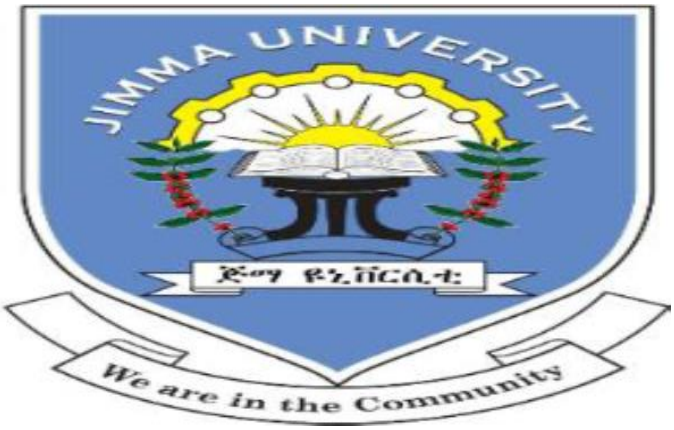


# JIMMA UNIVERSITY

# COLLEGE OF LAW AND GOVERNANCE

# SCHOOL OF LAW

**Title of the Research**

# The 2018 AMNESTY LAW IN ETHIOPIA: A VIEW FROM PROTECTION OF VICTIMS' RIGHTS AND THE OBLIGATION TO PROSECUTE.

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS OF LL.M. DEGREE IN HUMAN RIGHTS AND CRIMINAL LAW**

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**JIMMA, ETHIOPIA**

**OCTOBER 2, 2019**

## Declaration

I declare that this thesis titled 'The 2018 Amnesty Law in Ethiopia: A View from Protection of Victims' Rights and Obligation to Prosecute' is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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# Acknowledgment

The success of any academic achievement like this one cannot be the monopoly of a single individual. This work has in one way or the other received important contributions from many different people of diverse wisdom, profession and expertise. My diary of acknowledgements can hardly miss the enormous intellectual, material and moral support that I received from the following people:

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## List of Abbreviations and Acronym

| | |
|---|---|
| ACHPR | African Charter on Human and Peoples' Rights |
| AUO | African Union Organization |
| GC | Geneva Convention |
| ICCPR | International Convention on Civil and Political Rights |
| HRC | Human Rights Committee |
| FDRE | Federal Democratic Republic of Ethiopia |
| IAC | International armed Conflict |
| NIAC | Non-International Armed Conflict |
| UNSC | United Nation Security Council |
| UN | United Nation |
| IACtHR | Inter-American Court of Human Rights |
| ACHPR | African Charter on Human and People's Rights |
| ECHR | European Court of Human Rights |
| EUCHR | European Union Convention for the Protection of Human Rights and Fundamental Freedoms |
| IACHR | Inter-American Commission of Human Rights |
| UDHR | The Universal Declaration on Human Rights |
| HPR | House of Peoples Representatives. |

## Table of Contents

Declaration ..... i

Acknowledgment ..... ii

List of Abbreviations and Acronym ..... iii

Abstract ..... vi

**CHAPTER ONE** ..... 1

INTRODUCTON ..... 1

1.1. Background of the Study ..... 1

1.2. Statement of the Problem ..... 3

1.3. Research Questions ..... 6

1.4. Significance of the Study ..... 6

1.5. Objectives of the Research ..... 7

1.5.1. General Objectives ..... 7

1.5.2. Specific Objectives ..... 7

1.6. Scope of the Study ..... 7

1.7. Methodology ..... 7

1.8. Structure of the Study ..... 9

**CHAPTER TWO** ..... 10

The 2018 Ethiopian Law on Amnesty and the Obligation to Investigate and Prosecute Human Rights Violations ..... 10

2.1. Introduction ..... 10

2.2. The General Legal Duty of States to Ensure the Effective Protection of Human Rights ..... 10

2.2.1. Norms and Jurisprudence at International Level ..... 11

3.2.2. Norms and Jurisprudence at Regional Level ..... 12

2.3. Amnesty and the Duty to Investigate and Prosecute in International Law ..... 15

4.4. State Duty to Investigate and Prosecute under International Human rights law ..... 23

2.4.1. Norms and Jurisprudence at Universal Level ..... 23

2.4.2. Norms and Jurisprudence at Regional Level ..... 26

2.5. The Adequacy of Ethiopia's Amnesty Proclamation No. 1096/2018 in Addressing Ethiopia's Obligation to Investigate and Prosecute ..... 30

2.5.1. The FDRE Constitution with respect to Investigation and Prosecution ..... 41

**CHAPTER THREE** ..... 44

States Duty to Provide Effective Remedies for Victims of Human Rights Violation(s) Under International Laws and, its Implication for 2018 Ethiopia's Amnesty Law ..... 44

3.1. Introduction ..... 44
3.2. The Notion of Victim ..... 45
3.3. The Right to Justice' ..... 47
3.3.1. The Adequacy of Ethiopia's Amnesty in Addressing the Obligation to Ensure the Right to Justice ..... 50
3.4. The Right to Truth ..... 52
3.4.1. The Adequacy of Ethiopia's Amnesty in Addressing the Right to Truth ..... 55
3.5. The Right to Reparation ..... 56
3.5.1. The Adequacy of Ethiopia's Amnesty in Addressing Effective Reparation ..... 59
**CHAPTER FOUR** ..... 62
Conclusion ..... 62
BIBLIOGRAPHY ..... 66

# Abstract

The purpose of this study is to examine the Federal government amnesty law in line with victims' rights and Ethiopia's international obligation to prosecute serious violation of human rights and egregious international crimes. Moreover, the study seeks to determine the extent to which amnesty law program could be compatible to States international obligation, highlights the States duty to prosecute and ensure victims' rights, and identify the implications to Ethiopia's amnesty law. Based on international laws, jurisprudence, published literatures and other sources, the study identifies that States cannot have exempted from its obligation to protect victims' rights and prosecution of gross violations of individual rights and freedoms. Nevertheless, due to societal interest or resource constraints in divided societies, the study identified that States have a room to prioritize to prosecute the more responsible whilst granting amnesty to less responsible conditionally that can send strong message that all offenders are held accountable under the criminal justice systems. Further the study discovered that Ethiopia's amnesty law failed to ensure victims' rights and Ethiopia's obligation to prosecute, and are thus can evades the intended purpose of amnesty law to secure peace and reconciliations. Therefore, the adoption of amnesty as tool of achieving its rational can be justified when such a minimum standard particularly with the worst crimes and their particular class of more responsible offenders takes the form of prohibition against amnesty so as to prosecute them in criminal trial. Whilst with others benefiting from amnesty that takes into account the aspiration underlying prosecution, and provided that victims right ensured and investigation of all crimes thoroughly conducted are legitimate at list from view of victims and obligation to prosecution.



**Keyword**: Amnesty laws, gross human rights violations, selective prosecutorial strategy, victims right, investigation and prosecution for violations.

# CHAPTER ONE

# INTRODUCTON

## 1.1. Background of the Study

The current EPRDF ruling new government of Ethiopia seems to have been undergoing a transition period since April 2018, the date on which protests ended and the new Prime Minister Abiy Ahmed Ali took office. However, at the time of upon the coming to power of EPRDF ruling new government in May, 1991, ending seventeen years of human rights abuses of the Dergue regime, it was expected to respond towards the legacy of human rights abuses so as to heal the victims from their wounds and to prevent future human rights violations.[1] Upon the takeover of power, rather than granting amnesty for massive human rights violations committed under Dergue regimes, the current government opted to punish them including the former president Mengistu Haile- Mariam (in absentia) for, inter alia, 1,922 murders and 194 disappearances, as well as the arbitrary imprisonment of opponents and for torture of political prisoners.[2]. According to the leaders of the current government of Ethiopia, there were two reasons to opt criminal prosecution during transition: first, the scope of human rights abuses is as heinous as to be a concern of the international community; and second, a court trial is a legal process that all Ethiopians were accustomed to and for which its judgement would be respected and perceived as impartial.[3]

Ethiopia ruling government's after 28 years has restored new Prime Ministers Abiy Ahmed, and under his ruling, he has embarked on a wide-ranging transformative reform in Ethiopia and a regional integration initiative in the Horn of Africa region. Recently, under Abiy's initiative, leaders of Somalia, Ethiopia and Eritrea who have never come face to face to build

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[1] Human rights watch/Africa, 'Ethiopia: Reckoning Under the Law: Human Rights Watch/Africa Reports on the Process of Accountability and Justice of the Transitional Government of Ethiopia and its Special Prosecutor's Office'(Human Rights Watch/Africa 1994) <https://search.library.wisc.edu/catalog/1910081032602121>. Accessed 8 June 2019.

[2] See Amnesty International, 'South Africa: Mengistu - the Opportunity for Justice Must Not be Lost' (Amnesty News 7 December 1999). <https://www.amnesty.org.uk/press-releases/mengistu-opportunity-justice-must-not-be-lost> accessed 8 June 2019.

[3] C. Schaefer, 'The Derg Trial Versus Traditions of Restorative Justice in Ethiopia', in T. Kjetil et al. (eds.) *The Ethiopian Red Terror Trials: Transitional Justice Challenged* (Oxford: James Currey Publishers, 2009) 68-83.

peace in the Horn have now been invited by the charismatic Premier, Abiy.[4] Now that the Horn of Africa nations have pledged to make peace. Internally too, under PM Abiy, his ruling party has widened the political space allowing opposition and opponents to operate legally, as such moving towards peace and reconciliation have been started.

Most importantly, in order to further the internal reform, his government has also issued amnesty law. The new amnesty proclamation named *to provide amnesty to outlaws who have participated in different crimes 1096/2018*[5] was said to be essential to advance the democratization process in Ethiopia by widening the political space in the country.[6]

When awarding amnesty is launched by Ethiopian government as part of sweeping reforms under PM Abiy Ahmed, a number of exiled political forces were returned the country. The prominent group that were engaged in armed struggle against the government are Ginbot-7 lead by prof. Brehanu Nega, and OLF lead by Dawud Ibsa, to which the Ethiopian Parliament has branded as terrorist groups as per the anti-terrorism proclamation and later on they are unlisted from terrorist groups through the amnesty proclamation. Despite awarding amnesty, tensions were high following clashes between particularly rebel group OLF militiamen led by Dawud Ibsa and federal security forces, BBC Amharic reported.[7] Deputy Chief of Staff of the Defense forces, General Berhanu Jula said that a grave damage was inflicted in Western Oromia by OLF's armed group in the past few months[8]. In early October last year, Chief of the OLF, Dawud Ibsa, said that 'OLF does not have specific agreement with Ethiopian government, requiring it to disarm and struggle peacefully in Ethiopia.[9] However, when awarding amnesty is launched by Ethiopian government, it was intended to achieve peace, stability and reconciliation.

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[4] Herald, 'Interview Transcript with Costantinos: Contemporary Socio-Economic & Political Transition in Ethiopia & the Horn of Africa' (Respublica Litereria, ISSN 2018) 2 <*https://addisababa.academia.edu/CostyCostantinos*> accesses February 2019.

[5] FDRE Proclamation to Provide Amnesty to Outlaws Who Have Participated in Different Crimes (2018) No. 1096/2018, Entered in to Force on 13th July 2018 (my translation and also hereinafter concerning this relevant law).

[6] Y. Abiye, 'MPs Pass Landmark Amnesty Bill' (July 21, 2018) www.thereportereethiopia.com/article/mps-pass-landmark-amnesty-bill (accessed June10, 2019).

[7] Cited from Addis Standard, 'News: Ethiopia Defense Force Begins Airstrike in Western Oromia; Says Targets are OLF Military Training Camps' (2018). <Addisstandard.com/News-Tension-October-29/2018/addis-abeba> (accessed February 24, 2019).

[8] Ibid.

[9] Ezega, 'Clashes Between Rebel Group Oromo Liberation Front(OLF) Militiamen Led by Dawud Ibsa and Federal Security Forces' <https://www.ezega.com/news December 16,2018> (accessed in February 24, 2019).

According to the preamble of the proclamation, the law is issued for the purpose of creating and facilitating democratic order; ensuring peace and security; promote national consensus and forgiveness by eradicating hatred and mistrust among one another; and fostering the individual or collective reincorporation into society and facilitating the return of exiles by exempting them from a criminal accountability.[10] In principle it is worthwhile to the facts of awarding amnesty by the government, provided it is done in line with international laws adopted by Ethiopia and the spirit of the supreme law of the country of our constitution with due regard to victims' rights and prosecution of serious human rights crimes. This law is the subject of the analysis in this study.

## 1.2. Statement of the Problem

Amnesty has been the most favored and the most controversial mechanisms contemporary societies have used for the past four decades to address violent pasts, particularly when faced by conflict.[11] According to Mallinder, there have been 'over 506 different amnesty processes all over the world since the end of the Second World War to January 2008'.[12] Even though amnesties are very common and controversial, most studies that focus on impacts of amnesties, however, look at the effects on the rule of law and the stability of the government in a country as well as on society in general[13]. Research that does focus on the impacts of amnesties can provide many different insights. The impacts of amnesties on States obligation under international law with regard to the obligation to prosecute certain crimes and to ensure victims effective remedies, is not often looked at.[14] Nevertheless, it is important to look at impacts of amnesties on Ethiopia's duty to prosecute violation and to ensure victims' rights for several

[10] Federal Democratic Republic of Ethiopia's Proclamation to Provide Amnesty to Outlaws Who Have Participated in Different Crimes (2018) No. 1096/2010, Entered in to Force on 13th July 2018, preamble. (herein after amnesty proclamation No. 1096/2010).
[11] Dr. L. Mallinder, 'Global Comparison of Amnesty Law' [2009] *Queen's University Belfast* pt 1. Available at: https://www.academia.edu/8619949 (accessed on 10 may 2019).
[12] Ibid.
[13]C.P. Trumbull, 'Giving Amnesties a Second Chance' (2007) 25 (2) *Berkeley Journal of International Law* 320.
[14] M. Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge: Cambridge University Press, 2009) 3. Freeman noted that granting amnesties can be considered a direct hinder to victim's justice, especially to pursuing criminal accountability of perpetrators, but also to truth and reparation mechanisms.

reasons. States defend and justify the use of amnesties 'as they are successful in luring armed actors to demobilize, enter to peace agreements, and are thus an important tool to secure peace.[15]

However, regardless of its alleged importance, amnesty may need to take account of two significant notions in international law.

First, gross violations of human rights and international crimes that underpinned in treaty and customary international law, to which Ethiopia is adherent or State party of, requires and indeed imposed the obligation to investigate and prosecute upon States.[16] Also these obligations of states to prosecute are affirmed many times by other international and regional human rights bodies.[17] Further, the FDRE Constitution prohibits the application of amnesty for certain types of gross violation of human rights, requiring criminal accountability of perpetrators of such violations.[18] Therefore, in accordance with those obligations and the limits they impose, States may adopt certain measures to promote reconciliation and peace, one of which is amnesties.

The current amnesty law of Ethiopia, is applied and granted to individuals and groups for a number of crimes committed at any time before May 7,2018 including crimes punishable under anti-terrorism proclamation as well as crimes against the constitutional order and armed struggle

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[15] J. Edet and B.E. Kooffreh, 'Transitional Justice in Post Conflict Societies: Underscoring the Debates on Amnesty versus Victims' Rights' (2018) 73 *Journal of Law, Policy and Globalization ISSN* 139. <https://www.researchgate.net/publication/325746678,>

[16] For instance, from article 4 of the Convention on the Prevention and Punishment of the Crime of Genocide, article 7 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or punishment, and the four Geneva Conventions, OAU convention on prevention and combating terrorism, grave breaches under the system of grave breaches set out in the four Geneva Conventions of 1949 (Arts. 49, 50, 129 and 146, respectively) and Additional Protocol I of 1977 (Art. 85), states are duty bound to prosecute and punish the perpetrators of the prohibited acts under their respective conventions.

[17] For instance, the U.N. Human Rights Committee has repeatedly spoken on the duty to investigate and prosecute murder, torture and disappearance. For murder crime See, *Dermit v. Uruguay* Communication No. 84/1981, UN Doc A/38/40 (1983); for torture see, *Muteba v. Zaire* Communication No. A/39/40(2001); see for disappearance *Venezuela* case Human Rights Committee UN doc. GAOR, A/56/40 (vol. I) 49. Also international court of justice maintained that convention against torture obliged states to investigate and prosecute acts of torture. See, Belgium Vs Senegal(Habre) questions relating to the obligation to prosecute or extradite, judgment of 20 July 2012, para,122; also The International Criminal Tribunal for Rwanda held in Prosecutor v Akayesu, conformed the norms of Common Article 3 have "acquired the status of customary law ….and if committed during internal armed conflict, would constitute violations of Common Article 3 and mad that authors of such egregious violations must incur individual criminal responsibility. See for further *Prosecutor v Jean-Paul Akayesu, Judgement*, 2 September 1998, Case No. ICTR-96-4-T, pp. 242-259.

[18] Federal Democratic Republic of Ethiopia Constitution, Proclamation No. 1/1995 *Negarit Gazeta*, Addis Ababa, (1995) Art. 28. (here in after FDRE constitution).

that are punishable on the basis of various provisions of the criminal code of Ethiopia.[19] According to the amnesty law, any person in respect of whom the amnesty granted shall not be subject to apprehended, investigated, prosecuted or subjected to any form of punishment for any crimes that fall within the ambit of law.[20] A person is taken to be granted amnesty if he/she reports to the nearest federal or regional attorney office.

Nevertheless, it is not clear whether the 2018 amnesty proclamation is introduced in compliance with the FDRE constitution as well as international law requiring prosecution for certain types of crimes. Thus, an enquiry into the compatibility of the Ethiopia's amnesty law with FDRE constitution and international law is still very appropriate.

Second for the sake of victims, under international law States are expected to ensure that victims are not precluded from obtaining truth, justice and reparations for the violations they have suffered.[21] The right to effective remedies is articulated amongst others in ICCPR (art 2 (3)), and CERD (art 6), which Ethiopia is State party of. The right to effective remedies was in the UN 'Basic principles' defined as including the right to obtain truth, justice and reparation. Such victims' rights are the most often mentioned rights that are said to be denied to victims by amnesty laws. International tribunals agree that amnesty laws violate certain rights of victims: 'the Inter-American Commission and Court of Human Rights … have identified … principles that amnesties violate: the right to justice; the right to truth ...; the right to judicial protection …; and the right to judicial guarantees'.[22] Thus, an enquiry into the compatibility of the Ethiopia's

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[19] Amnesty proclamation No. 1096/2010 (n 10) article 5 provides crimes to be amnestied are; Outrages against Constitution or the Constitutional Order(FDRE criminal code art. 238), Obstruction of the exercise of Constitutional Powers(FDRE criminal code art. 339), Armed Rising or Civil War(FDRE criminal code art. 240), Attack on the Political or Territorial Integrity of the State(FDRE criminal code art. 241), Impairment of the Defensive Power of the State(FDRE criminal code art. 247), High treason(FDRE criminal code art. 248), treason(FDRE criminal code art. 249), Collaboration with the Enemy(FDRE criminal code art. 251), Espionage(252), Material preparation of Subversive Acts(256), Provocation and Preparation(257), Desertion(FDRE criminal code art. 288), Inciting the Public through False Rumors(FDRE criminal code art. 486), crimes committed in violation of FDRE Proclamation on Anti-Terrorism, 2009, Proc. No. 652, Neg. Gaze., 15th year, No. 57. (herein after FDRE anti-terrorism proclamation No. 652/2009) except if the crime committed in violation of anti-terrorism law causes death and the case are pending in trial court, and also crimes committed in violation of both emergency declaration proc. No 1/2009 and 2/2010

[20] Amnesty Proclamation No. 1096/2010(n 10) article 7(3).

[21] UN Position on Uganda Amnesty Act 2000, Submission to the Minister of Internal Affairs, (May 2012).

[22] As sited in R. C. Slye, 'The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American law: Is a Legitimate Amnesty Possible?' (2002) 43 (1) *Virginia Journal of International Law* 173,191-192.

amnesty law with international law with regard to victim's right to effective remedies are still very appropriate. Because it is not examined whether the amnesty proclamation was proclaimed in a manner that ensures effective remedy for the victims by including amnesty for the perpetrators. Thus, in addressing these problems, different selected international laws and jurisprudence governing victims' rights will be assessed in light of amnesty law under question in a manner which shows how victims effective remedies are addressed.

As consequences of the above factors which particularly related with victim's rights and states duty of prosecution while granting amnesty will be examined and explored in this research thesis. In doing so the study will mainly consider relevant international laws, jurisprudence, amnesty and victims' rights literatures in order to critically analyze whether such amnesty law complies with Ethiopia's international obligation to prosecute serious crimes and protect victims' rights.

## 1.3. Research Questions

A. Is the 2018 amnesty law compatible with Ethiopia's obligations under international law to investigating and prosecuting human rights violations?
B. Whether the Ethiopian government by introducing amnesty law works against or conforms with its international obligation to protect victims' rights to an effective remedy?

## 1.4. Significance of the Study

The study seeks to analyze the national amnesty law of Ethiopian government and examine the conformity of such law with international laws with regard to investigation and prosecution for acts entailing human rights violation. The study also seeks to assess the effectiveness of Ethiopia's amnesty law addressing victims' rights. There is need therefore to bring the Amnesty law into conformity with Ethiopia's international obligation in that regard.

Further, through analyzing international laws, jurisprudence, scholarly works and other relevant literatures with regards to the application and implementation of amnesty laws, this study will identify elements for consideration in designing amnesty processes.

Finally, the study also contributes to the Ethiopia academic literatures since there is no published articles and research conducted on the area of study.

## 1.5. Objectives of the Research

### 1.5.1. General Objectives

The general objectives of the study will be addressed is how amnesty laws can be considered legitimate in the light of Ethiopia's duty under international law to ensure prosecution of serious crimes and protection of victims' rights.

### 1.5.2. Specific Objectives

The study shall be guided by the following specific objectives: -

a) to assess State obligations to investigate and prosecute serious violation of human rights under relevant international laws, in addressing compatibility of amnesty proclamation passed by Ethiopian government;
b) to examine the amnesty legislation enacted by Ethiopia in ensuring effective remedies for victims of violations. and;

## 1.6. Scope of the Study

This study is limited to the discussion of the 2018 Amnesty proclamation No. 1096/2018, in line with the relevant international laws. As such, it is out of the scope of this study to comment on whether the introduction of amnesty was needed or whether such an approach was appropriate in the context it was adopted. Also the study will not examine the Amnesty Proclamation No. 1096/2018 in its full range, but concentrate on such law that has a possible impact upon victims' rights and states obligation to prosecute. In doing so the study explores wither such law safeguard victims' rights and compatible with Ethiopia's obligation to investigate and prosecute that has been imposed by relevant international laws. Also this study does not include in-depth studies of Ethiopian context and fieldworks, but rather to explore the actual text law as such. This could be a limitation regarding the context, yet, the finding could prove to be relevant in other context too.

## 1.7. Methodology

In order to achieve the research goals of this thesis I have relied essentially on comparative analysis. As such the study evaluate the compatibility of Ethiopia's amnesty law with international laws, in such a way that whether the crimes that fall within the amnesty law also found within the fabric of international law obliging states to prosecute. Also the

comparison is made with regard to victims' rights under international law and national law of Ethiopia particularly under the amnesty proclamation. In order to undertake such analysis the study employed qualitative method analysis.[23] This had covered a wide spectrum of material relevant to the study. For this purpose, both primary and secondary sources are employed.

Primary sources such as regional and international laws to which Ethiopia is adherent is consulted. These included analyzing conventions and treaties on human rights, international humanitarian law and customary international law as well as United Nations resolutions, authoritative interpretations of judicial and quasi-judicial bodies, general comments and reports will be analyzed regarding states duty to prosecute and ensure victims' rights. Then the study analyzed national laws of Ethiopia particularly the amnesty proclamation content in manner to show its compatibility with international norms and jurisprudence. To enrich the discussion, different principles and rules which are accepted in the field are discussed to fill the gap of legal regimes in Ethiopia. Such primary sources served essentially to determine the legal position of amnesty laws in terms of victims' rights and States duty to investigate and prosecute human right violations. Analysis of jurisprudence of international and regional courts and treaty bodies was indispensable for this purpose and particularly to solicit views from their decisions to unearth necessary conditions to the laws governing amnesties with respect to victims' rights and states duty of prosecution.

Among the secondary sources, books, journals articles, and websites relevant to the topic of my study are consulted. These materials also crucial in discussing in a way which shows the status of amnesty. The secondary sources are relevant to my study because it widened my knowledge on amnesty laws and it equally helped me to keep pace with relevant literature on the topic. Critically analyzing the content of literature was an essential asset to test my study. I equally took into consideration the purpose of the document I read, along with the general position of the author on amnesty laws. I was capable of pursuantly formulate my own perspective by collecting and analyzing both primary and secondary data on the issue of amnesty laws, upon which I drew my finding and I hope will be evident throughout the following pages.

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[23] A. Lewis, 'Computer Assisted Qualitative Data Analysis (CADQAS)' in N. Gilbert (ed), *Researching Social Life* (Shousand Oaks: Sage Publisher, 2008) 396.

## 1.8. Structure of the Study

This study is organized in four chapters, that systematically answers the issue raised within this first chapter. The second chapter deals with the 2018 Ethiopian law on amnesty and the obligation to investigate and prosecute human rights violations, addressing the adequacy of Ethiopia's amnesty proclamation No. 1096/2018 with regards to Ethiopia's obligation to investigate and prosecute gross human right violation. Chapter three deals with States duty to provide effective remedies for victims of human rights violation under international law particularly on victims right to justice, truth and reparations, addressing Ethiopia's amnesty law towards such victims' rights. Then finally, the paper provided the final conclusions and the finding of the study on how to effectively address states obligation to prosecute crimes and ensure victim's rights while securing amnesty needs to peace and democracy.

# CHAPTER TWO

# The 2018 Ethiopian Law on Amnesty and the Obligation to Investigate and Prosecute Human Rights Violations

## 2.1. Introduction

Under this chapter, relevant international legal regimes that required states to ensure effective protection in sense of duty to investigate and prosecute will be discussed separately in a manner which shows the legal regime of Ethiopia. In addition to international instruments ratified by Ethiopia, inter-American and European human right convention that developed by judicial interpretation and influential over other jurisdictions will be referred.

More specifically, international human rights laws to which Ethiopia is party lays down some clear legal rules regarding the responsibility of States to protect violations of individual rights and freedoms. Moreover, these rules have been further developed in a large number of cases by the international monitoring bodies. However, only a brief survey is feasible in this context of States' general legal duty to ensure the effective protection of human rights and of the most relevant specific legal obligations that this entails: the duty to investigate, prosecute and punish such violations and provide redress to the victim concerned. However, concerning the duty to provide domestic remedies through ensuring justice, truth and reparation for victims of human rights violations will be discussed separately under subsequent chapter. That being said, throughout the discussion, an assessment is made on the question of domestic amnesty within the notion of States obligation of prosecution and investigation for violations of individual rights and freedoms.

## 2.2. The General Legal Duty of States to Ensure the Effective Protection of Human Rights

All the major human rights treaties dealing with civil and political rights contain a general provision requiring the state parties to secure the protection of the rights contained in provisions of the treaty. International human rights law not only recognizes the human rights of every human being, but it also establishes a concurrent obligation on States to ensure, secure or

guarantee the effective enjoyment of human rights to all within their jurisdiction,[24] and confirmed by international jurisprudence. This section will simply highlight some general considerations relating to different aspects of States' legal duty effectively to protect human rights and fundamental freedoms. The provisions dealing specifically with questions of investigations, prosecution and so forth will be discussed in greater detail in the relevant subsections.

## 2.2.1. Norms and Jurisprudence at International Level

The International Covenant on Civil and Political Rights of 1966 under article 2(1) provides, each State party 'undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'. States further undertake to 'take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative and other measures as may be necessary to give effect to the rights recognized in the present Covenant'.[25] This type of obligation does not prescribe the methods by which rights ought to be secured, except to the extent that states undertake to adopt legislation. Nonetheless, the need to penalize serious violations of human rights is implicit in the notion of securing or ensuring their protection.[26] Generally, it is difficult to see how the rights could be genuinely secured without such measures.

In interpreting article 2(1), the Human Rights Committee has expressed the obligations to protect on the state party stating that "*.... failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties, as a result of States Parties' ... failing to exercise due*

[24] For example, see: International Covenant on Civil and Political Rights (adopted in Dec. 1966, enter in to force 1976) 999 U.N.T.S. 171 (Here in after ICCPR) Art. 2; African Charter on Human and Peoples' Rights(adopted27 June 1981, entered in to force 21 October 1986)21 ILM 58 (here in after ACHPR) Art. 1; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, *amended by* Protocols Nos. 3, 5, 8, &11(which entered into force Sept. 21, 1970, Dec. 20, 1971, Jan. 1, 1990, and Nov. *1*,1998, respectively) (hereinafter ECHR) Art. 1; American Convention on Human Rights, (adopted in 22 November 1969, entered into force 27 August 1978) O.A.S.T.S. No. 36 (here in after ACHR) Art. 1.

[25] ICCPR Art. 2(2).

[26] Naomi Roht-Arriaza (ed.) *Impunity and Human Rights in International Law and Practice* (Oxford: Oxford University Press, 1995) 29-32

*diligence to prevent, punish, investigate or redress the harm… not just caused by its agents but also such acts by private persons or entities..".*[27]

So, the state does not only have the duty to respect human rights but also to protect in the sense of to investigate and prosecute violations of human rights even if the alleged violation is perpetrated by third parties and if it has already violated the government has to provide effective remedy to the people whose right have been violated. Thus, what the Human right committee has said on the matter, it tells us how this treaty bodies view the level of state obligation in terms of protection of human rights and that protection being protection of Human right through prevention, investigation, prosecution and ensuring effective remedies. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights.[28] It follows from this basic and positive legal duty that if the rights has already violated the government are required effectively to investigate, prosecute and punish violations of individual rights and freedoms.[29]

### 3.2.2. Norms and Jurisprudence at Regional Level

At the regional level, article 1 of the African Charter on Human and Peoples' Rights of 1981 may at first appearance seem to use slightly less categorical language than the International Covenant when expressing that States parties 'shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them'. However, the mention to "other measures" suggests that this provision requires a clear obligation to take affirmative steps to comply with the obligations laid down by the Charter. This outlook has been strengthened by the African Commission on Human and Peoples' Rights, which has held that, under article 1 of the African Charter, States parties not only 'recognize the rights and freedoms proclaimed in the Charter but they also commit themselves to respect them and take measures to give effect to them'.[30]

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[27] UN Human Rights Committee, 'General Comment no. 31 [80]: The Nature of the General Legal Obligation Imposed on State' (adopted 2187th meeting on 29 march 2004) ICCPR/21/Rev.1/Add.13.
[28] UN Human Rights Committee, 'General Comment no. 31 (n 27) 1.
[29] See, for example, *Chongwe v. Zambia*, communication No. 821/1998, HRC on civil and political rights (Views adopted on 25 October 2000), in GAOR, A/56/40 (vol. II)143, paras. 7-8.
[30],*Avocats Sans Frontières* (on behalf of Gaëtan Bwampamye) v. *Burundi*, Communication No.231/99, ACHPR (decision adopted during the 28th Ordinary session, 23 October – 6 November 2000), para. 31

As a general rule it must be stressed that, despite the fact that the legal obligations to "respect" and to "ensure" in terms of human rights protections are not specified in clear or expressed manner in the treaty concerned, States in any event have a legal duty to carry out their treaty obligations in good faith. This basic rule of international law, also known as *pacta sunt servanda*, has been codified in article 26 of the Vienna Convention on the Law of Treaties and is, of course, equally suitable to human rights treaties as to other international treaties. For instance, if States simply grants Amnesty by failing, to prevent or vigorously to investigate alleged human rights violations and, where need be, to follow up the investigation with a prosecution, a State undermines its treaty obligations and hence also incurs international responsibility for being in breach of the law.

The American Convention on Human Rights of 1969 contains in effect identical undertakings to respect and ensure, which also contain the adoption of legislative measures where necessary.[31] With regard to the obligation to "ensure" the free and full exercise of the rights guaranteed by the Convention, the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case, which concerned the death of Mr. Velásquez the Court emphasized that

> *'As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.'*[32]

The Court added that:

> *'The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation, it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights.'*[33]

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[31] American Convention on Human Rights, (adopted in 22 November 1969, entered into force 27 August 1978) O.A.S.T.S. No. 36 (here in after American Convention on Human Rights) Art. l and 2.
[32] *Velásquez Rodríguez* Case, Inter-American Court of Human Rights (Ser. C) No. 4 (1988) 152, para. 166.
[33] *Rodríguez* (n 32) 152, para. 167.

What is decisive in determining whether a right recognized by the Convention has been protected is, in the words of the Court, whether the State has allowed the act to take place without taking measures to investigate it or to punish those responsible.[34] The States parties' legal undertakings under article 1 of the American Convention thus form a clear web of preventive, investigative, punitive and reparative duties aimed at effective protection of the rights of the human person.

Lastly, article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 provides that 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. The European Court of Human Rights for instance, considered States legal undertakings under article 1 of the convention when interpreting the right to life as guaranteed by article 2 of the same Convention. The Court has noted that *'…a primary duty of State to* ***secure*** *the right to life involves the investigation, prevention, suppression and punishment of breaches of such provisions.'*[35]

The obligation to protect the right to life in article 2(1), read in conjunction with the State's general duty under Article 1 of the Convention, requires by implication that there should be some form of effective official investigation when the covenant rights violated, for instance, in such specific case individuals have been killed. In order to secure the right to life under article 2 of the Convention, the High Contracting Parties are thus under duty to resort to effective measures of prevention, investigation and prosecution of violations of this right.

The positive obligations that may be inherent in an effective respect of the rights concerned under the European Convention are not limited to article 2 and the right to life but may also have implications for the protection of other rights and freedoms such as the right to freedom from torture in article 3,[36] the right to respect for one's family life in article 8,[37] the right to freedom of expression in article 10[38]and the right to freedom of peaceful assembly and to

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[34] *Rodríguez* (n 32) 154, para. 173.
[35] *Mahmut Kaya v. Turkey* ( ECHR, 28 March 2000), para. 85.
[36] *Assenov and Others v. Bulgaria* ECHR 1998-VIII 3290, para. 102.
[37] ibid.
[38] *Ozgur Gundem v. Turkey (*ECHR, 16 March 2000), para. 43.

freedom of association in article 11.[39] The nature and scope of such obligations depend, however, on the right at issue and the facts of the case taken into account.

In so far discussion one can conclude that irrespective of the terms used in international human rights treaties, States parties are duty bound to provide effective protection for the rights and freedom recognized therein to all persons within their jurisdiction. Positive obligations may be inherent in the effective protection of a human right recognized by international law. It should be noted that such States obligation to protect the rights and freedoms is not limited for acts of government officials but also entail a legal duty for the Contracting States to take positive action to ensure respect for those rights and freedoms between private citizens.

Lastly, it should be noted that such States obligation to protect as enshrined in so many international human rights treaties, and as have been further clarified by the Human Rights monitoring bodies entails: States have a duty to investigate all human rights violations; to bring perpetrators of certain violations to justice; and to provide effective remedies and reparation to victims.[40] In this way one can derive general limitations on municipal amnesty process from the global human rights imperative. Thus, States may adopt amnesty, which has to be weighed against its ability to ensure victims' rights as well as investigation of all violation and particularly by prosecuting perpetrators of serious violations of human rights violators.

## 2.3. Amnesty and the Duty to Investigate and Prosecute in International Law

In addition to international human rights law, there is a whole group of treaties that deal with specific international offences and provide for an express and specific obligation to facilitate the punishment of such offences. A series of treaties introduces universal jurisdiction and an obligation to prosecute and punish human rights violations such as genocide,[41] "grave breaches" of the Geneva Conventions,[42] Enforced Disappearance[43] and Torture.[44] All of those

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[39] *Ärzte für das Leben v. Austria* ECHR (1988) Series A, No. 139, p. 12, para. 32.
[40] See also UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (resolution 60/147 adopted by the General Assembly 16/12/2005) Principle 3.
[41] UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted 9 Dec. 1948, (entered into force 12 Jan. 1951) Art. 6.
[42] Geneva Conventions, Aug. 12, 1949: Art. 49 (Geneva I); 50 (Geneva II); 129 (Geneva III); and 146 (Geneva IV); Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Jun. 8, 1977, Art. 84.

instruments refers explicitly to the duty upon states to prevent, investigate and prosecute the crimes provided in their respective conventions. These treaty crimes are not normally discussed within the purview of international humanitarian and customary norms, but do fall within the broad categorization of human rights violations. An examination of these various treaties will also assist in defining the needs of the international community and the appropriate limitations on a national amnesty process. Under this section some brief discussion is made in reference to violent acts linked to an armed conflict or other situations of violence. This requires engagement with distinct sources of international law, including international treaties, customary international norm and international jurisprudence.

Under the system of grave breaches set out in the four Geneva Conventions of 1949 (Arts. 49, 50, 129 and 146, respectively) and Additional Protocol I of 1977 (Art. 85) States Parties are obliged to prosecute and impose effective penal sanctions for persons committing, or ordering to be committed, any of those grave breaches during an international armed conflict (IAC). They must search for persons alleged to have committed, or to have ordered to be committed, grave breaches and bring such persons, regardless of their nationality, before their own courts, or extradite them. In addition, States Parties must take measures necessary for the suppression of all acts contrary to the Conventions other than the grave breaches.

In the context of non- international armed conflict (NIAC), State customary duty to prosecute has been relied upon by the International Committee of the Red Cross (ICRC) to reinterpret customary international law relating to the duty to prosecute war crimes committed in non-international armed conflicts. The treaty law governing violence against civilians and combatants who are *hors de combat* during internal conflicts, namely Common Article 3 to the Geneva Conventions and Additional Protocol II, creates minimum standards of protection for civilians but contains no duty to investigate and prosecute.[45] However, in a 2005 study, the ICRC reinterpreted these provisions in light of its views on customary international humanitarian law proclaiming that 'serious violations of international humanitarian law constitute war crimes'

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[43] UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance,* adopted on 12 January 2007 (entered into force 23 December 2010) Art. 6 (1).
[44] UN General Assembly, *Convention against Torture and Other Cruel. Inhuman or Degrading Treatment* of 1984. (1984) ILM 1027. and amended in (1985) /LA/535. (Herein after Convention against Torture) Art. 4.
[45] Common Article 3 to the Geneva Conventions 1949.

regardless of whether they are perpetrated in international or non-international armed conflicts.[46] Thus, in both IACs and NIACs, it has been established under customary IHL that States must investigate all war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects.[47] Nevertheless, Protocol II of 1977, emphasizing 'the need to ensure a better protection for the victims of those non- international armed conflicts'[48], contains an exceptional reference in international treaty law to amnesty. Article 6(5) states:

> *"At the end of the hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons relating to the armed conflict, whether they are interned or detained".*[49]

This provision nevertheless generated significant controversy. First, it is not sound to accept that a core instrument of international humanitarian law provides in its very body an encouragement to exempt acts amounting to international crimes and war crimes from investigation and prosecution. This not only runs against the rule of interpreting treaties in light of its object and purpose,[50] but against the final cause of international humanitarian law generally.[51] It is hardly persuasive that the same egregious crimes are encouraged to be amnestied only for having occurred in an internal conflict rather than in an international one.[52] IHL does not address amnesties in IACs, however, combatant immunity would preclude the

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[46] See, J-M. Henckaerts & LD.Beck, *Customary International Humanitarian Law* (1st ed. International Committee of the Red Cross, 2005).

[47] See Rule 158 of the ICRC customary IHL study <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158> accessed 20 June 2019.

[48] International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609, Preamble.

[49] Ibid. art. 6(5).

[50] United Nations, *Vienna Convention on the Law of Treaties*, vol. 1155 (United Nations, Treaty Series, 23 May 1969) 331, article 31, available at:< http://www.refworld.org/docid/3ae6b3a10.html> accessed 1 February 2019. See Also Yasmin Naqvi, 'Amnesty for War Crimes: Defining the Limits of International Recognition' (2003) 85 IRRC 583, 604.

[51] C.D. Than and E. Shorts, *International Criminal Law and Human Rrights* (London: Sweet and Maxwell, 2003) 117-8.

[52] J. Gavron, 'Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court' (2002) 51(1) *International and Comparative Law Quarterly* 91, 106. Garvon contends that 'if the greatest value is placed on life and integrity of person and property, the dichotomy between the protection thereof in one type of conflict and not in another is hard to justify'.

prosecution of persons who are entitled to prisoner-of-war status for merely participating in hostilities. Where combatant immunity precludes the prosecution of persons who are entitled to prisoner-of-war status have been interned, but not convicted, describing their release as an amnesty is unproblematic.

In relation to such provision, Arriaza and Gibson indicate one more inference in point, that the 'broadest possible' passage under article 6(5), they suggest, shall be understood as 'without destroying the victims hopes and needs for retribution and denunciation as well as without infringing on other binding international treaties or customary international law.[53]

Such inference is consistent importantly with the ICRC's interpretation of article 6/5 which is mentioned in the customary rules of international humanitarian law rule applicable in NIAC, clarifies that persons suspected of, accused of, or sentenced for violation of international law are excluded from such an amnesty.[54] On this basis, the ICRC has reformulated article 6(5) of Additional Protocol II stating that based on customary law it should now be read as:

> *At the end of hostilities, the authorities in power must endeavor to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes.*[55]

This restricted way of interpretation[56] goes hand in hand with recent gradual growth and jurisprudence in the domain of human rights and humanitarian law. A clearer human rights based approach is increasingly developing, in which the line between State's sovereignty and its international obligations towards the individuals become diluted.[57] ICRC further proclaimed that amnesties for such it reformulated article 6(5) of Additional Protocol II, would be incompatible

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[53] N.R. Arriaza and L. Gibson, 'The Developing Jurisprudence on Amnesty' (1998) 20(4) *Hum Rights Q* 843, 865.

[54] ICRC, Customary International Humanitarian Law Study, Rule 159. Available at <http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule159> Accessed 10 February 2019.

[55] J.M. Henckaerts & D.B. Louise (n 46) Rule 159.

[56] In its commentary of 1987, The ICRC had commented on the provisions of article 6(5) that "the object of this subparagraph is to encourage gestures of reconciliation".
See<http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=DDA40E6D88861483C12563CD0051E7F2> [Accessed 1 September 2018].

[57] J. Gavron, 'Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court' (n 52)106.

with the customary rule, i.e., 'obliging States to investigate and prosecute persons suspected of having committed war crimes in non-international armed conflicts.'[58] Accordingly, amnesties that would, in effect, preclude any genuine investigation and accountability cannot be extended to those suspected of having committed war crimes or ordering them to be committed. This would be incompatible with States' obligation to investigate and, if appropriate, prosecute alleged offenders.[59]

Also regional courts have dealt with amnesty for crimes committed in context of armed conflict in various decisions. For example, the *Masacre de El Mozote* case was the first in which the Inter-American Court of Human Rights (IACHR) analyzed an amnesty law for war crimes committed in a NIAC. It held that 'the enactment of amnesty laws on the conclusion of hostilities in non-international armed conflicts are sometimes justified to pave the way to a return to peace'.[60] However, the IACHR interpreted Article 6(5) of Additional Protocol II to exclude amnesties that preclude the investigation and prosecution of war crimes.

In addition to grave breaches of GC/war crimes, amnesties cannot apply to genocide, crimes against humanity, torture and other gross violations of international human rights law. Regional courts have held that an amnesty cannot cover crimes against humanity generally,[61] nor prevent the investigation and punishment of those responsible for gross violations of human rights, such as torture,[62] murder, abduction, forced imprisonment, arson, destruction of property, kidnapping,[63] extrajudicial, summary or arbitrary execution, and forced disappearance.[64] Such

[58] J.M. Henckaerts and D. B. Louise (n 46) Rule 158.
[59] See ICRC, *Commentary on the First Geneva Convention* (2nd edition, 2016) para. 2845: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=3ED0B7D33BF425F3C1257F7D00589C84.
[60] See *Massacres of El Mozote and Nearby Places v. El Salvador* (2012), Inter-American Court of Human Rights.
[61] In *Almonacid-Arellano et al* v. *Chile* (2006) the Inter-American Court of Human Rights held that an amnesty could not cover crimes against humanity.
[62] In *Abdülsamet Yaman* v. *Turkey* (2004), the ECHR highlighted that where a State agent is charged with crimes involving torture or ill-treatment, an amnesty or pardon should not be permissible.
[63] See *Zimbabwe Human Rights NGO Forum* v. *Zimbabwe* (2006), African Commission on Human and Peoples' Rights.
[64] See the *Barrios Altos case* (2001), Inter-American Court of Human Rights.

decisions are based on obligations under international law, including existing regional human rights obligations.[65]

Moreover, the existence of customary international obligation of states to prosecute international crimes has proclaimed by international tribunals. Through their statutes and case law, the international tribunals and hybrid courts have defined and prosecuted crimes against humanity and war crimes committed in non-international armed conflicts. In doing so, they pronounced on the duty to prosecute of these crimes under customary international law and they have also held that international offenses may not be the object of an amnesty.[66] Statutes of various international criminal tribunals have explicitly declared that amnesties granted under national law to any person falling within the tribunal's jurisdiction shall not be a bar to prosecution.[67] With respect to the International Criminal Court (ICC) and the principle of complementarity under the ICC Statute, the effect of an amnesty law will be assessed in light of Article 17 of the Statute, particularly with regard to a State's unwillingness to prosecute.

**In concluding remark under this section**: the amnesty law that the IACHR, ICRC and others mentioned above have condemned have been very broad in their effect. For instance, in *Masacre de El Mozote* case, IACHR while condemned the non-investigation and non-prosecution created by amnesty, it has also recognized their values in return to peace.[68] Such case illustrates that the right balance must be struck between the pursuit of peace and ensuring

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[65] For example: i) in *Malawi African Association and Others* v. *Mauritania* (2000), the African Commission on Human and Peoples' Rights held that an amnesty law adopted with the aim of nullifying suits or other actions cannot shield the country from fulfilling its international obligations under the African Charter on Human and Peoples' Rights; and ii) in *Yeter* v. *Turkey* (2009), the ECHR reaffirmed that when an agent of the State is accused of crimes that violate Article 3 of the European Convention on Human Rights, the granting of an amnesty or pardon should not be permissible.

[66] For example: i) the Special Court for Sierra Leone, in the *Decision on Challenge to jurisdiction: Lomé Accord Amnesty* (2003), stated that the granting of amnesties by a State did not rule out prosecution for war crimes and other international crimes before an international tribunal; ii) the *Furundžija* judgment (1998) of the International Criminal Tribunal for the former Yugoslavia, which dealt with the war crime of torture, outlined that an amnesty covering crimes whose prohibition had attained the status of *jus cogens* was invalid and found that the alleged amnesties for international offences are prohibited under customary international law. See generally *Prosecutor v Furundžija* Case No. IT-95-17/1-T, pa 155 (Dec. 10, 1998); *Prosecutor v Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on the Accused's Second Motion for Inspection and Disclosure: Immunity Issue, pa. 17 and 25 (Dec. 17, 2008) and Decision on *Karadžić's* Appeal of Trial Chamber's Decision on the Alleged Holbrooke Agreement (Oct. 12, 2009) 52.

[67] See Article 10 of the Statute of the Special Tribunal for Sierra Leone, and Article 6 of the Statute of the Special Tribunal for Lebanon.

[68] See *Massacres of El Mozote and Nearby Places v. El Salvador* Inter-American Court of Human Rights (2012).

accountability. In such mentioned case, for IACHR amnesties are seen as preventing the possibility of investigation and prosecution that the international law needs to correct the gross violation of human rights crated by such crimes. A more refined and limited amnesty that contributes in return to peace provided the investigation and the prohibition of amnesty for more responsible offenders in creating such gross violation of human rights, could certainly goes hand in hand with the final cause of IHRL and IHL generally. The international and hybrid tribunals focus their prosecutorial resources on those who are deemed most responsible by considering as the planners or leaders in creating the condition to committee the most serious crimes[69].

Also the interpretation of ICRC on article 6(5) obliging States to investigate and prosecute persons suspected of having committed war crimes in non-international armed conflicts, in respect of that it prohibited application of amnesty,[70] needs to be considered pliably. Otherwise, the interpretation of ICRC obliging states to prosecute all persons suspected of or accused of acts committed in armed conflict, is hardly persuasive that, it might not be practical, particularly in such situations when substantial number of perpetrators involved and States in aftermath of such situations often encountered limited prosecutorial resources.[71] So such facts require rationalized strategic choice concerning what crimes to pursue and what defendants to prosecute. Rather, it is better understood as reconciling low-level perpetrators who are suspected of having committed war crimes with members of the society or for merely rebelling against the state.[72] The granting of partial or conditional amnesties may be considered as part of a negotiated settlement to address the legacy of a violent past linked to an armed conflict or other situations of violence. However, they must not bar or hamper the investigation of grave violation, and the prosecution of the most responsible perpetrators for creating the conditions of such violation.

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[69] S. Carsten, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 *Journal of International Criminal Justice* 695, 707

[70] J.M. Henckaerts and D. B. Louise (n 46) Rule 158.

[71] L-M. Ocampo, 'Beyond punishment: Justice in the Wake of Massive Crimes in Argentina' (1999) 52(2) *Journal of international affair* 669, 683-4

[72] N.R. Arriaza (ed.) *Impunity and Human Rights* (n 26) 59.

Grounds for distinction between the most responsible and low-level perpetrators, for example, is referred to in relevant instruments[73] and accepted in the aftermath of civil unrest.[74] Selectivity, is also acknowledged by the UN Secretary General,

> *'in the end, in post-conflict countries, the vast majority of perpetrators of serious violations … will never be tried, whether internationally or domestically. To address this impunity gap,… the prosecutors should develop prosecutorial policies that are strategic, based on clear criteria, and take account of the social context."*[75]

Experiences show that selective prosecution strategies may result in only some offenders being indicted, with others benefitting from amnesty. For example, the hybrid courts of Cambodia and Sierra Leone focus their prosecutorial resources on small proportion of each nation's offenders who are deemed more responsible[76] (five and thirteen respectively), which left thousands of other offenders to benefit from amnesty.

It is indeed ironic, for victims specifically, that only when the severity of crimes committed by most responsible and major criminals in context of creating the conditions becomes flagrantly shocking to the human dignity, advocacy for amnesty laws and alternative mechanisms of prosecution or punishment floats to the surface.[77] And as such major criminals shall take the form of prohibition against amnesty so as to be tried and prosecuted, and are thus secures deterrence and re-affirms rule of law. In such a way, commanders and other superiors can be held criminally responsible for war crimes committed pursuant to their orders, or owing to their failure to prevent, repress or report such acts.[78] If they are suspected or accused of the commission of a war crime under one of these forms of liability, then they may not benefit from an amnesty. This is particularly important and consistence as grounds for distinction between the

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[73] Chicago Principles On Post Conflict Justice, International Human Rights Law Institute (2007) 8. Available at: <https://law.depaul.edu/centers-and-institutes/ihrli/pdf/chicago-principles> [accessed 10 August 2018].

[74] J. Mendez, 'In Defense of Transitional Justice' in A. James McAdams(ed.), *Transitional justice and the rule of law in new democracies* (Notre Dame: University of Notre Dame Press, 1997) 17-8. See, D. Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14(3) *European Journal of International Law* 481, 6-7.

[75] UNSC, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (*UN Doc S/2004/616 2004), par 46.

[76] UN Department of Peacekeeping Operations, *Disarmament, Demobilization and Reintegration of Ex-Combatants in a Peacekeeping Environment: Principles and Guidelines* (UN 1999) Annex 2B, 109.

[77] R. Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Polity Press 2002)127-133. 34-5.

[78] For more information, see the ICRC Advisory Service's *Command Responsibility and Failure to Act* factsheet: <https://www.icrc.org/en/document/command-responsibility-and-failure-act-factsheet> accessed 10 February 2019.

most responsible and low-level perpetrators when prosecution of all offenders may not be practicable due to resource constraints and/or societal interests to pursuit of peace and stability, often, in aftermath of legacy of a violent past.

## 4.4. State Duty to Investigate and Prosecute under International Human Rights Law

As previously noted, the duty to investigate, prosecute and punish human rights violations is also inherent in States' general responsibility to ensure effective human rights protection and it is a duty that has been consistently emphasized by the international monitoring bodies. As this duty is not always expressly defined in the United Nations Charter and other general human rights treaties concerned, it will be analyzed below principally in the light of a selection of the many comments and judgments of these bodies that invoke the obligation to investigate, prosecute and punish violations of the rights and freedoms of the individual.

### 2.4.1. Norms and Jurisprudence at Universal Level

In General Comment No. 20 on article 7 of the International Covenant on Civil and Political Rights, the Committee noted, in general, "that it is not sufficient for the implementation of article 7 to prohibit such treatment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures that they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction."[79] In addition to its general comment, in the case *of Muteba v. Zaire*[80] the Committee held that Zaire had violated the right to be free from torture under article 7 of the Covenant. It was held to be under an obligation to inquire 'into the circumstances of torture, to punish those found guilty of torture and to take steps to ensure that similar violations do not occur in the future'.

Concerning murder, in the case of *Chongwe V. Zambia*, the Human Rights Committee has indicated that the Covenant requires the investigation of acts and the prosecution of

[79] UN Human Rights Committee, 'General Comment no. 31 (n 27) para. 8.
[80] Communication No. A/39/40(2001).

perpetrators.[81] With regard to Zambia's obligations under article 2(3)(a) of the Covenant, the Committee urges *"the State party to carry out independent investigations of the shooting incident, and to expedite criminal proceedings against the persons responsible for the shooting. …, the remedy should include damages to Mr Chongwe. The State party is under an obligation to ensure that similar violations do not occur in the future."*[82] Furthermore, in such *Chongwe* case, HRC noted no criminal proceedings had been initiated and the author's claim for compensation appeared to have been rejected. Also in the case *of Dermit v. Uruguay*[83] the Human Rights Committee held that where Uruguay had violated the right to life of a detainee under article 6, it was under an obligation to 'establish the facts of death' and 'bring to justice any persons found to be responsible for his death'.

That is not the only occasion that the Human Rights Committee has indicated the Covenant requires the investigation of acts and the prosecution of perpetrators. The Human Rights Committee also expressed concern at the lack of action by Venezuela to deal with disappearances that occurred in 1989, noting that the statement to the effect that investigations of the disappearances were "being pursued" was unsatisfactory.[84] Taking into account the provisions of articles 6, 7 and 9 of the Covenant, the State party should give special priority to rapid and effective investigations designed to determine the whereabouts of the disappeared persons and those responsible for disappearances.

Thus, the protection of human rights cannot realistically be ensured if serious violations of human rights go unpunished. The current victims will feel undefendable and potential perpetrators will not be sufficiently deterred, knowing that the political nature of their offence can serve as a basis for negotiating away the prospect of punishment. The Human Rights Committee has on occasion held amnesty laws to be inconsistent with a state's obligations in terms of the Covenant. Commenting on Argentina, the Committee has indicated that 'pardons and general amnesties may promote an atmosphere of impunity and respect for human rights

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[81] *Chongwe v. Zambia* Communication No. 821/1998 (Views adopted on 25 October 2000) in UN doc. A/56/40 (vol. II) 142, para. 5.3.
[82] Ibid 143, para. 7.
[83] Communication No. 84/1981, UN Doc A/38/40 (1983).
[84] *Venezuela* case Human Rights Committee UN doc. GAOR, A/56/40 (vol. I) 49, para. 6.

may be weakened by impunity for perpetrators of human rights violations'.[85] In its consideration of Peru's report submitted under article 40 of the Covenant, the Human Rights Committee noted,

> *The Committee is deeply concerned that the amnesty granted by Decree Law 26,479 on 14 June 1995 absolves from criminal responsibility and, as a consequence, from all forms of accountability, …… who are accused, investigated, charged, processed or convicted for common and military crimes for acts occasioned by the "war against terrorism" from May 1980 until June 1995 ... Such an amnesty prevents appropriate investigation and punishment of perpetrators of past human rights violations, undermines efforts to establish respect for human rights, contributes to an atmosphere of impunity among perpetrators of human rights violations, and constitutes a very serious impediment to efforts undertaken to consolidate democracy and promote respect for human rights and is thus in violation of article 2 of the Covenant. … this type of amnesty is incompatible with the duty of States to investigate human rights violations, to guarantee freedom from such acts within their jurisdiction, and to ensure that they do not occur in the future.*[86]

A normative trend has been created of requiring criminal proceedings in cases of serious violations of human rights. However, states generally possess a margin of discretion in their application of the provisions of human rights treaties. Also in the Mauritian Women case[87] the Human Rights Committee stated that, 'the legal protection or measures a society or a State can afford to the family vary from country to country and depend on different social, economic, political and cultural conditions and traditions'. The Committee, while generally denouncing the atmosphere of impunity created by amnesty laws, has also in certain cases apparently loosely recognized their value in contributing to the laying of 'solid grounds for the development of a free and democratic society based on the rule of law'.[88]

Whether a particular amnesty law violates the 'respect and ensure' provisions will therefore depend on the extent to which the law impinges upon the effective protection of the

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[85] See Concluding observations of the Human Rights Committee: Argentina, 3/10/95, A/50/40 (1995) 164.
[86] Human Rights Committee, Comments on Peru, (1996), UN Doc CCPR/C/79/Add.67; see also Human Rights Committee, Comments on Paraguay, (1995), UN Doc CCPR/C/79/Add48; Human Rights Committee, Comments on Haiti, UN Doc CCPR/C/79/Add49 (1995); Human Rights Committee, Comments on El Salvador, (1994), UN Doc CCPR/C/79/Add.34.
[87] *Aumeeruddy-Czijfra v. Mauritius* Human Rights Committee, Doc. A/36/40, p. 134.
[88] Human Rights Committee, Comments on Bulgaria. (1993) UN Doc CCPR/C/79/Add.24; see also Human Rights Committee, Comments on Morocco. (1994) UN Doc CCPR/C/79/Add44.

rights in question, and the contribution it makes to the establishment of a democracy in which human rights can be respected. In neither set of cases the human rights committee concerned with amnesty laws, which owing to their intended effect of national reconciliation, raise slightly different considerations. The jurisprudence is at present insufficiently developed to derive more precise guidance from it as to where the line is to be drawn.

## 2.4.2. Norms and Jurisprudence at Regional Level

In the earlier *Velásquez Rodríguez* case, the Inter-American Court of Human Rights, had set forth at some length its views on States parties' duty to investigate human rights violations, which in that case involved the abduction and subsequent disappearance of Mr. Velásquez. The Court held that:

> *"The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victims' full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty …. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim (….)Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane."*[89]

Thus, the Inter-American Court of Human Rights, in such famous Velasquez Rodriguez[90] held that State parties to the American Convention on Human Rights have positive obligations. These include, in the case of disappearances followed by torture and death, the duty to carry out a serious investigation, identify those responsible and impose appropriate punishments.[91]

The Inter-American Court of Human Rights held in the *Street Children* case that it is clear from article 1(1) of the American Convention on Human Rights "that the State is obliged to

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[89] *Velásquez Rodríguez* (n 32) 155-156, paras. 176-177.
[90] *Velásquez Rodríguez* (n 32) para 170; see also Naomi Roht- Arriaza, *Impunity and human rights in international law and practice* (n 26) 30-2.
[91] *Velásquez Rodríguez* (n 32) 324.

investigate and punish any violation of the rights embodied in the Convention in order to guarantee such rights.[92] Its statements cover, an incidental remark, all human rights violations. This was the situation in the *Street Children* case, in which the persons responsible for the abduction and killing of the children had not been punished because they had "not been identified or penalized by judicial decisions that had been executed". This consideration alone was sufficient for the Court to conclude that Guatemala had violated article 1(1) of the Convention.[93]

The need to ensure deterrence against serious violations of human rights has also been emphasized by the European Court of Human Rights. In *A V. United Kingdom*, the Court considered that:

> *the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment including such ill-treatment administered by private individuals ( ... ). Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity (... ).*[94]

The duty to investigate, prosecute and punish human rights violations is, of course, equally valid for the Contracting States to the European Convention on Human Rights. In numerous cases, for example, the European Court of Human Rights has emphasized the obligation to investigate in relation to the right to life. Its jurisprudence on this important issue was well summarized in the *Avsar* case, in which it held:

> *'The obligation to protect the right to life under article 2 of the Convention, read in conjunction with the State's general duty under article 1 of the Convention to 'secure to everyone within (its) jurisdiction the rights and freedoms defined in (the) Convention', also requires by implication that there should be some form of effective official investigation when*

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[92] *Villagrán Morales et al.v. Guatemala* Inter -American Court of Human Rights, Series C, No. 63, (judgment of November 19, 1999) 194-195, para. 225 (Case of Street Children).
[93] Ibid 195, para. 228.
[94] *A v the United Kingdom* App no 100/1997 (ECtHR, of 23 September 1998), para 22.

*individuals have been killed... The investigation must also be effective in the sense that it is capable of leading to the identification and punishment of those responsible ....''*[95]

Failure to initiate investigations into alleged human rights violations and, whenever appropriate, to bring criminal or other proceedings against those responsible for them clearly make it impossible for the victims or their next-of-kin "to be heard and to have their accusations discussed by an independent and impartial tribunal".[96] Such failure undermines not only the victim's right to an effective remedy but also the confidence that individuals and the public at large should have in their justice system and in the rule of law in general.

**In concluding remarks under this section**: this study has considered and identified that the inherent in the general duty to provide effective protection for human rights is the specific legal duty to investigate, prosecute and punish violations of the individual's fundamental rights and freedoms. The 'respect and ensure' provisions could also be violated by a failure to prosecute a violation when the obligation to prosecute is a necessary component to one of the protected rights. Human rights treaties frequently include the right to an effective remedy. Arguably, a remedy for certain categories of violation can only be effective if accompanied by criminal proceedings. In such cases, the right would not be secured without the initiation of steps towards the prosecution of the perpetrator. The ultimate purpose of such duty is to ensure the swift restoration of the victim's rights and freedoms.

Thus one could expect from domestic amnesty that States in order to complies by international law and to avoid international responsibility, its domestic amnesty shall consider all human rights violation has to be investigated, which might also be for the purpose of prosecution and punishment for serious violation of human rights. The amnesty laws that the Human Rights Committee have condemned have been very broad in their effects. The Committee, while generally condemning the impunity created by amnesty laws, has also in certain cases recognized their value in contributing to the laying of 'solid grounds for the development of a free and democratic society based on the rule of law'.[97] A more refined and limited amnesty law that

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[95] *Avsar v. Turkey* ECtHR judgment of 10 July (2001), paras. 393-395
[96] *Street Children Case,* (n 92)196, para. 229.
[97] Human Rights Committee, Comments on Bulgaria. (1993) UN Doc CCPR/C/79/Add.24; see also Human Rights Committee, Comments on Morocco. (1994) UN Doc CCPR/C/79/Add44.

contributed significantly to establishing democracy, excluded from its scope serious human rights violations and was accompanied by a thorough investigation of all crimes and human rights violations; bringing perpetrators of certain violations to justice; and provision of reparation to victims might be consistent with the provisions of international human rights instruments.

Also, Inter-American Court of Human Rights in the *Velásquez Rodríguez* case, while ruled that a state party to the American convention on human rights has a legal duty to take measure to investigate and punish for serious violation of human rights, but it also recognized that it is not possible to make a detailed list of all such investigation and punishment measures, since they vary with the law and the conditions of each State Party.[98] The inference is that, the absolutist claim of an obligation to prosecute is hard to defend in the face of competing and compelling societal interests that are particularly important to a society undergoing a major transition.[99] The implications of such case on investigation and prosecutions suggests that, for example, a domestic prosecutor may focus on a particular class of crimes (such as grave human rights violation and notorious international crimes) and a particular class of defendants (such as the most responsible leader or planer of a particular armed force, or terrorist group) with the belief that such prosecutions will more effectively diminish a prominent social ill. For remaining offenders, a decision not to prosecute such particular individual may be made in return for that individual's, surrendering fruits of criminal act like surrendering weapons, the revealing of truth about the role a perpetrator played in past abuses, the resultant revulsion of society, the perpetrator's apprehension of his wrongdoing and remorse for same (as in the case of plea bargaining) that allows some punishment without the cost and risk of a trial. Accordingly articulated amnesty could surely complies with States international obligation to investigate and prosecute for human rights violation created by crimes.

Henceforth, by considering the forgoing discussions, the subsequent sub-sections will have examined Ethiopia's obligation to investigate and prosecute violation of human rights to ascertain the compatibility of the 2018 Ethiopia amnesty proclamation No. 1096/2018 with such Ethiopia's obligation.

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[98] *Velásquez Rodríguez* (n 32) para. 174.
[99] See C. Nino, 'The Duty to Punish Past Abuses of Human Rights Put in to Context: The Case of Argentina' (1991) 100 *YALE Law Journal* 2619.

## 2.5. The Adequacy of Ethiopia's Amnesty Proclamation No. 1096/2018 in Addressing Ethiopia's Obligation to Investigate and Prosecute

The objective of this analysis under this section is to uncover the nature of crimes as found within the ambit of amnesty proclamation No. 1096/2018 in light of those acts which are universally recognized as contrary to international law obliging states to investigate and prosecute. In this way this study is not going to explore the factual existence of acts in Ethiopia contrary to international law and amnesty applied thereof, rather limited as it explores that whether the crimes that fall within the ambit of such amnesty under the question are also found within the fabric of international laws. Further, the section examines whether such amnesty is compatible with Ethiopia's treaty and customary norm obligations with regard to investigation and prosecution of crimes proscribed in international law.

Thus, for the purposes of examining Ethiopia obligation under treaty and international customary laws to investigate and prosecute, this study considers those acts which are internationally criminalized acts such as torture, terrorism acts, disappearance, hostage taking, as well as crimes under the system of grave breaches set out in the Geneva Conventions. Such acts are universally recognized as contrary to international law and FDRE constitution.[100] To go further, committal of such offences may attain the severity so as to amount to international crimes, as is the crime of genocide, crimes against humanity and war crimes.[101]

Prohibitions on the aforementioned crimes are endorsed in international human rights treaty law and its judicial or quasi-judicial body's decisions as well as amounting in many cases to international customary law. The authoritative interpretations by the bodies established to interpret the conventions, such as the U.N. Human Rights Committee, have found a duty to investigate every human rights violation[102], and investigation for the purpose of prosecuting

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[100] See D. Orentlicher 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,' (1991) Vol. 100 *Yale Law Journal* 2580-82. See, FDRE constitution Art. 28; the constitution required criminal liability of persons in respect of those crimes such as crimes against humanity, summary executions, forcible disappearances and torture.

[101] The Princeton Principles on Universal Jurisdiction, Princeton University Program in Law and Public Affairs [2001] 16. Available at: <http://www1.umn.edu/humanrts/instree/princeton.html> For definitions of these crimes, see UN General Assembly, *Rome Statute of the international criminal court* (last amended 2010), 17, July 1998, in articles 5, 6. 7 and 8.

[102] *Velásquez Rodríguez* (n 32) 155-156, paras. 176-177.

certain severe human rights violations.[103] For example, as this study discussed earlier under international norms and jurisprudence, the U.N. Human Rights Committee has repeatedly spoken on the duty to investigate and prosecute murder, torture and disappearance.[104] The duty to prosecute for certain crimes is also established explicitly in the Convention on the Prevention and Punishment of the Crime of Genocide[105], UN Declaration on the Protection of All Persons from Enforced Disappearances and the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment[106]. The four Geneva Conventions also require states to prosecute certain offenses, such as grave breaches.[107] To those conventions Ethiopia is party and adherent, so it is still obligated to fulfill its duties under international law, which include investigating and prosecuting violators of international human rights and international humanitarian law. The government of Ethiopia has the duty to investigate and prosecute those persons with respect to whom there are serious reasons for considering that they are responsible for serious violations both of international law and domestic law.

This study first seeks to examines whether Ethiopia as state party, while awarding amnesty, complies with its obligation under Geneva convention with regard to investigating and prosecuting grave breaches set out under such convention as well as those acts amounting in many cases to international customary law if committed in armed struggle.

Ethiopia's amnesty law applied to all offences committed before May 7, 2018, that are punishable under the anti-terrorism proclamation as well as crimes against constitutional order and armed struggle that are punishable on the bases of FDRE criminal code provisions. Ethiopian amnesty prohibited investigation and prosecution in respect of such punishable acts.

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[103] *Chongwe v. Zambia* Communication No. 821/1998 (Views adopted on 25 October 2000) in UN doc. A/56/40 (vol. II) 142, para. 5.3.
[104] For murder crime See, *Dermit v. Uruguay* Communication No. 84/1981, UN Doc A/38/40 (1983); for torture see, *Muteba v. Zaire* Communication No. A/39/40(2001); see for disappearance *Venezuela* case Human Rights Committee UN doc. GAOR, A/56/40 (vol. I) 49.
[105] Genocide Convention (n 41) Art. VI.
[106] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 44).
[107] Geneva Convention I (for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field), 12 August 1949, Article 49 (duty to search for and prosecute or extradite). Geneva Convention II, Article 50, 12 August 1949 (recognition as a crime). Geneva Convention III (Relative to the Treatment of Prisoners of War), 12 August 1949, Article 129 (duty to search for and prosecute or extradite), Article 130 (recognition as a crime). Geneva Convention IV (Relative to the Protection of Civilian Persons in Time of War), 12 August 1949, Article 146 (duty to search for and prosecute or extradite), Article 147 (recognition as a crime).

Ethiopia's amnesty law applied for a number of crimes linked with internal armed struggle that are punishable particularly on the bases of article 238-241 of the FDRE criminal code. Such provisions particularly deals with punishable acts in armed struggle against Ethiopian legitimate government as well as civil war against one another. Armed rebellion against government under such provision of criminal code is consistent with the prominent assertion of internal armed conflict that can be held as the use of armed force within the boundary of one state between one or more armed groups and the acting government, or between such groups.[108] In literature different terms are used to cover such situations such as: rebellion, revolution, internal disturbances, violence, terrorism, guerrilla warfare, resistance, internal uprising, civil war, war of self-determination…[109] With the intention to create familiarity with these multitude of terms attached to internal armed conflict, this study used them interchangeably throughout this study.

In the mentioned criminal code provisions particularly that deals rebellion against constitutional government, carried possible serious crimes including among others, murder, crimes against public security, injury to liberty, person, health or property. Those mentioned acts of crimes under FDRE criminal code are recognized as serious violation of common article 3 of GC[110] and also as grave breaches under the system of grave breaches set out in the four Geneva Conventions of 1949.[111]

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[108] See among the various definitions of internal armed conflict given in the literature L. Oppenheim and H. Lauterpacht, *International law– a treatise*, vol. II (London: Longman, Green and Co., 1952) 209: 'A civil war exists when two opposing parties within a state have recourse to arms for the purpose of obtaining power in the state, or when a large portion of the population of a state rises in arms against the legitimate government'. L. C. Green, *The contemporary law of armed conflicts* (Manchester, New York: Manchester University Press, 1993) 303: 'A non-international armed conflict is one in which the governmental authorities of a state are opposed by groups within that state seeking to overthrow those authorities by force of arms.'

[109] E.L. Haye, 'War Crimes in Internal Armed Conflict' (2008) 13 *Cambridge University Press* 5. In foot note Haye, as to terrorism, he held and argued that isolated acts of violence could amount to terrorism and fall short of internal armed conflicts. Repetitive acts or sustained use of force by organized armed groups however might be reported to be terrorism by the central government but nonetheless be regulated by the laws of armed conflicts applicable in internal armed conflicts.

[110] *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Appeal on Jurisdiction (2 October 1995) para. 134. In this case, the Court ruled that, customary international law imposes criminal liability for serious violations of common Article 3 of the Geneva Conventions.

[111] The four Geneva Conventions of 1949 (Arts. 49, 50, 129 and 146, respectively) and Additional Protocol I of 1977 (Art. 85).

The International Criminal Tribunal for Rwanda held in Prosecutor v Akayesu, conformed the norms of Common Article 3 have 'acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3 and mad that authors of such egregious violations must incur individual criminal responsibility for their deeds.'[112] Although Ethiopia by their domestic criminal laws particularly under article 240 and 241 has criminalized acts prohibited under common article 3 in way of if committed during armed struggle against constitutional government, but the amnesty law applied thereof without any recourse to investigation and prosecution. As can be seen from the mentioned Ethiopian criminal code, crimes committed in the context of armed struggle against constitutional government involves for instance, acts of violence or injure to life, liberty, health and property, which are prohibited under Common article 3. The prohibition of awarding amnesty for the mentioned crimes became clear under common article 3 that has acquired the status of customary law obliging states the perpetrators of such crimes in the context of civil war must not go unpunished. However, Ethiopia's amnesty law fails to contribute for criminal accountability of perpetrators of the mentioned crimes which are prohibited under common article 3, by awarding amnesty in respect of those crimes without requiring any form of investigation and prosecution.

Also, it has been established under customary IHL that grave violation of IHL constitute war crimes regardless of whether they are perpetrated in international or non-international armed conflicts.[113] The four GC provides grave breaches in Article 50/51/130/147.[114] Certain grave breaches acts provided under the four GC which extended to be applied in the context of internal armed conflict are also recognized as crime in FDRE criminal code linked with armed rebellion against the legitimate government. Armed struggle against the constitutional government under the FDRE criminal code article 240 involves violence and injure to life, liberty, person, health or property. Those mentioned acts of crimes in armed struggle under FDRE criminal code, are also

[112] *Prosecutor v Jean-Paul Akayesu, Judgement*, 2 September 1998, Case No. ICTR-96-4-T, pp. 242-259.
[113] See, J-M. Henckaerts & LD.Beck, *Customary International Humanitarian Law* (1st ed. ICRC, 2005).
[114] Grave breaches to which the preceding Article relates to those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property…

recognized as grave breaches under the system of grave breaches set out in the four Geneva Conventions of 1949 (Arts. 49, 50, 129 and 146, respectively) and Additional Protocol I of 1977 (Art. 85), in respect of those crimes the Ethiopian government applied amnesty without prior investigation and prosecution. The four Geneva Conventions respectively obliges States in Article 49/50/129/130 either to prosecute and punish or to extradite persons, that have committed those grave breaches of the law of war. In addition to treaty law of IHL, under its customary norms, imposed upon state the duty to investigate those acts of serious breach of IHL committed in civil war or armed struggle over which they have jurisdiction and, if appropriate, prosecute the suspects regardless of whether they are perpetrated in internal or international armed conflicts.[115] Actually, Ethiopia's amnesty that would, in effect, preclude any genuine investigation and accountability can be extended to those suspected of having committed war crimes or ordering them to be committed in the context of rebellion against constitutional government. This would be incompatible with States' obligation to investigate and, if appropriate, to prosecute alleged offenders.[116]

Further, this study considers the prohibition of torture, inhuman and degrading treatment or punishment for the purposes of examining Ethiopia's amnesty law in lights of its treaty and customary norm obligations with regard to investigating and prosecuting such acts. ICCPR and convention against torture, to which Ethiopia is party, provide that the protection and freedom of all human beings from torture, inhuman and degrading treatment or punishment (Article 7). Under ICCPR, freedom from this act is recognized as non-derogable. This crimes of torture, transgress the higher norms recognized by the international community as jus cogens.[117] Other relevant instruments to the protection against torture, such as the four Geneva Conventions (1949) which contain a common Article 3, under which torture and humiliating and degrading treatment is prohibited in international as well as internal armed conflicts.

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[115] See Rule 158 of the ICRC customary IHL study. Available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158>.

[116] See ICRC, *Commentary on the First Geneva Convention* (2nd edition, 2016) para. 2845: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=3ED0B7D33BF425F3C1257F7D00589C84.

[117] *Prosecutor v. Anto Furundzija* (n 66) para 144, 153-154.

The absolute prohibition of torture is set out in a number of international human rights treaties and customary norms but defining what treatment constitutes torture is complex. Article 1(1) of the UN Convention Against Torture defines torture quite broadly[118] but sets out certain elements that combined amount to torture under the Convention: 1) severe pain or suffering has to have been inflicted, 2) for a specific purpose, such as to obtain decision or information, as punishment or to intimidate, or for any reason based on discrimination, 3) by or at the instigation of or with the consent or acquiescence of state authorities. However, the later criteria or the assumption that the crime of torture is confined to state officials has now been rebutted; as the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) has confirmed, there is no need for a public official nexus in order for a private individual to be responsible for the crime of torture.[119] Also the Human Rights Committee in its General Comment 20, notes that it is the duty of states parties to afford everyone protection through legislative and other measures against the acts prohibited by Article 7, 'whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity'. This prohibition extends to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.

In Ethiopia torture or cruel, inhuman, or degrading treatment or punishment did not exist as an independent crime, save for the constitution.[120] However would normally be prohibited in criminal code in scattered manner. Due to lack of compressive designation of those act in Ethiopia domestic legal framework, however, having in mind international law standing, to which Ethiopia is adherent, this study considered torture under the category of civil war when the specific circumstances so compel.[121] For instance, article 239 prohibits and punishes acts of

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[118] M. Sepulveda and three others, *Universal and Regional Human Rights Protection: Case and Commentaries* (Costa Rica: University for Peace, 2004) 189.

[119] The Trial Chamber in the present case held the position that the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention''. Prosecutor v. Kunarac, Kovac and Vukovic, (12 June 2002) Case IT-96-23 & IT-96-23/1-A, Judgment of the International Criminal Tribunal for the former Yugoslavia (Appeals Chamber), para. 148.

[120] Article 28 of FDRE constitution provides among others torture will not be barred by statute of limitation, and not be commuted by amnesty or pardon of the legislature or any other state organ.

[121] The US courts have been stated that where rape, torture and summary execution are committed in isolation, these crimes are actionable, without regard to state action, to the extent they were committed in pursuit of genocide or war crimes. In this regard see, *Kadic v. Karadz˘ic´*, 70 F. 3d 232 (2d Cir., 1995) 243–244.

forcing a government officials through violence or threats or any other unlawful means, for the purpose of obtaining or forcing them to give a decisions. Therefore, in light of article 239 and 240 that deals armed struggle and in respect of which amnesty granted, it can be argued that, in the furtherance of civil war or armed struggle against the legitimate government to overthrows it, when they by violence compels or forces any official or body to give decisions or information would certainly amount to torture or cruel, inhuman, or degrading treatment or punishment. Thus, Ethiopia without conducting investigations and prosecution granting amnesty for acts that would potentially involves torture crimes would not be compatible with its international obligation because, as this study discussed earlier, the prohibition of torture and ill-treatment places the state under an obligation to investigate and prosecute those responsible for alleged violations of torture and ill-treatment.[122]

In connection to that, the finding of ICJ in case of Belgium Vs Senegal[123] involving crime of torture dispute would be a lesson for Ethiopia. In that case despite Senegal Court of Appeal and its Court of Cassation held that they lacked jurisdiction to entertain proceeding for acts of torture in the absence of appropriate legislation allowing such proceedings within the domestic legal order, ICJ finds the delay in the adoption of the required legislation necessarily affected Senegal's implementation of the obligations imposed on it by the torture Convention. And further concludes that the Republic of Senegal, by failing to make immediately a preliminary inquiry into the facts relating to the crimes of torture allegedly committed by Mr. Hissène Habré, and by failing to submit the case to its competent authorities for the purpose of prosecution, has breached its obligation under Article 6, paragraph 2 and Article 7, paragraph 1, of the Torture

[122] See, *Labita v. Italy* European Court of Human Rights Application No. 26772/95, Judgement of 6 April. 2000. par 131. In this case, The Court considers that where an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in the Convention", requires by implication that there should be an effective official investigation. As with an investigation under Article 2, such investigation should be capable of leading to the identification and punishment of those responsible. Like the European Court in the *Assenov* case, the Human Rights Committee has also elaborated on the duty to investigate allegations of torture and ill-treatment. the Human Rights Committee find a violation because of the state's failure to provide information or initiate an official investigation into the applicants' allegations. See, *Casafranca v. Peru,* Human Rights Committee Communication No. 981/2001 Views of 19 September 2003.

[123]*Belgium Vs Senegal (Habre)* International Court of Justice, questions relating to the obligation to prosecute or extradite, judgment of 20 July 2012, para,122.

Convention.[124] Therefore, Ethiopia cannot justified the non-investigation and non-prosecution of such crimes due to lack of appropriate domestic legal orders. In such a way, had the case of Ethiopia been considered by ICJ or other concerned organs, it would have been declared as Ethiopia has breached two obligations that respectively require a State party to conduct investigation and prosecution under Article 6 (2) and Article 7 (1), of the Torture Convention.

The other problems are the Ethiopian government clearly failed to take other *ius cogens* norms and non-derogable rights into account, when it made its Amnesty decision. These include such as the prohibition of enforced disappearances or kidnapping.[125] It is greatly acknowledged that such acts has transgress the higher norms recognized by the international community as *jus cogens*,[126] and are thus affirmed that no derogation is allowed.[127] Some treaties also explicitly prohibit derogation.[128] Under ICCPR, to which Ethiopia is party, the right to life and personal integrity are recognized as non-derogable rights that must be upheld in war and peace-time.

In Ethiopia enforced disappearances did not exist as an independent crime however would normally be prohibited as kidnapping. Enforced disappearances nonexistence as an independent crime is not only in Ethiopia but also, in the national laws of most states.[129] O'Shea by considering the inquiry of domestic law made by Roht-Arriaza indicates that summary execution would usually be prohibited as murder and that disappearances would normally be prohibited as abduction or kidnapping in domestic legal system.[130] Further it is not clear that the decisions of the Human Rights Committee dealing with disappearances require punishment on the basis that the cases involve disappearances.[131] It may simply have relied on a general duty to investigate and prosecute the most serious instances of human rights violations, in these cases involving serious infringements of the right to life, so as to ensure the rights in the Covenant.

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[124] Ibid Par 110-117.
[125] See Orentlicher (n 100) 2582.
[126] Unite Nation, *Vienna convention on the law of treaties* (n 50) article 53. See also Yasmin Naqvi, 'amnesty for war crimes' (n 50) 609-11.
[127] *See* Orentlicher, (n 100) 2607.
[128] See for instance, International Covenant on Civil and Political right art. 4(2) The American Convention on Human Rights, art. 27(2).
[129] A. O'Shea, *Amnesty for Crime in International Law and Practice*, (Netherlands: Kluwer Law International, 2002)254.
[130] Ibid.
[131] See *Bleier v. Uruguay*, Communication No. R.7/30, U.N. Doc. A/37/40 (1982); *Ouinteros* v. *Uruguay*. Communication No. 107/1981. UN Doc A/3 8/40 (1983).

Disappearances' involves a particular application of the right to security of person and the right to life, which may involve kidnapping, extra-legal execution or both.

Under the criminal code and particularly anti-terrorism law involves the crime of enforced disappearances as kidnapping, and causing a person's death, in respect of which amnesty applied as per article 5 of amnesty proclamation. The Ethiopian government granted amnesty extending to perpetrators of murder, as well as disappearances which normally be prohibited as kidnapping in anti-terrorism proclamation without any investigation and prosecution. Whether derivative obligations to investigate, to prosecute, or to provide effective remedies for violations of non-derogable rights are themselves non-derogable is unsettled.[132] The American Convention provides the most pressing evidence that derivative obligations are non-derogable when the underlying transgression involve non-derogable rights.[133] Article 27(2) states that the Convention "does not authorize any suspension of the enumerated articles ….*or of the judicial guarantees essential for the protection of such rights.' '*[134] Interpreting this provision, the IAC concluded that the right to seek habeas corpus cannot be suspended because it is necessary to ensure protection of the non-derogable rights to life, liberty and freedom from torture or forced disappearance.[135] Arguably, this rationale would make all derivative rights non-derogable where the underlying violation involved grave harms. States would be obligated to investigate, to prosecute, and perhaps to provide compensation in all such cases. Furthermore, international and regional human rights bodies, such as the UN Human Rights Committee and the Inter- American Commission on Human Rights, have stated that amnesties are incompatible with the duty of States to investigate serious crimes under international law and violations of non-derogable

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[132] Compare Orentlicher, (n 100) 2607 (arguing that derivative obligation may be derogable even when the underlying violations are not) *with* Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law* (California: California Law Review, 1990) 487 (arguing that in order to protect effectively underlying non-derogable rights, derivative obligations must also be non-derogable).

[133] *See* Orentlicher, (n 100) 2607.

[134] American Convention, art. 27. Suspension of the following provisions is not authorized: Article 3 (judicial personality), Article 4 (life), Article 5 (humane treatment), Article 6 (slavery), Article 9 (ex post facto laws), Article 12 (religion), Article 17 (family), Article 18 (right to a name), Article 19 (rights of the child), Article 20 (nationality), and Article 23 (participation in government).

[135] Orentlicher, (n 100) 2607-08 (citing Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of American Convention on Human Rights.), Inter-Am. Ct. H.R. (Advisory Opinion OC-9/87), O.A.S. Doc. (Ser. A) No.9 (1987)).

human rights law.[136] Ethiopia's amnesty applied for those peremptory norms such as enforced disappearance and acts against the right to life, precluding any genuine investigation and prosecution. And as such this would have the implication for its incompatibility with Ethiopia's obligation to investigate and, if appropriate, to prosecute alleged perpetrators of enforced disappearance and murder.

Furthermore, Ethiopia's amnesty application on such disappearance or kidnapping case that are punishable under the anti-terrorism proclamation, without any investigation which may give information on the fate or whereabouts of those persons impact on family members of disappearance and lead to such anguish as to amount to torture or other ill treatment, which is found to be a breach of Article 7 of ICCPR.[137]

Furthermore, this study considers whether Ethiopia, as a state party, complies with its obligation under OAU convention on prevention and combating of terrorism while awarding amnesty with regard to investigating and prosecuting acts of terrorism effectively. The amnesty proclamation further grants amnesty for violent acts of terrorism that would be implemented without the need of investigation and prosecution.[138]

Under the AOU convention, state parties are required to pass legislations on terrorist acts so as to criminalize and penalize terrorist acts.[139] In line with its obligations as a state party to the OAU convention, Ethiopia has enacted its own anti-terrorism law entitled the "Ethiopian Anti-Terrorism proclamation NO. 652/2009" with the aim of countering terrorism in its entirety[140]. The proclamation condemns and criminalizes terrorist acts by prescribing penalties for such acts. The anti-terrorism proclamation has defined terrorist acts in light of the definition given to such

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[136] For example, see *Juan Gelman et al.* v. *Uruguay,* Case 438-06, Report No. 30/07, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.130 Doc. 22, rev. 1 (2007).

[137] Human Rights Committee Communication No. 107/1981, Views of 21 July 1983.

[138] FDRE Proclamation on Anti-Terrorism, Art 3, 5 (1) (m) and 7 (3).

[139] The OAU Convention on Prevention and Combating of Terrorism (adopted on 1 July 1999, entered into force 6 December 2002) (herein after The OAU Convention on Prevention and Combating of Terrorism) article 2 (a).

[140] H. Wubie 'The Impact of Terrorism and Counter Terrorism on Human Rights Protection: The United Nations Response and Ethiopian Experience' (LLM Thesis University Addis Ababa, 2009) 85.

acts under the OAU convention.[141] To effectively counter terrorism, the proclamation has prescribed the procedures for investigations and prosecutions.[142]

Under the Ethiopian anti- terrorism proclamation, acts of terrorism entails that causing a person's death or serious bodily injury, causing serious damage to property; causing damage to natural resource, environment, historical or cultural heritages; endangers, seizes or puts under control, causes serious interference or disruption of any public service.[143] Those mentioned violent acts of terrorism under anti-terrorism proclamation are also set out in the AUO convention article 1 (3). In respect of those mentioned crimes the AUO convention required State party in whose territory a suspect is present immediately to make a preliminary inquiry into the facts (Art. 7, (1)), a necessary step in order to enable that State, with knowledge of the facts, to submit the case to its competent authorities for the purpose of prosecution (Art. 7 (2) ).

Despite the fact that Ethiopia has been a target of numerous terrorist attack,[144] and required under the OAU to maintain investigation and prosecution for alleged terrorist act, the country has extended the application of the amnesty to acts of terrorism,[145] in respect of which the AUO Convention required the investigation and the prosecution of perpetrators. Ethiopia failed to maintain two treaty obligations, which respectively require a State party to the AUO Convention, when a person who has allegedly committed an act of terrorism is its national or found on its territory, to hold 'a preliminary inquiry into the facts' (Art. 7, para. 1) and, 'if it does not extradite him', to 'submit the case to its competent authorities for the purpose of prosecution' (Art. 7 (2) and article 8 (4)).

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[141] FDRE Proclamation on Anti-Terrorism, preamble. The AOU convention on Prevention and Combating of Terrorism under article 2 (a) also requires States to establish criminal offences for terrorist acts as defined in that relevant convention.

[142] FDRE Proclamation on Anti-Terrorism, Art. 13-22 and its preamble.

[143] FDRE Proclamation on Anti-Terrorism, Art. 3 (1-6).

[144] W. Woldemichael, 'Terrorism in Ethiopia and the Horn of Africa: Threat, Impact and Response' (2010) *Rehobot Printers,*126 and 132. See also R.I. Rotberg, (ed) 'Battling Terrorism in the Horn of Africa' (2005). *Brookings Institution Press,* 15-16 ( terrorist attack occurred in Ethiopia are attempt of murder on Egyptian former President Hosni Mubarak in Addis Ababa in June 25, 1992;Bomb attack at the Ghion Hotel, Addis Ababa on January 18, 1996, left 9 dead and 5 injured and nearly three )and half million birr damaged; Bomb attack on Wabisheblle Hotel cause 2 death and 5 injuries on 5 august 1996; on 4 January 1996, bomb planted on bus carrying 62 passengers from Addis Ababa to Mekele and killed 19 people; Bomb attack on Ras Hotel Dire Dawa on February 2, 1996, killed 1 and 3 injured.)

[145] Amnesty proclamation No. 1096/2018 art 5 (1) (m).

Further the convention underlines the delinquency and non-justifiability of terrorist acts under any circumstances and prohibits state parties from providing havens to terrorist.[146] On this point, one can notes that Ethiopia cannot justify the non-investigation and non-prosecution of such acts of terrorism in the pretext of awarding amnesty. Thus, Ethiopia cannot rely on its domestic law, i.e., it cannot justify the non-investigation and prosecution of terrorism acts under any circumstances through awarding amnesty and so as cannot avoid its international responsibility.

Thus, the amnesty law of Ethiopia shields the most responsible offenders of such serious human rights violation and enormous international crimes, and as such the amnesty law appears to be contrary to Ethiopia's international obligation to investigate and prosecute those notorious crimes. With respect to those crimes discussed under this section, it remains to consider the compatibility of amnesty law with FDRE constitution with regard to Ethiopia's government obligation to investigate and prosecute such crimes.

### 2.5.1. The FDRE Constitution with respect to Investigation and Prosecution

The amnesty law is not only evading Ethiopia's international obligation to investigate and prosecute such notorious crimes, but also it appears to be questionable with regard to the FDRE constitution. FDRE constitution required criminal liability of persons in respect of those crimes such as crimes against humanity, summary executions, forcible disappearances and torture, to which the constitution prohibits granting amnesty or pardon.[147] In Ethiopia those crimes are not existed as independent crimes in penal law of the country. This is true in other countries also for instance in considering the provisions of domestic laws of States, Roht-Arriaza states that torture, abduction, summary execution and disappearances are prohibited and subject to penal sanction throughout the world.[148] She indicates in a footnote that summary execution would usually be prohibited as murder and that disappearances would normally be prohibited as abduction or kidnapping.[149] Such offences exist under Ethiopia's domestic law in the way that

[146] The OAU Convention on Prevention and Combating of Terrorism, Preamble and Article 4 (1).
[147] FDRE Constitution article 28.
[148] Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law* (n 132) 494.
[149] Ibid., footnote 241.

summary execution prohibited as murder and that disappearances prohibited as kidnapping.[150] Thus, Ethiopia's amnesty law applies and precludes any genuine investigation and prosecution that can be extended to those crimes, in respect of which the FDRE constitution prohibits the application of amnesty and required Criminal liability of persons who commits such grave crimes.

Even as this study discussed, with respect to those crimes that are prohibited under constitution, it might not follow that there must be a simultaneous duty to investigate and/or prosecute. However, it could be argued that the FDRE constitution prohibitions of amnesty and requiring criminal liability of persons who commits such grave crimes necessarily implies the duty to investigate and prosecute. Such a finding would depend on the assumption that the constitutional prohibition of such crimes and the need to criminal liability of offenders in respect of such crimes under the FDRE constitution is meaningless without a corresponding duty to investigate and prosecute. In addition to constitutional imposition, the constitution itself required the interpretation of those crimes in respect of international law adopted by Ethiopia.[151] So as this study indicated throughout forgoing discussions, international instruments ratified by Ethiopia, and that developed by its judicial and quasi-judicial bodies interpretation, has its own implication to Ethiopia's duty to ensure the investigation and prosecution of offenders of such mentioned crimes.

Therefore, applying amnesty on such mentioned crimes and prohibiting investigation and prosecution would have the implication for its non-compatibility with Ethiopia's International obligation and contrary to its constitution. The question arises whether and to what extent the Ethiopian amnesty is compatible with international law, having regard to its rationale. As discussed earlier, international law does not oblige states to embark on criminal prosecution at all costs. Human rights law cannot have an interest in threatening the survival of fragile democracies by imposing duties on states that may lead to civil unrest. Indeed, the constitution also needs to ensure criminal liability of offenders of gross human rights violation. Depending on

[150] Causing a person death is punishable under the FDRE criminal code for instance in the context of this study it is punishable on the bases of the provision that deals armed rebelling against States and civil war, crimes against the constitutional order as well as under anti-terrorism proclamation Art. 3. Moreover, disappearance is prohibited and sanctioned as crime of kidnapping under article 3 of anti-terrorism proclamation.

[151] See FDRE Constitution article 13.

how crafted, amnesties can also able to ensure criminal liability with the added advantage of serving societal interests and reintegrating offenders into society. Penal sanction is not an aim of its own end. Penalties shall prevent, not encourage human rights violations. Prosecuting the more responsible officials and benefiting the subordinate one conditionally, i.e. if the later surrenders weapons, admits his wrong doing and remorse for same could surely send a strong message to the society that all offenders of gross human rights remains subject to criminal justice systems. And doing so will saves scares resources of poor countries like Ethiopia and at the same time it will be possible to achieve the required reconciliation and intended democracy. For instance, article 240 (1) and (3), in respect of which amnesty applied,[152] respectively indicated organizer or leader of armed rebellion and, those who merely rebelling against legitimate government, also prescribed different penalties for such class of offenders. So, having regard to the compelling societal interest to reconciliation and democracy, it may be justified if it is understood as reconciling a person who merely rebelling against states with members of society. The international and hybrid tribunals focus their prosecutorial resources on those who are deemed 'most responsible.' This category of individuals is usually considered to include the 'planners, leaders and persons who committed the most serious crimes,'[153] and could comprise the 'political, administrative and military leadership.' However, Ethiopia's amnesty law failed to preauthorize what crimes and what offenders to pursue, but also failed to satisfy Ethiopian government obligation under the FDRE constitution and international law.

[152] Amnesty proclamation No. 1096/2018 art. 5 (1) (c)
[153] C. Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 *Journal of International Criminal Justice* 695, 707.

# CHAPTER THREE

## States Duty to Provide Effective Remedies for Victims of Human Rights Violation(s) Under International Laws and, its Implication for 2018 Ethiopia's Amnesty Law

### 3.1. Introduction

As seen in above chapter, the legal duty to provide domestic remedies for alleged victims is inherent in the general duty to provide effective human rights protection. Practice has consistently and convincingly shown that, unless an individual has an effective remedy for an alleged human rights violation, the true enjoyment of human rights will remain illusory. From the point of view of States, the existence of effective domestic remedies has the advantage of allowing them to remedy a wrong, thus avoiding international responsibility and a possible rebuke from an international monitoring body.

A great number of international human rights instruments recognize the right to an effective remedy for a human rights violation. In other words, a victim of a human rights violation is legally entitled to aspire to and secure an effective remedy. This right can be triggered only after a human rights violation has been committed. In other words, a human rights violation must take place before this right can be exercised. As stated by Zegveld, the right to a remedy is a "secondary right, deriving from a primary substantive right that has been breached".[154] Therefore, if there is no primary right, then there can be no secondary right. As a secondary right, it therefore depends on the existence of a violation (which could be past, present/continuous or threatened). First there must be a violation, which converts into the notion of a victim; and second, that violation gives rise to the pursuit of a remedy.

Although numerus international human rights instruments recognize the right to an effective remedy, this type of right does not prescribe the element or contents of effective remedy ought to be secured. Nevertheless, for the purpose of this study the elements of effective remedy for victims concerned is utilized as it implicit in the "Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights

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[154] LC. Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) *International Review of the red cross*, 503.

and Humanitarian Law",[155] which were adopted by United Nations Commission on Human Rights to give recognition to the interests of victims of human rights violations. The aim of this instrument is to provide victims of violations (of both human rights and international humanitarian law) with a right to a remedy.[156] Thus, amongst other things, the duty to "provide a remedy for violation of human rights and international humanitarian law includes reparation for the harm suffered,[157] access to justice[158] and the right to learn the truth in regard to these violations.[159]

## 3.2. The Notion of Victim

While as noted above there is no universal convention dealing with the rights of victims of conventional crimes, the United Nations General Assembly adopted, in 1985, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the text of which had been approved by consensus by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders.[160]

The Declaration defines the notion of victim of crime and abuse of power and specifies victims' rights of access to justice and fair treatment, restitution, compensation and assistance. The basic principles contained in the Declaration 'apply, without discrimination, to all countries, at every stage of development and in every system, as well as to all victims'.[161] They furthermore 'place corresponding responsibilities on central and local government, on those charged with the administration of the criminal justice system and other agencies that come into contact with the victim, and on individual practitioners.[162]

According to paragraph 1 and 18 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the term "victim" is 'a person who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering,

[155] Basic Principles and Guidelines. (n 40).
[156] Basic Principles and Guidelines. (n 40) See generally its Preamble.
[157] Basic Principles and Guidelines. (n 40) Principle IX.
[158] Basic Principles and Guidelines. (n 40) Principle VIII.
[159] Basic Principles and Guidelines. (n 40) Guideline 24.
[160] See UN, Use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN doc. E/CN.15/1997/16, note by the Secretary-General, para. 1.
[161] UN, Guide for Practitioners Regarding the Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN doc. A/CONF.144/20, p. 3, para. 1.
[162] Ibid, 3, para. 2.

economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power'.

This definition covers many categories of harm sustained by people as a consequence of criminal conduct, ranging from physical and psychological injury to financial or other forms of damage to their rights, irrespective of whether the injury or damage concerned was the result of positive conduct or a failure to act. Accordingly, in the context of this study, Ethiopia amnesty as noted in chapter two applied for a range of offences for instance acts committed in the course of armed rebellion against the legitimate government and acts of terrorism, entails among others causing a person death, bodily injurie, torture, disappearance/kidnaping. So such person, according to the declaration definition of the notion of victims, whose fundamental rights and freedoms violated or impaired, through acts or omissions that are in violation of Ethiopian national criminal laws are the possible victims of crimes. Also such impairment of individuals or groups fundamental rights as victims defined by such declaration, implies the impediment could be caused not by political offences but by non-political crimes that can have injured individuals or groups rights. For instance, Freeman, in classifying the types of offences for which a law gives an amnesty, the resulting laws can range from amnesties for political crimes which occurred in relation to a short-lived event, as a bloodless and unsuccessful coup, to blanket amnesties for all crimes that were committed during a conflict, including serious human rights violations.[163] So offences that could be considered as political crimes are crimes that were occurred in relation to a short-lived events without causing or involving violation or injure of a human persons fundamental rights and freedoms.

Therefore, non-political offences that entail serious human rights violation or injure of individuals and groups rights and freedoms, that can convert into the notion of a victim; and, that violation gives rise to the pursuit of a remedy. Thus, as per article 5 of Ethiopia amnesty law, amnesty is applied for non-political crimes, that particularly could have injured individuals and groups rights.

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[163] Freeman (n 14) 13.

Quite importantly, according to paragraph 2 of the Declaration a person may be considered a victim 'regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim'. According to the same article: 'The term 'victim' also includes, where appropriate, the immediate family or dependents of the direct victims and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.'

In this section, having in mind the *Basic Principles and Guidelines that* offers the right to justice, truth and reparation, henceforth selected statements and decisions will provide a general idea of the importance that international monitoring bodies attach to the availability of effective remedies for victims due to violations of their rights and freedoms, and its implication for domestic amnesty. Also, henceforth the discussion mostly focused around those important human rights and victim rights, i.e. the right to justice, the right to know the truth and the right to reparation. Grouping different remedies around these rights is done because most of the remedy that were found are linked to justice, truth and reparations in some way. Moreover, the question of amnesty and particularly Ethiopia's amnesty will also be examined in notion of international law frame works that impose obligation on States to ensure effective remedies for victims concerned.

## 3.3. The Right to Justice'

Among the rights that amnesties are said to violate, the most general is the right to justice. The principle of justice for everyone demands that victims' rights and sufferings be recognized and remedied, that the perpetrators be accountable and that the States involved act effectively to prevent similar acts from occurring in the future.[164] The right to justice has been interpreted to include the following: the right to an investigation that identifies those responsible for the violation; the prosecution of those identified as responsible; the punishment of those

[164] C. Slye, 'The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American law: Is a Legitimate Amnesty Possible?' (n 22) 193.

responsible; and the right to compensation for the wrong suffered.[165] Justice Richard Goldstone, the former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda has said that "full justice" consists of the "trial of the, perpetrator and, if found guilty, adequate punishment."[166] Similarly, the Inter-American Commission has stated that an amnesty that shields an individual from criminal liability violates the right to justice of the victim, as it prevents the state from fulfilling its obligation to investigate and take "punitive action."[167] The right to justice of a victim to have her perpetrator prosecuted or punished is the corollary to the state's obligation to investigate, prosecute and punish as discussed above. To contextualize the discussion under this section European Court of Human Rights for instance stated that:

> 'Given the fundamental importance of the right to protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life and including effective access for the complainant to the investigation procedure.'[168]

In such case, an effective investigation was not conducted into the circumstances of the death of the applicant's brother, the applicant had no effective remedy in respect of his brother's death as required by article 13, which had therefore been violated.[169] The European Court of Human Rights has expressed these sentiments in a number of cases. In the Selcuk and Asker judgment, for instance, the Court considered that:

> *the right to justice in notion of an effective remedy entails, in addition to the payment of compensation where appropriate and without prejudice to any other remedy available in the domestic system, an obligation on the respondent State to carry out a thorough and effective investigation …. and punishment of those responsible and including effective access for the complainant to the investigation procedure.*[170]

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[165] *Espinoza v. Chile* Inter-ACtHR Case 11.725, 133, OEA/ser. LN./II.106, doc. 6 (1999) 75 (right to justice includes "rendering justice in the specific case, punishing those responsible, and providing adequate reparations to the family members"); see also *Velásquez Rodríguez* (n 32) 174.

[166] As cited from C. Slye, 'The legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law' (n 22) 192.

[167] *Espinoza* (n 165) 82. (amnesty violates victim's right to justice by preventing the identification of perpetrators, establishing their responsibility, imposing the corresponding punishment, and providing judicial reparations).

[168] see, for example, *Mahmut Kaya v. Turke* (ECtHR judgment of 28 March 2000), par.124

[169] ibid, para. 126. For cases involving a violation of article 13 relating to the right to life or freedom from torture, see also *Aksoy v. Turkey* (ECtHR judgment of 18 December 1996) Reports 1996-VI, pp. 2286-2287, paras. 95-100, and *Avsar v. Turkey* (ECtHR judgment of 10 July 2001), paras. 421-431.

[170] *Selcuk and Asker V Turkey* case 12/1997 (ECtHR judgment of 24 April 1998), par 915-18.

In such cases based on facts where there was no thorough criminal investigation and the applicants argued that they could not successfully pursue a civil claim without the authorities first carrying out a thorough criminal investigation and as such hindered to exercise the right to justice.[171]

Let us consider this link between the notion of an effective remedy and alleged victims right to justice by considering amnesty as such. The obligation to provide an effective remedy is again common to all the major human rights treaties on civil and political rights,[172]and is also one of the rights listed in the Universal Declaration of Human Rights of 1948.[173] The Human Rights Committee has expressed the view that in Rodriguez v. Uruguay,[174] Uruguay's amnesty law deny the right to an effective remedy under the Covenant by ultimately excluding the possibility of investigation into past human rights violations and thereby preventing the state from discharging its responsibility to provide effective remedies to the victims of those abuses.[175] Without a criminal investigation, the victim may not be able to effectively pursue a civil claim. Also Human Rights committee has expressed these sentiments in a number of other cases for instance, the Committee, commenting on Peru's amnesty law, noted in its consideration of Peru's report pursuant to article 40:

> It also makes it practically impossible for victims of human rights violations to institute successful legal action for compensation.*[176]*

Whether a criminal investigation is a necessary part of an effective remedy will principally depend on any particular violation of a recognized right, together with the measure of protection provided by non-criminal legal mechanisms. Again, for instance if no or no adequate

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[171] Ibid.
[172] See International Covenant on Civil and Political Rights of 1966 article 2(3)(a).
[173] Universal Declaration of Human Rights Article 6.
[174] *Rodriguez v Uruguay* (Human Rights Committee decision on 1994), Communication No. 322/1988. U.N. Doc. CCPR/C/51/0/322/1988.
[175] See also Niomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law* (n 132) 474-83.
[176] See Human Rights Committee, Comments on Peru, UN Doc CCPR/C/79/Add.67 (1996); see also Inter-American Commission on Human Rights, Annual Report 1992-93. Report No 29/92, Uruguay. 2 October 1992 (1993). para 53.

civil remedy is available, then the additional absence of punishment for the violation may lead to an infringement of the victims right to justice and effective remedies provision.[177]

The American Convention's equivalent provision to the effective remedy provision of other instruments is article 25, which speaks of 'the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights'.[178] This right is entitled the 'Right to Judicial Protection'. The Inter-American Commission on Human Rights has interpreted this provision in relation to the obligation to 'ensure and respect' in terms of article 1(1). In doing so, it held Uruguay's amnesty law to be incompatible with these provisions as a denial of justice due to its failure to conduct investigation and ensure accountability, despite damages agreements that had been reached with certain victims.[179]

### 3.3.1. The Adequacy of Ethiopia's Amnesty in Addressing the Obligation to Ensure the Right to Justice

The authoritative decisions of human rights committee under ICCPR and other regional human rights bodies decisions as well as UN declaration on victims' rights has bearing effect on Ethiopia's obligation to ensure victims' rights to justice. This implies access to procedures that will investigate and establishes violators accountability and may include the rights of victims to participate in criminal proceeding. This discussion has asserted that the amnesty law inhibits Ethiopia's ability to satisfy the suggested standards governing access to justice because it obstructs investigation.[180] According to article 5 of Ethiopian amnesty, it applied on a range of serious crimes including for instance offences committed in armed rebellion against the legitimate government of Ethiopia punishable in light of article 239 and 240 of FDRE criminal code, and acts of terrorism which is punishable under the anti-terrorism proclamation, those acts as proofed above involves disappearance/kidnapping, acts of torture, causing a person's death and serious bodily injuries. In respect of such crimes, for example, as this study noted in the

[177] L. Mallinder, 'Can Amnesties and International Justice be Reconciled?' (2007) Vol.1, *International Journal of Transitional Justice*, 208, 215.
[178] American Convention's Article 25.
[179] Inter-American Commission on Human Rights, Annual Report 1992-93. Report No 29/92 -Uruguay, available at <http://www.cidh.oas.org/annualrep/92eng/Uruguay10.029.htm> accessed 11 June 2019.
[180] Amnesty proclamation No. 1096/2018 article 5 (1) and 7 (3) prohibits investigation and prosecution.

above discussion under international norms and jurisprudence, the U.N. Human Rights Committee has repeatedly spoken on the duty to investigate and prosecute acts causing persons death, torture and disappearance.[181] However, in respect of such mentioned crimes the amnesty law of Ethiopia under article 5 (1) and 7 (3), prohibited investigation and any form of punishment. It was implemented in such a way that violations were not investigated and offenders may not be identified. Without investigation, victims are unable to exercise their rights to fair hearing and judicial remedy under the regional Convention and the International Covenant. The amnesty law of Ethiopia, designed in the form of that any person in respect of whom the amnesty granted shall not be subject to search, investigation, prosecution and not subjected to any form of accountability for any crimes that fall within the ambit of such law.

Ethiopia's amnesty law as they are designed to entrench impunity and discourage even the most minimally-required investigation and accountability. Thus, they discourage, rather than further, justice. What makes the Ethiopia amnesties failed to ensure access to justice? Typically, this amnesty has two consequences i.e., it prevents the criminal prosecution and punishment of all offenders, and it prevents victims from seeking damages, truth, and other forms of accountability from those responsible for the violation of their rights. The previous discussions noted that international law obliges, or even should oblige, the prosecution and punishment of those responsible for gross violations of human rights and minimal guarantee of investigations and some form of accountability for other violations of individual rights and liberty. Thus, there is general agreement, that international law requires something more than the typical amnesty provides. At a minimum, justice requires some form of accountability and some form of recognition of the harm suffered by victims. The Ethiopian amnesties provide neither. Furthermore, amnesties that bar criminal investigation or prosecutions may still infringe the right to judicial guarantee in form of access to justice in those countries like Ethiopia where the information gleaned from criminal investigations and proceedings would be crucial for bringing a civil claim.

[181] For murder crime See, *Dermit v. Uruguay* Communication No. 84/1981, UN Doc A/38/40 (1983); for torture see, *Muteba v. Zaire* Communication No. A/39/40(2001); see for disappearance *Venezuela* case Human Rights Committee UN doc. GAOR, A/56/40 (vol. I) 49.

The so far discussion under the right to justice concluded that the legal duty under international law to provide effective human rights protection comprises the obligation to ensure that effective domestic remedies are available in terms of the rights to justices to victims concerned. This means that it is not sufficient for a remedy to be available under a country's constitution or other legislation. It must exist in practice and be allowed to function freely. In order to be effective, the exercise of a remedy must not be hindered by acts or omissions of the State concerned. for instance, the minimum criminal investigation and particularly pursuing the most responsible for their gross violation of human rights must not be hindered by issuing amnesty, so as to ensure the right to justice for victims concerned.

## 3.4. The Right to Truth

The State's duty to investigate, also relate to as the victim's and society's right to "truth," which is the clearest and greatly accepted right. The right to truth is also the right of family members and other close relatives and society to know the truth about human rights violations. It is related to the right to a remedy and to investigation. It is also an autonomous right, independent of other claims of the victims and their relatives, that is owed to society as a whole, as an objective State obligation rising from the right to ensure human rights to all.

In the realm of international human rights law, the right to truth is a legal concept developed through the practice of international human rights bodies, including Courts. In addition, it has been enshrined in international standards, including Article 24(2) of the Convention for the Protection of All Persons from Enforced Disappearances, which expressly recognizes the rights to truth.

In the area of international human rights law, the right to truth is mentioned in the jurisprudence of the Human Rights Committee. In 1981, the Committee held in the case of Almeida de Quinteros that it "understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter, in

particular of article 7."[182] In this case, the Committee considered the right to know the truth as a substantive and not merely a procedural right, whose violation amounts to a breach of the right to be free from torture or other cruel, inhuman and degrading treatment and punishment.[183] Indeed, the failure of authorities to investigate disappearances sometimes causes such suffering to the family that a denial of the right to truth constitutes cruel, inhuman or degrading treatment. In the case of Kurt v Turkey, the European Court of Human Rights recognized that failure of the authorities to provide information about the whereabouts of the disappeared amounted to a violation of the prohibition of torture and cruel and inhuman treatment in Article 3 ECHR.[184] While the right to truth was, in the beginning, associated with enforced disappearances, the Human Rights Committee has made it clear that it applies to human rights violations in general.[185]

The UN updated Principles on Impunity, establish as fundamental rights the 'inalienable right to the truth', 'the duty to remember', the 'victim's right to know', and 'guarantees to give effect to the right to know'.[186] In its study on the Question of Human Rights and States of Emergency, the Special Rapporteur of the Sub-Commission considered that the 'right to know' or 'right to truth' should be recognized as non-derogable. This right is, in his opinion, "closely linked to the right to a remedy" and "the existence of concurring jurisprudence in these systems through the UN and Inter-American in the opinions of the pertinent United Nations rapporteurs evidences the existence of a rule of customary international law".[187] In the same vein, the Working Group on Enforced and Involuntary Disappearances affirmed that "the right of the relatives to know the truth of the fate and whereabouts of the disappeared persons is an absolute

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[182] *Almeida de Quinteros et al v Uruguay*, Human Rights Committee, Communication 107/1981, UN Doc CCPR/C/19/D/107/1981 (1983), para 14.

[183] See also *Sarma v Sri Lanka*, Human Rights Committee, Communication 950/2000, UN Doc CCPR/C/78/D/950/2000 (2003), para 9.5.

[184] *Kurt v Turkey*, Europian Court of Human Rights, Report 1998-III (Judgment of 25 May 1998), para 174.

[185] Human Rights Committee, Concluding Observations on Guatemala, UN Doc CCPR/C/79/Add.63 (1996), para 25; *Hugo Rodríguez v Uruguay*, Human Rights Committee Communication 322/1988, UN Doc CCPR/C/51/D/322/1988 (1994), paras 12(3) and 14.

[186] Updated Principles Set of Principles for the protection and promotion of human rights through action to combat Impunity, UN Doc E/CN.4/2005/102(2005), Principles 2-5.

[187] United Nation, Report of the Special Rapporteur on the question of human rights and states of emergency, UN Doc E/CN.4/Sub.2/1995/20 (1995), Annex I, para 39(f).

right, not subject to any limitation or derogation".[188] Furthermore, the Inter-American Commission on Human Rights stated in its Annual Report 1985-1986:

> *'Every society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future. Moreover, the family members of the victims are entitled to information as to what happened to their relatives. The Commission considers that the observance of the right to know the truth will bring about justice rather than vengeance, and thus neither the urgent need for national reconciliation nor the consolidation of democratic government will be jeopardized.'*[189]

The Commission has derived the right to truth from the right to access to a fair trial and judicial protection (Articles 8 and 15 ACHR) and the right to information (Article 13 ACHR).[190] It has subsumed the right to truth under 'the right of the victim or his next of kin to obtain clarification of the facts relating to the violation and the corresponding responsibilities from the competent State organs, through the investigation and prosecution established in Articles 8 and 25 of the Convention'.[191] It has also recognized the right 'to know the full, complete, and public truth as to the events that transpired, their specific circumstances, and who participated in them" as "part of the right to reparation for human rights violations'.[192]

The Grand Chamber of the European Court expressly acknowledged the right to truth in 2012 in its judgment in the case of El-Masri v the Former Yugoslav Republic of Macedonia, highlighting the negative impact of the inadequate investigation on the right to truth.[193] It concluded that 'the summary investigation that has been carried out in this case cannot be regarded as an effective one capable of leading to the identification and punishment of those responsible for the alleged events and of establishing the truth'.[194]

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[188] General Comment on the Right to Truth in Relation to Enforced Disappearance, in UN Doc A/HRC/16/48 (2011) 12-17, para 4.
[189] Inter-American Commission of Human Rights, Annual Report 1985-1986, OEA/Ser.L/V/II.74, Doc. 10, Rev.1, (1988) 359.
[190] *Lucio Parada Cea and others*, Inter-American Commission of Human Rights, Case 10.480, Report No. 1/99, 27, (January 1999), para 148.
[191] *Bámaca Velásquez v Guatemala*, Inter-American Commission of Human Rights Series C No. 70(Judgment of 25 November 2000), para 201.
[192] *Monsignor Oscar Arnulfo Romero and Galdámez V. El Salvador*, Report No. 37/00, Inter-American Commission of Human Rights, Case 11.481 (13 April 2000), para 148.
[193] *El-Masri v. the Former Yugoslav Republic of Macedonia*, European Court of Human Rights Grand Chamber (Judgment of 13 December 2012), para 191.
[194] Ibid. para 193.

Therefore, the right to truth is a right of victims and their families to obtain information, clarification and disclosure of the facts leading to human rights violations and to know the truth about those violations, including about the perpetrators.[195] A denial of this right amounts not only to a denial of the right to a remedy, to investigation and to reparation; it can also constitute in itself cruel, inhuman and degrading treatment because it causes new suffering to victims and their relatives.[196] The right to truth and the right to justice are complementary and cannot be substituted for one another.

### 3.4.1. The Adequacy of Ethiopia's Amnesty in Addressing the Right to Truth

Under this discussion concerning the right to truth that have been strengthened by human rights bodies decisions through authoritative interpretation of international law, to which Ethiopia is adherent, one could expect that domestic amnesty of Ethiopia could have recognized revealing about human rights violations. At this point whether the amnesty law of Ethiopia by granting amnesty works against the right to truth or contributes to it is important. As previously noted conducting investigations or establishing accountability measures is crucial with regards to the amnesties' potential to contribute to revealing truth to victims and his/her next of kens. The Ethiopian amnesty simply applied on range of crimes prohibiting investigation and without requiring beneficiaries to disclose the facts of their wrong deed.[197] Actually conducting investigation may not be decisive in itself in achieving a genuine truth without the cooperation of offenders. A conditional amnesty with accountability measures are crucial in order to achieve a genuine truth.[198] So conditional amnesty that only applies to those who came to disclose the whole truth and prosecutions for those unwilling to do so could attracts the offenders to discloses the whole truth in order to exempt from prosecutions. As without the genuine threat of legal proceedings offenders are unlikely to apply for amnesty, which will inhibit the degree to which the truth is uncovered.[199]

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[195] Human Rights Committee, Concluding Observations on Guatemala (n 185)
[196] *Kurt* case (n 184).
[197] Amnesty proclamation No. 1096/2018 article 5 (1) and 7 (3) prohibits investigation and prosecution.
[198] Freeman (n 14) 13.
[199] L. Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Oxford: Hart Publishing, 2008)15.

Nevertheless, in Ethiopia the truth of what happened to the victims was still not uncovered as a result of the amnesty law because such amnesty as its per article 5 and 7, is implemented in such a way that the committal of offences will not be investigated and their offenders may not be identified, as such the forms of amnesty is a blanket one.[200] Such Ethiopian amnesty, if coupled with a truth requirement like the South African amnesty, provides detailed information about specific violations, will contributes victims right to know the truth and satisfy Ethiopia obligation under international law concerning victims right to know the truth. However, such amnesty law under the question required no form of inquiry or investigation or disclosure of truth can be imposed against beneficiaries of amnesty [201], and as such it appears to be implemented without requiring disclosure of facts to contribute to the victims understanding of what happened to them and why it happened. Thus amnesty law of Ethiopia by granting amnesty works against the right to truth rather than contributing to it.

## 3.5. The Right to Reparation

Mechanisms for the reparation of victims has a fundamental importance of establishing accountability for violations and achieving justice for the victims,[202] and according to Gierycz, Dorota, it can include monetary and non-monetary elements, such as restitution of victims' legal rights, official apologies, monuments, commemorative ceremonies and programs of rehabilitation.[203]

In most cases, the international human rights treaties do not specify what kinds of reparation could achieve effective remedies for a breach of a legal obligation. In a sense, this is logical in as much as the States parties to a human rights treaty are free to decide how to enforce reparation for a breach of the rights and freedoms concerned. However, article 14(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment specifies that States parties have a duty to ensure that victims of torture obtain redress and that

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[200] Ibid. 6. Mallinder has described Blanket amnesty as amnesties that apply across the board without requiring any application or even an initial inquiry into the facts to determinate if they fit the laws scope of application.
[201] Amnesty proclamation No. 1096/2010 (n 13) article 7. It prohibited any form of inquire and investigation in respect of such crimes that falls within its ambit of application.
[202] M.C. Bassiouni, 'Accountability for Violations of International Humanitarian Law and other Serious Violations of Human Rights' in M.C. Bassiouni (ed.), *Post-Conflict Justice*. (Transnational Publishers 2002)27-39.
[203]D. Gierycz, *Transitional Justice: Does It Help or Does It Harm?* (Norsk: Utenrikspolitisk Institutt 2008) 6. Available at: <https://www.files.ethz.ch > accessed 15 April 2019.

they have "an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible". Also the Rome Statute of the ICC specifies and authorizes the Court to determine any damage, loss or injury to victims and order reparations to them.[204]

Reparations became important in the international community with the adoption of the 1985 'Declaration of basic principles of Justice for victims of crime and abuses of power'.[205] These principles were updated in 2005 with the UN 'Basic principles on the right to remedy and reparation for victims'.[206] Reparations are also a fundamental component of the process of Restorative justice.[207] In the clearest and transparent manner, the UN 'Basic principles on the right to remedy and reparation for victims', provides that victims' right to reparation includes: restitution,[208] rehabilitation,[209] compensation,[210] satisfaction,[211] and guarantees of non-repetition.[212] Since in most cases, the international human rights treaties do not specify how a breach of a legal obligation should be remedied, the examples selected below will illustrate how the human rights treaty bodies deal with the question of reparation.

In the *Blazek* case, the human rights commission deals reparation in the form of restitution and compensation, which concerned the confiscation of property in the Czech Republic. Herein the Human Rights Committee expressed the view that, pursuant to article 2(3)(a) of ICCPR, the State party was "under an obligation to provide the authors with an effective remedy, including an opportunity to file a new claim for restitution or compensation" for an act of discrimination contrary to article 26 of the Covenant.[213] In this case, which concerned property, restitution may thus be possible. However, this may not be the case, especially where the persons concerned have been killed or subjected to violence and the options

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[204] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S.90 (entered into force July 1, 2002) Article 75.
[205] UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (General Assembly Resolution 40/34, 29/11/1985).
[206] Basic Principles and Guidelines (n 40).
[207] Bassiouni (n 202) 36.
[208] Basic Principles and Guidelines (n 40) Guideline 19.
[209] Basic Principles and Guidelines (n 40) Guideline 21.
[210] Basic Principles and Guidelines (n 40) Guideline 20.
[211] Basic Principles and Guidelines (n 40) Guideline 22.
[212] Basic Principles and Guidelines (n 40) Guideline 23.
[213] *Blazek et al. v. the Czech Republic*, Communication No. 857/1999, in UN doc. GAOR, A/56/40 (vol. II) 173, Human Rights Committee (adopted on 12 July 2001), para. 7.

are limited, by and large, to compensation and rehabilitation. In the Views it adopts under the Optional Protocol to the International Covenant on Civil and Political Rights, the Human Rights Committee is therefore limited to urging Governments responsible for human rights violations, in general terms, to pay compensation for the wrongs suffered without specifying the amount to be paid.[214] The examples selected below also will illustrate how the regional human rights courts deal with the question of reparation.

The European Court of Human Rights has regularly awarded reparation however unlike inter-American court as will be discussed below, only ruled in the form of compensation, inter alia to victims of torture and to the next-of-kin of victims of murder. Depending on the circumstances, compensation may be granted for pecuniary damage and also for non-pecuniary or moral damage which cannot be considered to be compensated by the sole findings of the international monitoring body concerned.[215] Such compensation may be granted not only to the victim himself or herself but also to the victim's next-of-kin.[216] Compensation for costs and expenses may also be awarded.[217]

Based on the provisions of Article 63(1) of the American Convention, the inter-American court has indicated that any violation of an international obligation that has caused damage entails the obligation to repair it adequately. And that this "provision embodies a norm of customary law that is one of the basic principles of contemporary international law on State responsibility."[218] Inter-American Court of Human Rights, in the cases of *Manuel Cepeda Vargas v. Colombia* ruled that the State has to make adequate reparation in the form of the following obligations: specific performance (measures of satisfaction and non-repetition Guarantee), to which the Court ordered the State to undertake all necessary means to continue conducting investigations with due diligence, as well as to remove all material and legal

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[214] See, for example, *Quinteros v. Uruguay* Communication No. 107/1981, UN doc. GAOR, A/38/40, 224Human Rights Committee (adopted on 21 July 1983), para. 16.
[215] See, for example, *Mahmut Kaya v. Turkey*, European Court of Human Rights (judgment of 28 March 2000), paras. 133-139 of the text as published at <http://echr.coe.int>accessed on 10 April 2019.
[216] Ibid. par. 134.
[217] Ibid. paras. 140-142.
[218] *Manuel Cepeda Vargas v. Colombia*, Inter-American Court of Human Rights Preliminary Objections, Merits, Reparations, and Costs, (ser. C) No. 213 (Judgment of May 26, 2010). par.211.

obstacles that contribute to impunity.[219] As well the court ordered the state has to provide medical treatment [220] and creation of the victims grant. The Court ordered the State to award a one-time grant named after Senator Cepeda Vargas, which must be administered by the Manuel Cepeda Vargas foundation to journalists of the weekly publication, *Voz.*[221] The grant must cover the total cost of obtaining a degree in communication sciences or journalism at a State public university chosen by the beneficiary.[222] The other form of reparation that the court ordered is compensation[223] for pecuniary damages and non-pecuniary damages as well as costs and expenses. Accordingly, the State party was under duty to provide the authors with an effective reparation that comprises measures of satisfaction, commemorative ceremonies, non-repetition guarantee, compensation and rehabilitation.

### 3.5.1. The Adequacy of Ethiopia's Amnesty in Addressing Effective Reparation

As noted in the above discussion, the right to compensatory reparations is especially violated by an amnesty that protects an individual from civil liability, and thus access to damages provided by a civil judgment. The right to reparations may also be violated by an amnesty that only provides protection against criminal liability. The Inter-American Commission has found that amnesties that bar criminal prosecutions may infringe the right to reparations in those countries where the information gleaned from criminal proceedings would be crucial for bringing a civil claim.[224]

An amnesty that incorporated and accompanied reparation mechanisms does not necessarily violate this rights. The Ethiopian amnesty law fails to ensure reparation for the victims concerned. There is no mention of or recognition of victims' rights to reparation while clearly granting amnesty for their perpetrators. As previously this study noted, international laws

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[219] Ibid, par 216.
[220] Ibid, par. 235.
[221]Ibid, par.233.
[222] Ibid, par.235.
[223] Ibid, par.246- 259.
[224] See *Espinoza v. Chile*, Case 11.725, Inter-Am C.H.R. 133, OEA/ser. LN./II.106, doc. 6 (1999) par. 84 ("the manner in which the amnesty was applied by the courts affected the right to obtain reparations within the civil courts, given the impossibility of individualizing or identifying those responsible for the disappearance, torture, and extrajudicial execution of Carmelo Soria").

recognized reparation which can come in many different forms like compensation, rehabilitation, satisfaction, and guarantees of non-repetition. Ethiopia amnesty recognized neither of them. However, some may argue that regardless of mention of victims' rights to civil relief in that particular amnesty law, offenders are not exempted from civil liability, since such amnesty law has not stated and recognized that offenders are exempted from civil liability.

Nevertheless, valid this view may be, the limited nature of the reparation in civil suit and the failure to conduct investigation or provide sufficient information for victims to bring civil actions would limit the victims or his/her next of kens from fully obtaining civil remedies, and as such can't mitigate Ethiopia's obligations. For instance, Human Rights committee, commenting on Peru's amnesty law, noted that without a criminal investigation, the victim may not be able to effectively pursue a civil claim.[225] By considering the limitations in Ethiopia's amnesty law, victims right to reparation were not effectively carried out, and as such Ethiopia will have incurred international responsibility for failing to ensure reparation for victims concerned. Therefore, one could expect there to be differences between of amnesties that do come with reparations and those that are not combined with reparations. Where amnesties are combined with some form of reparations States will be considered as it has ensured their international responsibility of providing reparation for victims concerned.

In concluding remark under this chapter, the discussion considered that victims of human rights violations, or their next-of-kin, have the right to effective redress for wrongs committed. Major international human rights treaties, principles, declarations and judicial and quasi-judicial authoritative decisions demand an effective remedy be available for individual victims of human rights violations. A remedy involves three elements: a victim's access to the appropriate authorities to have his claim genuinely heard and resolved; to know the truth; and the redress or relief that he can receive. In other word wherever possible, such redress should be in the form of the right to truth, justice and reparation. For reparation to be genuinely secured, fair compensation for pecuniary and/or moral damages combined by rehabilitation, satisfaction, and guarantees of non-repetition must be awarded. Therefore, since Ethiopia is a party and adherent to international norms and jurisprudence that imposed obligation to ensure redress to victims

[225] See Human Rights Committee, Comments on Peru, UN Doc CCPR/C/79/Add.67 (1996).

concerned, Ethiopia could have expected to ensure effective remedies. But its amnesties do come with neither of uncovering truth, justice and reparation for victim's concerned. Thus, Ethiopia's domestic amnesty recognized neither of them while granting amnesty for violators of human rights.

# CHAPTER FOUR

## Conclusion

One of the main points of discussion in this study has been the extent to which amnesties come into conflict with victims' rights and state duty to investigate and prosecute. International law is ambiguous as to whether or not it requires states to investigate and prosecute serious violation at all cost that may lead to a breakdown of public order. However, if the society is threatened with obstruction to peace, it must be acknowledged that states need to deal with gross violation of human rights and endeavor to ensure victims' rights in light of international law. This study argues that states may grant amnesty and abstain from criminal prosecution for acts that do not amount to gross human rights violation and egregious international crimes provided that the act is fully investigated and the victims of the said crime are duly redressed.

Under this study the finding is that amnesty comes into conflict when it evades victims' rights and exempted all perpetrators of the most serious crimes from criminal accountability. This study proved that prosecuting all transgressors of the most dignifying human rights may not be practical particularly, when states comes out of serious instability involving prosecutorial resource constraints. The question is now: What type of amnesty is acceptable in that given situation? In that situations amnesties that would, in effect, preclude prosecution shall not be extended to those high-ranking offenders on their perceived level of responsibility for most serious crimes, whilst conditionally granting amnesty to lower level offenders. Conditional amnesty that only applies to those who come to surrender arms, reveal the whole truth about his role in past violent acts, apprehension of his wrong doing and remorse for the same, and prosecutions for those unwilling to do so could attracts offenders to come forward to the terms of amnesty condition in order to exempt from prosecution tied with criminal trial. This observation implies that there might not be that great divide between amnesty and the aspiration underlying prosecution as it seems in terms of fulfilling human rights standards. They are also a means for affirming that no one is above the law and could surely achieve the anticipated fruits of investigation and prosecution. Depending on how granted, amnesties are also able to serve this function but with the added advantage of reintegrating offenders into society.

The implication of this finding is that amnesties combined with selective prosecution strategies can be consistent with a state's international obligations to investigate and prosecute, and can directly facilitate objectives associated with prosecution among others like reconciliation.

My finding may lead to the assumption that the Ethiopia's amnesty law is generally incompatible with international law and its FDRE constitution. The amnesty law is applied to individuals and groups on a range of crimes including crimes punishable under anti-terrorism proclamation as well as crimes against the constitutional order and armed struggle that are punishable on the basis of various provisions of the criminal code of Ethiopia. As such it applied on crimes committed in the context of armed struggle and acts of terrorism, particularly involving murder, hostage taking, disappearance (kidnapping) and torture. In respect of such acts the amnesty law not only prohibited prosecution, but also implemented in such a way that violation will not be investigated and offenders may not be identified. The Ethiopian amnesty have no international validity. Countries who are signatories to the ICCPR, Geneva Conventions, OAU convention on prevention and combating of terrorism or the Convention against Torture are in fact compelled to investigate and prosecute or extradite suspected perpetrators of severe violations of human rights. International custom further obliges all states to investigate and prosecute violation of peremptory norms and non-derogable rights. Acts of enforced disappearance as kidnaping in Ethiopia's legal order, as well as the right to life and personal integrity are such a peremptory norms. In respect of such crimes, the FDRE constitution prohibited amnesty and required criminal accountability. However, Ethiopia's amnesty law neither requires investigation and prosecution mechanisms to achieve criminal and non-criminal sanction, nor satisfy international standards about truth, justice, and reparation for victims. Yet, amnesty only seems justifiable if it is conditional and contains aspects of accountability, given that criminal prosecution are imposed on the most responsible perpetrators for the most serious crimes. However, under the amnesty law of Ethiopia's there is no enough accountability for it to be completely justified. This type of amnesty law of Ethiopia that offers legal protection against any criminal liability irrespective of the nature of crime committed can be referred as, '*blanket amnesty*'. In the future, amnesty proses should not only consider the legal nature of the relevant crime under national law. They should also assess the legal nature of the concerning crime under international law, before introducing amnesty laws.

For the sake of the victims, this study concluded that the law violates victims' rights to truth, justice and reparations by including amnesty for the perpetrators. Regarding the right to truth the study proved that an amnesty that required disclosure of truth can reveal much more about facts linked with violations. In order to benefit from the amnesty in Ethiopia's amnesty proclamation, truth-telling is not required. In this sense, the amnesty in such proclamation would seem to be not justifiable according to victim's perspectives. Also the study noted, the concept of justice will include effective investigation that leads to the identification of offenders, criminal accountability, reparations, and truth-seeking. Ethiopia's amnesty proclamation also failed to serve the victims' right to justice, and securing a degree of accountability. It seems unlikely to be accepted from a victims' perspective. As we have seen, the right to reparation is articulated in ICCPR (art 2 (3)), and CERD (art 6), amongst others, which Ethiopia is State party of. The right to reparation and remedy was in the UN 'Basic principles' defined as including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition like demobilization and dismantlement of the illegal armed groups. Ethiopia's amnesty proclamation contains neither of these elements.

However, this study is limited as it explores the aspect of amnesty only from a theoretical point of view in light of relevant international law, and further seeks to reach a conclusion whether amnesty is justifiable from a victim's rights and states duty to prosecute perspective. In this way, an in-depth study of the Ethiopian case accompanied with fieldwork would have strengthened the Ethiopian case in this study. Nevertheless, the law text is a device that has to be used vigorously by the victims in order to make claim for their rights. Having this in mind, this researcher believes that a study focusing on the law text could in this manner be useful.

The study, turns out that my view, on one hand based on the interpretation of the law from the perspective of victims' rights and states duty to prosecute, and on the other hand from practical consideration perspectives. Ethiopian case in this study, when coupled with a dismantling of the blanket impunity under its amnesty law, that combined selective prosecution strategies, and provided that the act is fully investigated and the victims of the said crime are duly redressed are legitimate at list from view of victims and obligation to prosecute. Within selective prosecution strategies, such a minimum standard particularly with the worst crimes and their particular class of most responsible criminals might take the form of a prohibition against

amnesties so as to prosecute them, with others benefited from amnesty. Also such amnesty beneficiary has to be subject to other alternative criminal accountability measures that takes into account the aspiration underlying prosecution. Doing so can send a clear message to the society that all heinous crimes perpetrators are dealt with criminal justice ambit, also at the same time satisfy Ethiopia's obligation under international law. So may lead to an acceptable model for other governments: a model that addresses both stability and compliance with the obligations of law to prosecute and ensure victims' rights. They have the potential at least to lay the indispensable conditions to legitimacy of amnesty that balance States need to restore peace and public order with its duty to ensure protection to victims' rights and duty to investigate and prosecute.

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