humanity entirely from war, whether internal or international.[11]

Recently crimes against humanity have been incorporated in the Rome Statute. The elements of the definition of crimes against humanity were among the contested issues during the negotiation of the Rome Statute. The debate among other things included: whether a nexus with armed conflict should be required; whether the definition should require discrimination generally or only for persecution and whether the contextual elements of "widespread" and "systematic" attack should be conjunctive or disjunctive.[12] After a lengthy debate the Statute came with a number of political compromises[13] under Art 7 and it specifically stipulated about crimes against humanity as one of the crimes that fall within the jurisdiction of the International Criminal Court (ICC).[14] The Statute has enlarged the list of

[10] See Guzman, The Road from Rome, *supra note* 4, p. 351
[11] Ibid
[12] See Margaret M. Guzman. *Crimes against Humanity*, Research handbook on international criminal law, p. 7 [here after in Guzman, Crimes against Humanity]
[13] Id, p. 3
[14] Art 7 of the Rome Statute Provides Crimes against Humanity: …. *"Crime against humanity" means any of the following acts when committed as part of a widespread or*

inhumane acts by incorporating all forms of grave sexual violence, enforced disappearance and apartheid. Further, the Statute has expanded the grounds upon which persecution could be committed. Moreover, the Statute settled two long disputed aspects of the definition of crimes against humanity. First, crimes against humanity no longer contain any nexus with armed conflict, whether international or non-international nature. Second, the Statute limited discriminatory ground /intent/ only to an act of persecution like that of ICTY. That is though the ICTR Statute required discriminatory intent or ground for the commission of crimes against humanity; under customary international law neither discriminatory ground nor intent is a required element of crimes against humanity except for 'persecution.'

1.2. Elements of Crimes against Humanity

Identifying the elements of crimes against humanity provides a moral basis for labeling a particular inhuman act as constituting a crime against humanity and justifies an exercise of international jurisdiction. As highlighted above, the objective elements (*chapeau*) of crimes against humanity substantially varied in various international instruments. Therefore, it remains important to establish the elements of the crime in customary international

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systematic attack directed against any civilian population, with knowledge of the attack: (a)Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender ……. (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

law. The elements of crimes against humanity are contextual (chapeau) and mental.

1.2.1. Chapeau (Objective) Elements of Crimes Against Humanity

A. Widespread or Systematic Attack

This is an essential element that distinguishes crimes against humanity from domestic crimes. It is this element that turns these crimes into attacks against humanity rather than isolated violations of the rights of particular individuals. The ICTR Statute and the Rome Statute are binding international instruments that incorporated this element of crimes against humanity. However, some writers argue that this element has been widely viewed as implicit in all definitions of crimes against humanity, beginning with the Nuremberg Charter.[15] It has four sub-elements: definition of the concept of widespread or systematic, attack, policy and nexus requirements.

Widespread or systematic: As stipulated in the ICTR and Rome Statute the term "widespread" and/or "systematic" are alternative requirements not cumulative ones. However, neither the ICTR nor the Rome Statute defines the term widespread or systematic. "Widespread" refers to the number of victims whereas "systematic" refers to the existence of policy or plan.[16] In *Prosecutor v. Akayesu case*, the ICTR Trial Chamber I define the concept of "widespread" as 'massive, frequent, large scale action, carried out collectively with the considerable seriousness and directed against a multiplicity of

[15] See Guzman, The Road from Rome, *supra note* 4 p, 375

[16] Simon Chesterman. An Altogether Different Order: Defining the elements of Crimes Against Humanity, Duke Journal of Comparative and International Law, Vol. 10 No. 307, 2000, P. 307-343 [Chesterman, An Altogether Different Order]

victims.'[17] The Chamber further defines the term "systematic" as 'thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources.'[18] Moreover, the ICTR Trial Chamber II defines the concept of systematic as 'an act which carried out pursuant to a preconceived policy or plan.'[19]

Attack: In the Nuremberg Charter and the ICTY Statute an attack bears necessary relation with aggressive war or armed conflict. However, the Control Council law No. 10 and the ICTR Statute, define crimes against humanity without reference to armed conflict. This issue was a point of contention in the debate regarding crimes against humanity at the Rome Conference. Finally the Rome Statute excluded the nexus to armed conflict; this is persuasive evidence that such a nexus may no longer be required under customary international law. Therefore the term attack refers to committing one or more enumerated act or acts of Art 3(a)-(i) of the ICTR Statute and Art 7 (1(a-k)) of the Rome Statute.

The Policy Requirement: The ICC Statute is the first international legal instrument to include the requirement of state or organizational policy in the definition of crimes against humanity.[20] Whether the attack is widespread, systematic or both, the relevant act or acts must be connected to some form of policy. There is no requirement that the policy comes from central government; the policy may be that of an organization or private group. This

[17] The ICTR Chamber I, Prosecutor v Akayesu, case no. ICTR-96-4-T, September 2, 1998, P.580, as cited by Chesterman, An Altogether Different Order p, 315
[18] Ibid
[19] The ICTR Chamber II, Prosecutor v Kayishema, case no. ICTR-95-1-T, May 21, 1999, P.123, Chesterman, An Altogether Different Order p, 315
[20] Rome Statute Art 7(2)

policy requirement essentially reiterates the position that isolated and random acts cannot amount to crimes against humanity. That is crimes against humanity shock the conscience of mankind and warrant intervention by the international community because they are not isolated, random acts of individuals but result from a deliberate attempt to target a civilian population.

The nexus requirement: To constitute a crime against humanity, an individual act must be part of a widespread or systematic attack. This requirement comprises objective and subjective components. First, the alleged crimes were related to the attack on a civilian population. This objective component does not require that the act was committed in the midst of the attack. A crime can be part of an attack even if it is geographically or temporally distant from the attack as long as it is connected in some manner.[21] Second, the subjective or mental element of crimes against humanity requires that the perpetrator act with knowledge that his act is part of a widespread or systematic attack against a civilian population.[22] Actual or constructive knowledge is enough. This test appears to reflect customary international law and is consistent with the provisions of the Rome statute.

B. Directed against any Civilian Population

All codified definitions of crimes against humanity have included the requirement that the enumerated acts be directed against civilian population.[23] The civilian population requirement includes two elements; the constitute acts must be directed against non-combatants

[21] Guzman, Crimes against Humanity, *supra note* 12, p. 16
[22] Ibid
[23] See Art 6(c) IMT Charter, Art 2 (1) (c) CCL No. 10, Art 5 ICTY Statute, Art 3 ICTR Statute and Art 7(1)Rome statute

and a large number of victims must be targeted.[24] This means that the victims or intended victims must be civilians. In cases of *Akayseu*, *Kayishema* of ICTR and *Tadic* of ICTY the Trial Chambers adopted the definition of civilian in the context of armed conflict. They interpreted the term "civilian" in a wider sense. In *Akayaseu* case, the Trial Chamber stated that "where there are certain individuals within the civilian population who do not come with the definition of civilians this does not deprive the population of its civilian status." [25] "Population" could be interpreted simply to imply broad based victimization, excluding small scale crimes against humanity. It is not necessary that the whole population of a specific geographic area be attacked, but rather there must be a number of victims and some connection among them.

1.2.2. The Mental Element of Crimes against Humanity

The *mens rea* of crimes against humanity is not explicitly codified in any of the relevant pre-Rome international instruments.[26] The mental element of crimes against humanity as stipulated in Art 7 of the Rome Statute is knowledge of the attack. The inclusion of the knowledge standard (general intent) in the Rome Statute represents significant advancement in the law of crimes against humanity.[27] Art 7 of the Rome Statute not only controls ICC's

[24] See Guzman, The Road from Rome, *supra note* 4 p, 361
[25] See the ICTR chamber I, Prosecutor v. Akayesu, case No. ICTR-96-4-T, September 2, 1998, P.580
[26] See Guzman, The Road from Rome, *supra note* 4 p, 377
[27] The adoption of the Rome Statute contributed significantly to the development of international law with respect to the *mens rea* of crimes against humanity. Article 7 of the Statute explicitly adopts a knowledge standard. The *mens rea* language in the definition of

application of the law but serves as an expression of the state of customary international law. The mental element of crimes against humanity under customary international law consists of a requirement that the perpetrator has knowledge of the nexus between his or her act and a widespread or systematic attack against civilians.[28] Put simply, the perpetrator's knowledge of his/her act is part of a widespread or systematic attack is sufficient to establish the *mens rea* of crimes against humanity under customary international law.

2. Crimes against Humanity under the Ethiopian Legal System

When a state ratifies a convention or when a norm gets the status of customary international law, it is an obligation of states under international law to implement it. As part of customary international law prohibitions of crimes against humanity have binding effect on the entire globe, including Ethiopia – Ethiopia bears an obligation to give effect to this prohibition. To fulfill this obligation the country is expected to domesticate the customary norm of crimes against humanity to its national laws.

2.1. Crimes against Humanity in the Penal Code of 1957

crimes against humanity (art 7) must be read in conjunction with Article 30 of the Statute regarding the "mental element." This Article stipulates that "*unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge*." This requirement of intent and knowledge, of course, does not apply to the chapeau elements of crimes against humanity since the chapeau states that knowledge alone suffices. Article 30 provides an additional indication that knowledge is sufficient for the circumstantial elements of the chapeau by defining intent only in relation to "conduct" and "consequence," while defining knowledge in relation to circumstances. See Guzman, The Road from Rome, *supra note* 4, p. 380

[28] See Guzman, The Road from Rome, *supra note* 4 p, 377- 402.

The title of Art 281[29] of the Penal Code of 1957 contained crimes against humanity and genocide together. Looking at the title of this provision, it reveals that the Penal Code provides both genocide and crimes against humanity as a single offence. However, when read closely the whole provision, it is more or less similar to Art 2 of the Genocide Convention except the inclusion of political group as one protected group in the Penal Code. All the elements listed in this provision are the constituting elements of the genocide crime as stipulated under Art 2 of the Genocide Convention. Art 281 provides special intent. Its scope of protection is limited to specific groups, and the material acts (modes of committing the offence) are also restricted in the same manner as the Genocide Convention.

The Genocide Convention governs genocide crime, not crimes against humanity. Genocide and crimes against humanity are two distinct international crimes. The definition and the constitutive elements of the two crimes are different. Crimes against humanity are directed at any civilian population whereas genocide is against specific groups. Moreover, the required mental element for crimes against humanity is general intent whereas for genocide it is specific intent. A broad interpretation of crimes against

[29] Art 281. Genocide; Crimes against Humanity
Whosoever, with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, organizes, orders or engages in, be it in time of war or in time of peace:

a) killings, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever; or
b) Measures to prevent the propagation or continued survival of its members or their progeny; or
c) The compulsory movement or dispersion of peoples or children, or their placing under living conditions calculated to result in their death or disappearance, is punishable with rigorous imprisonment from five years to life, or, in cases of exceptional gravity, with death.

humanity may include many ranges of criminal activities including genocide crimes.[30] The definition of crimes against humanity transcends the definition of genocide in terms of the scope of protection and the material acts constituting the crime. Therefore, the attempt to interpret Art 281 of the Penal Code as including crimes against humanity entails the following legal problems.

First, it narrows down the definition of crimes against humanity only to include groups and acts listed in the provision. It makes crimes against humanity similar to genocide which is distinct under international criminal law. Second, the attempt to include protected groups and enumerated acts other than mentioned in Art 281 of the Penal Code by way of reference to other international instruments or customary international law is not in line with the principle of legality. It may be taken as amount to the creation of new crimes i.e. crimes against humanity by analogy.

To sum up, even though the title of Art 281 of the Penal Code of 1957 seems to comprise, crimes against humanity, as a co-title to genocide in semicolon, strictly speaking, crimes against humanity was not recognized as independent crime in the Penal Code.

2.2.Crimes against Humanity in the Criminal Code of 2004

The 2004 Criminal Code does not have any provision that deals with crimes against humanity. It incorporates genocide and war crimes as crimes in

[30] See Patricia M. Wald. Genocide and Crimes against Humanity, Washington University Global Studies Law Review, Vol. 6, 2007, p. 621 - 633; Major Haile Meles et al. v Special Prosecutor, Amhara Regional National State Supreme Court, 1999, Criminal Case No.21/90, p. 15 [Unpublished]

violation of international law.[31] As stated above crimes against humanity and genocide are two separate crimes that have different contextual and mental elements. In addition to genocide the Criminal Code provides war crimes as crimes in violation to international law specifically laws of armed conflict. War crimes require the nexus between an act and the existence of armed conflict (warfare). However, the nexus between an act and armed conflict was not a requirement for crimes against humanity under customary international law as well as in the ICTR and Rome Statutes. Therefore, like to the 1957 Penal Code, the 2004 Criminal Code does not have prohibition of crimes against humanity.

2.3. Crimes Against Humanity in the FDRE Constitution and Other Laws

Art 28[32] of the FDRE constitution is titled as 'crimes against humanity.' Dissecting of sub-article one of this article is vital to understand what are contained in it.

[31] Part II Book III Title II, Chapter I of the criminal code provides; crimes in violation of international law as fundamental crimes; art 269 provides for genocide crimes and articles 270-280 provides for war crimes. See the Federal Democratic Republic of Ethiopia Criminal Code Proclamation No.414/2004, art 269-280

[32] Article 28: Crimes against Humanity

1. Criminal liability of persons who commit crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearances or torture shall not be barred by statute of limitation. Such offences may not be commuted by amnesty or pardon of the legislature or any other state organ.
2. In the case of persons convicted of any crime stated in sub-Article 1 of this Article and sentenced with the death penalty, the Head of State may, without prejudice to the provisions hereinabove, commute the punishment to life imprisonment (Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995)

1. …… crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia….

There is no any convention dealing with crimes against humanity. Unlike genocide and war crimes, crimes against humanity have evolved through customary international law. Further, in the Ethiopian legal framework there is no law which governs crimes against humanity. Therefore, the reference of the Constitution to international agreements ratified by Ethiopia and other laws of Ethiopia is far from clear. The only multilateral treaty that deals with crimes against humanity is the Rome Statute. The FDRE Constitution was promulgated three years before the adoption of the Rome Statute. Furthermore, during the adoption of the Rome Statute in 1998, the Ethiopian government remains abstained.

2. …such as genocide, summary executions, forcible disappearances or torture……..

This sub-article makes crimes against humanity as a collection of genocide, summary executions, forcible disappearances or torture. The lists aren't exhaustive. However, as repeatedly mentioned above crimes against humanity are different from genocide, summary execution, forcible disappearance or torture. However, this doesn't mean that crimes against humanity don't have similarity with these crimes. The latter two crimes (forcible disappearance or torture) if they committed by fulfilling elements of crimes against humanity stated above, they could amount to crimes against humanity. However, the intention of the legislature in Art 28 of the Constitution seems not to provide elements of crimes against humanity. Rather the intention is to provide the

effect of "crimes against humanity" [the listed out crimes] under the Ethiopian legal system.[33] It appears that crimes against humanity are treated as an agglomeration of all serious violation of human rights. However, though crime against humanity is serious violation of human rights, it is not the collection of genocide, war crimes, summary execution, forcible disappearance or torture.

Now the question is if crimes against humanity aren't incorporated in the FDRE constitution, or in the Criminal Code, or other proclamations how can Ethiopian courts apply the prohibitions of crimes against humanity? There is a legal lacuna in this regard. Where a legal lacuna happens judges have a mandate to fill-in gaps by referring to customary law. That is customary international law becomes topical in the domestic context in areas where international treaty norms are missing or not binding on the state or have become obsolete or when the issue isn't incorporated to domestic legal framework.[34] How international customary norms in particular those concerning crimes against humanity can be domesticated to the Ethiopian laws which judges could take due notice? This is a crucial issue that is worthy of investigation.

The FDRE constitution has two provisions (Art 9(4) and 55 (12)) which deal with the incorporation of international treaties in to the domestic

[33] Accordingly, the genocide crime, summary execution, forcible disappearance and torture shall not be barred by statute of limitation. Moreover, such offences may not be commuted by amnesty or pardon of the legislature or any other state organ. See Art 28(2) of the FDRE constitution

[34] Hannes Vallikivi, Domestic Applicability of Customary International Law in Estonia, Juridica international, Vol. 7, 2002, p. 28

legal system.[35]However, the Constitution remains silent about the domestication of customary international law. Yet we know that customary international law is one of the basic sources of international law. It is appropriate, in the interest of Ethiopia as a state, and individuals within Ethiopia, that this part of international law is enforceable within the country. For the state, it will portray Ethiopia in good light when international customary law is enforced; and for individuals, rights guaranteed by international law will ensure the application of international standards in the dealings of government with individuals.

The FDRE Constitution and Proclamation No. 321/2003 (A Proclamation to Amend the Federal Courts Proclamation No. 25/1996) recognized custom as one source of law under the Ethiopian legal system. Art 9(1) of the Constitution provides … *any law, customary practice or a decision of an organ of state ... which contravenes this Constitution shall be of no effect*. This article gives recognition to customary practices as one source of law. [36]

Art 2(2) of Proclamation No. 321/2003 reads as …*without prejudice to international diplomatic law and custom as well as other international*

[35] The Ethiopian legal system follows a dualist approach in transforming international treaties in to domestic law. The executive organ has the mandate to conclude and sign international treaties and the legislative organ has power to domesticate the signed treaties through legislative act usually through proclamations. See art 55 (2) of the FDRE Constitution; If international standards are incorporated into national legislation, it is easier for domestic courts and legal operators to apply them. Incorporation (domestication) should mean that the provisions of the convention can be directly invoked before the domestic courts and applied by national authorities.

[36] As the phrase 'any law' includes proclamations, regulations and directives enacted by the domestic law maker and international treaties ratified by Ethiopian; the term 'customary practice' may also refer to national and international customary practices.

agreements to which Ethiopia is a party... This article enables Ethiopian courts to take due notice of customary international law. Customary international law on its part is unwritten and derives from the actual practices of nations over time. To be accepted as law, the custom must be long-standing, widespread and practiced in a uniform and consistent way among nations. That is customary international law becomes binding on all states if it fulfills two elements- general state practice and o*pinio juri*.[37] At the apex of customary international law there are peremptory norms (*Jus cogens*). *Jus cogens* are at the peak of all sources of international law (treaties, ordinary customary international law, general principles of international law, judicial decisions, workings of scholars etc.).

International core crimes[38] in general, crimes against humanity in particular have the status of *jus cogens. Jus cogens* constitute an *obligatio erga omnes* – obligation owed to the international community. These obligations are inderogable.[39] The legal obligations which arise from crimes against humanity includes the duty to prosecute or extradite, the non-applicability of statutes of limitations for such crimes, the non-applicability of any immunity *ratione materiea or ratione personea* up to and including Heads of State, the non-applicability of the defense of obedience to superior orders, the universal application of these obligations whether in time of peace or war, the obligation is not derogable under states of emergency, and

[37]Malcolm N. Shaw, International Law, 5th ed., Cambridge University Press, Cambridge, United Kingdom, 2003, p. 68-84

[38] Art 5(1) of the Rome Statute of the International Criminal Court of 1998, which is an evidence of customary international law provides; crime of genocide; Crimes against humanity; War crimes; crime of aggression as core international crimes.

[39] Cherif Bassiouni, International Crimes, Jus Cogens and Obligatio Erga Omnes, p.265 – 277

universal jurisdiction over perpetrators of such crimes.[40] Art 28 (1) of the FDRE Constitution provides a few among these obligations; however this article lacks inclusiveness and exhaustiveness. Therefore, the Ethiopian government has an *erga omnes* obligation to give effect to the prohibitions of crimes against humanity in its domestic sphere.

Although there is no constitutional provision which deals with the domestication of customary norm, the Ethiopian courts have the mandate to fill-in gaps of prohibition of crimes against humanity by applying customary international law pursuant to Art 2(2) of Proclamation No. 321/2003. However, the prevailing experience shows that Ethiopian courts are very reluctant to cite international human rights instruments ratified by Ethiopia. Though recently in the Ethiopian Federal Supreme Court there are good beginnings using of international instruments in providing decisions, in other federal and regional courts the trend of using international law in rendering decisions is very minimal or almost none. Ethiopian courts have not the culture to apply international treaties ratified by Ethiopia let alone un-codified customary international law.

However, application of customary international law relating to crimes against humanity has its shortcomings. First determining the scope of crimes against humanity in customary international law remains difficult.[41] Second the ambiguities inherent in defining and using customary international law have sparked heated debates regarding its use, particularly in international

[40] Ibid

[41] See Kathleen M. Kedian, Customary International Law and International Human Rights Litigation in United States Courts: Revitalizing the Legacy of the Paquete Habana, William and Mary Law Review, Vol. 40 Issue 4 Article 6, 1999, p. 1396 & 1397

crimes claims in domestic courts.[42] Some argue that the ambiguities of customary international law are too great, and domestic courts lack the authority to find customary international law, and allowing them to do so offend the principle of separation of powers.[43] Further, some critics assert that customary international law is unenforceable in domestic courts without an explicit legislative authorization.[44] As we have seen above in Ethiopia there are some points of reference to use customary law; however, these references are neither precise nor sufficient. Rather than mentioning custom as one source of law, the Constitution and the Proclamation don't have detailed rules on, how courts apply customary laws. Moreover, establishing customary norms requires time, because it needs reading international and other state court's decisions. As we usually hear from judges and observe the practice, Ethiopian judges don't have sufficient time to write a lengthy judgment let alone to establish customary international norms.

Sometimes, applying customary law may be against the very purpose of the Criminal Code. Pursuant to Art 1 of the Criminal Code, the purpose of the Criminal Code is to ensure order, peace and security of the state, its peoples and inhabitants for the public good. It aims at prevention of crimes *by giving due notice of the crimes and penalties prescribed by law* …. Customary international law does not give due notice of crimes and penalties of crimes in a clear manner.

Moreover, using customary international law may override the principles of criminal law and fundamental rights and freedoms of

[42] Ibid
[43] Ibid P. 1398
[44] Ibid

individuals. Though Art 15(2) of the International Covenant on Civil and Political Right provides the possibility of application of customary norm as an exception to the principle of legality, application of customary norm may not strictly observe the principle of legality and non-retroactivity of criminal law.

Finally, in an already crowded judicial system, cases based on unidentified customary norms, to be decided by judges lacking expertise in international law, poses inherent dangers to the legal system in general and the fundamental rights of suspected individuals in particular. Presumably, without clarity on how to assess the validity of customary international law claims adequately, stability and predictability of judicial decision evaporates, injecting confusion into courtrooms and fostering arbitrary decision-making. Courts in other countries, such as Canada and Great Britain, almost never allow to apply customary international law in human rights litigations.[45] So the Ethiopian law making body should have taken a lesson from these countries and should have come up with a law which prohibits crimes against humanity.

3. Conclusion and Recommendation

Generally, the Statutes of international tribunals have significant difference regarding the concept of crimes against humanity. The Nuremberg Charter and the Statute of the ICTY require that crimes against humanity be committed in the context of an armed conflict, while the Statute of the ICTR requires no nexus with armed conflict but require an element of discrimination that is lacking in the other definitions. The Rome Statute

[45] Ibid p. 1414

restricts the discrimination requirement to acts of persecution only. Furthermore, the evolution of the definition of crimes against humanity in these international instruments has not been entirely linear: later definitions are sometimes more broader and sometimes narrower than their predecessors. As a result, the content of the norm prohibiting crimes against humanity remains subject to greater controversy than the norms prescribing genocide and war crimes. These differences between the statutes illustrate some of the remaining uncertainties within the international community regarding the elements of crimes against humanity.

Under customary international law crimes against humanity have objective and subjective elements. The objective elements include the widespread or systematic attack and an attack directed against civilian population. The term "widespread" or "systematic" is an essential requirement which turns crimes against humanity to an international crime. The subjective element of crimes against humanity is general intent or knowledge of an act is part of a widespread or systematic attack.

Under the Ethiopian legal system crimes against humanity aren't recognized as crimes in violation of international law. Based on this the writer forwards the following suggestions.

- To fill-in the legal lacuna the lawmaker should domesticate prohibition of crimes against humanity that exists under customary international law. That is the legislature is in a better position to domesticate crimes against humanity than courts. Or

- The lawmaker or the Federal Supreme Court should come up with general guidelines on how to apply customary law in general, crimes against humanity in particular to fill-in the existing legal-lacuna.