Some Remarks on Peculiar Facets of Regulatory Regime Governing Atrocity Crimes in Ethiopia.

Bereket Messele[∇]

Abstract

This piece briefly compares the FDRE Criminal Code provisions on atrocity crimes such as genocide, crimes against humanity, and war crimes with the rules and jurisprudence of International Criminal Law. Unlike the approach followed in the latter, the Criminal Code has expanded the category of protected groups from acts of genocide. It also provides an additional actus reus element. There is no specific atrocity offence called crimes against humanity under the Criminal Code. Ironically, the FDRE Constitution proscribes 'crimes against humanity' as a generic term that encompasses genocide, war crimes, and other serious offences, instead of being a separate offence. Whilst the Criminal Code lists acts that constitute war crimes, they are not explicitly defined as 'grave' breaches of the Geneva Conventions in contrast to the Statutes of the ICC, ICTY, and ICTR. Besides, the Criminal Code incorporates other acts as war crimes, the severity of which is questionable in light of the requirements under International Humanitarian Law (IHL). Moreover, unlike the ICC Rome Statute, a plan or policy as part of a large-scale commission of war crimes is not required under the Criminal Code.

Keywords: *Atrocity Crimes; FDRE Criminal Code; Genocide; Crimes; Against Humanity; War Crimes.*

1. Introduction

Atrocity crimes[1] have been (and are still being) committed in several parts of Ethiopia since a long time ago. Over the last five years, such incidents have

[∇]Author: Bereket Messele, LL.B, LL.M, PhD Student and Lecturer at the Department of Criminal and Criminology, Faculty of Law, University of Groningen, The Netherlands; Tel: +31 644079763; Email: b.e.messele@rug.nl.

[1] Atrocity crimes are related to the three legally defined International Crimes i.e. genocide, crimes against humanity and war crimes as enshrined in different international treaties and

frequently occurred due to the country's instability. In 1992, the country applied the prosecution mode of transitional justice by establishing ad-hoc "*red-terror trials*" for the former Dergue officials, where genocide and war crimes were the major issues at the trial.[2] The Ethiopian People's Revolutionary Democratic Front (EPRDF), which ruled Ethiopia for over 27 years, was also known for its prevalent violations of human rights and arbitrary killing of citizens despite the fast economic growth of the country.[3] The current regime (led by PM Abiy Ahmed since April 2018) received widespread popular support in the start due to immediate changes brought in the country, such as calling for reconciliation and reform, expressing interest in liberalising the political system, releasing hundreds of political detainees

national laws, namely, Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force 12 January 1951; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annexe (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993), (Hereinafter the ICTY Statute); Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994), [Hereinafter the ICTR Statute]; UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, (ICC Statute) and The 1949 Four Geneva Conventions and the 1977 Additional Protocols.

[2] See generally, Tadesse Simie Metekia, Prosecution of Core Crimes in Ethiopia: Domestic Practice vis-à-vis International Standards, University of Groningen, PhD thesis, published (2020); Marshet Tadesse, Prosecution of Politicide in Ethiopia: The Red Terror Trials, International Criminal Justice Series, Asser Press (2018).

[3] See, Amnesty International, Ethiopia: 25 Years of Human Rights Violations, Public Statement, AI INDEX: AFR 25/4178/2016 (2 June 2016). As the country was hit by a wave of protests, the EPRDF imposed a nationwide state of emergency several times from 2016 to 2018 in which state security forces injured, killed and detained thousands of protestors. See, Ethiopian Human Rights Council (EHRCO), 142 Special Report: Human Rights Violations Committed During the State of Emergency in Ethiopia: Executive Summary 6–11 (May 28, 2017), https://ehrco.org/wp-content/uploads/2017/07/HRCO-142nd-Special-Report-English-Executive-summary-2.pdf (the full report is available in Amharic only at https://ehrco.org/wp-content/uploads/2017/05/የሰብዓዊ-መብቶች-ጉባዔ142ኛ-ልዩ-መግለጫ-ግንቦት-2009-ዓ%E3%80%82ም.pdf.

and dropping terrorism charges against opposition party leaders in exile.[4] Despite such, the country has been still knocked by violence, armed conflict, and extensive practice of mob justice by non-state actors, and horrendous crimes have been frequently committed. Following the outbreaks of violence in different parts of the country, hundreds of people were killed and displaced. In October 2019 and June 2020, ethnically and religiously motivated conflicts took hundreds of innocent lives and destroyed properties in many parts of the country.[5] One of the major incidents that led to the occurrence of atrocity crimes was the outbreak of an armed conflict between the Federal Government and the Tigray Region on November 4, 2020. In this conflict, civilians suffered heinous and inhuman attacks committed by both parties to the conflict, most of which could fall under international crimes.[6] These days, there is an ongoing conflict between various non-state actors and the Ethiopian National Defence Force (ENDF) in Amhara, Oromia and a few other regions, which were often instigated by deep-rooted political divisions and disagreements. For instance, EHRC reported mass killings of civilians and arbitrary detention including an attack on medical professionals, patients, and healthcare facilities following deadly hostilities between ENDF and Fano

[4] See for instance, Mahlet Fasil, News: Ethiopia frees Andargachew Tsige, drops charges against Berhanu Nega, Jawar Mohammed and two media organs (May 28, 2018), available on, http://addisstandard.com/news-ethiopia-frees-andargachew-tsige-dropscharges-against-berhanu-nega-jawar-mohammed-and-two-media-orgs/, accessed on December 19, 2023.

[5] The Ethiopian Human Rights Commission (EHRC), 'It Did Not Feel Like We Had A Government': Violence & Human Rights Violations following Musician Hachalu Hundessa's Assassination, Investigation Report, (2020) 54.

[6] Report of the Ethiopian Human Rights Commission (EHRC)/Office of the United Nations High Commissioner for Human Rights (OHCHR) Joint Investigation into Alleged Violations of International Human Rights, Humanitarian and Refugee Law Committed by all Parties to the Conflict in the Tigray Region of the Federal Democratic Republic of Ethiopia, published on 3 November 2021, at 2.

armed group in the Amhara region.[7] It is evident that the prevalence of atrocity crimes in Ethiopia has been increasing dramatically.

On the other hand, atrocity crimes were legally criminalised in Ethiopia only after the 1957 Penal Code.[8] The country adopted its first codified criminal code in 1930.[9] Before that, any rule included a few criminal provisions codified under a single religious document called *Fetha Negest* (the law of the king).[10] The 1930 Penal Code neither comprehensively addressed several criminal matters nor had provisions on atrocity crimes. Following the 1960's extensive process of modernization of the law through codification, the 1930 Penal Code was replaced by the 1957 Penal Code.[11] The 1957 Penal Code was a relatively modern one and incorporated rules on *genocide* and *war crimes*.[12] After nearly half a century, it was again replaced by the 2004 FDRE Criminal Code (hereinafter, the Criminal Code). Despite the introduction of new crimes,[13] most of the rules governing atrocity crimes are simply

[7] EHRC, The human rights impact of the armed conflict on civilians in Amhara Regional State, public statement, August 14, 2023. See also, EHRC, የኢትዮጵያ ዓመታዊ የሰብአዊ መብቶች ሁኔታ ሪፖርት (ከሰኔ ወር 2015 ዓ.ም. እስከ ሰኔ ወር 2016 ዓ.ም.), last update, July 5, 2024.

[8] The 1957 Penal Code of Ethiopia, Proclamation No. 158 (1957)

[9] Penal Code of the Empire of Ethiopia 1930, entered into force September 1930, published by Emperor Haile Selassie printing house, (1930), Addis Ababa.

[10] The Fetha Negest, The Law of Kings, Translated from Ge'ez by Abba Paulos Tzadua, published by Faculty of Law of Haile Sellassie I University, Addis Abeba, Ethiopia, Chapter XLVII, XLVIII, XLIX, L (homicide, corporeal punishment, drunkenness, arson, usury, etc., (1968). See generally, Asefa Jembare, An Introduction to the Legal History of Ethiopia, Lit Verslag, (2000).

[11] The 1957 Penal Code, *supra note* 8.

[12] *Ibid*. Articles 181–295 of the Penal Code. Apart from the process of modernization, the major reason for the incorporation of these rules is aligned with the country's experience of the horrific attack following fascist Italian rule. For the details see Campbell, The Addis Ababa Massacre: Italy's National Shame (Oxford: Oxford University Press, 2017) 279-331.

[13] These are types of crimes created as a result of technological advancement and the creation of a complex society, such as the hijacking of aircraft, computer crimes, and money laundering, crimes against women and children, etc. See, Criminal Code of the Federal

reproduced from the 1957 Penal Code and incorporated into the Criminal Code without major alteration.[14] The way these crimes are regulated under the Criminal Code has some peculiar aspects compared to the approach followed under the rules and jurisprudence of International Criminal Law. This piece aims to uncover these peculiar aspects of the rules governing atrocity crimes in Ethiopia in light of International Criminal Law.

Atrocity crimes are global problems that in effect necessitate the evaluation of national laws in light of and in comparison, with the International Criminal Law. The way atrocity crimes are regulated under the Criminal Code can be examined in comparison with the rules and jurisprudence of International Criminal Law. Hence, the purpose of this article is to compare national law with international law as a benchmark. The comparative analysis as such enables us to grasp the rules of International Criminal Law and evaluate the Ethiopian counterpart. However, the legal analysis is restricted to offences definition or substantive elements (subjective and objective) of provisions on atrocity crimes under the Criminal Code and International Criminal Law. Other issues such as modes of criminal liability and punishment were not addressed by this article. Accordingly, the upcoming section does two things. First, it briefly describes the provisions governing core crimes under the Criminal Code. Then, the way these crimes are regulated under the Criminal Code[15] is assessed according to International Criminal Law rules, case law and jurisprudence.

Democratic Republic of Ethiopia (FDRE Criminal Code), Proclamation No. 414/2004 entered into force 9 May 2005, preamble.

[14] Generally, while the special Part of the Penal Code in Book II Title II Chapter 1 is entitled 'crimes against laws of nations' which encapsulated core crimes as 'fundamental offences', the caption of this specific part was changed to 'crimes in violation of international law under the 2004 FDRE Criminal Code. See Book III, Title II of the Criminal Code.

[15] FDRE Criminal Code, *supra note* 13. However, some changes introduced by the Criminal Code when it replaced the 1957 Penal Code are also occasionally raised in this chapter.

2. Atrocity Crimes and the Regulatory Regime in Ethiopia

2.1. Genocide

There is no specific provision defining the Crime of Genocide in the International Military Tribunal of the Nuremberg (IMT) Charter.[16] It was not even mentioned in the judgment of the tribunal since genocide was not known during that time and the horrendous acts committed by the Nazis against the Jews and other minority groups were addressed and punished with war crimes and crimes against humanity.[17] It was recognized for the first time as a crime under international law following the adoption of the UN General Assembly Resolution in 1946.[18] Based on this Resolution, the UN Economic and Social Council (ECOSOC) was authorized to prepare the draft Genocide Convention, which the General Assembly finally adopted on 9 December 1948 (hereinafter, the Genocide Convention)[19]

[16] Although genocide was mentioned in the text of the indictment, it did not form a separate charge during prosecution. Rather, it was seen as a conduct which satisfied the requirements of war crimes and crimes against humanity. See Commentary on the Law of the International Criminal Court, edited by Mark Klamberg, Torkel Opsahl Academic EPublisher Brussels, (2017), 19.

[17] Charter of the International Military Tribunal, August 1945, Article 6(c); Werle and Jessberger Principles of International Criminal Law, Oxford University Press, fourth edition (October, 2020) 294; William Schabas, Genocide in International Law: The Crime of Crimes (2nd ed., Cambridge: Cambridge University Press, 2009), at 44&46: Mark A. Drumbl, The Crime of Genocide, in Research Handbook of International Criminal Law-37 Brown publishing (2011). See also Robert Cryer, *et al*, An Introduction to International Criminal Law and Procedure, Cambridge University Press, 4th Revised edition, (August 2019) 207.

[18] UN General Assembly Resolution, the Crime of Genocide, 11 December 1946, A/RES/96, available on https://www.refworld.org/docid/3b00f09753.html, accessed on 20 March 2022

[19] Convention on the Prevention and Punishment of the Crime of Genocide, General Assembly resolution 260 A (III), Approved on 9 December 1948, entered into force 12 January 1951.

It has been almost 73 years since the Convention entered into force and is still applicable without changes.[20] The definition part of the Convention is explicitly transposed into the Statutes of ICC, ICTR, and ICTY[21] and numerous national laws. The first conviction for genocide was made following the judgment of ICTR in the *Akayesu and Kambanda* cases in 1988.[22] Today, the prohibition of the crime of genocide as stipulated under Article 2 of the Convention[23] has attained the status of *ius cogens* norm thereby posing *erga omnes* obligation.[24]

2.1.1. Offence Definition and *Mens Rea* Requirements

[20] Some scholars such as Bassiouni consider that 'genocide is addressed in a single specialized convention that has never been amended or supplemented, notwithstanding the pressing need to do so.' See M. Bassiouni, Introduction to International Criminal Law: Second revised edition, Martinus Nijhoff Publishers, (2013) 154.

[21] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Article 6: UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993, Article 4(2): UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994, Article 2(2).

[22] ICTR, *Prosecutor v. Akayesu*, Trial Judgement, (Judgement) ICTR-96-4-T, 2 September 1998; ICTR, *Prosecutor v. Jean Kambanda*, Appeals Chamber, (Judgement and Sentence), ICTR-97-23-S, 4 September 1998.

[23] Article 2 of the Convention reads: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

[24] UN Framework of Analysis for Atrocity Crimes, A tool for Prevention (2014) 26, available at https://www.refworld.org/docid/548afd5f4.html, accessed on February, 2020. See also, ICJ Advisory Opinion, Reservation to the Convention on the prevention and punishment of the crime of Genocide, ICJ (1951) Rep. 15, 23 ICJ, Case concerning Armed Activities on the Territory of the Congo (DRC v. Rwanda) Jurisdiction of the Court and Admissibility of the Application, Judgement, (3 February 2006), para. 64.

The vast majority of states criminalized genocide in their domestic law after the adoption of the Convention.[25] Ethiopia was a pioneer country in ratifying the Convention.[26] However, it took several years to implement the Convention through domestic legislation.[27] It was only after the promulgation of the 1957 Penal Code that the crime of genocide was made a punishable offence under Ethiopian law for the first time. Subsequently, when the 2004 Criminal Code substituted the 1957 Penal Code, it retained a substantial part of the provision on genocide[28] except for a few, yet important changes.[29]

The title of the Amharic text language of the Criminal Code describes the crime of genocide as '*ዘርን ማጥፋት*', which can be directly translated to English as 'destroying the race'.[30] The Amharic phrase does not include

[25] Antonio Cassese, Gaeta P., Baig L., Fan M., Gosnell C. and Whiting A., Cassese's International Criminal Law Oxford: Oxford University Press, (2013) 122.

[26] Tadesse has well explained the justifications for the then swift ratification of the 1948 Genocide Convention by Ethiopia. Of the major reasons, one is the atrocities committed by Italians following their occupation of the country in 1935. For details, see Tadesse, *supra note 2* at 179 & 180.

[27] Ethiopia has implemented the Convention under its domestic law six years after the coming into force of the Genocide Convention.

[28] Article 281 of the 1957 Penal Code, *supra note* 8.

[29] The most significant alterations as subsequently discussed include its replacement of the Penal Code's controversial *mens rea* requirement of 'plan to destroy' with the Convention's 'intent to destroy' and employed the term 'group' instead of the Penal Code's 'social unit of a multinational population unified in language and culture'.

[30] Article 269 of the FDRE Criminal Code reads as follows:

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, colour, religious or political group, organises, 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.

protected groups other than 'race' for the title only meant to notify the destruction of a race as such.[31] Ironically, the operative part of the provision however includes a broader category of protected persons than the Convention as indicated below. Therefore, the above misleading phrase in the Amharic text does not impact the application of the provision to other categories of protected groups – religious, national and ethnical groups. Perhaps, one could argue that titles in legal texts convey an abstract of detail provisions and are not required to go beyond them.

One of the major changes introduced by the Criminal Code was the requisite mental element to commit genocide, which shifted from 'plan to destroy' in the 1957 Penal Code to 'intent to destroy'.[32] It's important to note that according to the Convention, the 'plan to destroy' is not a legal requirement. Additionally, there is a significant distinction between using the phrase 'plan' versus 'intent' as the requisite *mens rea* since the former can only serve to demonstrate the existence of the latter. The ICTR Appeals Chamber in the *Kayishema and Ruzindana* case ruled that the presence of a plan may become a relevant factor while proving the specific intent and facilitating the proof of the crime.[33] Accordingly, the current provision of the Criminal Code resolved the discrepancy concerning genocidal *mens rea*.[34]

[31] Tadesse, *supra note 2* at 182. See also Marshet, *supra note 2*.

[32] According to Tadesse, in practice during the prosecution of Derg officials, both the Federal High Court and Federal Supreme Court 'failed to clarify whether what is referred to as ዕቅድ in the genocide provision of the Penal Code of 1957 meant plan or intent, or both'. As a result, it was not clear whether the Penal Code supports the jurisprudence of international criminal law in which the intent rather than the plan is the required *mens rea* of genocide. See Tadesse, *supra note 2*, at 266. Later on, article 269 of the FDRE Criminal Code replaced the phrase ዕቅድ (plan/intent) under Article 281 of the Penal Code of 1957 with አሳብ (intention). 'በማቀድ' is substituted with በማሰብ'. See Tadesse, *supra note 2* at 195 & 204.

[33] ICTR, *Prosecutor v. Kayishema and Ruzindana*, Appeals Chamber, (Judgement), 1 June 2001, ICTR-95-1-A, para.172. See also Cassese, 'Is Genocidal Policy a Requirement for the

However, what is different under the Criminal Code is it added the word '*organises, orders or engages in*' in the same provision defining genocide. This is a bit strange given the fact that these matters need to be dealt with under modes of participation in Article 32 of the Criminal Code. For all these forms of liability, the general principle of law applies to all forms of crime within the Criminal Code. The writer failed to find any reason for incorporating these modes of participation in the offence definition other than its being repetition.

On the other hand, the Criminal Code failed to incorporate the phrase '*as such*, which is in the offence definition of genocide under the Convention, ICC, ICTR, and ICTY statutes. Since different meanings are attached to the phrase, it remains ambiguous.[35] It was included under the Convention and ICC statute to avoid the explicit reference to the word 'motive' as there was disagreement during the negotiation of the Convention.[36] Although the motive for which a crime is committed is irrelevant to establishing criminal responsibility, it is debated that the discriminatory nature of the attack in genocide necessitates such.[37] Ad-hoc tribunals also interpret the phrase as emphasising the intent to destroy the protected group. For instance, ICTR and ICTY indicated that the phrase '*as such'* signifies 'that the victim of a crime of genocide is not merely the person but the group itself'.[38] But then, there is

Crime of Genocide?' in P. Gaeta (ed.), The UN Genocide Convention: A Commentary (Oxford: Oxford University Press, 2009) 128-136, 135.

[34] Tadesse, *supra note 2*, at 204.

[35] Schabas, Genocide in International Criminal Law, *supra note 17*, at 298&299.

[36] *Ibid*, 294. See also, A Greenawalt, Rethinking Genocidal Intent: The Case for a Knowledge-based Interpretation, Columbia Law Review (1999) 2259.

[37] ICTR, *Prosecutor v. Musema*, Appellate Chamber, (Judgement), ICTR-96-13-A, 16 November 2001 para. 165.

[38] ICTR, *Niyitegeka v. Prosecutor*, Appeals Chamber, (Judgment), 9 July 2004, ICTR-96-14-A, para. 53; ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Judgment), 26 February 2007, ICJ Reports 20076, para. 187.

an argument that such protective purpose of the criminalization of genocide is already expressed by the specific intent-requirement - *dolus specialis* to destroy the group in whole or in part.[39] Tadesse rightly justified the absence of the phrase in the Criminal Code that because of its ambiguity, it would be difficult for the legislator to find the appropriate terminology in the Amharic language that could properly describe the phrase.[40]

2.1.2. Extra Category of Protected Group: Recognition of *Politicide*

The Criminal Code replaced the phrase 'social unit of a multinational population unified in language and culture' in the 1957 Penal Code with a single word 'group' and explicitly recognized the four protected groups - racial, ethnic, national, and religious groups as enshrined under the Convention. What is interesting is that the Criminal Code extended the list of protected groups and additionally recognized *political, nation, nationality, and colour groups*, which was described as 'covering *twice* the number of groups protected by the Convention'.[41] By doing so, it adds categories of protected groups not mentioned in the Convention's definition of genocide.[42]

[39] Laras Berster, 'Article II' in C.J. Tams et al., Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary (München: C.H.Beck.Hart.Nomos, 2014), 152; Werle and Jessberger, Principles of International Criminal Law, *supra note 17,* at 156&315. ICTY, in *Tolimir* case, noted that 'the term "as such" emphasises the crime's prohibition of the destruction of the protected group itself'. See ICTY, *Prosecutor v. Tolimir,* Trial Chamber, (Judgement), 12 December 2012, IT-05-88, para. 741.

[40] In this regard, Tadesse tried to adduce the Federal High Courts' judgement in Mengistu *et al.* case where the court translated the Convention's definition of genocide to show the difference with the 1957 Penal Code in which it finally omitted the phrase '*as such*' in the translation. According to him, this suggests that 'either the terms were viewed as redundant additions by the Court or that their exact meaning was actually not obvious to the Court.' See Tadesse, *supra note 2* at 285.

[41] Tadesse, *supra note 2* at 204.

[42] Such addition of a broader category of protected group in the Criminal Code can be justified in light of the 1995 Constitutional approach which makes nations and nationalities as building blocks of the Constitution. It re-affirms that nations, nationalities and peoples are the holders of ultimate sovereign power and are entitled to every right including self-determination and secession. See article 8 and 39 of the Constitution.

This is indicated by some as a progressive move in light of International Criminal Law jurisprudence according to which there should be a closed one/exhaustive.[43] Except for the ICTR's decision which supports the non-exhaustive nature of the list of the protected group in the *Akayesu* case,[44] such a view is not held in the case-law of both the ICTY and ICC.[45] Since the introduction of the Convention, there have been critics for the limited focus on protected groups.[46] The various efforts to include even other groups namely, political and social were unsuccessful.[47] Only a few countries including Ethiopia, Bangladesh, Colombia, Costa Rica, Côte d'Ivoire, Ecuador, Poland, Slovenia, and Lithuania included '*political groups*' as one of the protected groups from genocidal acts.[48] Hence, the Ethiopian Criminal Code like the above countries appears to remedy the gap of the Convention.[49]

[43] Marshet, *supra note 2* at 76.

[44] ICTR, *Akayesu*, Trial Judgement, *supra note 22*, para. 511&516. Based on the *travaux préparatoires* of the Convention, the court determined that the drafters intended to protect any *stable and permanent group* rather than the groups specifically mentioned. See also Schabas, Genocide in International Criminal Law, *supra note 96*, at 153.

[45] ICTY, *Prosecutor* v. *Krstic*, Appellate Chamber, 19 April 2004, para 8; ICC, *AI Bashir Arrest Warrant*, Pre-Trial Chamber I, ICC-02/05-01/09-3, 4 March 2009 paras. 137.

[46] Cassese's International Criminal Law, *supra note 25, at* 122; Van Schaack, Beth, The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot, Yale Law Journal, Vol. 106, No. 2259, (1997) 2291; Cherif Bassiouni, Crimes Against Humanity in International Criminal Law, Second Revised Edition, American Journal of International Law, Volume 88 Issue 1, (1992); Cherif Bassiouni, International Criminal Law, Volume 1: Sources, Subjects and Contents Volume I, 3rd Edition, Published by Brill Nijhoff, (2008).

[47] David Nersessian, Genocide and Political Groups, Oxford University Press, (2010) 21; Report of the Preparatory Committee on the establishment of an international Criminal Court, Vol. I, Supp. No 22, A/51/22 (1996), para. 60.

[48] Marshet, *supra note 2* at 92. The same also applies in the Spanish *Pinochet* case. See, Van Schaack, Spanish Pinochet, American Journal of International Law, (1999) 693.

[49] Some suggest that 'political Group' comes under the scope of genocide protection by virtue of customary international law. See for instance, Beth Van Schaack, The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot, Yale Law Journal 106 (1997) 2259. However, Schabas criticize that it is ambitious to suggest that the practice of a few countries (which criminalized politicide under their domestic laws) defines some customary norm including political groups in the definition of genocide. See, William Schabas, An

In practice, the Ethiopian courts also passed decisions on the commission of genocide against a 'political group'.[50] In that respect, the Federal High Court in *Colonel Mengistu Hailemariam et al* case even stressed that 'the exclusion of political groups from the Convention's definition was in itself political, lacking any philosophical and legal justifications'.[51]

Against such, Tadesse discoursed that '…there could eventually be nothing that could prevent the treatment of all human groups as protected groups in the Ethiopian law of genocide'.[52] This seems a viable argument in light of what is enshrined under the Criminal Code. One could further submit that so long as the crime of genocide requires the specific '*intent to destroy'*, it does not seem problematic, though challenging, to extend the cart of a 'protected group'. Unlike crimes against humanity or war crimes, the gravity of genocide is mainly marked by the intent to destroy a protected group in whole or in part, which is principally in the mind of the perpetrator. The scope of interests protected by the crime of genocide is therefore narrower than that of crimes

Introduction to the International Criminal Court 3rd edn, Cambridge University Press, Cambridge, (2007) 162.

[50] The major one is the prosecution of Derg officials in the Red Terror Trials. The conviction for the crime of *politicide* is made based on the Penal Code 1957. In this trial about 3,583 Derg officials were convicted of heinous crimes and other ordinary crimes, of which about 1,100 were convicted for genocide against political groups and other crimes. See Marshet *supra note 2 at* 174. Some of the infamous cases include FHC, *SPO v. Colonel Mengistu Hailemariam et al.*, (Trial Judgment) 12 December 2006, File No. 401, 116.; FHC, *SPO v. Colonel Tesfaye Woldeselassie et al*., (Sentencing Judgment), 4 August 2003, File No. 03101, 26-32. After the Red Terror Trials, leaders of the Coalition for Democracy and Union (CDU) political party are also accused of politicide following the 2005 post-election violence during the EPDRF ruling. FHC, *Federal Prosecutor v. Hailu Shawulet al*., (Trial Ruling), 3 May 2007, File No. 43246/97. Marshet generally regarded it as the recognition of *politicide* as a form of genocide under Ethiopian law. See, Marshet, *supra note 2* at 93. Tadesse also indicates that the Ethiopian courts rejected the argument mentioned for the exclusion of political groups from protected groups on 'stable and permanent groups' long before it was raised in the international tribunal. See, Tadesse, *supra note 2* at 209.

[51] FHC, *SPO v. Colonel Mengistu Hailemariam et al*., (Ruling on Preliminary Objections), 10 October 1995, File No. 1/87, 104-105. See, Tadesse, *supra note 2* at 209.

[52] *Ibid* at 228.

against humanity, as it specifically pertains to attacks on civilian populations. Expanding the scope of genocide may complicate cases by creating overlap and broadening the situations to which it applies. Despite such limitations, one could argue that the Criminal Code has taken a step forward, such as including political groups. States are not barred from using broader definitions if they believe it offers better protection for the victim as long as it does not contradict the minimum requirement under the Convention.[53] The difficulty of invoking universal jurisdiction under customary international law for the part extended by the Criminal Code beyond the *erga omnes* definition of the crime of genocide could be a potential (procedural) limitation in this regard.

2.1.3. Prohibited Acts

Individual acts of the crime of genocide have one common aspect. They are all targeted toward the destruction of the physical, biological, or social existence of the members of the protected groups. While six behaviours amounting to *actus reus* of genocide are provided under the FDRE Criminal Code, the Convention and ICC Statute list five prohibited acts.[54] Peculiarly, the Criminal Code further recognized 'causing members of a group to disappear' as prohibited acts of genocide.[55] Another visible difference is, under the Criminal Code 'compulsory movement or dispersion of *peoples or children*'[56] constitutes an individual act of genocide, but when it comes to the Convention as well as the Statutes, the equivalent conduct is stated as 'forcibly transferring children of the group to another group'.[57] It is clear that

[53] See, Article 3 of the 1957 Convention, *supra note* 8.
[54] See Article 2 of the Genocide Convention, article 269 of the FDRE Criminal Code and Article 6 of the Rome ICC statute respectively.
[55] See above subparagraph (a) of article 69 of the FDRE Criminal Code. Except for this additional act, the Criminal Code reproduced the list of individual acts of genocide stipulated under the repealed Penal Code.
[56] See Article 269 (c) of the FDRE Criminal Code.
[57] See Article 2 (e) of the Genocide Convention.

the latter only requires 'forcible transfer of *children'*, *not people*. The Criminal Code added 'people' apart from not specifying that the compulsory movement must be from one group to another. One could argue that the Criminal Code's formulation seems to have forced displacement or similar acts in mind as a form of the *actus reus* of genocide. Marshet however considers that unless the purpose of compulsory transfer of people is also to exterminate them physically, it is not sufficient to be regarded as an underlying act of a crime of genocide.[58] This might also coincide with the conduct of 'ethnic cleansing' in which civilians belonging to a particular group are forcefully expelled from an area, a village, or a town. As the District Court of Jerusalem concluded in the *Eichmann* case, such conduct does not necessarily constitute genocide if its purpose is 'only' to remove a group of people from a territory.[59] Likewise, the ICTY in the Brđanin case held that the criminal strategy of cleansing Bosnian Krajina had been committed with the "sole purpose of driving people away" and there is no evidence that the conduct had been committed with the intent required for genocide.[60] It therefore appears that, while the forced transfer of people may not have any legal significance *per se*, it may serve as an indicator of a special intent of genocide.

The rest of the prohibited acts look similar except for the terminologies used. For instance, while both the Conventions and ICC Statute use the same terminology of 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part', the counterpart of the Criminal Code says 'placing under conditions calculated to

[58] The central point of his argument is that 'the compulsory transfer of people as such, more often than not, fails to fulfil the genocidal intent to eliminate the possible targets of genocide, which is the core element of the crime of genocide'. Rather, he considers such an approach 'a trivialization of the nature of the crime'. Marshet, *supra note 2* at 79.

[59] Eichmann v. Israel Attorney General, 36 ILR 5 (DC) (1968).

[60] ICTY, *Prosecutor v Brđanin*. Trial Chamber II, 1 September 2004, para 118.

result in their death or disappearance'.[61] Nevertheless, it is worth noting that 'placing' could potentially be interpreted as a lower threshold than 'deliberately inflicting', significantly extending the definition of *actus reus.* Likewise, the Criminal Code uses the broader term 'measures to prevent the propagation or continued survival of its members or their progeny' while both the Convention and ICC statute infer as 'imposing measures intended to prevent births within the group'.[62]

2.2. Crimes Against Humanity

Unlike genocide and war crimes, crimes against humanity are not regulated through a separate Treaty/Convention. It was first by the Nuremberg Charter[63] and later by the Tokyo Charter[64] that crimes against humanity were criminalised. A major advanced rule came after the promulgation of ICTY, ICTR, and ICC statutes.[65] However, the crime is not defined uniformly in these Statutes.[66] Nonetheless, the two major contexts in the commission of listed acts i.e., 'a widespread or systematic attack' and 'against a civilian population' form part of the constitutive elements of the definition of the crime as developed under customary law.[67] The terms 'widespread or systematic attack' are explicitly mentioned only in the ICC and ICTR

[61] See article 6(c) of the ICC statute and article 269 (c) of the FDRE Criminal Code.
[62] See article 2 (d) of the Genocide Convention, article 6 (d) of the ICC statute and article 269 (b) of the FDRE Criminal Code.
[63] Article 6(c) of IMT Charter.
[64] United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (London Agreement), (8 August 1945) article 6(c).
[65] The content of crimes has evolved since WWII through these statutes and the jurisprudence of their respective courts.
[66] See article 7(1) of the ICC Statute, article 5 of the ICTY and article 3 of ICTR.
[67] UN, Framework of Analysis for Atrocity Crimes: *supra note* 24.

Statutes.[68] It is generally because of these contexts of the commission of the crime that it is branded as an international crime, which could otherwise be regarded under ordinary crime such as murder and torture in the domestic jurisdiction.

2.2.1. The Neglected Regime under Ethiopian Criminal Law

There is no separate crime called 'crimes against humanity' under Ethiopian law, with its *mens rea* and *actus reus* elements. Hence, one cannot be specifically prosecuted for such a crime pursuant to the existing law. Instead, the term 'crimes against humanity' is merely mentioned both under the Constitution and the Criminal Code as encompassing different categories of international crimes. To begin with, Article 28(2) of the Constitution, which is captioned as 'Crimes against Humanity', reads:

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.[69]

[68] The ICTY does not mention such elements. The *chapeau* of the provision reads that '…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…'. Similarly, see article 6 of IMT, it does not mention such elements. Whereas, article 3 of the ICTR provides that '…when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds…' but without any link with an armed conflict and Article 7(1) of the ICC Statute reads '…when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack…'.

[69] Constitution of the Federal Democratic Republic of Ethiopia, 1995, Federal Negarit Gazzeta, Proc. No. 1, 1st Year, No.1, Article 28(2). The provision actually is meant to provide a rule on the statutes of limitation and amnesty or pardon for the crimes listed therein. However, one can envisage that it incidentally indicates the crimes against humanity as generic crime that encompasses genocide, summary execution, forcible disappearance or torture.

Accordingly, the Constitution treated genocide and other crimes as falling under the general category of crimes against humanity. Indeed, the *travaux* préparatoires of the Constitution also indicate its broader conception than being a separate offence.[70] Likewise, the legislator has used the term crimes against humanity to broadly denote international crimes in Article 44(1) of the Criminal Code and refer to genocide and war crimes specified under Articles 269-274. The provision is neither designed to define crimes against humanity nor elaborate it as such since it is rather meant to govern a statute of limitation.[71] The reference to the other provisions of the code dealing with genocide and war crimes generally shows the legislators' assumption that crimes against humanity broadly encompass these crimes. The issue becomes clearer when one looks into the specific acts criminalised as violations of International Law in those provisions of the Criminal Code i.e., articles 269-274. None of these provisions defines a specific act of crimes against humanity except acts of genocide and war crimes.[72] Here too, the *travaux* préparatoires of the Criminal Code precisely count genocide and crimes against humanity as similar acts and accordingly clarify the cause for abolishing the term 'Crimes against Humanity' in the text of the Criminal

[70] The Constitutional Assembly, Minutes of Constitutional Assembly; Discussions and Debates on the Making of the FDRE Constitution, Vol. 5, (Unpublished, Addis Ababa, Ethiopia, 1994)107.

[71] This provision is part of the rules regulating 'Participation in Crimes Relating to The Mass Media' under chapter IV of the Criminal Code and specifically it deals with special Criminal Liability of the Author, Originator, or Publisher who contributes to the commission of different serious crimes including crimes against humanity defined under Articles 269 – 274.

[72] That section of the FDRE Criminal Code is entitled 'Crime in violation of international law' under the chapter named 'fundamental crimes'. *Ibid*.

Code,[73] unlike article 281 of the 1957 repealed Penal Code which indicated them alternatively.[74]

The author opines such a broad stipulation of crimes against humanity under Ethiopia law coincides with the classical understanding which considers genocide as a subclass of crimes against humanity. For instance, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968) treats genocide as one category of crimes against humanity.[75] At one point, ICTR for instance explained that the crime of genocide is a type of crimes against humanity,[76] although later it also explained their difference.[77] There are times in history when 'Genocide' was regarded as a specifically odious and heinous form of crimes against humanity,[78] although later the definition of these crimes evolved in different paths. Likewise, some domestic laws characterise the crime of genocide as a species of crimes against humanity.[79] That way, the Ethiopian law seems to reflect the classic understanding that crimes against humanity encompass

[73]The *travaux* préparatoires document of the FDRE Criminal Code, (Unpublished, Addis Ababa, Ethiopia, 2003) 143&144.

[74] The naming of the offence under the title of article 281 of the Penal Code reads 'genocide; crimes against humanity'.

[75] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968), Article 1.

[76] ICTR, *Prosecutor v Kayishema and Ruzindana*, Trial Chamber (Judgement) 95-1-T, 21 May 1999, para.89. See also, K. Ambos, Treatise on International Criminal Law: Vol II, The Crimes and Sentencing, Oxford, Oxford University Press, (2014) at 2&5 and Werle and Jessberger, *supra note 17*, at 328.

[77] ICTR, *Kayishema and Ruzindana*, Trial Chamber (Judgement), *supra note 76*, para. 89.

[78] United Nations War Crime Commission, History of the United Nations War Crime Commission and the Development of the Laws of War, London, (1948). Furthermore, Alette and Fred noted that 'Genocide was for a long time considered a subset of crimes against humanity as genocide fulfilled the legal requirements for categorization as crimes against humanity.' See, Alette Smeulers and Fred Grünfeld, International Crimes and other Gross Human Rights Violations, A Multi- and Interdisciplinary Textbook, International and comparative criminal law series, v. 32, Martinus Nijhoff, publishers, (2011) at 90.

[79] See for instance, Article 211-1 of the French Penal Code of 1992, Article 611 of the Estonian Penal Code, and Article 313 of the Penal Code of Burkina Faso.

different crimes, of which genocide is one. This is generally striking given the fact that crimes against humanity have been criminalised as a separate offence in international and domestic laws for nearly a century. Hence, the question remains, is whether the absence of domestic laws necessarily precludes the prosecution of the crime before the courts of Ethiopia. Below, relevant suggestions are made in this respect.

2.2.2. Possible Way-out: Customary International Law aspects of Crimes against Humanity

Several countries incorporated the definition given for crimes against humanity as enshrined under the ICC Statute into their national laws.[80] Yet, Ethiopia is neither a signatory nor a party to the ICC Statute. Lack of regulation of the crime in Ethiopia becomes more challenging for there is no precedence of prosecution and punishment of such crimes by the domestic courts.[81] Consequently, Marshet indicated two alternatives as a solution. The first is recourse to ordinary crimes to investigate and prosecute perpetrators of crimes against humanity. He argues that this approach is followed in the prosecution of the Derg officials.[82] The idea is through the application of rules on ordinary crimes such as killing, torture, rape, etc., it is possible to least fight impunity and ensure the accountability of the perpetrator of crimes against humanity. Nevertheless, the problem with this approach is that it lacks the moral condemnation and labelling that should be attached to core crimes, notably crimes against humanity in this case. The author rather sees the possibility of prosecuting through war crime if it is connected with armed conflict and in so far as the individual acts committed coincide with the

[80] Darryl Robinson, The Draft Convention on Crimes against Humanity: What to do with the Definition?' in Morten Bergsmo and Song Tianying, *eds*, On the Proposed Crimes Against Humanity Convention (FICHL 2014) 103.
[81] Marshet Tadesse, *supra note 2*, at 106.
[82] *Ibid*.

requisite *mens rea* of war crimes under customary international law. This is because crimes against humanity are often committed in the period of an armed conflict or some sort of violence.[83] However, it is still challenging to envision this possibility in situations that may not be classified as an armed conflict. This is because crimes against humanity encompass a different contextual element i.e., the commission of underlying acts, such as killing and persecution of civilians, as part of a *widespread* or *systematic* attack.

The second is the application of international criminal law on crimes against humanity for domestic prosecution. It is usually the case that customary international law (upon passing through the test of *opinio juris* and *state practice*) becomes applicable in domestic situations in areas where international treaty norms are not incorporated into the legal framework of a given state.[84] The central point of Marshets' argument is that '... the criminalization of crimes against humanity has risen to the level of a *jus cogens* which imposes *erga omnes* obligation which means a non-derogable duty owed to all mankind'.[85] In fact, certain forms of crimes against humanity

[83] Alette Smeulers and Fred Grünfeld, *supra note 78*, 46&86.

[84] Cherif Bassiouni, International Crimes, Jus Cogens and Obligatio Erga Omnes, Law and Contemporary Problems Vol. 59, No. 4, (1996) 277; Hannes Vallikivi, Domestic Applicability of Customary International Law in Estonia, Juridica international, Vol.7, (2002), 28.

[85] See Marshet, *supra note 2*, at 106. His argument is supported by several scholars. See for instance,

Werle and Jessberger, *supra note 17*, at 330; Bassiouni *supra note 99*, at 158; Cassese A, Genocide. In: Cassese A, Gaeta P, Jones JRWD The Rome Statute of the International Criminal Court Vol I. Oxford University Press, New York, (2002), at 191; Schabas *supra note 96*, 143; Ambos, *supra note 76* at 40; De Hoogh A, Obligation Erga Omnes and International Law: A Theoretical Inquiry into the Implementation and Enforcement of International Responsibility of States, Kluwer Law International, The Hague, (1996), at 63; Tam CHJ, Enforcing Obligations Erga Omnes in International Law, Cambridge University, Press, Cambridge, (2010); Van Schaack B, The Definition of Crimes Against Humanity: Resolving the Incoherence, Colum. J. Transnat'l L. 37, (1999), at 850. See also, *Nulyarimma v Thompson*, Federal Court of Australia, Judgment of 1 September 1999, para. 18-21. Hence, the point is that such a justification confers the Ethiopian Courts jurisdiction over crimes against humanity.

have attained customary international law status. The case law of the ICTY and ICTR,[86] the UN Secretary-General,[87] and the Law Commission[88] established the fact that criminal liability for crimes against humanity represented an imperative standard of international law.[89] Unlike war crimes and genocide, which have been codified in a separate treaty, crimes against humanity is evolved through customary international law.[90] Furthermore, a state can even prosecute past perpetrators without violating the principle of legality and non-retroactivity of criminal law since core crimes including crimes against humanity have already attained the status of customary international law.[91] For instance, the trial panel of the former Court of Bosnia and Herzegovina held that although crimes against humanity were not included in the criminal code during the conflict between 1992 and 1995, in

[86] Court of Bosnia and Herzegovina, *Mitar Raševid et al*., Case No. X-KRZ- 06/275, 1st Instance Verdict, 28 Feb. 2008, p. 164; ICTR, Akayesu, Trial Judgement, *supra note 22*, at 577.

[87] UN Secretary-General Report pursuant to paragraph 2 of Security Council Resolution 808 (1993) 34&48.

[88] International Law Commission (ILC), Commentary on the Draft Code of Crimes against the Peace and Security of Mankind (1996), Article 18.

[89] *Ibid*, Article 26.

[90] Robert Cryer, *et al*., *supra note 17*, 231 & ff. Commentary on the Law of the International Criminal Court, *supra note 15 at* 121&122.

[91] Several international human rights law instruments and regional human rights courts affirm the retroactive prosecution of a person for the commission of core crimes as the exception to the principle of legality. See, the International Covenant on Civil and Political Rights (ICCPR), General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, article 15 (2); Universal Declaration of Human Rights (UDHR), (1948), article 11(2). Vienna Convention on the Law of Treaties, (1969), entered into force on 27 January 1980, article 57&64. ECtHR, *Vasiliauskas v. Lithuania* (App.no. 35343/05) (October 2015). In this case, the Court ruled that the conviction for political genocide under the new Criminal Code of Lithuania is a violation of the prohibition of retroactive application of law. Regarding crimes against humanity, a Court would still have to determine that a particular form of conduct amounted to customary international law at the time of commission and, in addition, that this was sufficiently known to the perpetrator. See the recent case of Kosovo Specialist Chambers, *Specialist Prosecutor vs Thaçi (Hashim) and others*, Decision on the application for interim release, Case No KSC-BC-2020-06, KSC-BC-2020-06/F00412, ICL 2102 (KSC 2021).

1992 crimes against humanity were accepted as part of customary international law and constituted a non-derogative provision of international law.[92] Therefore, it can argued that certain forms of 'crime against humanity' falls under *jus cogens* rules which imposes *erga omnes* obligation on states.

Accordingly, it seems vital to look into elements of the crimes against humanity as recognized under customary international law so that the Ethiopian courts can consider them during domestic prosecution. Therefore, the question is which elements of 'crimes against humanity' have attained the status of customary international law and how they are interpreted and applied. Except for some differences in the contextual elements, the Statutes of ICTR and ICC including the decisions of Courts generally reflect crimes against humanity as they existed under customary international law.[93] The essential elements that must be established before any particular act is regarded as a crime against humanity include: the accused commits a prohibited act in a "widespread or systematic" manner, which is "directed against any civilian population",[94] and there must be a nexus between the acts of the accused and the attack.[95]

Looking at the elements that are not required under customary international law, although the ICTY statute requires that the attack must be committed in the context of an armed conflict, the Court held that a connection with an

[92] *Mitar Raševid et al*., *supra note 86*, at 165.
[93] International Criminal Law Services (ICLS), International Criminal Law & Practice Training Materials, OSCE-ODIHR/ICTY/UNICRI Project on Supporting the Transfer of Knowledge and Materials of War Crimes Cases from the ICTY to National Jurisdictions, Module 7, Crime against Humanity, (2018) at 4, available on https://iici.global/0.5.1/wp-content/uploads/2018/03/icls-training-materials-sec-7-cah1.pdf, accessed on 20, February 2022.
[94] UN, Framework of Analysis for Atrocity Crimes, *supra note* 24, at 22.
[95] ICLS, *supra note* 93, at 4.

armed conflict is not required.[96] Similarly, the ICTR statute requires the attack to have a discriminatory element, but this is not required under customary international law.[97] The ICTR Appeals Chamber in this regard held that the discriminatory ground restriction in the Statute applies only to that Court and is not a requirement in customary international law.[98] Also, in the ICC the above two elements are not required.[99] Moreover, the ICTY held that as a matter of customary law, it is not required to show that the attack was carried out as part of a 'policy' or 'plan'.[100] This is rather required under the ICC statute that the attack must be committed under or in furtherance of a State or organisational policy.[101]

Material/individual acts of crimes against humanity listed under the three statutes seem quite comparable although the ICTY and ICTR have a list of around 8 acts whereas the ICC has more than 10 lists as an act broadly proscribed encompass several acts.[102] Additionally, the phrase 'other inhumane acts' is included in all of them whereas the ICC statute further reads

[96] ICTY, *Prosecutor v. Dusko Tadic a/k/a*, IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (October, 1995) para. 141; Extraordinary Chambers in the Court of Cambodia, *Prosecutor v. Kaing Guek Eav*, (Case No. 001/18-07- 2007/ECCC/TC), Trial Judgement, (July 2010), 218.

[97] However, it should be underlined that it is only the contextual element of the 'attack' that needs to be non-discriminatory since the individual acts of crime of persecution might *per se* requires the persecution be carried-out on discriminatory grounds. See ICLS, *supra note 93* at 7.

[98] ICTR, *prosecutor v Jean-Paul Akayesu*, Appeal Chamber (Judgement), ICTR-96-4-A, 1 June 2001, para. 469.

[99] *Ibid*.

[100] See, ICTY, *Prosecutor v. Kunarac et al*., Appeals Chamber, (Judgment), 12 July 2002, IT-96-23/1-A, 96&98. The trial panel ruled that there is no requirement that the acts of the accused were supported by any form of "policy" or "plan" at the ICTY or in customary international law. But, the court at the same time noted that it is relevant to establish the attack was necessarily widespread or systematic, or directed against a civilian population.

[101] The ICC Statute, article 7(2).

[102] See article 7(1) (a-k) of the ICC Statute, article 5 (a-i) of the ICTY and article 3(a-i) of ICTR.

'other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or mental or physical health'.[103] All of them apparently intended to include serious crimes that can result in grave suffering to civilians as individual acts of crimes against humanity. The practical application of these acts might not be similar according to the interpretation of different courts. Nevertheless, it is worth mentioning that there are also customary international law rules as regards particular conduct, such as the prohibition against torture and enslavement.

2.4. War Crimes

War crimes are serious breaches of international humanitarian law (IHL) or laws and customs of war during an armed conflict. The principal sources of war crime in international law include the 1907 Hague Regulation,[104] the 1949 Four Geneva Conventions,[105] the 1977 Two Additional Protocols,[106] International Criminal Law Statutes (ICTY, ICTR, and ICC),[107] and

[103] *Ibid*.

[104] The purpose of the Hague Conventions is to limit the means and method of warfare.

[105] The four Geneva Conventions primarily focus on protecting civilians and other categories of protected persons who no longer participate in hostilities. Thus are: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, entered into force 21 October

1950; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, entered into force 21 October 1950; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force 21 October 1950; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force 21 October 1950.

[106] The two Additional Protocols (APs) updated the level of protection given to the category of persons protected under the four Geneva Conventions and accordingly AP I deal with international armed conflict and non-international armed conflict. Because of AP I the traditional distinction of the 'Hague Law and Geneva Law' no longer becomes relevant as it combines rules from both Conventions.

[107] Article 2 and 3 of the ICTY, Article 4 of the ICTR and Article 8 of the ICC

customary law.[108] There are also several other treaties on the regulation of certain means of warfare notably biological and chemical weapons and anti-personnel mines, protection of cultural property, and the prohibition on the use of child soldiers.[109]

2.4.1. Gravity of Violation of IHL and the FDRE Criminal Code

War crime was introduced in Ethiopia by the 1957 repealed Penal Code.[110] Before that, it was not known as criminal conduct in any domestic legal text. The Criminal Code has replicated the list of acts of war crimes from the 1957 Penal Code. However, there are also additional lists of acts included as an *actus reus* element of war crime against a civilian population, wounded, sick, shipwrecked persons, or medical services following the 1977 Protocols Additional to the four Geneva Conventions. Generally, the Criminal Code included 13 provisions (Articles 270-283) regarding war crimes in the Special Part of the Code, entitled 'Chapter I Fundamental Crimes, Title II Crimes in

[108] Most of the provisions of the 1907 Hague Regulations and the 1949 Geneva Conventions have become recognized as customary law and hence apply to all states whether they are parties or not. See, Thedore Meron, Human Rights and Humanitarian Norms as Customary Law, Oxford Press, (1999) 62.

[109] Some of the Conventions includes Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction 10 April 1972; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effect, 1980; Convention on the Prohibition of the Use, Stockpiling, production and Transfer of Anti-personnel Mines and their destruction, 1977. See in general, Depositary Notification C.N.651.2010 Treaties-6, dated 29 November 2010, available at http://treaties.un.org accessed on March 20, 2022; Resolution on amendments to article 8 of the Rome Statute of the International Criminal Court, ICC-ASP/16/Res.4, adopted at the 12th plenary meeting on 14 December 2017, by consensus, ICC-ASP/16/20, available at https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16- Res4-ENG.pdf accessed on March 20, 2022.

[110] The rules on war crime from articles 282-295 were applicable irrespective of the nature of war either in the international or non-international armed conflict.

Violation of International Law'.[111] The Criminal Code does not follow the classification of grave breaches used in the Geneva Conventions of 12 August 1979,[112] which are replicated by the ICC, ICTR and ICTY Statutes.[113] The *chapeau* of Article 270 which prohibits war crimes against the civilian population reads:

Whoever, in time of war, armed conflict or occupation organises, orders or engages in, against the civilian population and in violation of the rules of public international law and of international humanitarian conventions[114]

Except for referring to Public International Law and IHL rules, this provision does not mention the seriousness/gravity of an act to designate it as a war crime. Nevertheless, this does not pose a problem in the application of war crime for a serious breach of Geneva Conventions since article 270 of the Criminal Code provides that a war crime against civilians is committed when it is in 'violation of the rules of public international law and international humanitarian conventions.' This means war crimes provisions of the Criminal Code should be interpreted in the light of international law and IHL treaties. Ethiopia is a party to the four Geneva Conventions including the two additional protocols. Four of the Geneva Conventions in turn have a specific

[111] This does not mean that there are no acts provided in other sections of the Criminal Code which may fall under the category of a war crime. For instance, article 315 (2) which prohibits improper use of enemy uniforms in times of war is situated in the military crimes section. See, Tadesse, *supra note* 2, 301.

[112] See article 8(2) (a) of the ICC Statute, and articles 3 and 4 of the ICTY and ICTR.

[113] Article 2 of the ICTY which says '...grave breaches of the Geneva Conventions…' Article 4 of ICTR reads 'serious violations of Article 3 common to the Geneva Conventions'. Whereas, article 8 (1) of the ICC statute, apart from providing the requirement (not as elements of the war crime) that 'committed as part of a plan or policy or as part of a large-scale commission' for the court to have jurisdiction over war crime, sub-article 2(a) of the same clearly defines war crime as 'Grave breaches of the Geneva Conventions'.

[114] Subsequent provisions also refer to such under the phrase 'in the circumstances defined above' see articles 271 and 272 or specifically mention phrases like 'international law and humanitarian conventions', and 'international conventions to which Ethiopia is a party' see articles 275 & 276.

list of grave breaches of the law of war notably, Article 50 GC I, Article 51 GC II, Article 130 GC III, and Article 147 GC IV. That is, a grave breach of an act is committed against protected persons (wounded, injured, sick, shipwrecked, prisoners of war, and civilians) and property. Therefore, although the seriousness of the breach is not mentioned as a defining element of war crime in Ethiopia, it is still a requirement for prosecution since the Criminal Code needs to be interpreted following the IHL rules of the 1949 Geneva Conventions. Moreover, in the Tadic case, the ICTY held that the omission of the seriousness test is not directly an issue as long as other requirements are met. [115]

But then again, the Criminal Code proscribes certain acts as war crimes that do not satisfy the required threshold of severity under the IHL. Like the ICC Statute and others, the *actus reus* element of war crimes under the Criminal Code constitutes the commission of individual acts within the context of an armed conflict. Some of these individual acts as indicated above include war crimes against protected persons and property and the use of prohibited means and methods of warfare. Indeed these acts constitute violations of IHL rules and satisfy the test of seriousness.[116] A war crime is committed when there is a serious violation of the rules of IHL by individuals participating in an armed conflict.[117] The ICTY Appeals Chamber ruled that a violation is serious when it constitutes a 'breach of a rule protecting important values' or 'involves grave consequences for the victim'.[118] Nevertheless, as indicated by Tadesse, the Criminal Code's Articles 274,[119] 277,[120] and 278[121] failed to encompass

[115] See, ICTY, *Prosecutor v. Tadić*, Appellate Chamber, (Judgement), IT-94-1-A, 15 July 1999.
[116] Tadesse, *supra note 2* at 306.
[117] This was also established by the ICTY Appeals Chamber in the infamous case of *Tadic.* See, ICTY*, Prosecutor v. Tadić,* supra note 115, para. 94.
[118] *Ibid*.
[119] Article 274 criminalises acts of 'provocation and preparation' to commit crimes such as war crimes against the civilian population, war crimes against wounded, sick or shipwrecked

conducts that could amount to a war crime for they do not met the required threshold of gravity under IHL.[122] Similarly, the mere act of insulting persons belonging to a humanitarian organisation and an enemy bearing a flag of truce/negotiator, which doesn't satisfy the threshold of seriousness under IHL respectively criminalised as a war crime under Articles 281(1) and 283[123] of the 2004 Criminal Code. [124]

The other important issue is related to the jurisdictional threshold of the ICC statute to handle war crimes. ICC exercises its jurisdiction over war crimes when it is '...committed as part of plan or policy or as part of a large-scale commission of such crimes.[125] Indeed this is not the element of a war crime under the statute. Rather, it indicates how the Court exercises its jurisdiction by focusing on the most serious situations rather than isolated incidents of war crimes. Nonetheless, it is worth mentioning that Article 8(1) of the ICC statute states 'in particular', which implies that war crimes committed without a plan/policy may not be *directly* excluded from the ICC's jurisdiction. When it

persons or medical services war crimes against prisoners and interned persons, war crimes against prisoners and interned persons

[120] Article 277 criminalises the violation of an armistice or a peace treaty duly concluded.

[121] Article 278 criminalises acts of a person who is not a member or an auxiliary of armed forces recognized by the officials of the Ethiopian government and who engages during wartime in hostile acts against the Ethiopian defence force, its services, lines, or means of communications or transport.

[122] Tadesse, *supra note 2, at* 302-304.

[123] Article 281(1): insulting a person belonging to or a representative of, an international humanitarian organisation as well as a person placed under the protection of such an organisation. Article 283: insulting an enemy bearing a flag of truce, an enemy negotiator, or any person accompanying him or her.

[124] Tadesse, *supra note 2* at 306.

[125] See article 8(1) of ICC statute. Unlike 'widespread or systematic attacks' in the case of crime against humanity, plan, policy and scale in the case of war crimes under the ICC statute do not constitute the elements of the crime. To fall under the jurisdiction of the Court, the act should constitute a war crime when it meets the required gravity of the threshold under Article 17(1) (d). According to this provision the court is empowered to determine the case inadmissible in cases where there is not sufficient gravity to justify further action by the court. See also, Robert Cryer, *et al, supra note 96,* at 277&278.

comes to the Criminal Code, this is not a requirement at all. Therefore, the Ethiopian Courts can prosecute war criminals regardless of the gravity of the situation, even in cases of single isolated acts constituting war crimes.

2.4.2. Absence of Classification of the Nature of the Conflict: Progressive Development

One of the interesting aspects of the Ethiopian Criminal Law is the absence of classification of war crimes based on the nature of an armed conflict as international or non-international. Under the ICC Statute, such a distinction is clearly made.[126] Hence, the application of these rules depends on the nature of the conflict. Although there is no clear indication, the implicit exclusion of the nature of an armed conflict in the application of provisions on war crimes under the Criminal Code can be inferred from Article 270.[127] The provision does not define or classify the application of the subsequent articles on war crimes based on the nature of the armed conflict. Under the definition given by ICTY armed conflict does not only encompass conflict between two or more states but also includes 'protracted armed violence between governmental authorities and organised groups or between such groups within a state'.[128] Hence, unlike the ICC Statute, the Ethiopian Criminal law provisions on war crimes are applicable irrespective of the nature of the conflict. This in turn has its advantages. The first is a procedural advantage. The Ethiopian courts need not pass through the complex and rigorous process of characterization. And, in practice that has happened in the *Legesse Asfaw et*

[126] While articles 8(2) (a) and (b) of the ICC Statute cover acts committed in an international armed conflict, articles 8(2) (c) and (e) refer to those acts committed in a non-international armed conflict.

[127] It reads that war crimes against civilians could be committed 'in times of war, armed conflict or occupation'. *Chapeau* of Article 270 of the FDRE Criminal Code.

[128] ICTY, *Tadic v Prosecutor*, *supra note 117*, para. 77. See also, ICC, *Prosecutor v. Lubanga*, Trial Chamber. (Judgement), ICC-01/04-01/06, (14 March 2012), para. 533.

al. case. Second, substantively, unlike the ICC, in which not all kinds of war crimes are punishable when committed in non-international armed conflicts, all acts listed in the criminal law as war crimes are punishable irrespective of the nature of the armed conflict.[129] More interestingly, this is crucial because the recent atrocities committed in the country are the result of internal armed conflict, such as between the Federal Government and Tigray Region although it may be characterised as an 'internationalised' non-international armed conflict because of the involvement of Eritrean troops later.[130] In practice, the Federal High Court in the *Legesse Asfaw et al.* case similarly applied the 1957 Penal Code provisions of war crime despite acknowledging the non-international character of the armed conflict.[131]

Against this backdrop, Tadesse believes that ultimately the Criminal Code 'only allows the direct application of IHL treaties, thereby excluding the applicability of war crimes defined in customary international law' which could 'serve as a legal basis to consider several war crimes as punishable when committed in the context of internal armed conflicts.'[132] The failure to recognize customary international law as a *legal basis* for war crimes by the Criminal Code, in turn, results in the limited application of IHL rules to the situation of non-international armed conflict i.e. only the minimum treatments stipulated under common article III to the four Geneva Conventions and

[129] See, Tadesse, *supra note 2* at 312.

[130] Furthermore, Tadesse argued that this is a positive development when it is seen from recent laws such as the ICC statute where 'not all kinds of war crimes are punishable when committed in non-international armed conflicts. This includes Article 8(2) (b) (iv), (v), (vi), (vii) & (viii). See Tadesse, *supra note 2* at 310 & 311.

[131] *Ibid*, at 309.

[132] For instance, some of the customary international rules applicable to non-international armed conflict including means and method of warfare are rules prohibiting the use of poison or poisoned weapons, asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, bullets which expand or flatten easily in the human body, such as bullets with a hard envelope, which does not entirely cover the core or is pierced with incisions under article 8(2) (e) of the statute. Tadesse, *supra note 2 at* 312.

Additional Protocol II.[133] However, it seems important to question the necessity of explicit recognition of 'customary law' by the Criminal Code for the application of such rules in Ethiopia in the case of war crimes. The answer seems not affirmative because, once a certain rule is already crystallised into a custom, it is binding upon all states except in the case of the '*persistent objector*' rule, which Ethiopia is not.[134] Therefore, one could argue that it can neither opt out of the application of such custom nor require specific recognition of the custom for its application.

2.4.3. Individual Acts of War Crime: General Stipulations of the FDRE Criminal Code

The ICC statute contains a long list of individual acts of war crimes (more than 50) under Articles 8(2)(a)(i) to 8(2)(e)(xv). However, most of them are listed twice based on the applications of the rules in the case of international and non-international armed conflict. Whereas, the Ethiopian counterparts contain around 35 individual acts of war crime which were applicable without the distinction to the nature of the conflict. In terms of organisation, there are flaws in the stipulation of the category of these individual acts under the Ethiopian Criminal Code. For instance, some of the acts of war crimes that could potentially fall under the category of prohibited means and methods of warfare were listed under Article 270 of the Criminal Code which deals with

[133] Tadesse described such failure as a 'regressive development 'despite its long progress in abolishing the distinction as to the nature of armed conflict in its conventional definition of war crime. See, Tadesse, *supra note 2* at 307.

[134] James R Crawford, Brownlies's Principles of Public International Law, Oxford, 9th edition, (2019) 30; Michael Akehurst, Custom as a Source of International Law, The British Yearbook of International Law, 1(1976). Based on the decision of the ICJ, customary international law both globally and regionally comprises two components: an extensive and uniform consistent *state practice* and the belief that the practice is required by law (*opinio juris*). See ICJ North Sea Continental Shelf Case (FRG v Denmark) (FRG v The Netherlands) (1969) Rep 3, para 77.

war crimes against civilians.[135] Moreover, the individual acts under the Criminal Code appear to be stipulated in a more generic term than the ICC Statute.[136]

Concluding remarks

This paper undertook a helicopter view comparison of the way atrocity crimes are regulated under Ethiopian law vis-a'-vis relevant International Criminal Law rules and jurisprudence. It has accordingly uncovered some peculiar facets of the Ethiopian counterpart. Crime of genocide, as proscribed under Article 269 of the Ethiopian Criminal Code is regulated relatively in a similar fashion to the 1948 Genocide Convention, and the Statutes of the ICC, ICTY and ICTR. However, unlike the latter two, the Criminal Code is not a verbatim copy of the Genocide Convention. It includes an extra list to the category of protected groups i.e., *political*, *nation*, *nationality*, and *colour groups* in addition to four exhaustive lists under the Convention - *racial*, *ethnic*, *national*, and *religious*. Likewise, it has added another *actus reus* element of crime 'causing members of a group to disappear' and compulsory movement or dispersion of not only children but also '*people*', which is not mentioned under the Convention. There is no specific provision governing Crimes against humanity in the Criminal Code. The term is merely mentioned as a broad category of crime that encompasses international crimes, such as genocide and war crimes. Consequently, the application of the definition and

[135] See Article 270 of the FDRE Criminal Code which says 'using any means or method of combat against the natural environment to cause widespread, long term, and severe damage and thereby to prejudice the health or survival of the population'. Similarly, article 270 (o) reads 'attacking dams, dykes, and nuclear electrical generating stations, if their attack causes the release of dangerous forces and consequent severe losses among the civilian population'. Indeed, these acts directly affect the civilian population. However, in terms of classification, they better fit to be stated in the part dealing with the prohibited means and method of warfare in the subsequent article of 276 (unlawful methods and means of warfare). For more see Tadesse, *supra note 2*, at 332.

[136] *Ibid*, at 326.

elements of the crime developed under customary international law can potentially be proposed as a solution to fill the gap. Conducts which amounts to war crimes are proscribed under the Criminal Code. A reference is also made to the IHL rules to which Ethiopia is a party. However, unlike the Statutes of ICC, ICTY, and ICTR, it is not defined as a 'grave' breach of the Geneva Conventions and includes some prohibited acts that do not satisfy the required threshold of severity under the IHL. Furthermore, unlike the ICC Statute, a plan or policy as part of a large-scale commission of war crimes is not required under the Criminal Code. Moreover, the Criminal Code provisions on war crimes are applicable regardless of the nature of the conflict (international/non-international) unlike such distinction under the Statute of ICC and Additional Protocol II of the Geneva Convention on the Law of War.