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CONFLICT OF LAWS IN DELEGATION OF CRIMINAL JURISDICTION BETWEEN ETHIOPIA AND OTHER COUNTRIES: CHOICE OF APPLICABLE CRIMINAL LAW

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Abstract

As a sovereign state, Ethiopia can exercise its jurisdiction on criminal cases based on principles recognized under its Criminal Code and International Law. At times, Ethiopia may not be practically able to exercise its jurisdiction over the offender when, for instance, someone after committing the crime absconds to other state. If there is no possibility of extradition of such suspect, Ethiopia may delegate the exercise of its jurisdiction to the country of refuge so that the offender will be tried in the latter's court. In some other cases, when someone absconds and sought refuge in Ethiopia after committing a crime in another country, the latter may delegate the exercise of its jurisdiction to Ethiopia. In both scenarios, the criminal law that the delegated country shall apply to entertain the delegated case is a question that calls for an answer. This question triggers the usually neglected question of choice of applicable law in criminal matters. This Article aims at discussing the choice of applicable criminal law at the time of delegation of criminal jurisdiction between Ethiopia and other countries. By examining the issue in light of the principles of criminal jurisdiction and customizing the principles developed in the choice of law over civil cases, this Article argues that the applicable law by the delegated state (country of refuge) in the case of delegated exercise of jurisdiction is the criminal law of the delegating state.

Keywords: *choice of law, country of refuge, criminal jurisdiction, criminal law, delegation*

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I. INTRODUCTION

Indisputably, States¹ are entitled to maintain their peace and stability. To this end, they enforce criminal law which specifies actions/omissions that a person shall not commit along with the penalty to be imposed on the transgressors. In principle, a state has jurisdiction to prosecute anyone who has violated its criminal law through its law enforcement agencies. State's exercise of jurisdiction is also the inherent and primary manifestation of its sovereignty.

Needless to say, much attention has not been given in Ethiopia to the application of conflict of laws in criminal matters. In other countries, the lack of attention to conflict of laws in criminal matters can be partly attributable to identifying conflict of laws only in relation to civil cases.² Similarly, this can be presumed in the Ethiopian context as there is a dearth of court cases and scholarly articles related to the area. Despite this, the exercise of jurisdiction by one state over a certain crime may sometimes involve issues with a foreign contact which, *inter alia*, demand identifying the set of law that shall apply to resolve it. This would, in turn, lead to conflict of laws question to arise.³

Under international and national laws, it is known that there are different recognized principles for states to exercise jurisdiction over certain crime/s or person/s suspected of perpetrating the same. However, the mere existence of these principles does not mean that states are always able to exercise their jurisdiction. For instance, the suspected offender may abscond to other countries after committing the crime and seek refuge. Due to this, it would be difficult for a state under whose territory a crime has been committed to exercise its jurisdiction. When this is the case, states would follow other alternatives like delegating the exercise of their jurisdiction to other countries to prosecute the suspect.⁴ Likewise, Ethiopia can delegate the exercise of its criminal jurisdiction to the country of refuge when a person has committed crime in Ethiopia cannot be tried for lack of extradition.⁵ In such cases, "Ethiopia entrusts the task of punishing the offender in her stead."⁶ Similarly, other countries may delegate Ethiopia to exercise criminal jurisdiction.

¹ In this Article, the word State refers only to those entities which are subjects of International law as defined in Art.1 of the Montevideo Convention on Rights and Duties of the States (1933). Hence, unless explicitly stated, those administrative units within the municipal sphere which are called as "states" are not within the focus of this Article.

² Robert A. Leflar, *Conflict of Law: Choice of Law in Criminal Cases*, 25 (1) CASE WESTERN RESERVE LAW REVIEW, 44-65, 44 (1974). See also, Markus D Dubber, *Criminal Jurisdiction and Conceptions of Penalty in Comparative Perspective*, 63 (2) THE UNIVERSITY OF TORONTO LAW JOURNAL, 247-277, 263 (2013).

³ What would bring the question of conflict of laws is not only the civil nature of the case. Though conflict of laws is usually identified only in relation to civil cases, there are still chances for the same question to arise in criminal cases too. When it comes to criminal jurisdictions involving two states, albeit it would fall within the scope of public international law, when the question comes particularly to delegated exercise of criminal jurisdiction, it has also features that can be regulated by conflict of laws principles.

⁴ PHILIPPE GRAVEN, AN INTRODUCTION TO ETHIOPIAN PENAL LAW 37 (Haile Sellassie I University and Oxford University Press) (1965).

⁵ *The Criminal Code of the Federal Democratic Republic of Ethiopia*, Proclamation No.414/2004, FED. NEG. GAZETA, Art. 12, Addis Ababa, 9th May 2005.

⁶ GRAVEN, *supra* note 4.

Though the Criminal Code of Ethiopia (here in after the Criminal Code) has tried to regulate delegating Ethiopia's exercise of jurisdiction to country of refuge, it does not address the question as to which law that the delegated country shall apply. The question is also valid when Ethiopia is delegated by other countries. In the latter case, however, the question is twofold since the Criminal Code does not explicitly state whether Ethiopia can accept and exercise delegated criminal jurisdiction from other countries. This question has to be addressed before examining the choice of law question in relation to it. To provide an answer to the choice of applicable criminal law when Ethiopia delegates its criminal jurisdiction, Phillip Graven argued that the criminal law of the country of refuge (the delegated state) is the applicable law.⁷ On the contrary, as the place of commission of the crime is the delegating state, it can be said that the criminal law of the delegating state is comparatively closer to the case than that of the delegated state. Unless the delegated state has another basis to justify assuming jurisdiction, the room is not totally closed to argue that the criminal law of the delegating state shall apply because, among other things, the crime would principally affect the interest of the delegating state.

Generally, the application of conflict of laws involves identifying the appropriate law to entertain the case.⁸ The same holds true in the delegation of criminal jurisdiction as it requires choosing the applicable law from the two competing set of laws: the criminal law of the delegating state and that of the delegated state. This Article aims at examining the choice of applicable criminal law in the above two ways of delegation, i.e., when Ethiopia is the delegating state and when Ethiopia is the delegated state. To do this, the Article approaches the issue by studying it in light of the principles of state's exercise of criminal jurisdiction and experience of other countries. Moreover, some relevant principles of choice of law used in conflict of laws in civil cases are also adopted to provide answer for the choice of law question in delegation of criminal jurisdiction.

The remaining part of the Article is organized in four sections. The second section tries to lay a conceptual framework by briefly discussing the meaning and the principles of criminal jurisdiction. The third section then discusses the principles adopted by Ethiopian criminal law and how it regulates the delegation of criminal jurisdiction to countries of refuge. Section four, on its part, addresses the question of choice of law when Ethiopia delegates its criminal jurisdiction. It also attempts to investigate whether Ethiopia may accept delegation from other countries and the related choice of law issue when Ethiopian is delegated to exercise criminal jurisdiction. Finally, the fifth section provides some concluding remarks.

⁷ *Id.* at 38.

⁸ ABLA J MAYSS, PRINCIPLES OF CONFLICT OF LAWS 109 (Cavendish Publishing Limited, 3rd ed. 1999); Hannah L. Buxbaum, *Determining the Territorial Scope of State Law In Interstate and International Conflicts: Comments on the Draft Restatement (Third) And on the Role of Party Autonomy*, 27 DUKE J. COMAT & INT'L L 381-403, 382, (2017).

II. PRINCIPLES FOR STATES EXERCISE OF CRIMINAL JURISDICTION: AN OVERVIEW

Jurisdiction is the states' exercise of their authority (on a legal basis) over persons, incidents or properties.⁹ It is one manifestation of the sovereignty of states by applying their legislative, judicial or executive powers over the said persons, incidents or properties.¹⁰ There are certain accepted principles under international law by which states can exercise their jurisdiction on a certain criminal matter.¹¹ The main principles are the Territoriality Principle, Nationality Principle, Protective Principle and Universality Principle.¹²

Territorial Principle recognizes the authority of a state to prescribe criminalized actions/omissions within its territory.¹³ If someone, irrespective of his nationality, commits a crime inside the territory of a state, the state can exercise its jurisdiction over the transgressor.¹⁴ Since it is said that the exercise of jurisdiction includes the exercise of legislative, judicial or executive powers, the criminal laws of the state will apply to the case, the court of the state will try the offender and its authorities will enforce the punishment.¹⁵ Sometimes, a crime might be started within the territory of one state and completed in the territory of another state. To accommodate these instances, Subjective Territoriality Principle and Objective Territoriality Principle are recognized within Territoriality Principle. The former allows the state under whose territory the crime has been started or the unlawful act has been committed to assume jurisdiction, and the later permits the state under whose territory the crime has been completed (the intended result has been achieved) to exercise jurisdiction.¹⁶

Though Territoriality Principle is the oldest principle, understanding jurisdiction on strictly territorial principle is not acceptable in the contemporary world. As such, other principles for extra-territorial exercise of jurisdiction have been recognized in international and national laws. These principles are Nationality Principle, Protective Principle and Universality Principle.¹⁷ According to Nationality Principle, a state can exercise its jurisdiction over its nationals regardless of the place of commission of the crime. This principle is known as Active Nationality

⁹ Anthony Colangelo, *Legal Studies Research Paper Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and international Law*, 48 (1) COLUMBIA LAW SCHOOL PUBLIC LAW & LEGAL THEORY WORKING PAPER GROUP, 121-201, 126 (2007). See also Joseph H. Beale, *The Jurisdiction of a Sovereign State*, 36 (3) HARVARD LAW REVIEW, 241-262, 241 (1923).

¹⁰ *Id.*, Joseph H. Beale, at 251.

¹¹ MALCHOM N. SHAW, *INTERNATIONAL LAW* 652 (Cambridge University Press, 6th ed.) (2008).

¹² *Id.*, at 652-668. See also Anthony Colangelo, *supra* note 9, at 127-129.

¹³ According to the present conception, territory of a state includes the land, the air space above the land and its territorial sea. Moreover, the board of the ships and the air crafts are also considered as a territory of the state the flag of which they carry.

¹⁴ Alejandro Chehtman, *Jurisdiction*, in *OXFORD HANDBOOK OF CRIMINAL LAW*, (Markus Dubber and Tatjana Höernle eds., Oxford University Press).

¹⁵ SHAW, *supra* note 11, at 652.

¹⁶ *Id.*, at 654, see also PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 110 (Routledge Publisher, 7th ed.) (1997).

¹⁷ Hannah L. Buxbaum, *Determining the Territorial Scope of State Law In Interstate and International Conflicts: Comments on the Draft Restatement (Third) And on the Role of Party Autonomy*, 27 DUKE J. COMAT & INT'L L. 381-403, 386, (2017).

Principle.¹⁸ Moreover, there is also another version of Nationality Principle called Passive Nationality Principle by which states can exercise their jurisdiction over crimes committed abroad against their own nationals.¹⁹

On the basis of Protective Principle, a state can exercise jurisdiction over crimes, though they are committed abroad, against its security, integrity and vital interests. The kinds of crimes that can be dealt under this principle are dubious and prone to political manipulation.²⁰ But still, states can claim jurisdiction based on this principle on crimes such as crimes against state's military forces, crimes against its currency and espionage.²¹ Universality Principle, on the other hand, recognizes states exercise of jurisdiction over international crimes like War Crimes, Genocide, and Piracy.²² According to this principle, every state, irrespective of lack of direct link between the crime and the state, is equally recognized to exercise its jurisdiction over the perpetrators of international crimes because these crimes are considered as crimes against the whole international community.²³

Generally, in the past, the application of criminal law used to be highly influenced by strict territorial sovereignty ground.²⁴ As the jurisdiction of a state includes, among others, legislative jurisdiction, and because states are sovereign, a criminal law of a sovereign state was believed to be applicable only within its territorial limits.²⁵ Corollary to this, a sovereign state was not expected to give effect to criminal/penal laws of another state. Nowadays, however, understanding jurisdiction and applicability of criminal law exclusively based on territorial sovereignty cannot always be a base to decide the applicability of criminal laws. As discussed above, the grounds other than territoriality principle have recognized the exercise of jurisdiction extra-territorially which includes applying their criminal laws on extra-territorial conducts. Hence, the conception of jurisdiction on a purely territoriality ground has become obsolete. The perception that confines the application of a criminal law exclusively within a country is "parochialism".²⁶ Thus, even if territoriality is the principal ground for criminal jurisdiction and application of criminal law,²⁷ there are extra-territorial aspects too.²⁸

¹⁸ SHAW, *supra* note 11, at 663.

¹⁹ *Id.* at 664, See also Malanczuk, *supra* note 16, at 111.

²⁰ SHAW, *supra* note 11, at 667.

²¹ Malanczuk, *supra* note 16, at 112, see also Chetman, *supra* note 14, at 11.

²² SHAW, *supra* note 11, at 668.

²³ *Id.*

²⁴ Buxbaum, *supra* note 17, at 386.

²⁵ SHAW, *supra* note 11, at 653.

²⁶ Markus D Dubber, *Criminal Jurisdiction and Conceptions of Penalty in Comparative Perspective*, 63(2) THE UNIVERSITY OF TORONTO LAW JOURNAL 247-277, 256, (2013). It is "Parochialism" because, while the crimes committed in one country could affect the interest of another state or individual/s living in the latter, limiting the exercise of jurisdiction only on territoriality ground would inappropriately narrow the possibility of prosecuting the perpetrator/s, by the state whose interest or the interest of its inhabitants is affected by the crime committed outside of its territory.

²⁷ SHAW, *supra* note 11, at 654.

²⁸ Buxbaum, *supra* note 17, at 249. See also Dubber, *supra* note 26. Even if criminal jurisdiction has territorial and extra-territorial features, there are differences between common law and civil law legal systems regarding the conception of territorial and extra-territorial criminal jurisdictions. In common law systems, the exercise of criminal jurisdiction is territorial as a matter of principle and extra-territorial jurisdiction is an exception. And sometimes the

III. EXERCISE OF CRIMINAL JURISDICTION UNDER ETHIOPIAN CRIMINAL LAW

A. Principal and Subsidiary Exercise of Jurisdiction

Ethiopia's jurisdiction over criminal cases is regulated under the provisions of the Criminal Code of Ethiopia.²⁹ The Code has specifically provided its scope of application based on conditions related to place which incorporate grounds recognized by international law and states as principles to exercise criminal jurisdiction. With respect to place, the Criminal Code divides the application of the Code as Principal Application and Subsidiary Application.³⁰ The former identifies the kind of crimes over which Ethiopia shall exercise its principal jurisdiction even when other countries have already exercised their jurisdiction over the case.³¹ From the nature of the crimes incorporated under the Principal Application of the Code, it can be discerned that the legislator thought that these crimes primarily affect Ethiopia's interest.³²

The Criminal Code shall be applied on anyone, except those who are protected by immunities under international law, who violates its provisions while he/she is within Ethiopian territory.³³ This provision reiterates the Territoriality Principle of criminal jurisdiction. It is stated above that Territoriality Principle is further classified as Subjective Territoriality and Objective Territoriality Principles to allow more than one state in case where a crime is started in a state and completed in another state.³⁴ However, the part of the Criminal Code that regulates its application with respect to place has not explicitly covered this aspect. Yet, Article 25 of the Code can provide some hint as to which specific principle is recognized in Ethiopian.³⁵ Accordingly, when certain criminal conduct is started in one place and its desired result is achieved in another place ("non-instantaneous crimes" as they are described by the Criminal Code)³⁶, Ethiopia can exercise its principal jurisdiction only if the criminal act is committed in Ethiopia. And when the prohibited conduct is committed abroad and the consequence thereof has occurred in Ethiopia, the jurisdiction of Ethiopia is subsidiary to the jurisdiction of the place of

exercise of extra-territorial jurisdiction is even considered as the exercise of rules of territoriality. The Civil Law countries, on the other hand, consider territoriality as the "primary norm" and they also recognize extra-territoriality as the other ground for the exercise of criminal jurisdiction.(see Dubber, *supra* note 26, at 266-667)

²⁹ CRIMINAL CODE, *supra* note 5.

³⁰ *Id.*, Chapter II, Section II, Sub-section I (Art. 11-16).

³¹ *Id.*, Art. 16.

³² But here, the fact that Ethiopia claims principal jurisdiction on these types of crimes, *per se*, does not mean that other countries cannot exercise their own jurisdiction based on other grounds. Even if it has the risk of exposing the offender to double jeopardy, other countries can also exercise their jurisdiction on a case where Ethiopia is exercising or has already exercised its jurisdiction. In the same manner, Ethiopia can also, in principle, exercise its jurisdiction whether other countries are exercising their jurisdiction or not.

³³ CRIMINAL CODE, *supra* note 5, Art. 11. And according to the terms of Art. 11(1) and Art 2 of the FDRE Constitution, the territory of Ethiopia constitute the territory of the regional states that form Ethiopia. Though not explicitly mentioned on this provision, according to rules of Public International Law, premises of Ethiopian diplomatic missions abroad, ships and Aircrafts carrying Ethiopian flag are also considered as Ethiopia's territory.

³⁴ SHAW, *supra* note 11, at 652.

³⁵ Though Art 25 seems to only regulate domestic conflict of jurisdiction, between two or more national administrative units in Ethiopia, it can also regulate international conflict of criminal jurisdiction between Ethiopia and other sovereign state. See GRAVEN, *supra* note 4, at 65.

³⁶ CRIMINAL CODE, *supra* note 5, Art 25(2).

commission of the prohibited conduct.³⁷ This means that Ethiopia can exercise its jurisdiction only when the state under whose territory the criminal act was committed fails to exercise its jurisdiction. Hence, it can be concluded that, in the case of “non-instantaneous crimes”, it is only over cases that fall under Subjective Territoriality Principle that Ethiopia can exercise its principal jurisdiction. Those cases that are covered by Objective Territorial Principle would therefore be subjected to its subsidiary jurisdiction.

In addition, the Criminal Code shall principally apply on “who outside of Ethiopia has committed one of the crimes against the State of Ethiopia, its safety or integrity, its institutions, essential interests or currency”³⁸ This ground is based on Protective Principle. Universality Principle is also recognized under Article 17(1) (a) of the Criminal Code.³⁹ In addition, Nationality Principle, which comprises Active Nationality and Passive Nationality Principles, is stated under Art 18(1) of the Criminal Code.⁴⁰ These Universality and Nationality Principles are grounds for Ethiopia’s exercise of subsidiary jurisdiction.⁴¹ Unlike the grounds for the exercise of principal jurisdiction, these subsidiary jurisdictions will be exercised only if the accused was not tried and final judgment had not been given in a foreign country and upon the fulfillment of the other conditions under Art 19 of the Criminal Code.⁴²

B. Delegating Criminal Jurisdiction to Other Countries

Though Ethiopia shall exercise its criminal jurisdiction over anyone who has committed a crime in Ethiopia, it may delegate its jurisdiction to a foreign country in which the foreigner has taken refuge and his extradition cannot be obtained.⁴³ Delegation exclusively falls within the countries’ sovereign power that the act of rendering and accepting the same will be conducted based on the free consent of the respective countries.⁴⁴ When Ethiopia delegates its jurisdiction to country of

³⁷ *Id.*, see also GRAVEN, *supra* note 4, at 65. But here, before Ethiopia’s exercise its subsidiary jurisdiction mentioned under Art 25 (2), whether the conditions for the subsidiary application of jurisdiction that are mentioned under Art 19 need to be met or not remains to be another question.

³⁸ CRIMINAL CODE, *supra* note 5, Art 13.

³⁹ Universality Principle recognizes states exercise of jurisdiction over International Crimes like War Crimes, Genocide, and Piracy (Shaw, *supra* note 11, at 668).

⁴⁰ As discussed under section one of this Article, Nationality Principle has two components: Active Nationality and Passive Nationality Principles. The text of Art 18(1) which reads as “This Code shall also apply to any person who has committed a crime **outside Ethiopia against an Ethiopian national...**” (*Emphasis added*) is the recognition of Passive Nationality Principle. And the part of the same provision which says “This code shall also apply...**to any Ethiopian national who has committed outside Ethiopia** a crime of another kind than those specified in the foregoing Articles...” (*emphasis added*) recognizes Active Nationality Principle. Here, the exercise of Active and Passive Nationality Principles is subjected to the restrictions stated under Arts 18 and 19 the code.

⁴¹ CRIMINAL CODE, *supra* note 5, Chapter II, Section II, Sub-section II.

⁴² *Id.* Art.17 and 18. The conditions stipulated under Art 19 can be summarized as follows. Except in the case of exercise of jurisdiction based on universality principle or as per Art 18(2) of the Criminal Code, before Ethiopia starts exercising its criminal jurisdiction, formal complaint has to be lodged in the place of commission of the crime, in case when the crime is punishable up on complainant either in the law of its commission or Ethiopian criminal law. In addition, the suspect must either be in Ethiopian territory or has already been extradited to Ethiopia. Moreover, in every case, the prosecution shall also be endorsed by the Minister of Justice (now the Federal Attorney General) (see Proclamation No 943/2016)).

⁴³ *Id.*, Art.12.

⁴⁴ GRAVEN, *supra* note 4, at 36-37. Here, the process of offering and accepting the delegation has political aspect which can be highly influenced by the level of diplomatic relationship existing between the two countries. Since it is

refuge and the latter accepts it, “the authorities of the latter shall be taken to have substituted themselves in the place of the corresponding Ethiopian authorities.”⁴⁵

Despite the above, it should be noted that not all forms of Ethiopia’s criminal jurisdiction can be delegated. Since Article 12 of the Criminal Code is placed immediately next to the provision that specifies Ethiopia’s criminal jurisdiction on the basis of Territoriality Principle (Art 11) and from the text of Article 12 which reads “Where a foreigner who *has committed a crime in Ethiopia* cannot be tried or punished....” (*emphasis added*), it is possible to say that only crimes that fall under Ethiopian’s principal jurisdiction can be delegated.⁴⁶ Here, when the crime is a “non- instantaneous type,” as defined under Article 25, “the exception that Article 25 creates to Article 11”⁴⁷ shall not be forgotten. In “non- instantaneous” crimes, Ethiopia can delegate its jurisdiction only when the criminal conduct has been committed in Ethiopia. However, when only the consequence of the criminal act has been achieved in Ethiopia, Ethiopia cannot delegate its criminal jurisdiction because it does not have principal jurisdiction in these types of crimes. This is what the combined reading of Articles 12 and 25 of the Criminal Code would convey.⁴⁸ Moreover, crimes which are under Ethiopian’s principal jurisdiction based on Protective Principle (Criminal Code, Art. 13) cannot be delegated for other countries.⁴⁹

Since Article 12 talks only about the case of a foreigner, if delegation can be given when an Ethiopian has committed an offense in Ethiopia and absconds to another country is ambiguous. The *expose de motif* of the Criminal Code has not also said anything as to why Article 12 states only about a foreigner. Despite this, the author argues that the case of an Ethiopian citizen shall be seen in light of the rationale of Article 12 and interpreted as per what Art 2(4) dictates, *i.e.* interpretation according to the spirit and purpose that the Criminal Code wants to achieve.⁵⁰

not within the purview of this Article, this and other procedural aspects of delegating the exercise of criminal jurisdiction are not discussed.

⁴⁵ *Id.*, at 38.

⁴⁶ GRAVEN, *supra* note 4, at 37.

⁴⁷ *Id.*, at 65.

⁴⁸ As said above, it is only when Ethiopia claims/exercises its principal jurisdiction based on territoriality jurisdiction that delegation of criminal jurisdiction to another country is possible (GRAVEN, *supra* note 4, at 37). Nevertheless, since a criminal act might be started within one state and its result is achieved in another state, Territoriality Jurisdiction is divided into Subjective Territoriality and Objective Territoriality Principle which provide the right to exercise jurisdiction to the state in which the crime has been started and to the state in which the resulted is achieved respectively (Shaw, *supra* note 11, at 652). Despite this, as per Art 25(2) of the Criminal Code, when only the consequence of the criminal act has been achieved in Ethiopia, Ethiopia’s exercise of jurisdiction is not principal. It is rather subsidiary. As a result, these types of crimes cannot be delegated to other countries.

⁴⁹ GRAVEN, *supra* note 4, at 37. The prohibition is because crimes subject to Ethiopian’s principal jurisdiction on Protective Principle may be committed in the foreign country under its help and support or another foreign country. In this case, if the offender resides or escapes to the foreign country which has provided help for the crime, delegating this country will not be helpful to achieve the purpose of the law as this country may not be partial. This is also true when the offender commits a crime in Ethiopia under the help of a foreign country to whose territory he escapes after the commission of the crime (GRAVEN, *supra* note 4, at 37-38).

⁵⁰ CRIMINAL CODE, *supra* note 5, Art 2(4).

Delegation of criminal jurisdiction is one way of avoiding impunity that may otherwise happen as a result of “negative conflict of jurisdiction”.⁵¹ In some cases, the offender may commit a crime in Ethiopia and absconds to other country (with no possibility of extradition). In this case, save for the possibility of trial in absentia under Article 160-164 of the Criminal Procedure Code of Ethiopia, Ethiopia may not be practically able to exercise jurisdiction over the offender. So does the country of refuge because of lack of grounds for the exercise of the same. This is a “negative conflict of jurisdiction” that would help the offender to escape criminal liability.⁵² Even in cases that can be tried in absentia, the sentence passed may not be practically executable.⁵³ Thus, though it is not stated on the *expose de motif*, the author of this paper argues that the reason why Art 12 is incorporated under the Criminal Code cannot be different than avoiding impunity that may possibly arise as a result of the mentioned problems.

Accordingly, when the offender absconds to another state, Ethiopia may delegate the country of refuge to conduct the prosecution so that the offender will not escape liability. At this time, it seems essential not to overlook one difference between the Penal Code (1957) and the Criminal Code (2004). The Penal Code mandatorily required Ethiopian authorities to request for delegation.⁵⁴ And since the Penal Code prefers delegation over trial in absentia, the latter will be conducted only after the possibility for delegation is exhausted.⁵⁵ Unlike the Penal Code, trying the possibility of delegation is not mandatory under the Criminal Code.⁵⁶ According to the latter, the choice between trial in absentia and delegation shall thus be done on a case by case basis by taking different factors, which can serve the interest of justice, in to account.

Since it is accepted that there should not be impunity, whether the offender is a foreigner or an Ethiopian, the purpose that delegation would serve is valid when an Ethiopian commits a crime in Ethiopia and escapes to another country with no possibility of extradition. As a result, delegation can be the viable way to bring the offender in front of justice. Irrespective of nationality of the offender, delegation is therefore in line with the object and purpose of Article 12 and the Criminal Code in the whole.

IV. DELEGATION OF CRIMINAL JURISDICTION BETWEEN ETHIOPIA AND OTHER COUNTRIES: WHICH COUNTRY’S CRIMINAL LAW SHOULD APPLY?

As it is already mentioned, the Ethiopian Criminal Code, under Art 12, tries to regulate delegation of Ethiopia’s jurisdiction to other countries. However, it does not answer as to which law, the criminal law of Ethiopia or that of the delegated country, would apply to entertain such cases. Moreover, there is no specific provision on whether Ethiopia can exercise criminal jurisdiction by delegation from other countries. In addition to doubts related to the legality of its exercise, the question regarding the applicable criminal law can be raised if Ethiopia accepts

⁵¹ GRAVEN, *supra* note 4, at 36.

⁵² *Id.*, at 36-37.

⁵³ *Id.*, at 37.

⁵⁴ PENAL CODE OF THE EMPIRE OF ETHIOPIA, Proclamation No. 158, NEGARIT GAZETA, Art. 12, 23rd July 1957, Addis Ababa.

⁵⁵ GRAVEN, *supra* note 4, at 37.

⁵⁶ See CRIMINAL CODE, *supra* note 5 Art 12(1).

delegation. The following two sub-sections discuss the choice of applicable criminal law when Ethiopia is the delegating country and when it is the delegated country.

A. The Applicable Criminal Law when Ethiopia is Delegating Country

It is said that Ethiopia can delegate its criminal jurisdiction to the country of refuge when an offender in Ethiopia escapes to another country with no possibility of extradition.⁵⁷ Delegating Ethiopia's criminal jurisdiction is prescribed both in the old Penal Code⁵⁸ and in the current Criminal Code of Ethiopia.⁵⁹ However, both the Penal Code and the Criminal Code do not provide clear answer for the choice of applicable criminal law question.⁶⁰ In the absence of clear stipulation in the Penal Code, Philip Graven opined that the case will be entertained by the country of refuge using its own law.⁶¹

In the contemporary world, various "choice influencing considerations" are being applied to identify the appropriate criminal law.⁶² In USA, for instance, there is no strict rule to be followed in criminal cases that involve giving effect to the criminal law of other state and some courts tend to decide the issue on case by case basis by considering factors like "state sovereignty and local control over criminal policy and individual rights".⁶³ In the Ethiopian case, the author contends that there are sufficient grounds or choice influencing factors that should be considered so that the court of the delegated country should apply the criminal law of Ethiopia.

First of all, a country needs to prove whether its jurisdictional claim and exercise rests on solid legal basis before it applies its own laws on territorial and extra territorial conduct.⁶⁴ Such

⁵⁷ CRIMINAL CODE, *supra* note 5, Art 12.

⁵⁸ PENAL CODE, *supra* note 52.

⁵⁹ CRIMINAL CODE, *supra* note 5.

⁶⁰ Art 12(3) of the Criminal Code stipulates as to how the suspect shall be treated where he has not undergone his punishment or only undergone part of it in the foreign country. It says that the whole or the unexpired part thereof shall be enforced in Ethiopia if he is apprehended and the enforcement of the penalty is not barred by limitation under the provisions of this Code. In doing so, if there is a difference, in form and nature, between the sentence passed by the foreign court and Ethiopian Criminal law, such punishment as is the closest to that imposed in the foreign country shall be enforced. From this, it may be argued that the law that should apply during delegation is the criminal law of the delegated state because the stipulation of this provision will be irrelevant if what should be applied by the foreign court is the Ethiopian law. However, Art 12(3) still wants to regulate the period of limitation according to the Ethiopian Criminal Code by stating "...the enforcement of the penalty is not barred by limitation **under the provisions of this Code.**" (*emphasis added*). And this leads to question as to how can criminal sentence passed in accordance with a foreign criminal law be regulated according to the provisions of Ethiopian criminal law? Once a case has been delegated to a foreign country for the latter to try it according to its own criminal law, all the issues related to it, including the period of limitation shall be regulated according to the same criminal law. Regulating the sentence in one criminal code and the period of limitation in another would amount to regulating the same criminal conduct with two different criminal codes. That is why the author argues that the Criminal Code does not have clear stand on law that should apply.

⁶¹ GRAVEN, *supra* note 4, at 38.

⁶² Lefar, *supra* note 2, at 61 & 65.

⁶³ Jenia Iontcheva, Turner, *Interstate Conflict and Cooperation in Criminal Cases: An American Perspective, European Criminal Law*, EUROPEAN CRIMINAL LAW REVIEW 1-52, at 3 & 13, available at <http://ssrn.com/abstract=2473248>, (Accessed on 18 August 2018).

⁶⁴ Colangelo, *supra* note 9, at 126. It must be noted that applying criminal laws of one state over a given case is one component of its exercise of jurisdiction with respect to the case. See also Beale, *supra* note 9, at 241.

legal bases can be inferred from domestic and international law. It is only when a state has legally justified jurisdiction that it shall apply its criminal law. This is because “judicial jurisdiction and legislative jurisdiction are identical.”⁶⁵

In Ethiopia, the law states that “the authorities of the later (delegated country) shall be taken to have substituted themselves in the place of the corresponding Ethiopian authorities.”⁶⁶ As a result, the delegated state cannot be taken as exercising its own jurisdiction. It shall rather be taken as if it is exercising the jurisdiction of Ethiopia. Hence, unlike what Philip Graven opined,⁶⁷ the author argues that the country of refuge takes a responsibility to entertain the case as if the trial is happening in the courts of the delegating state. As Robert A. Leflar stated, “judicial jurisdiction and legislative jurisdiction are identical”⁶⁸ that they cannot exist and exercised separately from one another. In delegation of criminal jurisdiction, legislative jurisdiction shall thus be considered accepted or delegated together with the judicial jurisdiction. This makes the criminal law of the delegating state to be applied by the delegated state.

In addition, even in case when two or more states claim jurisdiction over a certain crime, the jurisdiction shall be exercised by the one with material and substantial connection with the case.⁶⁹ This can also be called as “interest analysis” which involves taking different factors into account and “identifying a state with the greatest interest in having its law applied.”⁷⁰ In other words, a state needs to have strong connection with the crime to exercise its jurisdiction over it.⁷¹ Specifically, if a state wants to apply its criminal law to regulate activities outside of its territory, the conduct must first cause injury to “the peace and good order of its territory”⁷² or it has to be justified by one of the principles of criminal jurisdiction. The “interest analysis test” basically considers two factors: “the geographical locations of acts” and “the effects of acts”⁷³ and identifies whose interest was more affected.⁷⁴

⁶⁵ Leflar, *supra* note 2, at 47.

⁶⁶ GRAVEN, *supra* note 4, at 38.

⁶⁷ *Id.* Graven stated his opinion in the following words. “**In the case of delegation**, Ethiopia which has the principal jurisdiction waives her right to try the offender and vests the exercise of the right in the country of refugee which will there upon have the principal jurisdiction and punish the offender under its own laws as though the offence had been committed in its own territory.” (*emphasis added*)

⁶⁸ Leflar, *supra* note 2, at 47. Within the context of criminal law, legislative jurisdiction is the power of a sovereign state to legislate the prohibited conducts by its own criminal law.

⁶⁹ SHAW, *supra* note 11, at 655.

⁷⁰ John Bernard Corr, *Criminal Procedure and the Conflict of Laws*, 73 THE GEORGETOWN LAW JOURNAL, 1217, at 1219 (1985), available at: <http://scholarshiatlaw.wm.edu/facpubs/839>, (Accessed on 1/9/2018). This principle of “interest analysis” or identifying the state with relatively better/best substantial connection with the case is a principle that is derived from the application of conflict of laws in civil cases. (See Leflar, *supra* note 2, at 49) . And as John Bernard Corr succinctly stated it “...application of certain conflicts principles developed many years ago in civil litigation is the best way-probably the only way-to achieve consistent and just results in this surprisingly sticky area (**choice of law**) of criminal law” (*emphasis added*).

⁷¹ Shlomit Wallerstein, *Delegation of Powers and Authority in International Criminal Law*, LEGAL RESEARCH PAPER SERIES PAPER NO 3/2013, 1-27, 3, (2014).

⁷² Edward S Stimson, *Conflict of Criminal Laws*, available at, www.constitution.org/cmt/stimson/con_crim.htm, (Accessed on 15 November, 2017).

⁷³ Leflar, *supra* note 2, at 49.

⁷⁴ Turner, *supra* note 63, at 28-29.

In USA, *Major v. Common Wealth of Kentucky* case, a murder committed in Kentucky was under trial in its court. The contentious issue was the choice of law, between the laws of Kentucky and Massachusetts, which should be applied to pass decision on admissibility of evidence extracted by tapping telephone conversation between a father (living in Kentucky and consented to the interception) and the suspect (living in Massachusetts). The court decided to apply the Kentucky law commenting that “Massachusetts did not have more significant relationship than Kentucky”⁷⁵ This judgment can be used to show the application of “the interest analysis test”. Because Kentucky had more significant relationship to the case than Massachusetts, Kentucky is considered to have the greatest interest. The experience in UK is also similar in this regard as England’s criminal law is applicable “if either the defendant’s act or its harmful consequences are located in England unless Parliament declares otherwise.”⁷⁶

At this juncture, it is important to make it clear that the choice of law experiences of the American courts is mostly in relation to conflict of criminal law between two American States. It should also be noted that American States have exclusive control over criminal matters committed inside their territory.⁷⁷ Moreover, they are considered as “severally sovereign, independent and foreign to each other in regard to their internal affairs.”⁷⁸ Since the thoughts, in the court cases, about choice of criminal laws are developed within this context, which is also true regarding conflict of criminal laws between two internationally sovereign states, the author argues that they can validly be applied to resolve some choice of criminal laws issues having international features including delegation of criminal jurisdiction.

Bringing the above experience to the case of delegated exercise of jurisdiction, the criminal law of the delegating state shall apply as creating the substantial (material) link between the crime and the law of the forum (country of refuge) will not be plausible in the existence of the law of the country of commission of the crime. Simply stated, the fact that Ethiopia is the place of commission of the crime and whose interest has been affected makes its criminal law to have a comparatively strong material connection than the criminal law of the delegated country.⁷⁹

Applying the criminal law of the delegating state is also justified when we examine the issue from another perspective. In the first place, it is clear that delegation can hardly be a ground for

⁷⁵ ROBERT L. FELIX & RALPH U. WHITTEN, *AMERICAN CONFLICTS LAW: CASES AND MATERIALS* 11-12, (5th ed., 2013).

⁷⁶ Lefar, *supra* note 2, at 59.

⁷⁷ Turner, *supra* note 63, at 3.

⁷⁸ Buxbaum, *supra* note 17, at 386.

⁷⁹ The “strongly connected” thesis based on the place of commission of the crime may be challenged when the victim and the perpetrator of the crime are not citizens of the place of commission of the crime. For example, let us assume that a citizen of country A, being in the territory of country B, commits a crime of homicide against the citizen of country C. In this case, one may argue that country A and C are more connected to the case than country B. Even in this case too, the author contends that country B is more connected than others because it is the right as well as the responsibility of every state to keep the security of its national and non-nationals on its territory. A state should not be considered as more concerned to its nationals abroad than foreigners living in its territory. Furthermore, whether the victim and perpetrator of the crime are locals or foreigners, the crime first affects the inhabitants of the place of commission of the crime. This provides country B with relatively more substantial connection/interest to the case than countries A and C.

exercise of jurisdiction because it is neither among the recognized principles nor a ground for the exercise of the recognized principles.⁸⁰ Secondly, it is understood that the existence of the ground/s (connecting factor/s) is mandatory to justify states exercise of extra-territorial jurisdiction. In other words, we can say that there is a presumption against extra-territorial application of criminal laws.⁸¹ As such, applying the criminal law of the country of refuge would amount to an extra-territorial application of its criminal law if the necessary link between its law and the crime remains loose or missing. In such situation, the application of criminal law of the forum state is not warranted by international law and perhaps under domestic laws. For example, the Fifth Amendment of the US Constitution prohibits the application of US Criminal Code to criminalize foreign conducts that are not subject to universal jurisdiction. According to this amendment, except in the case of a universal crime, there need to be an obvious connection between the criminal act and US before the criminal provisions of the US Criminal Code is applied.⁸² As per the interpretation given by the US Supreme Court to Sherman Act, the required connection is the impact that the conduct in question caused to the US.⁸³

In case of delegation, the delegation is only reason that creates a nexus between the country of refuge and the criminal case. This makes it appropriate for the court in the country of refuge to apply the criminal law of the place of commission of the crime which is “obviously connected” to the case. Since there is no impact that the crime has caused on country of refuge, to apply its law would be inappropriate and unjustified extra-territorial application of the law.⁸⁴ When we examine the application of the criminal law of the delegating country, it would not, however, entail extra-territorial application of criminal law. Firstly, the crime has been committed in its territory. Secondly, the country of refuge is exercising the jurisdiction of the delegating state. Indeed, it can still be justified based on territoriality principle, *i.e.* trying the accused based on criminal law of the place of commission of the crime.

The question of identifying the applicable criminal law can also be examined in the light of the dissenting judges’ opinion of the *Lotus* case.⁸⁵ In their decision on the case, the dissenting

⁸⁰ The recognized principles and grounds for the exercise of criminal jurisdiction are discussed briefly under section II of this paper.

⁸¹ Buxbaum, *supra* note 17, at 388-389.

⁸² Colangelo, *supra* note 9, at 123.

⁸³ Buxbaum, *supra* note 17, at 394. Even if Sherman Act was the law passed by the US Congress, in 1890, to regulate trade practices, the interpretation given by the Supreme Court can be used to clarify what connection between a crime and a country means in other kinds of crimes too. However, some authors opined that the nexus, between the criminal case and US, to apply the American law for extra-territorial conducts is required only if the accused would receive severe penalty than what would have been imposed under the law of the place of commission of the crime. This standard is relatively lower than requiring the existence of impact on America. (See Michael Farbiarz, *Extraterritorial Criminal Jurisdiction*, 114 (4) MICHIGAN LAW REVIEW, 507-557,510 (2016).

⁸⁴ This is said based on the assumption that there is no nexus, other than the delegation, between the crime and the country of refuge. If there are other grounds of justifying jurisdiction, the case of delegation and the choice of law may need to be examined differently so that the forum court may apply its own criminal law.

⁸⁵ The fact of the *Lotus* case can be summarized as follows. A French boat named *Lotus* was collided with another Turkish vessel named *Boz-Kourt*. As a result, some crew members in the latter died. When the French boat latter arrived at the Turkish port, the Turkish authorities arrested and prosecuted the crew members of the boat for the crime of manslaughter. France opposed this prosecution, and the case was submitted to Permanent Court of International Justice for it to decide on the appropriateness of the Turkish exercise of jurisdiction.

judges stated that the criminal law that should apply is that of the place of commission of the crime.⁸⁶ When we put delegation of criminal jurisdiction in context, given that there is no other ground of nexus, the applicable criminal law is the criminal law of the delegating state (place of commission of the crime). The county of refuge has to either extradite the offender to the former or try the accused according to the criminal law of the delegating state.

In criminal law, the application of a law over a certain action or omission is believed to have historical explanation based on territoriality justifications.⁸⁷ In the case of choice of law, whether it is criminal or civil case, the chosen law must be helpful to achieve the “socio-legal purposes that choice of law process need to serve”.⁸⁸ The factors that need to be considered to decide on the choice of law can be studied in this regard. The factors are predictability of results, maintenance of interstate and international order, simplification of judicial task, advancement of the forum’s governmental interests and better application of rule of law.⁸⁹ Applying the criminal law of the place of commission of the crime in case of delegation is, therefore, more or less justified when it is evaluated based on these factors. Doing so is more helpful to “maintain predictability of results” as it makes it clear that the offender will be subjected to the criminal law of the delegating state irrespective of the forum of trial. On the contrary, given the numbers of countries to which the accused may abscond, predictability can hardly be maintained if the law of country of refuge applies. This is because it makes the issue highly subjective and relative to how the law of the country of refuge reacts to the crime that he is accused for.

“Maintenance of interstate and international order” can also be better safeguarded through the application of criminal law of the delegating state. The offender will still be tried according to the criminal law of the delegating state even if he absconds to another country. This would discourage potential criminals who would otherwise violate the criminal law of a country if they think that there is modest treatment or mitigated penalty in the country of refuge. This is important in maintaining peace/order in the two respective countries and internationally.

Furthermore, there is no visible interest of the forum country that could be affected when it applies the criminal law of the delegating country. Indeed, as delegation is subject to the prior consent of the country of refuge,⁹⁰ it can reject delegation if it thinks that it would be against its national interest or if it does not believe in the appropriateness of the prosecution, especially when the conduct is not a crime according to its law. Once the country of refuge accepts the delegation, it is fair to assume that it believes in the appropriateness of the prosecution and there is no visible interest that can be affected by applying the criminal law of the delegating state. In fact, applying Ethiopian criminal law has the potential to serve the interest of the forum state as it can be used as a basis to claim similar treatment (reciprocity) from the delegating country when the latter, some other time, accepts delegation of criminal jurisdiction from the former.

⁸⁶ Stimson, *supra* note 72.

⁸⁷ Lefar, *supra* note 2, at 47.

⁸⁸ *Id.*, at 55.

⁸⁹ *Id.*, at 6.

⁹⁰ GRAVEN, *supra* note 4, at 37.

Applying Ethiopian criminal law can also contribute in the better application of rule of law. Rule of law encompasses principle of legality which requires for criminal laws to be stated publicly in advance and equally applied on individuals who are under its scope.⁹¹ When one goes against the criminal law of a country, he is believed to be informed, from publicized criminal law of the land, as to what kind of repercussions his action/omission would entail. If he violates the law, it is taken as acceptance from his side for any corresponding punishment unto him.⁹² In other words, "...legal effect of an individual's conduct always depends on one's law and not upon the law of any other country into whose territory he may subsequently go."⁹³ There is nothing that holds this conception of principle of legality and rule of law inapplicable in case of delegation of criminal jurisdiction.

It is commented that in case of delegated exercise of jurisdiction, the criminal law of the place of commission of the crime can be applied by the country of refuge if it is more favorable to the accused than the law of country of refuge so that principle of legality can be upheld.⁹⁴ However, applying the criminal law of the delegating state only when it is favorable to the accused does not seem to be in line with the basic feature of the principle of legality. It is true that rule of law and principle of legality are designed to protect the interest of the accused. However, protecting the interest of the accused has to be seen within the context of the interest of the society against whom the crime was committed. In delegation, treating the offender based on the law he has violated would be in his best interest as he is presumed to be informed about the consequences of his action/omission. Secondly, in crimes other than those punishable upon complaint, it is the society which is the victim of the crime. As such, applying the criminal law that its representatives have passed would be in the best interest of the society. Moreover, the act of a person who would commit a crime in one country and abscond to another shall not be promoted by applying a lenient punishment of the country of refuge. This is because applying the criminal law that favors the offender would encourage potential offenders to commit a crime in one country and escape to another country to face lesser punishment. This will fly in the face of rule of law and maintenance of order in the country/place of commission of the crime.

It is also known that principle of equality before the law is the other element of rule of law. Applying the criminal law of the country of refuge may sometimes violate this principle. For instance, let us assume that two or more individuals have principally participated in the commission of a crime in Ethiopia and each absconds to different countries and Ethiopia gives delegation for each of them. If the law of the country of refuge is to be applied, there will be a possibility for each to receive different penalty. This is against the principle of equality because the same provision must be cited against those who have principally participated in the same crime. This outcome can be minimized, if not avoided, if all of the countries of refuge apply the

⁹¹ BRIAN Z. TAMANAHA, *THE HISTORY AND ELEMENTS OF THE RULE OF LAW*, at 236, 240.

⁹² Simeneh Kiros, *Methods and Manners of Interpretation of Criminal Norms*, 11 (1) MIZAN LAW REVIEW 88, 104&105 (2017).

⁹³ Stimson, *supra* note 72.

⁹⁴ GRAVEN, *supra* note 4, at 38.

criminal law of the delegating state. This is another illustration for why applying the law of the delegating state, is helpful for “better application of rule of law.”

Among the listed factors above,⁹⁵ the only goal that is relatively difficult to be achieved is “simplification of the judicial task”. In fact, this problem can still be minimized through the assistance that can be provided by the delegating country. In the America’s experience, one of the reasons why courts of one state are prohibited from applying the criminal laws of other states is because “... the diplomatic processes of extradition and interstate rendition would give adequate relief against absconding parties.”⁹⁶ Here, “The true rule is not that foreign penal laws will not be enforced, but that an accused will not be tried for violating a foreign criminal law and the reason for it is that the trial can more conveniently be held in the state where the accused was in at the time of the conduct in question.”⁹⁷ In the case of delegation, when these two points are put together, the accused “cannot conveniently be tried” in the place of commission of the crime because he absconds to other country. And it is because extradition is not possible that a state would resort to delegation.⁹⁸ Consequently, the “possibility of extradition” cannot be presented again as a justification not to apply the foreign criminal law. Since the reasons for the prohibition of giving effect to foreign criminal law are inexistent in case of delegation, it is therefore possible to apply the criminal law of the delegating state so far as it is appropriate to the case.

Indeed, the author argues that absence of extradition and the adoption of delegation should be taken as compromise between the conflicting interests of the state where the crime is committed and that of the suspect. When a person absconds to a foreign country after committing a crime, it would be in the best interest of the state if the suspect is extradited and tried according to its criminal law. The absence of this extradition is believed to work in the interest of the suspect because, *inter alia*, he is saved from being subjected to the court and law enforcement agencies by which he does not want to be treated. If it is a compromise, the country shall not therefore be disadvantaged for the second time by holding its criminal law inapplicable. As the suspect is benefited, at least in principle, from the absence of extradition, he shall come half way and be tried in accordance with the criminal law of the delegating state.

As an adverse argument to what is stated in the aforementioned paragraphs, one may argue that the question of choice of criminal law shall be answered in accordance with the municipal law of the delegated state. Some may also take setting the applicable law could be going beyond the limits and intruding into the sovereignty of other countries.⁹⁹ Nonetheless, it should be noted that, even in the existence of municipal law, courts are expected to make judicial interpretation

⁹⁵ As already stated, the other factors that should be considered in determining the applicable law are predictability of results, maintenance of interstate and international order, advancement of the forum's governmental interests and application of the better rule of law.(Lefar, *supra* note 2, at 6).

⁹⁶ Lefar, *supra* note 2, at 47.

⁹⁷ Stimson, *supra* note 72.

⁹⁸ Art. 12(1) of the Criminal Code which makes conferring delegation conditional upon the absence of extradition of the offender, from the country of refuge, can be taken as example here.

⁹⁹ Buxbaum, *supra* note 17, at 385.

when the application of a certain law would result in unintended outcomes.¹⁰⁰ This provides them the discretion to apply other set of law which they believe is appropriate to the case.

Moreover, if sovereignty is the justification not to execute criminal law of other countries, its influence will be minimal when it comes to delegation. Undoubtedly, delegation is to be given based on the prior consent of the states concerned.¹⁰¹ Once the country of refuge consents to exercise the delegated jurisdiction, it is fair to assume that the focus shall be more to cooperation (between the two states) to provide justice over the case.¹⁰² In USA, for example, one of the opinions on the choice of law suggests that the forum court shall apply the law of the *situs* (the place where the investigation was conducted) if it finds it appropriate. Such actions of the forum court will be in line with “cooperative federal venture”.¹⁰³ This sentiment of cooperation to provide justice can also be presumed to exist in the case of delegation of criminal jurisdiction.¹⁰⁴ Justice, among others, requires the application of the best law to the case and this is one of the reasons why court of one state, in civil cases, applies the relevant laws of another state.¹⁰⁵ This is also true in the case of cooperation by delegating/accepting criminal jurisdiction because of the justifications discussed above, *i.e.*, justice will be best served when the applicable law is the law of the delegating state.

Generally, due to the reasons discussed in this section, the delegated country shall try the offender in accordance with the Ethiopian criminal law when Ethiopia delegates its criminal jurisdiction to the countries of refuge.

B. The Applicable Criminal Law when Ethiopia is Delegated Country

Sometimes a suspect after committing a crime inside the territory of other sovereign states might escape and seek refuge in Ethiopia. In this case, the state where the crime has been committed may request for extradition of the suspect and Ethiopia may not accept the request due to different reasons.¹⁰⁶ Following this, the foreign state may request to delegate Ethiopia for the suspect to be tried in Ethiopia. The acceptance by Ethiopia of the delegation would similarly give rise to the question of choice of criminal law that should be applied by Ethiopian courts.

¹⁰⁰ Lefar, *supra* note 2, at 44 &57.

¹⁰¹ GRAVEN, *supra* note 4, at 37.

¹⁰² Here, even if the decision to give and accept delegation is also a political decision in addition to being legal, once delegation is accepted, the trying court in the country of refuge, at least in principle, shall focus on ascertaining how to arrive at a just decision with respect to the case.

¹⁰³ Turner, *supra* note 63, at 28-29.

¹⁰⁴ As it is said before, if the country of refuge is not interested to be delegated/cooperate, it is still within its sovereign power to reject the request for delegation.

¹⁰⁵ Ibrahim Idris, *The Applicability of Foreign Civil Laws: A Case Comment on Civil Appeal No 852/73*, 13 JOURNAL OF ETHIOPIAN LAW 227, 228 (1986).

¹⁰⁶ As per Art 21(2) of the Criminal Code, Ethiopia shall decline from extraditing the offender if the offender is an Ethiopian national (either at the time of request or at the time of commission of the crime). The request may also be rejected if there is no extradition treaty between Ethiopia and the country requesting the extradition or in case when the case cannot be covered by the terms of the extradition treaty if any. Moreover, according to Art 21(1), the request for extradition shall also be rejected if the crime over which extradition is sought for falls under Ethiopia's exercise of principal jurisdiction according to Art 13 of the Criminal code (Protective Principle).

Before proceeding to the choice of law question, it is important to examine if the Ethiopian law recognizes delegation of criminal jurisdiction to Ethiopia. The delegation of criminal jurisdiction to Ethiopia is not expressly recognized under the Criminal Code and Article 12 of the Code deals only with delegating Ethiopia's criminal jurisdiction to other countries. However, the absence of explicit recognition in the Code to delegation of criminal jurisdiction from other countries cannot enable the accused to object based on lack of jurisdiction because, first of all, "there is no inherent problem with states delegating their power to punish to other states."¹⁰⁷ More importantly, the delegated state should not be taken to be exercising its own jurisdiction, but the jurisdiction "on behalf of the delegating state."¹⁰⁸ The accused cannot object the jurisdiction of the latter since it is the place of commission of the crime and by extension the jurisdiction of the delegated state cannot also be challenged.

Besides, the author contends Ethiopia may accept delegation of criminal jurisdiction from other countries. It is not logical to assume that the legislator of the Criminal Code would prohibit delegation from other countries while it recognizes the possibility for delegating Ethiopia's criminal jurisdiction to other countries. Indeed, if Ethiopia envisages delegating its criminal jurisdiction to other countries in "special cases", it is reasonable to assume that it is also ready to accept the request for delegation of criminal jurisdiction from other countries.¹⁰⁹ Nevertheless, for Ethiopia's acceptance /exercise of delegation from other countries to give sense, the crime should fall neither under the principal nor subsidiary application of the Criminal Code. If the crime is the subject of either the principal or subsidiary application of the Criminal Code, the Code shall be implemented over the crime.¹¹⁰ This means that Ethiopia can exercise its criminal jurisdiction in its own right. However, Article 18(2) of the Criminal Code, which states about the subsidiary application of the Code on crimes which are committed outside of Ethiopia, is worth considering here. The full text of the provision reads as:

In the case of all other crimes committed outside Ethiopia by a foreign national, the criminal shall, save as otherwise expressly provided, failing extradition, be prosecuted and tried only if the crime is punishable under Ethiopian law with death or with rigorous imprisonment for not less than ten years.¹¹¹

Article 18(2) brings crimes committed outside Ethiopia by a foreigner under the subsidiary application of the Criminal Code. Accordingly, if extraditing the suspect is not possible and "the crime is punishable under Ethiopian law with death or with rigorous imprisonment for not less

¹⁰⁷ Wallerstein, *supra* note 71, at 1.

¹⁰⁸ GRAVEN, *supra* note 4.

¹⁰⁹ It is not to mean that Ethiopia should always accept delegation from other countries. As it is stated, delegating and accepting criminal jurisdiction is not purely legal issue. What type of the crimes to delegate? Whom to delegate? When to delegate? etc. have also political dimensions. So, Ethiopia's decision to accept or not to accept the delegation of criminal jurisdiction may depend on the actual circumstances of a given case. In any case, the legal room must be open to accommodate the possibility of accepting delegated criminal jurisdiction from other countries.

¹¹⁰ CRIMINAL CODE, *supra* note 5, Art 11-19.

¹¹¹ *Id.*, Art.18(2). The phrase "all other crimes" refers to crimes committed by a foreigner outside of Ethiopia that cannot be covered under other provisions regulating the principal and subsidiary application of the Code.

than ten years”¹¹², the case is under the subsidiary application of the Criminal Code so that Ethiopia can exercise its subsidiary criminal jurisdiction over the suspect.¹¹³ And this can be done without getting delegation of criminal jurisdiction from the country under whose territory the crime has been committed or whose interest has been affected by the crime or others.

However, the author would like to comment the legislator of the Criminal Code should not have brought crimes referred in Art 18(2) under Ethiopia’s subsidiary jurisdiction. Rather, they should have been prescribed as crimes over which Ethiopia should get delegation to exercise jurisdiction. This is because Art 18(2) talks about a foreigner who has committed a crime outside of Ethiopia and the only connecting factor between the case and Ethiopia is the fact that the suspect has sought refuge in Ethiopia.¹¹⁴ Ethiopia’s exercise of jurisdiction on this kind of cases, by her own right, will not be compatible with the recognized principles of criminal jurisdiction.¹¹⁵ Unless it is supported by one of the principles for criminal jurisdiction, states exercise of jurisdiction may be taken as inappropriate and hence unacceptable by another state as well as international law.¹¹⁶ And according to the principles, the presence of the suspect under the territory of one country (after committing crime in the territory of another country) *per se* is not recognized as a ground to assume jurisdiction over him. In the case of crimes stated under Art 18(2), Ethiopia, as a country under whose territory the suspect found himself, may either extradite him to the country of commission of the crime (if it is possible) or needs to get delegation to prosecute the suspect. It would be unjustified extra-territorial exercise of criminal jurisdiction if Ethiopia starts prosecuting the suspect without being delegated. Moreover, prosecution without delegation has also a potential to expose the offender to double jeopardy as the country of commission of the crime may not necessarily be bound by the sentence passed in Ethiopia.¹¹⁷ Thus, so far as there is no other connecting factor and no interest is affected, this danger of double jeopardy could have been avoided had the legislator of the Criminal Code made

¹¹² *Id.*

¹¹³ It brings under the subsidiary criminal jurisdiction of Ethiopia because jurisdiction encompasses legislative, judicial and executive jurisdictions. (Beale, *supra* note 12, at 241, see also Shaw, *supra* note 13, at 652) In addition, “legislative jurisdiction and judicial jurisdiction are identical” (Lefar, *supra* note 2, at 47).

¹¹⁴ The fact that a foreigner sought refuge in Ethiopia after committing a crime abroad is taken as the only connecting factor (between the crime/s and Ethiopia) because if there is any other connecting factor, there will be a possibility for the case to fall under other provisions of the Criminal Code which regulate its applicability with respect to place and this would make the presence of Art 18(2) irrelevant. This is what can be concluded from the part of Art. 18(2) which says “....In the case of all other crimes committed outside Ethiopia...” and from Art. 18(1) which says “...save as otherwise expressly provided...”

¹¹⁵ Since the crime has been committed outside Ethiopia, it is out of territoriality principle. There is also no principal interest of Ethiopia that is affected, by the crime committed abroad, and this makes the case out of the Protective Principle. And the suspect is not Ethiopian or has not victimized Ethiopian to bring him under the Nationality Principle. Furthermore, the crimes are not of the nature that can make them subjected to the Universality Principle. As said, if the crime falls under one of these principles, the relevance of Art. 18(2) will be questionable.

¹¹⁶ SHAW, *supra* note 11, at 652; Malanczuk, *supra* note 16, at 111.

¹¹⁷ According to Art.16 of the Criminal Code, if a crime falls under Ethiopia’s principal jurisdiction, the sentence passed by a foreign court over a crime may not bind Ethiopia and the suspect may be prosecuted again for the same crime in Ethiopia. And the country in whose territory the crimes mentioned under Art 18(2) of the Criminal Code have been committed may also have the same kind of provision in its criminal law.

delegation from other countries a requirement before Ethiopia exercises jurisdiction over crimes under Art 18(2).

In all other cases, as stated earlier, Ethiopia may accept delegation of criminal jurisdiction from other countries. This will in turn pose questions pertaining to choice of appropriate criminal law to be applied by Ethiopian Courts. All the discussions regarding the choice of applicable criminal law when Ethiopia is a delegating state are, *mutatis mutandis*, valid. This makes the criminal law of the respective delegating country the applicable law by the Ethiopian courts. The application of the criminal law by Ethiopian courts of the delegating state in their exercise of delegated jurisdiction can also be vindicated when it is seen from another perspective. As it is said, no mention has been made in the Criminal Code regarding delegation from other countries. With this, it can be argued that it is only on the mentioned grounds for its principal and subsidiary application that the Criminal Code shall apply. In addition, it is presumed that the legislator has exhaustively listed down grounds that allow application of the Criminal Code. In all other grounds which are not mentioned including delegation, the Criminal Code shall not apply. Otherwise, it could be taken as being in defiance with the principle of legality which, among others, regulates the application of the Criminal Code with respect to place.¹¹⁸ This, together with the presumption against extra-territorial application of criminal laws,¹¹⁹ will lead to conclude that the applicable law should be the criminal law of the delegating state when Ethiopia accepts delegation from other countries.

V. CONCLUSION

When a foreigner after committing the crime in Ethiopia absconds to another country with no possibility of his/her extradition, Ethiopia may delegate the exercise of its criminal jurisdiction to the country of refuge according to Article 12 of the Criminal Code. In the same vein, another country may also delegate Ethiopia. Such acts of delegation of criminal jurisdiction triggers the question of choice of law which entails identification of the criminal law that the delegated country shall apply. This Article concludes that the applicable criminal law in case of delegation shall be the criminal law of the delegating state for the following main reasons.

The old conception that characterizes jurisdiction on strictly territorial sovereignty has come to be obsolete. Thus, when a court is faced with choice of law question in criminal matters, it has to choose the appropriate law by considering different factors. The interest which has been most affected by the crime (interest analysis test) is among the factors to determine the county having substantial connection with the crime. Though the principle of interest analysis is developed in the application of conflict of laws in civil cases, various courts have used it to resolve the choice of law question in criminal matters. In the case of delegated exercise of criminal jurisdiction, unless there is evidence to the contrary, the delegating state (where the crime is committed) is

¹¹⁸ Simeneh, *supra* note 92, at 108.

¹¹⁹ Buxbaum, *supra* note 17, at 388-389.

presumed to have strong connection with the crime and that the crime affects its interest. This makes its criminal law the appropriate law to be applied by the court in the delegated country.

Moreover, the law to be chosen by courts must be able to satisfy the purpose of the choice of law process. Since one of the main objectives of choice of law is rendering justice, the law that has historical and territorial connection with the place of commission of the crime is relatively helpful than other criminal laws. Save for some exceptional situations, this is because a crime should be taken to be organically connected to its place of commission. As a result, it is when the law of the place of commission of the crime is applied that the justifications and historical explanations that give impetus for the drafting of the criminal law can at the same time be applied and best serve justice. This can also go together with the sentiment of cooperation that is believed to exist between the two countries.

In addition, applying criminal law of the delegating state is also helpful to maintain predictability of results in criminal proceedings, to preserve interstate and international order, and application of relatively better rule of law. Furthermore, it is identified that states exercise of criminal jurisdiction shall be supported by at least one of the grounds for territorial or extra-territorial criminal jurisdiction. Since delegation is not among the recognized principles for criminal jurisdiction, applying the criminal law of the delegated country would amount to inappropriate exercise of extra-territorial jurisdiction of the country of refuge. On the other hand, since the delegated state is exercising the jurisdiction of the delegating state and since judicial and legislative jurisdiction are inseparable, the application of the criminal law of the delegating state can still be justified by territorial jurisdiction.

Due to the above reasons, when there is delegation of criminal jurisdiction between Ethiopia and other countries, the court in the delegated state (forum state/country of refuge) shall therefore apply the criminal law of the delegating state to entertain that specific case.

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