JIMMA UNIVERSITY

COLLEGE OF LAW AND GOVERNANCE

SCHOOL OF LAW

THE CRIMINALIZATION AND PROSECUTION OF TORTURE IN ETHIOPIA: ANALYSIS OF ITS NATURE AND SCOPE IN LIGHT WITH INTERNATIONAL LAW

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

BY: - ALEMNEH DESALEGN

ADVISOR: TADESSE SIMIE M.

OCTOBER, 2019

Declaration

‘I declare that this thesis titled The Criminalization and Prosecution of Torture in Ethiopia: Analysis of Its Nature and Scope in Light with International Law is my own work, that it has not been submitted before for any degree or examination in any other university, and that the sources I have used or quoted have been indicated and acknowledged as complete references.’

Alemneh Desalegn _____

Advisor

Signature _____

Abstract

Torture is one of the worst scourges known to humankind. It is a problem in all regions of the world and affects all kinds of persons. Despite the prevalence, currently torture is considered as *hostis humani generis*- an enemy of all mankind. Thus the practice of torture has existed through all periods of history and is not confined to any single political system, regime, culture, religion or geographical location.

The aim of this study is to analyze the nature and scope of torture in Ethiopian in light with international laws, particularly the UN Convention against Torture and Covenant on Civil and Political rights to which Ethiopia is member party and thereby bear obligation to implement the conventions in the domestic arena. Thus, the study asses the criminalization and prosecution of torture in Ethiopia in relation to international laws and practice.

The study employs qualitative research method in which authoritative sources are established both from primary and secondary sources. The study used international law and jurisprudences, and domestic laws, and moot and pending domestic cases as a primary source. Authoritative books, journals and reliable web-sites were consulted as secondary sources.

Even if the international laws to which Ethiopia is a party prohibit torture absolutely and ban application of amnesty, pardon, immunity and statute limitation, the Ethiopian laws allowed these to be applicable to torturous acts. This mainly because there is no law that separately criminalizes torture and those laws regulating amnesty, pardon, immunity and statute of limitation do not exclude torture from their application. Besides, the elements of torture under Ethiopia law and practice are not in conformity with international laws.

Therefore, the research come up with the conclusion that the law and practice of criminalization and prosecution of acts constituting torture in Ethiopia are not in compliance with the obligation of the country under international laws to criminalize and prosecute torture, particularly under UNCAT and ICCPR. Based on the findings appropriate recommendations are provided.

Acknowledgment

First and for most I would like to thank GOD and St. MARYY. Then I would like to thank my Principal Advisor Tadesse Simie M. (PhD candidate) for his helpful comments and support in providing cases for my paper.

Lastly, I would like to thank every person who supported me in different means.

Thank you all!!

Table of Contents

Acronyms

AC- Appeal Chamber

ACHR – American convention on human rights

ACHPR – African charter on human and peoples' rights

AHRJ- African Human Rights Law Journal

AmJIL- American Journal of International Law

AP- Additional protocol

AU- African Union

CAT- Committee against Torture

CC- Criminal Code of 2004

CERD- racial discrimination convention

CMWF-migrant workers convention

CR- Convention on the status of refugees

CRC – Convention on the rights of child

CRPD- disability convention

DAT – Declaration against Torture and Cruel, Inhuman or Degrading Treatment or punishment

ECHR – European convention for the protection human and fundamental rights

ECtHR- European Court of Human Rights

ELF- Eretria Liberation Front

EPRP- Ethiopian People's Revolutionary Party

EPDRF- Ethiopian People's Democratic and Revolutionary Party

FDRE- Federal Democratic and Republic of Ethiopia

FGA- Federal General Attorney

GC- General Comment

GCs- Geneva Conventions

HOF- House of Federation

HPR – House of Peoples' Representatives

HRC- Human Rights Committee

HRQ- Human Rights Quarterly

ICC – International criminal court covenant on civil and political rights

ICCPR- International covenant on civil and political rights

ICESCR- International covenant on economic, social and cultural rights

ICJ- International Courts of Justice

ICL- International Customary Law

ICTR - International criminal tribunal for Rwanda

ICTY- International criminal tribunal for the former Yugoslavia

ILC- International Law Commission

MEISON- All-Ethiopian Socialist Movement

NISS- National Intelligence and Security Services

OLF –Oromo Liberation Front

SPO –Special Prosecutor Office

TC- Trial Chamber

TPLF- Tigiray People Liberation Front

UN – United Nations

UNCHR- United Nations Human Rights Council

UNCAT– Convention against torture and other cruel, inhuman or degrading treatments or punishments

UNGA- United Nations General Assembly

CHAPTER ONE

INTRODUCTION

1.1. Background of the Study

Torture is one of the worst scourges known to humankind. It is a problem in all regions of the world and affects all kinds of persons. Torture practiced since ancient time in Greece and Roman Empire on slaves and citizens, respectively, for their status and treason.[1] Although with the Age of Enlightenment torture began to be perceived as infringing upon human dignity and was recognized as no longer a legalized deterrent or method of interrogation, its practice continued to be perpetrated.[2] The practice of torture has existed through all periods of history and is not confined to any single political system, regime, culture, religion or geographical location. Despite the prevalence, currently torture is considered as *hostis humani generis*- an enemy of all mankind.[3]

The international communities have been taking different measures to eradicate and abolish the practice of torture as unacceptable practice. Both international human rights laws and international humanitarian laws prohibit acts of torture against individuals protected by the respective laws. The 1948 Universal Declaration of Human Rights was the first international legal text to establish that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.[4] Subsequently, the ban on torture has been codified in a number of international and regional human rights treaties, including the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[5], the 1966 International Covenant on Civil and Political Rights (ICCPR)[6], the 1969 American Convention on Human

[1]R. Malise, *Torture: The Grand Conspiracy* (London: Weidenfeld and Nicolson Press 1978) 28-38.
[2] P. Edward, *Torture: Expanded Edition* (Philadelphia: University of Pennsylvania Press 1996) 92-96.
[3] R. Lord, 'The Liability of Non-State Actors for Torture in Violation of International Humanitarian Law: An Assessment of the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' (2003) 4 (1) *Melbourne Journal of International Law* 1, 3.
[4]The Universal Declaration of Human Rights (adopted 10 December 1948) UNG Res. 217 A (III) (Here in after UDHR) Art. 5.
[5]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. 3.
[6]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. 7 and 10.

Rights (IACHR)[7], the 1981 African Charter on Human and Peoples' Rights (ACPHR)[8], the 1984 Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)[9], and the 1990 Convention on the Rights of the Child (CRC).[10] Except UNCAT, none of these international human rights instruments clearly provide a definition for the term "torture".[11]

But this definition is neither full-bodied nor acceptable in other sphere of international law.[12] In one instance International Criminal Tribunals for the Former Yugoslavia (ICTY) held that the definition of torture under article 1 of UNCAT cannot be regarded as binding in every context since it is not definition of torture under international customary law.[13] However the broad convergence of the main international instrument and international jurisprudence suggests the general acceptance of the main elements contained in the definition set out under article 1 of UNCAT, which can be deduced from reference made to the UNCAT definition by different human rights bodies and criminal tribunals.[14] Though the application and acceptance of the definition of torture in other international law is remained to be debatable, most international

[7]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. 5.

[8]African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered in to force 21 October 1986) 21 ILM 58 (here in after ACHPR) Art. 5.

[9] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered in to force in June 26, 1987) 1465 U.N.T.S. 85 (Here in after UNCAT).

[10] Convention on the Rights of the Child (adopted in Nov. 1989, entered in to force 2 Sept. 1990) 1577 U.N.T.S. 3 (Here in after CRC) Art. 37.

[11] UNCAT article 1/1 defines Torture as:

> For the purpose of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public officials or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanction.

[12] R. Nigel, *The Definition of Torture under International Law* (Oxford: Oxford University Press 2002) 468-493.

[13]R. Lord, note 3, 26-27. The author concluded that the international *ad hoc* criminal court for the former Yugoslavia (ICTY) propose some change in the definition of torture provided under the UNCAT, stating that this definition is not representative of definition of torture under international customary law, rather it is definition for the purpose of the convention.

[14] See for instance the following cases before ECt.HR and ICTY, respectively, *Selmouni v France* Application No. 25803/94, ECtHR, July 1999; *Prosecutor v Delalic et al.* (Judgment) ICTY-96-21-TC (16 November 1998).

disposition and bodies tend to agree in four constitutive elements of torture which are also explained as 'elements of the definition'.[15]

Accordingly the four elements of definition are; 1/ acts that inflict severe pain or suffering, 2/ the act must be intentional, 3/ the commission of the act is to achieve one of the purposes provided in the convention, and 4/ the perpetrator must act in state official capacity. But since recent time the responsibility of non-state actors for the violation of prohibition of torture under international human rights law is recognized[16], which to some extent makes change in the definition of the term, at least, in the context of ICCPR. The former UN Special Rapporteur on torture, Manfred Nowak, has also mentioned that these four elements contribute to comprehensive concept of torture, as distinguished from other form of ill-treatments.[17]

The prohibition of torture is absolute[18] and has attained the status of *jus cogens* or become peremptory norm and from which the international community cannot derogate.[19] Among the legal consequences of *jus cogens*, it creates obligation *erga omnes*- that is towards the international community as opposed to those arising vis-à-vis another State- and its violation is repressed based on universal jurisdiction.[20] However, there is ongoing debate over whether *jus cogens* imposes obligation on States to take measure to prosecute its violation. Bossioni strongly advocates that the implication of a *jus cogens* are those of a duty and not of an optional rights.[21] Other counter argues that 'the legal interest of States which underlies the obligation *erga omnes*,

[15] M. Kidus, 'Interpretation of article one of the Convention against Torture in Light of the Practice and Jurisprudence of International Bodies' (2014) 5 *Beijing Law Review* 49.

[16] Human Rights Committee; CCPR General Comment 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment, UN Doc HRI/GEN/1/Rev.5 (2001) (Herein after HRC GC No. 20) Para 2 and 13.

[17] UNCHR, 'Report of Special Rapporteur on Torture' (2010) UN Doc A/HRC/13/39 Add.5, Para. 30

[18] Committee against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, 6, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) (Herein after CAT GC No. 2) Para 2, 15 and 16.

[19] Vienna Convention on the Law of Treaties (adopted in 23 May 1969, entered in to force 27 January 1980) 1155 U.N.T.S. 331 (Here in after VCLT) Art. 53.; Human Rights Committee, General Comment No. 24 (52) (1994), UN Doc. CCPR/C.21.Rev.1/Add.6 (1994), at Para. 10; see also, *Prosecutor v Anto Furundzija* (Judgment) ICTY-95-17/1-TC (10 Dec.1998) (Here in after *Furundzija*) Para 153.

[20] E. de Wet, 'The Prohibition of Torture is an International Norm of Jus Cogens and Its Implications for National and International Customary Law' (2004) 15 *EJIL* 97; and see also M. C. Bassiouni, 'Accountability for International Crimes and Serious Violations of Human Rights: International Crimes, Jus Cogens and Obligation Erga Omnes' (1996) 59 *LAW & CONTEMP.PROBS* 63.

[21] C. Bassiouni, note 20, 68.

does not necessarily translate into a positive duty to prosecute every instance of war crimes'.[22] Nevertheless, ICTY held that 'the prohibition against torture exhibits three important features, (one of which is the obligation *erga omnes*) which are probably held in common with the other general principles protecting fundamental human rights.[23] UNCAT also establishes a universal jurisdiction over crimes of torture.[24]

Article 4 of the UNCAT is central to the Convention's objective of fighting impunity. This article requires State party to the convention to make torture an offence under its domestic criminal law, and it requires the punishment of perpetrators of, or participants in, torture through appropriate penalties taking into account the grave nature of the crime of torture. Human Rights Committee (HRC) in General Comment (GC) No. 20, in interpreting the provision of article 7, affirmed that State parties to ICCPR are duty bound to criminalize and prosecute violation of article 7 of the covenant.[25] Even if the provisions of UNCAT did not ban grant of amnesty and pardon, international bodies' decision and interpretations of laws banning torture found that some State practice of amnesty and pardon is incompatible with absolute prohibition of torture.[26] The Committee against Torture (CAT) clearly stated that;

> …Amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability and no exceptional circumstances' dictum of the Convention imposes an obligation to prosecute and punish the perpetrators and that failure to satisfy this obligation violates the principle of non-derogation...[27]

HRC also under its GC No. 20 indicates that crime of torture is not subject to amnesty as it is not compatible with the duty of State to prosecute torture as crime.[28]

---

[22] Y. Naqvi, 'Amnesty for War Crimes: Defining the Limits of International Recognition' (2003) 85 (851) *IRRC* 583, 609-13

[23] *Furundzija*, note 19, Para 147. The tribunal stated that 'prohibition on torture imposes on states obligation *erga omnes*, each of which then has a correlative rights …thus States bear obligation to take necessary measures to prevent and punish torture (Para 151-52).

[24] Article 5(2) of UNCAT provides that; State Party is required to take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8.

[25] HRC, GC No. 20, note 12, ibid.

[26] CAT GC No. 2, at para.5; HCR GC No. 20, Para. 15; *Rodriguez v Uruguay*, Communication No. 322/1988, HRC, Judgment, 1994, Para 12 (4).

[27] *Guridi v Spain*, Communication No. 212/2002, CAT, Judgment, 2005, Para 6 (7).

[28] HRC, GC No. 20, Para 15.

At national level Federal Democratic Republic of Ethiopian (FDRE) Constitution prohibits cruel, degrading and other forms of inhuman treatment or punishment.[29] Although the Constitution does not explicitly use the term torture in its formulation, the government of Ethiopia stated, under the periodic report it submitted to human rights committee, that 'there could be no doubt that the practice is altogether banned torture within the extended meaning of the broad prohibition of cruel or inhumane and degrading treatment or acts'.[30] In addition, the constitution also places torture on the list of crimes against humanity whose prosecution cannot be barred by a statute of limitation and whose penalties cannot be commuted either by pardon or amnesty by any state organ, including the legislature.[31]

In addition, Ethiopia is party to different international human rights and other international laws against torture. Ethiopia becomes party to the UNCAT and ICCPR.[32] Even if these conventions have not yet reproduced in the Federal Negarite Gazette, as per article 9/4 of the FDRE Constitution, they become the integral part of law of the land up on ratification. Thus, Ethiopia bears obligation to criminalize and punish or prosecute violation of right not to be subject to torture as serious crime under its domestic legal system. Currently, the national criminal law criminalized torture as war crimes and as use of improper method. The criminal code provisions proscribed torture a follow:

Art. 270 War Crimes against Civilian:

Whoever, in time of war, armed conflict or occupation organizes, orders or engages in, against the civilian population and in violation of the rule public international law and of international humanitarian conventions

a) killings, *torture or inhuman treatment*, including biological experiments, or any other acts involving dire suffering or bodily- harm, or injury to mental or physical health is punishable with rigorous imprisonment from five years to twenty-five years, or, in more serious cases, with life imprisonment or death[33].

[29] Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, 1st year No.1, 21st August, 1995(here in after FDRE constitution) Arts.18

[30] HRC, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, First Periodic Report of States Parties: Ethiopia, CCPR/C/ETH/1, July, 2009,Paras 44-51.

[31] FDRE constitution, Art. 28/1.

[32] Ethiopia ratify/acceded to ICCPR on June 1993 and to UNCAT on 14 March 1994.

[33] The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004 (Herein after CC), Art 270-72 and 424. See also Art. 270 (a) (Emphasis added); CC Art. 217 (1) (a) and 271 (a) also prohibit

Art. 424:- uses of improper methods.

> *1/* Any public servant charged with the arrest, custody, supervision, escort or interrogation of a person who is under suspicion, under arrest, summoned to appear before a court of justice, detained or serving sentence, who, in the performance of his duties, improperly induces or gives a promise, threatens or treats the person concerned in an improper or brutal manner, or in a manner which is incompatible with human dignity or his office, especially by the use of blows, cruelty or physical or mental torture, be it to obtain a statement or a confession, or to any other similar ends, or to make him give a testimony in favorable manner is punishable with simple imprisonment or fine, or, in serious cases, with rigorous imprisonment not exceeding ten years and fine.

The criminal law banning torture, however, does not provide a clear definition for the term torture. On the other hand, in real life the prevalence of torture in Ethiopia is repeatedly reported by international reports and the country criticized by international bodies for impunity of perpetrators of torture.[34] Recently, even high ranking government officials confess the prevalence of torture in the country against suspect and inmates.[35]

Although there are researches (see below section 1.3) regarding torture those researchers did not address the issue of criminalization and prosecution of torture under Ethiopian law and practice in light with international laws and practice. For this reason, this thesis examines criminalization and prosecution of torture in Ethiopia in light with the nature and scope of torture under international law.

---

torture against wounded, sick or shipwrecked persons or medical services, and prisoners and interned persons as war crimes, respectively.

[34] CAT, Concluding Observation on Ethiopia, CAT/C/ETH/CO/1, 20 Jan 2011, Paras 10- 11; Amnesty international world report, January 2018. Available at: <https://www.hrw.org/worldreport/2018/country-chapters/ethiopia> (accessed on 2 March 2019); HUMAN RIGHTS COUNCIL – HRCO (Ethiopia), *142nd Special Report: Human Rights Violations Committed During the State of Emergency in Ethiopia: Executive Summary* 6 – 11 (May 28, 2017), <https://ehrco.org/wp-content/uploads/2017/07/HRCO-142nd-Special-Report-English-Executive-summary-2.pdf> (the full report is available in Amharic at: <https://ehrco.org/wp-content/uploads/2017/05/የሰብዓዊ-መብቶች-ጉባዔ-142ኛ-ልዩ-መግለጫ-ግንቦት-2009-ዓ%E3%80%82ም.pdf>) (accessed on 7 April 2019); Association for Human Rights in Ethiopia, '*Ethiopian Political Prisoners and Their Accounts of Torture'* (February 2018). Available at: <https://ahrethio.org/wp-content/uploads/2018/02/Ethiopian-prisoner-and-their-accounts-of-torture.rep2018.pdf> (accessed on 7 April, 2019); Human Rights Watch, World Report (2018). Available at: <https://www.hrw.org/world-report/2018/country-chapters/ethiopia> (accessed on 8April 2019).

[35] Amhara Mass Media documentary film, "የፍትህ ሰቆቃ" part I and II. Available at <https://www.youtube.com/watch?v=3JKZs7Kk3CY&list=WL&index=3&t=0s> and <https://www.youtube.com/watch?v=c48h55XR3ns&list=WL&index=1>; see also ETV news available at; <https://www.youtube.com/watch?v=BCBbqIOsdqk> (accessed on 20 May 2019)

1.2. Statements of the Problem

Individuals are protected absolutely from acts threatening of and encroaching in their human dignity. International and Regional Human Rights Instruments ensure this and impose duty on member state to criminalize and prosecute torture in their domestic legal system. Especially ICCPR and UNCAT obliges member state to criminalize and prosecute violations of prohibition of torture.

The Ethiopian criminal code criminalized and subsumed torture as war crime and use of improper method.[36] Although the Ethiopian criminal code criminalized acts of torture as use of improper method and violation of international humanitarian law (war crimes), it has been criticized for being narrow in its scope in light with international laws.[37] The CAT in considering the report made by the government of Ethiopia comments that the term torture and its notion is note directly incorporated as per the provision of UNCAT.[38] Besides, the committee mentioned that the scope of prohibition of torture is not properly addressed by the criminal code.[39] However, the committee did not clarify in detail the extent to which the criminal code's torture provision failed to mirror the international definition.

In addition, different reports show the prevalence of torture in Ethiopia[40] despite the ratification/accession of international human rights laws, particularly ICCPR and UNCAT. Besides, the Medias' of Ethiopia reveals the commission of torture by government officials and security personnel before the recent transition.[41] Moreover, the government recently admitted that the government has been committing acts of torture against inmates in the prisons.[42]

[36] CC, Art. 270-272 and 424.
[37] CAT, Concluding Observation on Ethiopia, note 34, Para 9.
[38] ibid.
[39] ibid.
[40] HRC, Concluding Observation on Ethiopia, CCPR/C/ETH/CO/1, August 2011, Para 16-18; Amnesty international world report and other international reports, note 34.
[41] Amhara Mass Media documentary film and ETV news, note 35.
[42] H.E. Dr. Abiy Ahmed said 'security institutions tortured citizens in order for government to remain in power and committed "terrorist acts" against its own citizens in the past' in a rare and candid admission. *Visit:* <https://www.aljazeera.com/news/2018/06/ethiopia-pm-security-agencies-committed-terrorist-acts 180619051321984.html> (accessed as of 23 May, 2019).

Nevertheless the prosecution of violation of prohibition of torture is rare in Ethiopia as point out by CAT and HRC in their concluding observation on Ethiopia.[43]

Thus it is imperative to study the criminalization and practice of prosecution of torture in Ethiopian based on the parameter under international law regarding the nature and scope of torture. Besides, it is vital to assess what is the impact of being underline offence in relation to the absolute nature of prohibition of torture. Finally, it is also essential to evaluate whether the prosecution of torture in practice, in the absence of clear definition of torture under the CC, go in line with the nature and scope of torture under international laws. Precisely, this research tries to answer the questions:

- How the Ethiopian legal system does provide for criminalization and prosecution of torture?
- Is the criminalization and prosecution of torture in Ethiopia in line with the nature and scope of torture under international law?

1.3. Literature Review

As far as the knowledge of the researcher is concerned two researches and one article were conducted that are related to torture. The first research is an empirical work which assessed the implementation of protection from torture and other inhuman treatments in selected prisons found in the Oromia Regional State, Ethiopia.[44] Abebe, the researcher, revealed that there is violation of the right against inhuman treatment, but those violent acts do not reach the threshold of severity that constitutes torture.[45] However, the research did not deal with the practice of prosecution of torture in Ethiopia criminal law system in light with the nature and scope of torture under the international law.

The second work is a comparative study on the legal limits to police custody interrogation conducted by G. Hadush.[46] The objective of the research is to compare legal limits

[43] CAT, Concluding Observation on Ethiopia, note 34, ibid; HRC, Concluding Observation on Ethiopia, note 40, ibid.
[44] T. Abebe, 'Freedom from torture, inhuman or degrading treatment or punishment: the case of some selected Prisons of Oromia National Regional State' (2011) *LL.M Thesis, Addis Ababa University* (Unpublished).
[45] ibid 177.
[46] G. Hadush, 'The legal limits to police custody interrogation methods: a comparative look at the British and Ethiopian interrogation laws' (2014) *LL.M Thesis, European University* (Unpublished).

on interrogation method under British and Ethiopian law. The research concluded that British have more detail and comprehensive legal order than Ethiopia that governs interrogation methods and the result of extending the limit.[47] Besides, the research reached at the conclusion that the criminal law of Ethiopia makes the police use of improper method of interrogation crime.[48] This research too did not deal with the prosecution of torture in practice in Ethiopia rather it discussed the procedural issues of interrogation by police.

Thirdly, T. Tesfaye in his article entitled 'Human Rights Violation in Ethiopia from 1991-2017: The Case of Torture and Ill-Treatments' discussed the violation of rights against torture and other ill-treatments in Ethiopia during the last three decades.[49] The article concluded that there is no sufficient international, regional and national mechanism adopted for the enforcement of the rights even if there are laws prohibiting and preventing torture. Thus, he suggested that Ethiopia should sign those international protocols that provide international compliant mechanisms and should include torture as an offence in the criminal code and also adopt national compliant mechanism as well as provide victims with effective and appropriate compensation.[50] This article too did not address the nature and scope of torture under Ethiopian law and practice in light with international law. Therefore, the criminalization and prosecution of torture under Ethiopian criminal law has not been studied in light with the nature and scope of torture under international law.

1.4. Objectives of the Study

The study has the following general and specific objectives.

1.4.1. General Objectives

The general objective of the research is to analyze the nature and scope of torture in the criminalization and prosecution of torture under Ethiopian law and practiced in light with the international law.

[47] ibid 74-86.
[48] ibid.
[49] T. Tafese, 'Human Rights Violation in Ethiopia from 1991-2017: The Case of Torture and Ill-Treatments' (2019) available at: <https://www.academia.edu/38195835/Human_Rights_Violation_in_Ethiopia_from_1991-2017_The_Case_of_Torture_and_Ill-Treatments> (accessed on 3 April 2019).
[50] ibid.

1.4.2. Specific Objectives

The specific objectives of this research are:

- To determine whether the Ethiopia law criminalizes torture absolutely and allows no justification.
- To examine whether acts constituting torture in Ethiopia are excluded from the application of laws regulating amnesty, pardon, immunity and statute of limitation.
- To compare the scope/elements of torture under the Ethiopian law and international law.
- To assess whether the prosecution of acts constituting torture in Ethiopia is in light with the scope of torture under international law.

1.5. Method of the Study

There are extensive literatures and jurisprudences on the issue on which the study use to conceptualize the nature and scope of torture under international laws. There is, however, a paucity of domestic literatures on the topic. Since the focal point of the thesis is to evaluate the compatibility of domestic criminalization and prosecution of torture in Ethiopia with that of the nature and scope of torture under international laws, a qualitative research method is implemented. Analyzing the nature and scope of torture under international laws and national laws can lead to new insights and a deeper understanding of the issue. This may also help to sharpen the focus of the analysis of the subject matter under the study by suggesting new perspectives.[51]

Accordingly the paper, first, analyzed Ethiopian criminal law provisions dealing with torture and practice of the prosecution and then compare with the international laws, general comments, jurisprudence of international human rights bodies regarding the nature and scope of torture under international human rights laws.

Thus this thesis employs qualitative research method in that authorities are established from both primary and secondary sources of information. International instruments prohibiting torture, general comments and jurisprudences of human right bodies and other international

[51] H. Linda, *International Comparative Research: Theory, Methods and Practice* (Palgrave: Macmillan Basingstoke 2009) 10.

criminal tribunals, national laws and case are consulted as primary source. Authoritative authors' books, journals or articles, preparatory works of international instruments, and other written sources in both international law and national law have been considered. Besides, reliable web sites were also consulted.

1.6. Scope of the Study

The research limits its scope of international law to ICCPR and UNCAT as a parameter for the comparison. The scope of domestic legal analysis covers the Criminal Code of the Federal Democratic Republic of Ethiopia and other laws which are currently in force regarding amnesty and pardon, and period of limitation. Finally, the assessment of the prosecution of torture in Ethiopia, to make the research manageable (in terms of time and cost), it is limited to the major cases since the transitional government of Ethiopia 1990s. Accordingly, Red-Terror cases of the 1990s and the current cases against National Security (NISS) officials, Federal Prison Administration officials and Federal Police investigators, which are pending before the Federal High Court at the time of conducting this work, are considered in light with international laws.

1.7. Limitations of the Study

The availability of domestic cases involving issue of torture in publishing or in any other way was a critical challenge that the researcher encountered during the study. Due to this the researcher has limited access to the currently pending cases in that the cases were referred in the Federal General Attorney Office as getting the copy were not allowed for confidentiality reason.

1.8. Significance of the Study

The research up on its completion will have the following importance:

- Determine nature and scope of torture under Ethiopian criminal law and practice,
- Provide assistance to government of Ethiopia to comply with its international obligation,
- Provide possible solution for existing problems in repressing torture at national level, which may be considered by legislative and
- Finally, contribute to the literature as baseline information for further study on the subject matter.

1.9. Structure of the Study

The paper will have five chapters. The first chapter provides general overview of the study. As an introductory it deals with background of the study, statement of problem, Literature review, objectives and scope of the study. This chapter also provides what research method employed to conduct the research and importance of the study up on its completion. It also outlines challenges encountered while conducting the research.

Chapter two is about the legal frame work of torture. The chapter has four sub-sections which precisely discussed international and regional conventions and customary international law prohibiting torture in the first and second sections. The third section provides the obligation of state to criminalize and prosecute torture under international laws. This section also briefly discussed the issue of whether one of the elements of torture (status of perpetrator) should be extended or not. The final section offers an insight to domestic laws criminalizing torture in two sections separating them as pre and post 1994. Here legal arguments regarding self-executing or non-self executing nature of international law in Ethiopia legal system are discussed briefly.

Chapter three provides the absolute nature of torture under Ethiopian law and practice vis-à-vis international law. The chapter has three sections. The first section provides introduction to the chapter. The second section analyzes the law on limitation and derogation regarding torture in Ethiopia and international law and defense of justifiable acts for torture. The third section analyzes law and practice in Ethiopia regarding grant of amnesty, pardon, statute of limitation and immunity for alleged torture in relation to the international law and jurisprudences.

Chapter four provides the elements of torture and the practice of prosecution of torture with the existing lack of clear definition of torture in the criminal code in light with international law. Under this chapter each elements of torture in the criminal code as crime of use of improper method are analyzed in light with the scope of torture under international law. Besides, how acts constituting torture under international laws are prosecuted in Ethiopia is discussed. Finally, the last chapter, chapter five, presents the summary of the major findings, the conclusion drawn from those findings and possible recommendations.

CHAPTER TWO

INTERNATIONAL, REGIONAL AND NATIONAL LAWS PROHIBITING TORTURE

2.1. Introduction

Several international instruments and customary international laws prohibit torture. This chapter briefly outlines those international and regional human rights instruments and international humanitarian laws that ban torture as well as torture as preemptory norm. The chapter also provides obligation of state to criminalize and prosecute torture arising from the international law. The controversy over the obligation to criminalize torture as a separate crime touched briefly and the paper argued for the separate criminalization of torture under domestic legal criminal law.

Lastly, it precisely discuses the national legal frame work prohibiting torture in Ethiopia. In so doing laws pre and post adoption of UNCAT dealt separately. The chapter also raised scholarly arguments regarding the self executing or non-self executing nature international laws in domestic legal system. The paper argued that such distinction shall be made based on the nature of the international instrument, not whether the domestic law provides such conclusive provision or otherwise.

2.2. International and Regional Legal Framework

2.2.1. Treaties

The UN charter was drafted in the aftermath of World War II, the Holocaust, and the murder of millions of innocent human beings. But contrary to what might have been expected given this background, the charter did not impose any concrete human rights obligations on the UN member states. Although a group of smaller countries and non-governmental organizations (NGOs) attending the San Francisco conference fought for the inclusion of an international bill

of rights in the charter[52], these efforts failed, principally because they opposed by the major powers.[53]

The two major human rights provisions of the Charter are Article 55 and 56. Besides, article 62 of the charter mandated the Economic and Social Council (ECOSOC) that it 'may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.' The council used this power when it recommended the Universal Declaration of Human Rights (UDHR'). General Assembly of the United Nations (UNGA) adopted and proclaimed UDHR on December 10, 1948.[54] Although UDHR was a non-binding UNGA resolution and was intended, as its preamble indicates, to provide 'a common understanding' of the human rights and fundamental freedoms mentioned in the charter, it has come to be accepted as a normative instrument in its own right. Together with the charters, the universal declaration is now considered to spell out the general human rights obligations of all UN member states.[55] UDHR, furthermore, as most scholars argued, has now attained a customary international law status because the provisions represent the consensus of the international community.[56] UDHR prohibit torture universally for the first time, which provides that: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.[57]

The non-binding nature of the declaration, before conception of UDHR as customary law, prompted International Covenant on Civil and Political Rights (ICCPR) and become as a reaffirmation of the provisions of the declaration in binding sense. It provides that: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, on one shall be subjected without his free consent to medical or scientific experimentation'.[58]

This provision maintained the provision of Article 5 of UDHR in the same wording. Although ICCPR does not define what torture means, during its drafting delegates had been

[52] S. Charnovitz, 'Non-Governmental Organizations and International Law' (2006) 100 *AmJIL* 348
[53] T. Buergenthal, 'The Normative and Institutional Evolution of International Human Rights' (1997) 19 *HEQ* 705
[54] J. Morsink, *The universal declaration of human rights: Origin, drafting, and Intent* (Philadelphia: university of Pennsylvania Press 1999) 4.
[55] T. Buergenthal, 'The Evolving International Human Rights System' (2006) 100(4) 783
[56] N. Petersen, 'Customary law without custom? Rules, Principles, and the role of state practice in international norm creation' (2008) 23 *AmUILR* 276.
[57] UDHR, Art. 5.
[58] ICCPR, Art. 7

agreed that the meaning of torture encompasses both physical and mental torture.[59] The second paragraph of Article 7 above specifically prohibits medical or scientific experimentation against individual without his/her free consent. Art. 7 of ICCPR is, thus, formulated in such a way as to assure its widest possible application.[60]

There are also many international instruments protecting individuals who are found in special categories, most of them are member of groups who are in need of special attention due to their vulnerability to violence. Accordingly convention on the rights of child (CRC)[61], convention on elimination of all forms of racial discrimination (CERD)[62], refugee convention (RC)[63], convention on the protection of the rights of all migrant workers and members of their families (CRMW)[64], and convention on the rights of person with disabilities (CRPD)[65] directly ban torture against the [individual] members of the group who are the respective beneficiary of the conventions.

It is since 1975 that international community began to make an effort to come up with special international laws that particularly govern torture at international level. Accordingly, UNGA adopted Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhumane or Degrading Treatment or punishment (DAT). The Declaration defines torture under its first paragraph of Art. 1, as follow:

> For the purpose of this Declaration, 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from,

[59] M. Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff Publishers 1987) 150; see also W. A. Schabas, *The Death Penalty as Cruel Treatment and Torture: Capital Punishment Challenged in the World's Courts* (Northeastern University Press 1996) 28.
[60] B. Klayman, 'The Definition of Torture in International Law' (1978) 51 *Temple Law Quarterly* 449, 466.
[61] CRC, Art. 37
[62] International Convention on the Elimination of All Forms of Racial Discrimination (adopted in 21 Dec. 1965, entered in to force Jan 4, 1969) 660 U.N.T.S. 195, Art. 5.
[63] Convention Relating to the Status of Refugees (adopted in 28 July 1951, enter in to force 22 April 1954) 189U.N.T.S.137, Art. 33.
[64] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted in 18 Dec. 1990, entered in to force 1 July 2003) 2220 U.N.T.S. 3, Art. 10.
[65] Convention on the Rights of Persons with Disabilities (adopted in 13Dec. 2006, enter in to force 3 May 2008) 2515U.N.T.S.3, Art. 15.

inherent in or incidental to, lawful sanctions to the extent consistent with the standard Minimum Rules for the Treatment of Prisoners.

Paragraph two of the same article considers torture as aggravated version of cruel, inhumane or degrading treatment or punishment. Even if the declaration is not binding in its legal sense, it imposes obligation up on states to criminalize or outlaw acts of torture and permit no exception or any kind of justification even during emergency, and provide local remedy for the victims of torture.[66]

On 10 December 1984, the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT) was unanimously adopted by the General Assembly and entered in to force on 26, June 1987. Although it has been said that UNCAT is substantively based on the DAT, there are some changes it brings on the declaration. Among others it elaborated upon the draft Declaration's criminalization of torture by proposing the principle of universal jurisdiction and it suggested mechanisms for the prevention of torture, including an international monitoring mechanism to be entrusted to the Human Rights Committee, the supervisory body established under the Civil and Political Rights Covenant.[67] Besides, the convention define torture with some modification and in strict or strong sense as it includes *act committed by a third person* and more elaborative in government participation by adding *or with the consent or acquiescence of a public official or other person acting in an official capacity*, and extending the purpose list by including *or for any reason based on discrimination of any kind*.[68] Furthermore the convention provides space for more or a wider protection in any other international or national laws, before and after it comes into force, under its article 1(2). The convention maintained that, like that of DAT, no exceptions can be invoked as a justification of torture even in time of war, political crisis and state of emergency.[69]

Regional human rights laws also prohibit torture in general. European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) provides in Article 3 that: 'No

[66] DAT, Art. 2, 3 and 11.
[67] A. Boulesbaa, 'An Analysis of the 1984 Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (1986) 4 *Dickinson Journal of International Law* 185; see also M. Lippmann, 'The Development and Drafting of the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment' (1994) 17 *Boston College International and Comparative Law Review* 275.
[68] DAT, Art. 1(1) in comparison with UNCAT Art. 1 (1) (Emphasis added).
[69] UNCAT, Art. 2(2).

one shall be subjected to torture or to inhuman or degrading treatment or punishment'. This provision differs from Article UDHR and Article ICCPR only in so far as it omits the word "cruel". Inter-American Convention on Human Rights (ACHR) provides that: 'No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person'.[70] The African Charter on Human and Peoples' Rights (ACHPR)[71] also under its Art. 5 prohibit torture as follow:

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

The Charter is different from the other instruments as it contains several prohibitions in a single article and attaches the issue of torture with value of human dignity.[72] Finally International Humanitarian Laws (IHL) and International Criminal laws (ICL) prohibit torture. The Four Geneva Conventions and their Additional Protocols as well as the Statutes of *ad hoc* and Permanent International Criminal tribunals make torture punishable as war crime and crimes against humanity at international level.[73] Article 17 of the third Geneva Convention specifies that 'no physical or mental torture, nor any form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever'. Torture is also precluded as a grave breach of each of the Geneva Conventions.

[70] ACHR, Art. 5/2

[71] F. Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Hague: Kluwer Law International 2003) 118-123.

[72] ibid.

[73] I, art 12; GC II, art. 12; GC III, art. 17 and 87; and GC IV, art. 32; AP I, Art. 75 (2) (ii) and AP II, Art. 4 (2) (a); UN Security Council, Rome Statute of the International Criminal Court (last amended 2010) (Here in after ICC) Art. 7 and 8; UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002) (Here in after ICTY Statute) Art. 3 and 5; UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as amended on 13 October 2006) (Here in after ICTR Statute), Art. 3 and 4; see also C. Smith, 'Common article 3 of the Geneva conventions as a minimum standard in international humanitarian law' (2005) 13 *Irish Students Law Review* 168.

2.2.2. Customary Law and Torture as a Norm of *Jus Cogens*

One of the sources of international law as listed under the IJC statute is customary international law which constitutes two substantive elements for its formation: state practice and *opinion juris* (intention of state to be bound by that they practiced as forming a law).[74] Although there is inconsistency in state practice of torture, it does not affect the formation of international customary law. To this effect ICJ, on the *Nicaragua v. United States*[75], stated:

> The court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.

As Decker observed there is great consensus amongst the international legal scholars about the existence of a customary norm prohibiting torture.[76] The concept of *jus cogens* was accepted by the international law commission (ILC), and incorporated in the final draft on the law of treaties in 1966, article 50 which latter become Article 53 of the Original convention, which states that:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

[74] Statute of International Court of Justice (ICJ), 1954, Art. 38; see also J. klabbers, *International law* (Cambridge: Cambridge University Press 2013).
[75] Military and Paramilitary Activities in and against Nicaragua, (*Nicaragua v. United States of America*) (Merit) (1986) ICJ Rep. 14, Para 207.
[76] J. Decker, 'Is the United State Bound by Customary International Law of Torture?' (2006) 6 *Chicago Journal of International Law* 803, 819.

Neither International Customary Laws (ICL) nor the Vienna Convention on the Law of Treaties (VCLT) provides an accepted list of *jus cogens*. During the discussions by the International law Commission (ILC) on the topic some examples of *just cogens* have been given, and they include unlawful use of force, piracy, slave trading and, and [recently] torture.[77] The inclusion of torture as norm of *jus cogens* also confirmed in the international jurisprudences.[78] From the reading of the provision under Article 53 of the VCLT it is evident that state agreement to expose individual to torture would be void.

2.3. Obligation of State to Criminalize and Prosecute Torture

ICCPR simply provided a prohibition of torture and other ill-treatments under article 7 without clearly providing obligation to criminalize such prohibition under national legal system. However, the HRC under its GC interpreted this article as incorporating a requirement to bring perpetrators to justice.[79] Accordingly, article 2 of ICCPR obliged state to make effort for the implementation of the provisions of the covenant, particularly in their national legal system. The HRC in its GC No.31 stressed that states have obligations to investigate and bring to justice perpetrators of violations including *torture and similar cruel, inhuman and degrading treatment*.[80]

In contrary to ICCPR, UNCAT provide obligation to prevent, criminalize, and prosecute torture explicitly.[81] UNCAT, under its article 2 and 12, provides that state party to the convention should take legal measures and investigate and prosecute crime of torture. The CAT under its GC No. 2, ensure this legal obligation by extending the obligation to prevent and eradicate torture by taking appropriate measures and obliged to investigate and prosecute (exercise due diligence to

[77] J. D. Mujuzi , 'An analysis of the approach to the right to freedom from torture adopted by the African Commission on Human and Peoples' Rights' (2006) 6(2) *AHRJ* 423.
[78] *Furundzija*, note 19, Paras 150-155, ICTY held that the prohibition of torture has acquired the status of *jus cogens*; and see also Human Rights Committee, CCPR General Comment No. 29: Article 4: Derogation during a State of Emergency, UN doc. CCPR/C/21/Rev.1/Add.11 (2001), Para 10-12.
[79] Human Rights Committee, 'General Comment no. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant' UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) (Herein after HRC GC No. 31) Para 18.
[80] HRC, GC No. 31, Para 8 (Emphasis added).
[81] UNCAT, Art. 2, 4(1) and 14; The jurisprudences of CAT is also similar, see for instance CAT, Concluding Observation on Cambodia, UN doc. CAT/C/CR/31/7, 2004, Para 6(d).

prevent torture) perpetrators of torture with direct or indirect involvement or knowledge of public official either by subordinate state officials or by private actors.[82]

However, it is not clear whether both UNCAT and ICCPR require state to criminalize torture as a separate offence. Some argued that they do not and other argued they obliged state to do so. The former argued that 'states parties, although they are obliged to make acts of torture 'punishable', are not also obliged to criminalize in their domestic laws acts amounting to torture as a separate offence under the UNCAT'.[83] Those who support the separate criminalization argued that unless torture is made crime as a separate offence it is difficult to maintain its absoluteness, in a sense that it is difficult to make those defenses applicable for other crime inapplicable to torture, and unless definition of torture is provided it is difficult to state to ensure appropriate sentence to torture and apply universal jurisdiction.[84]

Nevertheless, jurisprudences of human rights bodies, shows that state should criminalize torture as a separate offence. For instance the HRC in its concluding observation on United States of America stated its concern about 'lack of comprehensive legislation criminalizing all forms of torture, and recommended that USA should enact legislation to explicitly prohibit torture …provides for penalties commensurate with the gravity of such acts'.[85] UNCAT did not require state to adopt the definition of torture provided under its article 1, but the CAT is now requiring state to include this systematically by requiring definition of torture under their national law and ensuring its compatibility with that of its definition.[86]

The practice of state in this regard is inconsistence, some criminalize torture as a separate offence through enacting separate and comprehensive law, and some other prefer to define

[82] CAT, GC No. 2, Para18 and 26.
[83] E. A. Cirimwami, 'Does the United Nations Convention against Torture Oblige States Parties to Criminalize Torture in their Domestic Laws' (2018) 2 *African Yearbooks of Human Rights* 1.
[84] R. Nigel. and M. Pollard, 'Criminalization of Torture: State Obligations under The United Nations Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment' (2006) 2 *EHRLR* 120; see also Clapham and others*, Torture by Private Actors and 'Gold-Plating' the Offence in National Law: An Exchange of Emails in Honour of William Schabas*, Arcs of Global Justice: Essays in Honour of William Schabas, in Margaret M. de Guzman and Diane Marie Amann (ed.) (Oxford University Press, OUP) (2018) 287-295. Available at: <https://ssrn.com/abstract=3099614> (accessed on 28 June 2019).
[85]HRC, Concluding Observation on the Fourth Periodic Report of the United States of America, CCPR/C/USA/CO/4, 2014, Para 12.
[86] APT 2008, 18-19; and see also CAT, Concluding Observation on Vietnam, UN Doc. CAT/C/VNM/CO/1, 2018, Para 6.

torture under their general criminal law.[87] Besides, some states define torture more broadly than UNCAT by avoiding the element of official capacity and extending the purpose element.

Regarding avoiding the "element of official capacity" the researcher argues for the wider application of torture in domestic legal system for the following reasons. First, UNCAT does not prohibit such wider application, rather it provide a minimum standard of definition for torture. Second, those countries that are member to ICCPR are required to enforce article 7 widely than UNCAT article 1. The prohibition on torture and ill-treatment in the ICCPR applies regardless whether the acts were committed by *public officials* or *other persons acting on behalf of the State*, or *private persons.*[88]

Thirdly the definition for torture under national law should be contextualize to the domestic criminalization of torture to hold individual responsible. In other words the national criminal law is not to hold the state liable like international human rights bodies. In this regard the approach of international criminal tribunals which supports the possibility of commission of torture by private individuals shall be adopted.[89] Lastly, state become accountable for acts of non-state actors when state failed to exercise *due diligence or for its acquiescence*.[90] In order to avoid such liability state must prevent or protect individuals from private acts of torture. Besides, recent jurisprudences of CAT show that rape which is committed by private individual are considered as torture.[91] Therefore, adopting such definition is legal and logical to combat impunity of torture perpetrators.

---

[87] Association for the Prevention of Torture (APT) and Convention against Torture Initiative (CTI), '*A Guide on Anti-Torture Legislation'* (2016) 15-16. Available at: <https://www.apt.ch/content/files_res/anti-torture-guide-en.pdf> (accessed on 28 June 2019) (Here in after APT 2016). South Africa, Uganda, Kenya and Philippines enacted specific law for prevention and punishment of torture, whereas Mali, Canada and New Zealand define and criminalize torture in their criminal code as a separate crime.

[88] HRC, GC No. 20, Para 13 (Emphasis added).

[89] International *ad hoc* criminal tribunals concurred that torturous acts can be committed by private individual without the involvement of state official. In addition they held that the criminal responsibility of individuals is different with that of state responsibility before human right bodies. See for instance *Prosecutor v Kunarac et al.* (Judgment) ICTY-96-23-T C & IT-96-23/1-TC (22 Feb. 2001) Paras 468- 495, 482; *Prosecutor v Kunarac et al.* (Judgment) ICTY-96-23-TC & 96-23/1-AC (June 2002) Para 145-148; *Prosecutor v. Kvocka*, Case No. IT-98-30/1-T, ICTY, Judgment, Nov. 2, 2001, Para 139.

[90] *Hajrizi Dzemajl et al. v Federal Republic of Yugoslavia*, Communication No. 161/2000, CAT, Judgment, November 2002, Para 9(2).

[91] K. Fortin, 'Rape as torture: An evaluation of the Committee against Torture's attitude to sexual violence' (2008) 4(3) *Utrecht Law Review* 145.

2.4. The Crime of Torture and the Legal Framework in Ethiopia

This sub-section provides laws prohibiting torture since legal modernization takes place in Ethiopia-1930s. It provides guarantee of the rights under the basic law and other subsidiary laws as well as criminalization of torture in the three regimes criminal laws since 1930 penal code. Nevertheless the discussion presented in two parts. The date of accession to the UNCAT by Ethiopia is taken as a demarcation for separating the two parts. Accordingly the first part discuss pre 1994 laws that prohibits torture which includes the 1931 Imperial Constitution, the Revise Constitution of 1955, PDRE Constitution of the Derg rgime and 1994 FDRE constitution. Subsidiary laws the penal code of 1930, 1957, and special penal code of 1981 are discussed briefly. Part two provides the international laws to which Ethiopia is a party and Criminal Code of 2004.

2.4.1. Pre 1994 Ethiopian laws and the Proscription of Torture

It was in the 1930s that Ethiopia started modernizing her legal system regarding codification of laws and it was during this time that Ethiopia had the first written Constitution.[92] The 1931 Constitution simply strengthen the prerogative authority of the emperor in all respect, while guaranteeing some sorts of human rights under its chapter three.[93] Nevertheless, Among the 55 provisions of the Constitution none of them recognize the most important rights like right to life and right to free from subject to torture.

Due to the political crisis internally and external factors like international influence, and the re-unification of Ethiopia and Eretria in form of confederation forced the imperial regime to revise its Constitution.[94] The Revised Constitution of 1955 includes about 29 provisions under Chapter Three which deals with human rights and some of the provisions as direct (verbatim)

[92] H. Bereket, 'Constitutional Development in Ethiopia' (1966) 10(2) *Journal of African Law* 74.
[93]Ethiopian Constitution of 1931, Established in the reign of His Majesty Haile Sellassie I, 16th July 1931, Chapter Three, Art. 18-29. freedom from illegal arrest, sentence and punishment, freedom of movement, right to be tried by a legally established rights, right to privacy, freedom of expression and property right.
[94] H. Bereket, note 92, 81-82.

copy from UDHR.[95] The Constitution of 1955 did not clearly provide for the rights against torture, rather it provides that: 'No one shall be subject to cruel and inhuman treatment'.[96] Then overthrow of the imperial regime introduced the country with the new Constitution of the People's Democratic Republic of Ethiopia (PDRE) which ended up the imperial rule or kingship.[97] Undeniably the ideology of the government, socialism, affects the recognition of fundamental rights. This can be inferred from Part Two Chapter Seven of the PDRE Constitution of 1987, which is claimed the copy paste of the former Soviet Union, gives more emphasis to social and cultural rights than civil and political rights in that the Constitution put social and economic rights first before civil and political rights.[98] However, unexpectedly it does not provide provision that prohibit torture and other ill-treatments.

There are also subsidiary laws before 1994 that criminalized torture. With the introduction of western-based codes-the first Ethiopian Penal Code appeared in the early 1930's.[99] The Penal Code of 1930, which was enacted one year prior to the 1931 Constitution, is the first codification in criminal justice system. The code has 487 articles which provide prohibited acts with their respective punishment and introduce some criminal law principles.[100] Although the code criminalized many offences including those committed against human person, dignity, property, and health,[101] it does not outlaw or mention the term torture and cruel, inhuman or degrading treatment or punishment.

The modernization of Ethiopian legal system in general and the criminal justice system in particular sought by the then government to govern 'the complexities of modern life' and result

[95] The Revised Constitution of Ethiopia, proclamation No.144/1955, Negarit Gazetta, Year 15, No. 2, Art 37-65. (Here in after Constitution of 1955); and see also H. Bereket, note 92, 83.
[96] ibid Art. 57.
[97] M. Fisseha-Tsion, 'Highlights of the Constitution of the Peoples' Democratic Republic of Ethiopia (PDRE)' (1988)14(2) *Review of Socialist Law* 129.
[98] The Constitution of the People's Democratic Republic of Ethiopia, proclamation No. 1, 1987, Nagarit Gazetta, Year 47, No. 1 (Here in after PDRE Constitution) Art. 35-58; see also Menghistu F, note 88, 152.
[99] J. W. Van Doren, 'Positivism and the Rule of Law, Formal Systems or Concealed Values: A Case Study of the Ethiopian Legal System' (1994) 3 *J. Transnat'l L. & Pol'y* 165.
[100] M. Abdo, 'Legal History and Traditions' (2009) *A Teaching Material prepared by Justice and Legal System Research Institute* (unpublished) 92.
[101] The Penal Code of 1930, Enacted in the reign of His Majesty Haile Sellassie I, September 1930, Part V, Chapter 1-13. Among other things the Code punish insulting, false accusation, adultery, abortion, assault, bodily injury, perjury and murder.

the revision of the Penal Code of 1930.[102] The second Penal Code promulgated on 23 July 1957 and come in to force on 5 May 1958 criminalized acts of torture.[103] During this 1950s Ethiopia was a signatory state of UDHR and adopted the Revised Constitution of 1955 which prohibit cruel and inhuman treatment. Besides, the drafter of the Penal Code consulted the then Italian, Greek, Yugoslavia and Swizz Penal Codes.[104] All these reasons seem contributing factor to criminalize torture. The Penal Code criminalized torture as war crime (as fundamental offences against law of nations- international law).[105] In addition, the Code in same Part, Book IV, Title III Offences against Public Office, chapter I also proscribed torture committed by public servants.[106] Article 417 provides that:

> Any public servant charged with the arrest, custody, supervision, escort or interrogation of a person who is under suspicion, under arrest, summoned to appear before a court of justice, detained or interned, who, in the performance of his duties, treats the person concerned in an improper or brutal manner, or in a manner which is incompatible with human dignity or with the dignity of his office, especially by the use of blows, cruelty or physical or mental torture, be it to obtain a statement or a confession, or to any other similar ends (…).

The Revised Special Penal Code of 1981 also criminalized use of improper method.[107] The provision of the Code provides:

> Any public servant or official or any elected member of a mass organization or a co-operative society or any member of any revolution defense charged with the arrest, custody, supervision, escort or interrogation of a person who is under suspicion, under arrest, summoned to appear before a court of justice, detained or interned, or imprisoned, who in the performance of his duties, treats the person concerned in an improper or brutal manner, or in a manner which is incompatible with human dignity…

This provision did not mention the term torture unlike the penal code of 1957. Besides, all the Codes did not provide a definition of what torture means. Lastly, ICCPR which prohibit

[102] P. Graven, *An Introduction to the Ethiopian Criminal Law: Article 1-84 Penal Code*, (Nairobi: Addis Ababa University and Oxford University Press 1965) 1.
[103] The Penal Code of the Empire of Ethiopia, Proclamation No. 158/1957, Federal Negarit Gazeta, 16th year No. 1, 23rd July 1957 (entered in to force 5th May 1958) (Herein after Penal code of 1957) Art. 283-291 and 417.
[104] P. Graven, note 101, 2.
[105] Penal Code of 1957, Art. 283-291.
[106] ibid Art. 417.
[107] The Revised Special Penal Code, Proclamation No. 214/1981, Negarit Gazeta, No. 2, 5th November 1981 (entered in to force 8th Sept. 1981) Art 22.

torture under its Article 7 become part of the law of the land as the country ratified/acceded to the convention on 11 June 1993.[108]

2.4.2. Post 1994 Laws

The FDRE Constitution (which is currently in force), the supreme law in domestic legal system of Ethiopia[109], devoted one third of its provisions for guaranteeing and ensuring human rights of individual living in the territory of Ethiopia.[110] The Constitution is adopted in 1994 at the time when the country has already becomes member parties to several international and regional human rights instruments.[111] Besides, the Constitution widened the scope of application of those rights by making reference, for its interpretation, to international human rights laws to which Ethiopia is a party.[112]

The FDRE Constitution under its Chapter Three provides human and democratic rights. Among the fundamental human rights it guarantees, treatments of person as human during the enforcement of law is important to this paper. Mainly Article 18 of the Constitution stipulates that *no one shall be subjected to cruel, inhuman or degrading treatment or punishment.*[113] This provision is different from Article 57 of the 1955 constitution in that it adds the term 'degrading' and 'punishment' which widened the scope of the protection from ill-treatment in that any cruel, inhuman and degrading punishment is not acceptable, which were not clearly provided in the 1955 constitution.

However, both Constitutions do not mentioned the term 'torture' clearly and this also may invite a criticism and debate on the prohibition of torture under the FDRE Constitution. The writer of the paper criticizes the drafter of the Constitution for their poor drafting work. Because, as it has been mentioned above during the drafting and deliberation stage there were several international and regional human rights instruments which Ethiopia ratified/acceded to be bound by them. At least it was possible to copy paste the provision of UDHR. The lack of due diligence

[108] In addition Ethiopia accessed to the four Geneva conventions in 2 October, 1969. Thus Geneva conventions are also parts of the law of the land.
[109] FDRE constitution, Art. 9/1.
[110] ibid Arts.13-44
[111] Drafting Committee of Constitution, 1st-50th ordinary meeting minutes (Feb, 1993- Jan, 1994), Vol. 1, specially 48th meeting minutes, available at: <www.absinilaw.com> (accessed on 6 May 2019)
[112] FDRE Constitution Art. 13/2.
[113] ibid Art. 18 (1) (Emphasis added).

of the Constitution Drafting Commission can also be inferred from article 93 of the constitution which make the nomenclature of state non-derogable. Due to this someone may argue that torture is not prohibited under the Constitution of Ethiopia. But, as Abebe rightly observed the provision should be interpreted constructively than in a manner that destructs its meaning and purpose.[114] He argued that:

> Logically speaking, if the Constitution prohibits inhuman and cruel treatment, for the stronger reason it must prohibit torture as well. Therefore, the interpretation that must be applied for the case of Article 18 is liberal and constructive interpretation in which torture must be considered as one form of inhuman treatment. That is also the way of interpretation supported by the combined reading of article 9(4) and article 13(2) of the same Constitution.[115]

He also argued that article 19 (5) which prohibit coercion of suspects for extracting confession and article 28 of the Constitution which makes torture as crimes against humanity also shows that the Constitution prohibit torture thereby article 18 do so.[116] The writer of this paper also agrees with such kind of interpretation of Article 18 of the Constitution. Because, in addition the argument forwarded by Abebe, the government of Ethiopia also follow this approach in interpreting the article before the Human rights Committee in making the initial Periodic report in 2009.[117] Besides, the provisions of Chapter Three of the Constitution are to be interpreted in accordance with international human rights instruments to which Ethiopia is a party.[118] Accordingly, ICCPR and other instruments prohibit torture in addition to cruel, inhuman or degrading treatments mostly in single provision and in similar manner.[119] Therefore, article 18 should be understood as it incorporate and prohibit torture.

There also other subsidiary laws that prohibit torture in Ethiopia. The FDRE Criminal Code of 2004 (CC), which has repealed Penal Code of 1957, criminalized torture in a similar manner with the Penal Code it repealed.[120] Of course the main reasons for the amendment of the Penal Code of 1957 were not specifically to deal with criminalization of torture, although the

[114] T. Abebe, note 44, 90-91.
[115] ibid.
[116] ibid.
[117] HRC, First initial periodic report of Ethiopia, note 30, ibid.
[118] FDRE constitution, Art. 13(2).
[119] ICCPR, Art. 7; ACHPR, Art 5.
[120] CC, Art. 270-72 and 424. The provision changes only in the number of the articles regarding Torture as offence of within the context of war crimes. In other words this Code does not bring any substantial changes regarding torture committed during an armed conflict.

general rationale provided by the CC provides that the major changes that take place within the last half century

> …recognition by the constitution and international agreements ratified by Ethiopia (…), *the democratic rights and freedoms of citizens and residents, human rights*... After all these phenomena have taken place, it would be inappropriate to allow the continuance of the enforcement of the 1957 Penal Code.[121]

The CC makes torture punishable under article 270 ff as war crimes and under article 424 as use of improper method (crime against public office), although it does not provides clear definition of the term torture in both cases.[122]

The CC widened the provision as compare to the Penal Code. It criminalized inducement or promise made by the public servant in the control of a person.[123] The other change made to the 1957 Penal Code is the structure of the article and punishment. Regarding the structure CC has two sub-articles and the second sub-article provides for the punishment of public officials who order the acts under sub-article 1.[124] With respect to Punishment Penal Code punished torture by fine or simple imprisonment, where as the CC provides a maximum of rigorous imprisonment not exceeding ten years in aggravated circumstance, fine or simple imprisonment in case of normal circumstance.[125]

However, Abebe revealed that the CC does not provide sufficient penalty that takes the gravity of torture in to account which is contrary to the UNCAT article 4(2).[126] Although No international law provide a specific range of penalty for crime of torture jurisprudence of human rights bodies condemned light penalty which do not take the gravity of the crime.[127] Some recommended to making the Penalty within the range of six (6) to twenty (20) years of imprisonment.[128] Further difference which may be said significant is the addition of the purpose

---

[121] ibid see the Preface, Para 1 (Emphasis added).
[122] See the full text of the provisions of Art. 424/1 above in section 1.1.
[123] **የኢትዮጵያ ፌደራላዊ ዲሞክራሲያዊ ሪፐብሊክ የተሻሻለው የወንደል ህግ ሐተታ ዘምክንያት**, 203, available at: https://abyssinialaw.com/online-resources/codes-commentaries-and-explanatory-notes [accessed on 8 May 2019]
[124] ibid.
[125] Penal code of 1957, Art. 417; and CC, Art. 424 (1)
[126] T. Abebe, note 44, 92.
[127] CAT, Concluding Observation on Cambodia, UN doc.CAT/C/CR/31/1, 2004, Para 7.
[128] C. Ingelse, *The UN Committee against Torture: An Assessment* (Hague: Kluwer Law International 2001) 342.

to makes him give a testimony in a favorable manner which does not appeared in the older code. Finally, the CC criminalized torture as underling offence under the crime entitled use of improper method, as crime against public offence, while international law (the UNCAT and the ICCPR) to which Ethiopia is a member State prohibit and criminalized torture as violation against the person.[129] In addition to the domestic laws, Ethiopia is well known for the signing and ratification of international instruments since the foundation of United Nations. Accordingly, the country ratified several international human rights instruments including ICCPR, UNCAT, CRC CEDAW, CERD and CRPD.[130] Except UNCAT all conventions provide general prohibition of torture in one way or another, as discussed above under section 2.2.

There is unsettled debate, among legal scholars in Ethiopia, over the incorporation and execution of treaties ratified by Ethiopia. Those who argue that Ethiopia is among those who follow monist approach, the mere ratification is enough for domestic application of treaties.[131] Woldemariam claims that treaty follows same procedure with adoption of proclamation and no constitutional provision that require publication of treaty after ratification.[132] Besides, there is no law in Ethiopia that makes publication of law as validity requirement. Woldemariam also argued that practice shows that no publication of treaties in the official Negarit Gazette is a requirement for their application.[133] Idris hold that ratification is not enough rather the publication under Negarit Gazetta is mandatory for their enforcement by courts.[134] He argued based on article 71 of FDRE constitution which requires proclamations or laws enacted by parliament shall be signed by the president.[135]

There is also a distinction among treaties ratified by state as self-executing and non-self-executing treaties. In the former case domestic courts simply enforce or apply the treaties provision, whereas the second case signify that treaties must be accompanied by enabling

[129] UNCAT Art. 4 and ICCPR Art. 7.
[130] Ethiopia acceded to UNCAT on 14 March 1994. Date of ratification of all other the treaties is available at: <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx> (accessed on 15 May 2019).
[131] T. S. Bulto, 'The Monist-Dualist Divide and the Supremacy Clause: Revailing the Status of Human Rights Treaties in Ethiopia' (2009) 23(1) *Journal of Ethiopian Law* 132; G.A. Woldemariam, 'The Place of International Law in the Ethiopian Legal System' (2016) 1(1) *Ethiopian Yearbook of International Law* 61.
[132] G. A. Woldemariam., note 131, 74-76.
[133] ibid.
[134] I. Idris, 'The Place of International Human Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution' (2000) 20 *Journal of Ethiopian law* 113, 125-126.
[135] ibid.

national law for their application by the domestic courts. According to Woldemariam, the first approach appears the FDRE constitution's preference, despite no clear provision to this effect.[136] Because he has stated that article 9 (4) of the constitution make treaties parts of law of the land, thus self-executing nature of the treaties. Besides, there has been no declaration, in practice, made by the government which supports otherwise.[137] Thus international treaties ratified by Ethiopia in general and UNCAT in particular are merely incorporated in to domestic law by ratification and can be applied by domestic courts without any further enabling legislation.

However, some treaties by their nature require an implementing legislation for the treaty to be applied by domestic courts. This is particularly the case for criminalization of torture based on the UNCAT. Ethiopia as a member of UNCAT bears obligation to criminalize torture. For the mere fact that Ethiopia is party to UNCAT does necessarily implies that domestic courts can apply the UNCAT directly to punish torture. The following arguments propounded to support this assertion. First, as a general rule, international laws that criminalize certain acts are non-self-executing.[138] Second, the provisions of UNCAT which criminalize torture did not provide appropriate range of penalty, and, thus it is non-self-executing (needs enabling legislation).[139] This position is also held by the Special Tribunal for Lebanon (STL) Appellate Chamber in its interlocutory decision referred by the trail chamber to it. The court concurred that being a party to an international law which criminalize a certain act does not confer state to directly apply the treaties without enacting domestic criminal law for the punishment of the act under the treaty. The court stated that:

> This provision does not necessarily entail, however, that the authorities of a state party to the ICCPR may try and convict a person for a crime that is provided for in international law but not yet codified in the domestic legal order: in criminal matters, international law cannot substitute itself for national legislation; in other words, international criminalization alone is not sufficient for domestic legal orders to punish that conduct.[140]

[136] G. A. Woldemariam., note 131, 76-77.
[137] ibid.
[138] *El Sayed Jemil v prosecutor* (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging) STL-11-01/I- AC (16 February 2011) Para 76.
[139] ibid.
[140] *El Sayed Jemil v prosecutor*, note 138, Paras 132-133.

CHAPTER THREE

THE ABSOLUTE NATURE OF TORTURE UNDER ETHIOPIAN LAW AND PRACTICE VIS-À-VIS INTERNATIONAL LAW

3.1. Introduction

The right to freedom from torture is absolute and non-derogable.[141] While most human rights are subject to limitation by law and suspension during emergency, the right against torture is not. As the next sections provides, the violation of right against torture is not tolerable and its prosecution should not be impeded by any legal or factual impediments. This chapter is devoted to discuss the absolute nature of prohibition of torture under Ethiopian and international law and practice.

Accordingly, the first section precisely deals with limitation and derogation of rights against torture in Ethiopia law and international law. The next section provides the prohibition of impediments that hinder ensuring criminal liability of torture perpetrators in law and practice of Ethiopian legal system in relation with international law and jurisprudences.

3.2. Justification for Torture: Defense of Justifiable Acts

Generally limitation refers permanent restriction on the exercise of rights on recognized legal grounds.[142] The law, guaranteeing the rights, shall provide ground of limitation for enjoying rights. Limitations may be provided in a single provision as general limitation clause or specifically in all provision of guaranteeing the rights.[143] Among the ground of limitation public healthy, public order, national security and right and freedom of other are the main. On the other hand derogation refers to temporary suspension of right by law when imminent danger or

[141] ICCPR, Art. 4 (1)

[142] The Siracusa Principle on the Limitation and Derogation Provision in the International Covenant on Civil and Political Rights, (1985) 7 *Hum. Rts Q. 3*.

[143] See for instance, the UDHR, art. 29 (2); and see the constitution of South Africa, Section 36 (1) which provide general limitation grounds upon which the specific rights provided might be limited. On the other hand ICCPR and African Charter do not have a general limitation clause. For further see A. K. Abebe, 'Human Rights under the Ethiopian Constitution: A Descriptive Overview' (2011) 5 (1) *Mizan Law Review* 41, 58-63

emergency occurred.[144] While limitation is a permanent restriction, derogation suspends individuals from exercising their right until the cause for the suspension ceases to exist. Both must be done by law, although derogation requires an enactment of martial or emergency law.[145]

The FDRE Constitution provides provision that recognizes the situations that may suffice to suspend or derogate rights ensured under chapter three. Accordingly, when there is external invasion, a breakdown of law and other order which endangers the constitutional order, natural disaster or an epidemic occur the council of ministers may enacts a decree to suspend rights contained in chapter three.[146] However, it provides that the rights provided under article 18, 25 and 39 (1-2) shall not be suspended under any circumstance.[147] Therefore, the rights ensured under article 18 (right not to be subject to inhuman treatment or punishment, including torture) are non-derogable in any circumstance even during state of emergency.

The prohibition of torture under article 18 (1) of the FDRE Constitution provides no specific limitation clause. In addition to this, the constitution does not have a general limitation clause, like other countries constitution and international instruments do.[148] Thus it can be concluded that prohibition of ill-treatments including torture under article 18 of the constitution is not subject to limitation on the basis of any legal or factual grounds.

Across the spectrum of international human rights treaties, both general and specific, the prohibition of torture is framed as an absolute right which permits of no limitations and derogation even in states of emergency. Article 7 of the ICCPR is assured without any restriction or limitation whatsoever. In addition, under Article 4 of the Civil and political Rights Covenant, Article 7 specified as a non-derogable right. Besides, in its GC No 20, the HRC also declared the absolute and non-derogable status of the prohibition:

> [T]he text of article 7 allows of no limitation: The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force.

[144] A. K. Abebe, note 143, 60-62
[145] ibid.
[146] FDRE constitution, Art. 93 (1-4).
[147] ibid Art. 93 (4) (c).
[148] A. K. Abebe, note 143, ibid.

> The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.[149]

The UNCAT, under its article 2 provides the same maxim of non-derogability of torture in any circumstance that justify the violation of prohibition of torture. Article 2 (2) of UNCAT provides that: 'No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture'. Boulesbaa observed that the prohibition of torture is non-derogable in all circumstances arguing 'the term "whatsoever" employed to close the door to a construction of the article which could lead to an interpretation that the exceptional circumstances referred to … are exhaustive'.[150] In January 2008 the CAT under its GC No. 2 stated that no justification for torture in any scenario under any circumstance including 'any threat of terrorist acts'[151] is acceptable. The committee also reiterates its view in its concluding observation against Turkey in 2016 and coincided that '… the committee draws the attention of the state party to paragraph 5 of its GC No. 2 by state parties, in which it states, *inter alia*, the exceptional circumstances also include any threat of terrorist act'.[152]

The above discussion shows that the supreme law of the land, the FDRE Constitution, is similar with international law (ICCPR and UNCAT) which prohibit torture absolutely and allows no legal and factual ground for the justification of torture. However, it is also important to consider subsidiary laws particularly the Criminal Code (CC) as it forms the part of Ethiopian legal order and special laws that govern possible justification for violation of laws for avoiding criminal responsibility.

The CC provides general defenses which can be raised by the accused during trial.[153] Among others defense of necessity is the main. The scope of application in terms of which crimes it is applicable is not provided. As general rule it is applicable for all crimes proscribed in

[149] HRC GC No. 20, Para 3.
[150] A. Boulesbaa, *The U.N. Convention on Torture and the Prospects for Enforcement* (Hague: Martinus Nijhoff Publishers 1999) 79.
[151] CAT, GC No. 2, Para 5.
[152] CAT, Concluding Observation on the Fourth Periodic Reports of Turkey, UN doc. CAT/C/T/CO/4, 2016, Para 12; HRC, Concluding Observation on the 5th Periodic Report of Canada, UN doc. CCPR/C/CAN/CO/5, 2005, Para 15; *Paez v Sweden*, Communication No. 63/1997, CAT, Judgment, 1997, Para 14.
[153] CC, Art. 68 through 81.

the special part of the code. Acts of necessity is an act which is performed to protect a legal right of the actor himself or the right of another person from an imminent and serious danger.[154] Thus the person who performed such act is exempted from criminal liability. Contrary to the CC, the HRC ruled out the possibility for defense of justifiable acts, such as the defense of necessity, to be invoked to justify practice of torture.[155]

In addition, CC in its general part, chapter II, section II provides that acts required or authorized by law are not punishable as long as they did not exceed the legal limits provided. Particularly acts done in respect of public, state or military duties, and acts in exercise of right to correction or discipline are exempted from criminal liability.[156] This means lawful sanction or punishment inherently resulting severe pain or suffering does not incur criminal liability, *unless it exceeds the legal limit*.[157] This is also recognized under the UNCAT article 1(1). The CC provides fine (Art. 90 ff), confiscation of property (Art. 98 ff), compulsory labor (Art. 103 ff), deprivation of liberty (simple and rigorous imprisonment- Art. 106 ff) and death (Art. 117 ff) as a major and serious penalty. However, a sanction considered as lawful under national law nonetheless constitutes torture under international law if it causes severe pain or suffering and meets the additional elements of the torture.[158] The HRC point out forms of corporal punishment that have been outlawed under international law including using excessive chastisement, canes or whips, and lashes ordered as punishment for crime or as an educative or disciplinary measure.[159] Besides, the HRC and the CAT in their jurisprudences confirmed that corporal punishments are not considered as lawful sanction and rather they are in breach of the covenants.[160] Correspondingly, the CC does not recognize corporal punishment or punishment to the body of a person as form of punishment.

[154] ibid Art. 75.
[155] HRC, Concluding Observation on Israel, UN doc. CCPR/CO/78/ISR, 2003, Para 18. The committee explicitly declared that the defense of necessity is incompatible with article 7 of ICCPR.
[156] CC Art. 68 (a and b).
[157] ibid, sub-article (c) (Emphasis added).
[158] *George Osbourne v Jamaica*, Communication No. 759/97, HRC, Judgment, 2000, Para 9(1). The Committee mention its concerns of the sentence subjecting the author for 15 years imprisonment with hard labor and 10 stroke of the tamarind switch is against article 7 of the ICCPR and stated that 'the permissibility of the sentence under domestic law cannot be invoked as justification under the covenant'.
[159] HRC, GC No. 20, Para 5.
[160] *Pryce v Jamaica*, Communication No. 793/98, HRC, Judgment, 2004, Para 6 (2); HRC, Concluding Observation on Yemen, UN doc. CCPR/CO/84/YEM, 2005, Para 16.

Hence, the above analysis revealed that defense of necessity may justify torture in Ethiopia CC which defies international law prohibition. Nonetheless, recognize pain or suffering arising or incidental to a lawful sanction as an exception for the prohibition of torture under article 18 (1) of FDRE Constitution which is in conformity with international law.

3.3. Impediments on Prosecuting and Sentencing Torture

As discussed under above (section 2.3) states are under obligation to repress violation of the right not to be subject to torture through investigating and prosecuting violations. However, those international laws, so far discussed above, which prohibit torture, do not provide a clear provisions that restrict state derogating from their obligation towards investigating and punishing violation of freedom from torture via legal impediments.

Nevertheless, HRC recognized that 'the problem of impunity for these violations, a matter of sustained concern by the committee, may well be an important contributing element in the recurrence of the violations', and that states may not relief public officials or state agents who have committed criminal violations 'from personal responsibility, as has occurred with certain amnesties and prior legal immunities and indemnities'.[161] Similarly, CAT held that '… impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability'.[162]

3.3.1. Amnesties

International laws do not include a legal definition of what constitutes an amnesty and pardon. Amnesties are legal measures that have the effect of prospectively barring criminal prosecution and, in some cases, civil action against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty's adoption, or retroactively nullifying legal liability previously established.[163] Amnesties do not prevent legal

[161] HRC, GC No. 31, Para 18; see also HRC GC No. 20, Para 44.
[162] CAT, GC No. 2, Para 5.
[163]OHCHR, Rule-of-Law Tools for Post-Conflict States, Amnesties, HR/PUB/09/1 (2009) 5. Available at: <https://www.ohchr.org/documents/publications/amnesties_en.pdf> (accessed on 18 April 2019); see also Black's Law Dictionary, (8th ed. 2004) 92–93 and 1144 define, amnesty as a 'forgetfulness, oblivion; an intentional overlooking' and is etymologically related to the Greek word for oblivion or not remembering. Contrastingly, a

liability for conduct that has not yet taken place, which would be an invitation to violate the law. An amnesty is distinguished from a pardon. A pardon occurs post-prosecution and revokes the penalty without absolving the individual(s) concerned of responsibility for the crime.[164] In other words, a pardon does not extinguish penal responsibility but exempts those convicted of an offence from serving all or part of their sentence. This is also provided under article 229-230 of the CC.

The FDRE constitution under article 28 (1) provides that crimes such as genocide, summary executions, forced disappearances or torture may not be subject to amnesty or pardon of legislature or any other organs. However, there is no crime called torture, rather torture is subsumed as underline offence under war crimes and crime of use of improper method. Thus when act constituting torture committed the perpetrator will be charged with war crimes if it is committed in the context of armed conflict or use of improper method in the context of violation of public office duty.

Although the constitution provides such prohibition of amnesty and pardon for torture clearly, it is a general law. Recently the country has enacted a new amnesty proclamation No. 1096/2018 which has total of 8 articles and aimed to end up fear of persecution by those person who are abroad.[165] However, the proclamation is applicable for some categories of crimes (crimes against state, crimes against state interest and terrorism).[166] The proclamation excludes crime of terrorism which results death (article 3 of proclamation No. 652/2001) and violation of martial laws (proclamation No. 1/2017 and proclamation No. 2/2018) from the benefit of amnesty proclamation but not crimes of use of improper method which subsumed torture.[167]

Internationally, amnesty and pardon are generally neither explicitly prohibited nor required by international treaty and customary laws. International bodies jurisprudence, however,

---

pardon is legally defined as 'the act or an instance of officially nullifying punishment or other legal consequences of a crime. A pardon is usually granted by the chief executive of a government'.

[164] ibid; see also ICRC, *Commentary on the Additional Protocols*, 1987, Para 4617. Available at: < https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=C6692EB184B56F56C12563CD0043A476> (accessed on 19 April 2019).

[165] A proclamation to Grant Amnesty for Persons Who are Involved in Different Crimes, Proclamation No. 1096/2018, entered in to force 13th July 2018 (Herein after Amnesty proclamation), Preamble Para 1 and Art. 4.

[166] ibid Art. 5 (1) (a-l).

[167] ibid clause (m-n).

indicate that torture is not subject to amnesty. International criminal courts' jurisprudences revealed that granting amnesty by enacting law for person who commits torture is facilitating impunity and incompatible with the non-derogable nature of torture. In the *Furundzija* case, ICTY held that:

> It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio,* and then be unmindful of a state say, taking national measures authorizing or condoning torture or absolving its perpetrators through an amnesty law. If such a situation where to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above (null and void) and in addition would not be accorded international legal recognition.[168]

Human rights bodies' jurisprudences also interpret state obligations to investigate and prosecute under their respective implementing clauses as prohibiting amnesty. The HRC in its GC No.20 stated that:

> [A]mnesties are generally incompatible with the duty of states to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.[169]

In the case *Rodriguez v. Uruguay*[170], the HRC reiterated this view stating that failure to investigate allegation that the applicant had been tortured by the secret police of the former military regime and amnesties for gross violations of human rights and legislation, such as Law No. 15,848, *Ley de Caducidad de la pretension punitive del Estado,* are incompatible with the obligations of the Uruguay under the ICCPR. In 2003 HRC expressed its concerns about E1 Salvador's 1993 General Amnesty Act and the application of that Act to serious human rights violations, including those considered and established by the United Nations Truth Commission for E1 Salvador. The HRC considered that the act infringed the right to an effective remedy,

[168] *Furundzija,* note 19, Para 155
[169] HRC, GC No. 20, Para 15.
[170] *Rodriguez,* note 26, Paras 12.3 and 12.4; The Committee expressed its concern that, *in adopting this law, the State party has contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations* (Emphasis added).

since it prevented the investigation and punishment of all those responsible for human rights violations.[171] The CAT also holds the same position in its jurisprudences. The CAT stated in its GC No. 2: 'The committee considers that amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability'.[172] It also considered that amnesties for the crime of torture are incompatible with State obligations under Article 4. It has stated: 'In order to ensure that perpetrators of torture do not enjoy impunity, States parties must ensure the investigation and where appropriate, the prosecution of those accused of having committed the crime of torture, and ensure that amnesty laws exclude torture from their reach'.[173] Recently the Committee, in concluding observation (in the year 2017 on Rwanda), stated its concerns that the country's criminal law do not exclude torture from the application of amnesties and recommended Rwanda to amend her law in conformity with her duty under the convention.[174]

The above discussion revealed that acts constituting torture as underline offence of crime of use of improper method are subject to amnesty under the Ethiopian law in contravention with the absolute nature (non-derogability) of torture under international law.

3.3.2. Pardon

The FDRE Constitution also prohibit grant of pardon to perpetrators convicted of crime of torture. Recently HPR has promulgated a proclamation that provides procedure for granting pardon.[175] The proclamation is applicable on final sentence rendered by Federal Courts, Military Courts, and State Courts entertaining federal jurisdiction and when death penalty passed.[176] The proclamation is applicable for all crimes except any crimes which cannot be commuted by

[171] HRC, Concluding Observation and Recommendations: El Salvador, UN doc. CCPR/CO/78/SLV, 2003, Para 6.
[172] CAT, GC No. 2, Para 5
[173] CAT, Concluding Observation on Chile, UN doc. CAT/C/CR/32/5, 2004, Paras 6(b) and 7 (b); CAT, Concluding Observation on Bahrain, UN doc. CAT/CO/34/BHR, 2005, Paras 6(f and g) and 7(d); and CAT, Concluding Observations on Cambodia, note 81, ibid.
[174] CAT, Concluding Observations on Rwanda, UN doc. CAT/C/RWA/CO/2, 2017, Paras 12-13
[175] Proclamation to provide for the procedure of granting and executing pardon, proclamation No. 840/2014, Federal Negarit Gazette, 21st August 2014 (Herein after Pardon proclamation)
[176] ibid, Art. 4.

pardon as provided by other laws.[177] This proclamation too does not clearly prohibit grant of pardon for war crimes and use of improper method. It just provides that 'without prejudice to prohibiting provisions of other law'. The term 'law', the researcher believes that, include the FDRE Constitution. It is only the Constitution domestic law that prohibit grant of pardon for torture. However, the CC did not criminalized torture as independent/separate crime. Rather the CC subsumed torture under crime of use of improper method. Thus it indicates that a person who is sentenced of use of improper method is eligible for the benefit of pardon proclamation.

In contrary, international jurisprudences which define international laws shows that granting pardon for person sentenced for violating laws against torture is contrary to state obligation under both ICCPR and UNCAT. Accordingly, CAT in the case of *Urra Guridi v Spain*[178]considered that the pardons granted to the civil guards had the practical effect of allowing torture to go unpunished and encouraging its repetition. The Committee concurred in this case that pardons, therefore, constituted a violation of Article 2(1) of the UNCAT, which requires that states take effective measures to prevent torture.[179]

This shows that the Ethiopian Pardon law does not exclude torture from its application while it is expected to do so under UNCAT and ICCPR.

3.3.3. Immunities

Although States are obliged to prosecute torture committed within their territory, as discussed in section 2.3, there is an exception to this principle of duty to prosecute - state immunity.[180] There is no internationally agreed definition of immunity. But from the legal point of view the concise Black's law dictionary defines immunity as exemption or protection from an obligation or penalty.[181] There are a variety of forms of immunity that are granted to government officials in order to enable them to carry out their functions without fear of being sued or charged

[177] ibid Art. 15 (1).What is "law" means to the purpose of this proclamation is not provided under the definitional part.
[178] *Kepa Urra Guridi v Spain*, Communication No. 212/2002, CAT, judgment of 17 May 2005, Para 6(6).
[179] ibid.
[180] L. M. Caplan, 'State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory' (2003) 97 *AmJIL*741.
[181] Black's Law Dictionary (8th ed. 2004) 778.

with a crime for so doing.[182] Subject matter (or functional) immunity covers the official acts of all state officials (*Acta jure imperii*) and is determined by reference to the nature of the acts in question rather than the particular office of the official who performed them. Personal immunity is the one which is attached to the person, which cover *any act* that some classes of state officials perform.[183] Immunity is, generally, legal grants to individuals or entities to prevent them from being held liable for a violation of the law (criminal prosecution).[184]

Regarding the law and practice in Ethiopia, the new criminal code recognized international relation based immunities for foreigner. This is enforceable in Ethiopia as Ethiopia signed multilateral treaty.[185] However, Ethiopia does not have a comprehensive immunity law by which the relationship between Ethiopia and other international community governed[186] and domestic state officials' immunity law is also found in different pieces of laws. The only law that provides immunities in Ethiopia for foreigners is the CC.[187] Immunities arising from public international law bar criminal action against immune foreigner officials or international entities from Ethiopian Courts.[188] The CC reference to the public international law as sources of immunities should be interpreted as referring international immunities laws to which Ethiopia is a party. According to these laws (treaties and customary laws) head of state and other higher state officials like foreign ministers and other ministers, and diplomats are entitled to enjoy immunities from criminal prosecution by Ethiopian Court.

However, neither the Constitution nor any other law provides the limits or exception to such immunities. Those international laws of immunities do not also clearly govern to which

[182] D. Akande and S. Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21(4) *EJIL* 815; see also C. Antonio, 'When May Senior State Officials Be Tried for International Crimes? (Some comments on the Congo v Belgium Case)' (2002) 13(4) *EJIL* 853, 864-865.
[183] ibid 819; and see C. Antonio, note 183, 862-4.
[184] ibid 818.
[185] Ethiopia accessed to Vienna Convention on Diplomatic Relations (adopted on 18 April 1961, entered in to force on 24 April 1964) 500 U.N.T.S. 95 (Here in after VCDR) on 22 Mar 1979.
[186] G. Y. Tessema, 'Immunities and Privileges of UN Agencies in Ethiopia: Problem and Possible Remedies' (2018) 6 *International Journal of Advanced Research* 143.
[187] CC, Art. 4; which provides that 'no difference in treatment of criminals may be made except as provided by this code, which are derived from immunities sanctioned by public international law and constitutional law…'
[188] Ethiopia is member to convention on diplomatic relation and convention on immunities and privileges of UN and its staff; See also Proclamation No 618/2009, which ratified the African protocol on the immunities and privileges of AU and its staffs.

crime they are not applicable.[189] In her fifth report on immunity of state officials from foreign criminal jurisdiction, Special Rapporteur Escobar Hernandez found that the international treaties, international bodies practice, national laws and judicial practice have now tended for the recognition of limitation and exception to immunities from foreign jurisdiction in case of international crimes.[190]

The practice, regarding exercise of jurisdiction over foreign diplomats or state officials, shows that Ethiopia remains strict to the adherence of the international law of immunities than other international laws, like Convention against Genocide, UNCAT… which displaced immunity. This can be inferred from the obedience to the immunity of Sudanese head of State – President Omar Al-Bashir- by refraining from prosecuting or answering for call for his arrest by ICC.[191] There is no criminal case, as far as the researcher's information is concerned, that entertains foreign state officials in the domestic court. On the other hand the international human rights instruments (ICCPR and UNCAT) require member state to avoid possibilities of impunity of torture perpetrators through immunity. This can be inferred from the jurisprudences of both conventions' committees. In this regard the CAT has expressed that granting immunity for torture cases would violate the principle of non-derogability.[192] It also considers that the obligations to prosecute cases of alleged torture under the Convention are incompatible with immunity.[193] Furthermore, the CAT has reiterated that immunity for acts of torture is incompatible with the Convention, in relation to the obligation to provide redress for victims:

> Granting immunity, *in violation of international law*, to any State or its agents or to non-State actors for torture or ill-treatment, is in direct conflict with the obligation of providing redress to victims. When immunity is allowed by law or exists *de facto*, it bars victims from seeking

[189] VCDR; Vienna Convention on Consular Relations (adopted on 24 April 1963, entered in to force on 19 March 1967) 596 U.N.T.S. 261 (Herein after VCCR); Vienna Convention on Special Missions (adopted on 8 December 1969, entered in to force on 21 June 1985) 1400 U.N.T.S. 231(Herein after VCSM); Convention on Jurisdictional Immunities of States and Their Property (adopted on 2 Dec. 2004, not yet entered in to force) A/RES/59/38.

[190]UNCHR, 'Report of Special Rapporteur on Torture' (2016) UN Doc A/CN.4/701. International laws like conventions against torture, enforced disappearance, Un convention against corruption and African convention preventing and combating corruption, Genocide Convention, and convention on the suppression or punishment of crime of apartheid impliedly displace application of immunities form being bar to criminal prosecution in foreign jurisdiction (see Paragraph 33-42). Available at: <https://undocs.org/pdf?symbol=en/A/CN.4/701> (accessed on 29 May 2019).

[191] C. B. Murungu, 'Immunity of State Officials and Prosecution of International Crimes in Africa' (2011) A thesis for the degree Doctor Legum (LL.D) University of Pretoria (Pretoria University Press) 205-221.

[192] CAT, GC No. 2, Para 5.

[193] ibid.

full redress as it allows the violators to go *unpunished* and denies victims full assurance of their rights under article 14.[194]

The HRC, in consideration of the fourth periodic reports of US expressed its concerns that victims of torture are not able to claim compensation from state party and its officials 'due to the broader application of … immunity.'[195]

Regarding domestic officials the supreme law of the land, FDRE Constitution, does not include immunities under its article 28 which provides that perpetrators of torture will not be exempted from criminal liability through amnesty, pardon and statute of limitation. Conversely, the Constitution grants immunity for some categories of government officials. Accordingly, the constitution provides that members of the House of Peoples' Representatives (HPR) and House of Federation (HOF) are not subject to prosecution for the vote they casted or opinion expressed in their respective house.[196] Therefore, the members of the house have functional immunity. As members of the parliament, the Prime minister is also entitled for such functional immunity.[197] The personal immunity from being arrested or prosecuted is also granted to the Prime minister, members of HPR and HOF. Accordingly, 'no member of the [both] House may be arrested or prosecuted without the permission of the House except in the case of flagrante delicto."[198]

However, there is a discrepancy between the English and Amharic version of both articles. The Amharic version provides that 'any members of the [both] House who commit serious crime[199] shall not be arrested or prosecuted …' The English version, whereas, does not provide any reference about the gravity of the crime. Since the Constitution itself provides that the Amharic version shall prevail over the English[200], those persons are immune from arrest or prosecution for crimes of serious nature unless their immunity is stripped by HPR. Lastly, judges and others public officials like Parliament appointees (Ombudsmen and Human rights

[194] ibid Para 42 (Emphasis added).
[195] HRC, Concluding Observation on USA, note 85, ibid.
[196] FDRE Constitution, Art. 54 (5) and 63 (1).
[197] ibid Art. 73 (1) provides that 'the Prime Minister shall be elected from among members of the House of Peoples' Representatives'.
[198] ibid Art. 54 (6) and Art. 63 (2).
[199] The Constitution does not provide what 'serious crimes' means. However, by reading Article 108 of the New Criminal Code, one can deduce that serious crime is a crime punishable with 1 -25 years of rigorous imprisonment. Particularly see the Amharic version of the CC. The crime use of improper method falls within this category of crimes (see Art. 424 of the CC).
[200] FDRE Constitution, Art. 106.

commissioners), Investigators of human rights commission…etc are entitled to immunity. However, there is no a rule governing a limitation on or exception of such immunity. Nevertheless, unlike diplomats and consular, their immunity is not absolute. Rather the Parliament in case of its appointees and the high officials in case of professionals will remove the immunity up on request by General Attorney in case of criminal proceedings against the immune.

The practice shows that former head of state may be held criminally liable for his acts. In the case of *Mengistu Haile-mariam*, who was the head of state during the Derge regime, the Federal Higher Court held that Ethiopia ratified Convention against Genocide and the Convention does not allow immunity for state officials in its article 4, thus it is inconsistence with international law to immune the accused from criminal prosecution.[201] Former head of government, Prime Minister Tamirat Laine, was subject to criminal prosecution for the commission of crime of corruption. However, his immunity was stripped by the parliament, but not automatically by law. Recently HPR stripped the immunity of Finance Minister, Mr. Alemayehu Gujo, for the alleged crime of corruption.[202] Immunity of government officials do not nude automatically, rather it should pass through a parliamentary process. In this regard, in its jurisprudence, CAT has argued against immunity for [former] heads of state stating that: 'in the Committee's view, that paragraph (article 5/2) conferred on states parties universal jurisdiction over torturers present in their territory, whether former heads of state or not, in cases where it was unable or unwilling to extradite them'.[203]

Foreign state officials, therefore, are immune from Prosecution by Ethiopian court when they found committing crimes. National state officials like members of HPR and HOF, Ministers and Parliament appointee and some Professionals are immune from Prosecution until the concerned body strips the immunity- there is no automatic removal of immunity.

[201] *Special Prosecutor v. Colonel Mengistu Haile- Maria et al* (Ruling on Preliminary Objection of September 1994) Federal High Court, File No. 1/87, 16-21; see also A. G. Alemu, 'The Anatomy of Special Prosecutor v. Colonel Mengistu Hailemariam et al. (1994-2008)' (2009) 4 (1&2) *International Journal Ethiopian Studies* 1.

[202] <https://www.ezega.com/News/NewsDetails/4495/Ethiopian-State-Minister-in-Custody-After-Parliament-Strips-Immunity> (accessed on 5 June 2019).

[203] CAT, Third periodic report of the United Kingdom of Great Britain and Northern Ireland and dependent territories, CAT/C/SR. 354, 18 November 1998, Para 39.

3.3.4. Statute of Limitation

The FDRE Constitution under article 28 (1) also provides that statute of limitation does not bar any legal action against crime of torture. So far the knowledge of this researcher is concerned there is also no binding international instruments that explicitly restrict state from providing statute of limitation for torture under their criminal laws, except that of UN Convention[204] which provides the non-applicability of statute of limitation for war crimes and crimes against humanity. In Ethiopia the CC provides an implementing provisions regarding period of limitation under its articles 216 through 222. Article 424 which proscribe torture as use of improper method provide a punishment not exceeding ten years of rigorous imprisonment and fine, and not exceeding 15 years imprisonment and fine when the crime is committed by the order of public officials.[205]

The period of limitation under the criminal code calculated starting from the date of the commission of the crimes and determined by taking the maximum penalty provided in the special part which proscribe acts and provided their respective penalties.[206] The rage of ordinary period of limitation under the criminal code is between 3-25 years. According to the criminal code its is 10 years in case of crime of use of improper method and 15 years in case where the crime is committed by order of public officials that bar prosecution.[207] There are some special criminal laws that provide statute of limitation for the crime they proscribe.[208] Although the Constitutional preclusion of application of statute of limitation for torture, it does not work for the crime titled 'use of improper method' in the CC and no other special law that prohibit the application of period of limitation for crime of use of improper method.

Whereas the CAT, in paragraph 5 of GC No. 2, states that amnesty or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability. Furthermore

[204] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (adopted on 26 November 1968, entered in to force 11 November 1970) 754 U.N.T.S 73, Art. 1 (a) and (b).
[205] CC, Art. 424 (1-2).
[206] ibid Art. 219.
[207] ibid Art. 217 cumulative with 424.
[208] See for instance Proclamation on Anti-Terrorism, Proclamation No. 652/2009, Federal Negarit Gazetta, 15th years, No. 57, Ar. 24- which provides crime of terrorism cannot be barred by statute of limitation.

CAT has repeatedly taken the position, in its GC No.3[209] and in numerous concluding observations,[210] that there should be no statutes of limitations for the crime of torture and found that not excluding torture from the application of statute of limitation is in violation of article 1, 2 and 4 of the convention. The HRC, in GC No.31 paragraph 18 stated that 'unreasonably short periods of statute of limitation in cases where such limitations are applicable' should be removed in respect of torture and cruel, inhuman and degrading treatment; summary and arbitrary killing and enforced disappearance.[211]

Therefore, the Ethiopia law failed to preclude the application of the statute of limitation for acts constituting torture while the international law strictly recommends the abolishment of providing period of limitation for crimes of torture.

[209] CAT, GC No. 3, Para 38.
[210] CAT, Concluding Observations on Chile, note, 173, Para 7 (f); see CAT, Concluding Observation on Rwanda, note 174, Para 12; CAT Concluding Observation on Vietnam, note 86, Paras 6 and10.
[211] HRC, Concluding Observation on El Salvador, Note 171, Para 7.

CHAPTER FOUR

THE SCOPE OF TORTURE UNDER ETHIOPIAN LAW AND PRACTICE IN LIGHT WITH INTERNATIONAL LAW

4.1. Introduction

Under this chapter what constitute torture and when did we say that torture is committed is discussed in detail. Generally it has been agreed that torture has four essential elements; sever pain (mental or physical) through action or omission, purpose, status of perpetrator and the subjective element (intention).

The UNCAT define torture under its article 1 (1) as follow:

> For the purpose of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public officials or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanction.

The New Criminal Code criminalized acts of torture as crimes of use of improper method. Article 424 provides that:

> Any public servant charged with the arrest, custody, supervision, escort or interrogation of a person who is under suspicion, under arrest, summoned to appear before a court of justice, detained or serving sentence, who, in the performance of his duties, improperly induces or gives a promise, threatens or treats the person concerned in an improper or brutal manner, or in a manner which is incompatible with human dignity or his office, especially by the use of blows, cruelty or physical or mental torture, be it to obtain a statement or a confession, or to any other similar end, or to makes him give a testimony in a favorable manner is punishable with simple imprisonment or fine, or in serious cases, with rigorous imprisonment not exceeding ten years and fine.

This provision does not criminalize torture as a separate or independent crime. Rather it makes torture one of the acts that constitute crime of use of improper method which is a crime against public office not crime against person. As an act, the CC does not even provide what it means by torture. However, it could be said that torture, physical or mental, is one of the act which may be constitute crime of use of improper method when the other elements are met. The next sections provide comparative analysis of elements of torture in Ethiopia criminal Code and international law as well as discuss what how prosecution of torture acts are made in the absence of separate and non-defined crime of torture.

4.2. The Nature of the Act

The provision Article 424 (1) provides that '…improperly … treats the person concerned in an improper or brutal manner, or in a manner which is incompatible with human dignity or his office, especially by the use of blows, cruelty or physical or mental torture…' The spirit of the provision seems generally punishing all types of ill-treatments.

Although there is no clear position as to what distinguish torture from other forms of ill treatments international human rights bodies followed two approaches- severity and purposive approaches. While the HRC under its GC No. 20 on article 7 has provides that:

> The Covenant does not contain any definition of the concepts covered by article 7, nor does the committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.

Nevertheless HRC has indicated that the violation of article 7 of ICCPR evaluated on the basis of the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim.[212]

The CAT has recognized that *in practices, the definitional threshold between cruel, inhuman or degrading treatment or punishment and torture is often not clear.*[213] Nevertheless, the jurisprudences of CAT are not clear as to which approach is followed by the committee. In

[212] Association for the Prevention of Torture (APT) and the Center for Justice and International Law (CEJIL), '*Torture in International law: A guide to jurisprudence*, (2008) 8 (Herein after APT 2008).
[213] CAT, GC No. 2, Para 3 (Emphasis added).

some case it decides without considering the severity and purpose, in some other cases it employ severity approach.[214] Nevertheless the CAT concluded that the distinction between torture and other ill-treatment is made on case by case analysis of an assessment of the severity of the treatment inflicted.[215] Unlike UNCAT this provision of Art. 424 (1) does not provide the requirement of severe pain or suffering, which is a threshold to distinguish torture from other ill-treatments. Nevertheless, the adjective 'severe pain or suffering' is not clear and the utilization of this term under international human rights bodies may not have such problem as it does not results criminal responsibility of individual, nonetheless it is not advisable to use such vague terms in national criminal law. Thus, the domestic criminal law must come up with other clear term which is important for distinguishing torture from other acts or treatments like cruelty and brutality.

The criminal code provision does not provides what acts may constitute a physical or mental torture. Although International laws did not do the same, the jurisprudences of international and regional human rights bodies provides lists of acts constituting torture by their nature.[216] When the new criminal code is its draft stage these jurisprudences were already know. The drafting body could consider them while preparing the criminal code. As the interpretation by human rights bodies to their respective instruments is binding on member state to the instrument, states should follow the foot step of these bodies in domestic application of the treaties. This has not been considered and included in the criminal code, which results that the code is open for doubt which benefits the accused of torture rather than ensuring his punishment.

[214] *Dragan Dimitrijevic v Serbia and Montenegro*, Communication No. 207/2002, CAT, Judgment, 2004; See also *Jovica Dimitrov v Serbia and Montenegro*, Communication No. 171/2000, CAT, Judgment, 2005; *Danilo Dimitrijevic v Serbia Montenegro*, Communication No. 172/2000, CAT, Judgment, 2005, Para 7.2.

[215] CAT, Concluding Observation on the USA, UN doc. CAT/C/USA/CO/2, 2006, Paras 29-30. The committee held that *the pain or suffering must be severe and may be physical or mental in nature* (Emphasis added).

[216] The Committee against Torture and Inter-American Commission of human rights provide list of acts constituting torture by their nature; such the use of water, nakedness, hooding, physical beatings, forced standing, prolonged use of light and loud noises, deprivation of food, limited access to hygiene and medical care, mock executions or death threats, and threats of harm to family members, applying electric shocks to a person, beating, cutting with pieces of broken glass, putting a hood over a person's head, burning him or her with lighted cigarettes and use of dog to induce fear. For further see Jurisprudence of the CAT, Part IV, 206-7. Available at: <http://www.omct.org/files/2006/11/3979/handbook4_eng_04_part4.pdf> (accessed on 5 June 2019); D. Weissbrodt and C. Heilman, 'Defining Torture and Cruel, Inhuman, and Degrading Treatment' (2011) 29 *Law & Ineq.* 343. Available at: <http://scholarship.law.umn.edu/faculty_articles/366> (accessed on 5 June 2019).

In addition the inflicted pain or suffering through the act or omission, could be physical or mental both under the criminal code and international laws.[217]

Finally, the provisional expression in the criminal code seems that torture is committed by act, and does not include torture by omission. This can be inferred from the act listed which are committed by act and may not be done by omission of duty. However, although the definition under article 1 of UNCAT provides that torture can be committed by act, the jurisprudences of international bodies repeatedly maintained that torture can also be committed by omission. Thus the phrase 'any act' under article 1 of UNCAT should not be narrowly interpreted, rather it should be understood as torture committed by *omission*.[218] The approach used by the criminal code is different. It lists acts like inducing, promising, threaten or treat, blow, cruelty, physical or mental torture. But, it could be argued that an act as defined by the criminal code may constitute both commission and omission.[219] Therefore, torture resulting from omission of what is proscribed by the law can be said violation of article 424 of the criminal code.

4.3. Intention

Mens rea on the other hand is the subjective element of a crime, a mental state or state of mind of the criminal, which can be either intention or negligence. Intention in general indicates that a person engaged in certain acts/omission that results some illegal consequences knowingly or deliberately.

The *mens rea* or mental state required for the crime of use of improper method by torture is not clearly provided in the criminal code of 2004. Although Article 424/1 does not provide for the mental element clearly, since a crime is not punishable by negligence unless the special part provides so[220], it is logical to presume that the article impliedly requires intention. In other word unless a special part of the criminal code provide a crime punishable with negligence specifically and clearly, there is no crime by negligence. So that when the special part of the criminal code

[217] CAT, Concluding Observations on the U.S., note 215, ibid.
[218] CAT, GC No. 2, Para 15; CAT, Concluding Observations on Chile, note 173, Paras 6 and 7; *Hajrizi Dzemajl et al.*, note 90, ibid; see also Rodley N. and Matt P., note 84, ibid (Emphasis added).
[219] CC, Art. 23 (1)
[220] CC, Art. 59 (2).

provides a crime without stating the required mental state, it is presumed that the crime is punishable only when it is committed by criminal mind or intention.

Internationally too 'intention' is one of the main components which make up the concept of torture.[221] The CAT jurisprudences show that the convention requires specific intent, that is pain and suffering must intentionally be inflicted to the victim in order to qualify as torture.[222] However, scholars argued in favor of general intent, in which it is sufficient that the actor intended to conduct the act/omission.[223] The CAT changed its approach in a recent decision of in the case of *EN v. Burundi* to this scholar recommendation. In this case the committee holds the view of ECtHR, in assessing intention, it considered the burden of proof shifts to the state to disprove torture once a credible allegation has been made.[224] Thus, the intent to inflict severe pain or suffering presumed based on the mere fact that the [potential] victims sustained such pain or suffering.[225] Generally, it is agreed that negligence would not result criminal liability for torture[226], as there is no torture by negligence.

Finally, the above discussion shows that, with regard the element of intention, the CC reflects mental element in the UNCAT.

4.4. Purpose

The purposive element is central to the notion of torture as understood from the practice of the international bodies.[227] It also serves as distinguishing element of torture from other ill-treatments. Similar approach is followed in the international criminal law where the element of 'purpose' used to distinguish torture from other form of ill-treatments. The ICTY trial chamber

[221] CAT, GC No. 2, Para 15.
[222] United Nations Voluntary Fund for Victims of Torture, '*Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies*' (2011) 2-30. Available at: <https://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf> (accessed on 5 June 2019) (Herein after UNVFVT) (Emphasis added).
[223] L. Fernandez and L. Muntingh, 'The criminalization of torture in South Africa' (2016) 60(1) *Journal of African Law* 83.
[224] *EN v Burundi*, Communication No. 578/2013, CAT, Judgment, 2016, Para 7(3).
[225]ibid; see also *Selmouni v France*, note 14, Para. 8. The European Court of Human Rights noted in this case where there was no direct evidence of intent, that 'where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused'.
[226] APT 2008, 12.
[227] UNVFVT, note 222; and Rodley Nigel, note 12, 482.

in the *Delalic* case has held that torture is distinguished from other offences of willfully causing great suffering or serious injury primarily on the base of purposive element.[228]

The purpose requirement is distinguishable from the requirement of intention. The intention requirement is related to an intention to inflict pain and/or suffering, whereas the requirement of a purpose relates to the motivation or the reason behind the infliction of that pain and suffering.[229] Thus torture is committed to achieve a prohibited (specific) purpose not for all purpose. A prohibited purpose, however, does not mean illicit act or the purpose is illegal by its nature, it might be legal in other circumstances.[230] Furthermore, as Mathew pointed out, 'the demonstration of purpose or motive may prove valuable in assisting in the establishment of intent at trial'.[231]

Regarding for what purpose torture is committed, Article 424 (1) provides that '…be it to obtain a statement or a confession, or to any other similar end, or … to makes him give a testimony in a favorable manner'. UNCAT definition also includes a purpose limitation; a particular act constitutes torture only if performed for certain purposes. The act must have been undertaken for such purposes as obtaining (from the victim or a third person) information or a confession, punishing him for an act he or third person has committed or is having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.[232]Accordingly, Extracting a confession, obtaining information, imposing punishment, intimidation or coercion and discrimination are those purposes that perpetrators desire to achieve or those motivation that drive perpetrators to engage in torture.

The lists of the purpose under article 424 (1) are not exhaustive as it is inferred from the phrase 'to any other similar ends'. Similarly, according to UNCAT and its committee, the lists viewed as indicative rather than exhaustive.[233] The phrase 'such purpose as' indicates the non-exhaustiveness of the list, nevertheless what other purpose may be included is not clear. Scholars suggested that only those purposes that are similar with the listed purposes are included.

[228] *Delalic*, note 14; and see also David W and Cheryl H, note 216, 387.
[229] Rodley N and Matt P, note 84, 124-5
[230] David W and Cheryl H, note 216, 386.
[231] L. Mathew, note 67, 314.
[232] UNCAT, Art. 1.
[233] M. Nowak and E. McArthur, *The United Nations Convention against Torture: A Commentary* (Oxford: Oxford University Press 2008) 75; *Delalic*, note 14, Para 470; and *Furundzija*, note 19, Para 162.

According to Meskele, the element joining these purposes is perhaps best understood as *some connection with the interests or policies of the State and its organs*.[234] Sufficiently severe pain or suffering inflicted by a public official purely sadistically, but for no other purpose, would therefore appear to be excluded from the definition of torture.[235]According to ICTY and CAT humiliation, retaliation, gender based discrimination (in case of rape against women) are prohibited purposes that are included in the definition of torture.[236]

The criminal code provides only torture for the purpose of extracting statement or confession, and to make the victim a testimony in a favorable manner. First, the lists which are clearly provided as prohibited purpose do not properly helps to sufficiently determine what other similar ends are. UNCAT includes torture for extracting information from third person. The CC limits the sources of the information only to the victim of torture. In other word an intentional act of torture on person for the purpose of obtaining statement, confession, testimony or any information from another third person is not crime of use of improper method by torture.

It is also doubtful whether the prohibition of torture as a punishment can be included within the phrase 'any other similar ends'. For the following reasons the researcher argues that it is not. First, extracting confession, statement or testimony is not similar with the legal essence of punishment. Second, one of the canons of interpretation is that criminal law should be interpreted narrowly or strictly. Thirdly, the rule of interpretation (*Ejusdem Generis*) allows only the same species as that of expressly dealt with by the provision should be included. Accordingly, torture for obtaining of any information or not to testify, confess and make any statement may be included within the species of statement, confession, or testimony but not punishment. In addition, the spirit of the whole article seems regulating the pre-judicial proceeding as it can be understood from the reading of the title of the provision cumulative with the lists like obtaining statement, confession …or testimony in favorable manner. Whereas, UNCAT prohibit the torture as punishment for the crime a person or third person has committed or is suspected of having

[234] Meskele, K. note 15, 52 (Emphasis added). He argued, in addition, that 'the definition of torture on the latter instrument goes further and more expansive than UNCAT in that it does not require 'severity' of pain and make reference to 'any other purpose' rather than 'such purpose as'. According to the rule of interpretation the latter phrase purports for more narrow interpretation than the former'.
[235] ibid.
[236] K. Fortin, note 91, 150-162.

committed. The criminal code did not, however, mention utilization of use of improper method on the victim for the acts of third person.

The positive aspect of the criminal code in this regard is that it adds testimony as purpose for which torture can be committed as crime of use of improper method. The definition of torture under UNCAT does not clearly listed a purpose for obtaining testimony. Such extension of the definition by domestic law is not prohibited, rather the UNCAT article 1 (2) give recognition for more protection.

4.5. The Status of the Perpetrator

Article 424 (1) provides that 'any public servant charged with arrest, custody, supervision, escort or interrogation of a person…' are those people who can commit act of torture as a crime of use of improper method. The phrase public servant include all government official whosoever they are entrusted with the custody, arrest, interrogation or escort of a person. In other words, it is the existence of duty to guard (escort), responsibility to interrogate, custody and arrest of the person under his control that determine whether a person is liable for committing torture as a crime of use of improper method. Therefore, any public officials that are not in control of the victim and responsible for his arrest, custody, escort or interrogation is not liable even if his is state officials and commit acts of torture.

Likewise, UNCAT Article 1, in defining torture, provided that torture is said to be committed 'when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of public officials or other person acting in an official capacity'. This indicate that in order to allege and censure state before CAT the state official [*de jure* or *de facto*] must be involved either directly by acting or failing to act or indirectly through instigation or giving consent for the commission of torture. This can be inferred from the jurisprudences of the committee.[237] The committee has also interpreted the language 'acting in an official capacity', for example, to include *de facto* authorities, including rebel and insurgent groups which 'exercise certain prerogatives that are comparable to those normally exercised by legitimate

[237] Meskele K., note 15, 53; see APT 2016, note 87, 14;

governments'.[238] Torture committed by private individuals or state official in their private capacity does not fall within the scope of definition of Article 1 of CAT, but liable for violation when they failed to exercise due diligence to prevent violation.[239]

However, in the criminal code the scope regarding to person who can be potential perpetrator of acts of torture as a crime of use of improper method is limited to public officials who is in control of the victim only. Surprisingly, the criminal code makes torture as punishable act as war crime committed by any person without providing official status. Whosoever, party to the war or armed conflict, tortured a person during war time is punishable for war crime. Thus torture in the context of war is punishable without the status of the perpetrators, as there can be a war between state and non-state actors, as in the case of freedom fighters and defense force of government.

Article 424 does not also include a person with *de facto* state officials and individual in their private capacity. Generally, the provision does not include non-state actors and state actors with no legal power to arrest, custody, supervision, escort or interrogation for the violation of article 424. As will be discussed in section 4.5 those persons who committed acts constituting torture without legal or *de facto* power to control the victim have been charged with crime of abuse of power or grave willful injury than torture. However, there are possibilities where non-state actors may commit torture on a person under their control. For instance the Criminal Procedure Code allows arrest of person by private individuals.[240] Although UNCAT does not clearly prohibit torture by private person, it warn state to prevent torture by private person. The minimum level of state involvement provided by CAT is acquiescence, which require state to take reasonable measure or due diligence to prevent its dweller from torture or provide victims of torture with remedy.[241] The U.N Special Rapporteur on Torture, Nigel S. Rodley, interprets the state action requirement to be met when public officials are 'unable or unwilling to provide effective protection from ill-treatment (i.e. fail to prevent or remedy such acts), including ill-

[238] *Sadiq Shek Elmi v Australia*, Communication No. 120/98, UN Doc.CAT/C/22/D/120/1998, judgment 25 May 1999), Para 6.5; see also Rachel Lord, note 3, 15.
[239] *Hajrizi Dzemajl et al.*, note 90, ibid.; and see Rodley S. Nigel, note 12, at 485-87; CAT, Concluding Observation on Nepal, UN doc. CAT/C/NPL/CO/2, Para 2; CAT, Concluding Observation on Austria, UN doc. CAT/C/AUT/CO/3, Para 4.
[240] Criminal Procedure Code of Ethiopia, Proclamation No. 186/1961, Article 58 cumulative with Article 29 (1).
[241] ibid 213; see Meskele K., note 15, 54; CAT, GC No. 2, Para 18.

treatment by non-state actors'.[242] Rodley in his article concluded that 'public official has to be the perpetrator, directly or indirectly, for a violation of international human rights law to be established'.[243]

Nevertheless, HRC seems widened the involvement of state by requiring state parties to the covenant to protect person from torture committed by either in official capacity or private capacity.[244] As it has been argued in chapter two (see section 2.3), this widening of scope of liability of state is also important for domestic criminalization of torture, there by state will hold private individuals for crime of torture domestically. Similar to HRC but very clearly, international criminal tribunals hold that private individuals are liable for the commission of crime of torture even though they have no link with state, thereby concluded the status of the perpetrator is not essential element for establishing crime of torture [*in the context of war crimes or crimes against humanity*]. ICTY trial and appeal chamber in the case of *kunarac* hold that the definition provided by the UNCAT is not a representative of torture in all contexts and in international customary law.[245]

The definition under UNCAT is provided only for the purpose of UNCAT and in international human rights perspective. Although the tribunal agreed that acts/omission, sever infliction of pain or suffering, intention and prohibited purpose are elements of torture crime in both stream of international laws, the status of perpetrator which is essential to hold state accountable before international human rights bodies is not as such essential under international criminal law. Besides, Duwelf argue that making status of perpetrator as essential element of torture definition defeat the very aim of the convention.[246] ICTY in *kunarac* case provided the following reason for its departure from the definition provided under Article 1 of UNCAT. First, the definition provided by UNCAT works only the purpose of the convention only. Second, the two streams of international laws function in different approach regarding individuals. That is

[242] OHCHR, '*Human Rights Fact Sheet: No. 4 Combating Torture'* (May 2002) 34.
[243] Rodley S. Nigel, note 12, 487.
[244] HRC, GC No. 20, Para 2, it stated that *It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary 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* (Emphasis added); see also HRC GC 31, Para 8.
[245] *Kunarac et al.*, note 89, Para. 495; *Kunarac et al.*, note 89 Para 148.
[246] D. Steven, *The Signature of Evil: (Re) Defining Torture in International Law*, (Cambridge: Intersentia Publisher 2011) 477-480.

individuals are not subject to international human rights law and accountable for its violation before human rights bodies, but states. In *kvocka*, an ICTY trial chamber explained that 'the state actor requirement imposed by international human rights law is inconsistent with the application of individual criminal responsibility for international crimes found in international humanitarian law and international criminal law'.[247] Finally, in trial chamber, it stated that torture can be committed without the involvement of state officials with same degree of severity, with same intention and for similar purposes.[248]

4.6. The Practice of Prosecuting Torture in Ethiopia

4.6.1. The Red-Terror Cases

After two years from the overthrow of the imperial regime and the Derge come to power there was political and human rights crisis in Ethiopia following the assassination of Derge and All-Ethiopian Socialist Movement (MEISON) officials by the Ethiopian People's Revolutionary Party (EPRP) what the government called "White-Terror."[249] In return to the white terror by opposition parties (anti-revolutionaries) against the Derge, in particular following the assassination of General Teferi Banti and the coming in to power of Colonel Mengistu H/Mariam, Derge publicly announced the Red-Terror campaign in 1977.[250]

During the red-terror thousands of persons were arrested, tortured, and summarily executed, many of by local kebele officials.[251] After the fall of the Derge regime on 8 may, 1991 the upcoming regime, Ethiopian people democratic revolutionary front (EPDRF) had detained most of former state officials. In 1992 the transitional government of Ethiopia established the Special Prosecutor Office (SPO) for the investigation and prosecution of the crimes committed in between 1974-1991.[252]

[247] *Kvocka*, note 89, ibid.
[248] *Kuranac*, note 89, Para 493.
[249] Human Rights Watch/Africa, *Ethiopia: Reckoning Under the Law*, Nov., 1994, Vol. 6, No. 11, 1-6; see also A. G. Alemu, 'Apology and Trial: The Case of the Red-Terror Trial in Ethiopia' (2006) 6(1) *AHRLJ* 64.
[250] ibid 64-5.
[251] ibid 68-70.
[252] Proclamation for the establishment of the Special Prosecutor's Office, Proclamation No. 22/1992, Negarit Gazetta, No. 18.1992, Art. 6.

The special prosecutor office had brought total of 5198 public and military officials of the Derge regime in 1997, among them 2952 were charged in absentia and 2246 were charged in detention.[253] SPO charged those accused in three different categories (the policy makers, the field commanders and the material offenders) and several types of crimes (Genocide, War Crimes, Crimes against Humanity, torture, aggravated Homicide, rape, forced disappearance, and abuse of power).[254] Nevertheless all the issues raised in the major trail like the case between *SPO v. Colonel Mengistu H/marial et al* and *SPO v. Shaleka Melaku Tefera* are also raised all other trails.[255] Due to this these two cases are used for this paper.

In the case between *SPO v. Colonel Mengistu Hailemariam et al* total of 106 persons were accused of four main charges with several counts based on the 1957 penal code.[256] The important indictments under this case are count 172-174 which fall under the second charge of Genocide by causing bodily harm or serious injury to the physical or mental healthy under article 281/a and alternatively as Grave Willful Injury under article 538/a/b/c.

The indictments simply mentioned the causing of bodily harm or serious injury to the physical or mental healthy by using the statement or phrase *different methods of torture* on 99 person in paces called Special Investigation Police Office, Central Investigation Institution and Bermuda which is found in Addis Abeba kebel 12. [257] According to the SPO witnesses several methods of torture were employed against the victims listed in the charge. Among other the forms of torture, whipping with an electric cable or leather whip after binding the victim's legs and hands and stuffing objects into their mouths; whipping while the victim is suspended; keeping a bound victim suspended for long time; torture by electric shock; applying a burning newspaper to the body; pulling out hair; mutilating the body; rubbing a dry body or bones with a wooden board; stretching nails and nipples with pincers; pulling out fingernails; killing or torturing others in the presence of the victim; frightening by setting dogs on a person; taking victim for a false execution; suspending heavy objects from men's genitals;

[253] G. Alemu, note 249, 76.
[254] ibid.
[255] G. Alemu, note 201, 2.
[256] *Mengistu et al.* (Revised Indictment of 27 November 1996).
[257] ibid 102-105 (Emphasis added).

inserting heavy objects into a woman's uterus; and forcing a victim with wounded feet to walk on gravel.[258]

As per the witness and the Court this torturous acts were conducted as investigation method to extract information about anti-revolutionaries and confession of victim as member of Eritrea Liberal Front (ELF), Tigiray People Liberal Front (TPLF), Oromo Liberal Front (OLF), MEISON, EPRP, or commission of certain acts against the regime.[259] The court found the defendants guilty of genocide and grave willful injury. In the descending opinion by Judge Nuru Seid, the defendants are responsible for Aggravated Homicide and Grave Willful Injury, mainly because the law governing Genocide in the Penal Code has already repealed impliedly by the then laws.[260] Even if the defendants appealed against high court verdict and sentence, regarding the verdict the Supreme Court reaffirm the Higher Court verdict.[261]

Coming to the other major case the case between *SPO v. Shaleka Melaku Tefera*[262], the SPO charged the accused with total of 86 people for serious injury to physical and mental healthy as genocide under Article 281/a and alternatively Grave Willful Injury under article 538/a-c of the penal code of 1957. The indictment, like that of the above case, simply mentioned that the accused committed the crime of genocide or grave willful injury against 86 people by using different methods of torture for they are member of ELT, TPLF, OLF, MEISON, EPRP and generally as anti-revolutionary in place provided by the accused as investigation places.

According to the High Court and evidence of the SPO the bodily injury or harm were sustained by the victims due to different methods of torture employed against them for the extraction of confession or information about the anti-revolutionaries movement. Based on this information the accused determine what to be done against the victims. Among the methods of torture employed against the victim were whipping with an electric cable or leather whip after binding the victim's legs and hands and stuffing objects with blood into their mouths; whipping while the victim is suspended upside down; keeping a bound victim suspended

[258] '*Dem Yazele Dossie'* (Special Prosecutor's Office, Final Report, 2010), 272–279.
[259] ibid; see also *Special Prosecutor v. Colonel Mengistu Haile*, note 201, 16-21.
[260] *SPO v Colonel Mengistu Hailemariam et al*., note 201, 745-746.
[261] *SP0 v Respondents (Colonel Mengistu Hailemariam et al.)* (Judgment of Appeal, May 2008) Federal Supreme Court, File No. 3018126.
[262] *SPO v Shaleka Melaku Tefera* (Judgment of Dec. 2005) Federal High Court, File No. 03112.

for long time; pulling out tooth; mutilating the body; frightening by setting Guns; standing on men's genitals; and putting head in water and make difficult to breath. The High Court, in its verdict, found the accused guilty of grave willful injury in contravention to article 538 of the penal code stating that "the accused is found guilty of causing grave bodily injury against 83 persons."

4.6.2. The General Attorney Indictments against Former State Officials

Ethiopia has been passing through political and legal reforms since April 2018. Following this transition the government has been working to punish former state officials who are alleged to commit "grave human rights violations." Regarding criminal liability of former officials for grave violation of human rights, 44 people are now, in general, accused before the federal courts. The accused persons, like the SPO against Derge officials, classified in two three groups (the high officials of national intelligence and security service (NISS), officials of prison administrations, and police officers). The charge brought against them is based on the general criminal code and special law of crimes of corruption under proclamation No. 881/2015. Besides, the indictment against the high officials of the security agency and prison administrations divided in time based on acts committed before 2015 and acts committed during 2015 and then after. The cases are pending and at the time of the writing the court is hearing the testimony of the witnesses produced by Federal General Attorney (FGA).

In the case between *FGA v. Getachew Assefa Abera et al.* FGA accused 26 persons who were the high officials of the former National Intelligence and Security Service (NISS). The charge brought against them has total of 46 charges for acts committed in two different times. The first, acts committed before 2015 and second acts committed during and after 2015. For the acts committed before 2015 FGA used the criminal code of 2004 and for the acts committed during and after 2015 FGA used corruption crimes proclamation No. 881/2015.[263] According to the criminal charge the victims were those persons who were suspect of terrorism, member or actor on behalf of Aribegnoch Ginibot Sebat (G7), OLF and other opposition political parties who were labeled as terrorist and Islamic movement or Islamic extremist. The indictment specify

[263] *Getachew Assefa et al.* (indictment of 7 May, 2019) FGA file No. 198/2011.

that the accused persons establish and provide illegal detention and investigation center and institutions for their well functioning by providing officials and executing personnel.[264] They establish some unknown or secret place of investigation in different part of the country including Addis Abeba, Jimma, Hawassa, Shashemene, and Gonder.

FGA alleged that in those unknown and the legal federal police investigation center known as mehikelawi several acts of torture were committed against suspects of different crimes for the purpose of extracting information, confession, coercing them to testify against their peers, and forcing them to serve as spy. Among the acts that are alleged by the FGA starving (denying food), detaining in dark room, electric shocks, suspending plastic with water on men gentiles, pulling out nails by pincer, suspending victims for long time in the wall, whipping the inner part of the leg with an electric cable or leather whip after binding the victim's legs and hands (what is called 'wefe lala') and stuffing objects (like socks, scarves with blood…) into their mouths, whipping while the victim is suspended; pulling out hair and other tortuous acts not mentioned here are the most and major acts listed repeatedly in most charges.[265]

All of the accused are charged with crime of abuse of power as per Article 407 of the criminal code for acts committed before 2015 and article 9 of corruption crimes proclamation No. 881/2015 for acts committed during and after 2015 as principal offender based on article 32 (1) (a, b) of the criminal code. All the charges (46) stated that the criminal acts were committed with 'intent to injury the rights of another'. The accused raised no preliminary objection against the charge, rather stated they do not have preliminary objections.[266] The prosecutors prefer article 407 (1, 2) of the criminal code and 9 (1, 2, and 3) of the corruption crimes proclamation based on the following reasons. First, the accused do not fall under the scope of article 424. This is to mean that the accused do not have power to arrest, detain and investigate or interrogate the victims. Second, they do not have a legal power to establish detaining and investigating institution in their own. Thirdly, although the acts constitute crimes of torture under international law, we do not have a separate crime of torture in the criminal code and other laws. Finally,

[264] ibid; see particularly charge No. 1 and 2 of the indictment.
[265] See for instance charge 10, 24, 26, 32 and 39 in the indictment against *Getachew Assefa et al.*
[266] *FGA v Getachew Assefa et al*. (Ruling on Preliminary Objection of July 2019) Federal High Court, file No. 23840.

those articles criminalize injuring the right of others through abuse of power. Therefore, it is better to charge the accused with crimes of corruption.[267]

In the case between *FGA v. Officer Geberemariam Weliday Abirha et al*. total of 8 accused are charged with 7 criminal charges. The accused were high officials in the federal rehabilitation centers (kilinto and kality), Ziway and Shewa Robit rehabilitation center. The first four charges were crime of homicide committed when kilino was at fire or burning. The last three charges are torturous acts committed against suspect of incinerating or burning kilinto.[268]

According to the charges, after the burning 400 inmates were taken to Shewa Robit and Ziway rehabilitation center. The accused tortured them alleging that they set fire to burn kilinto. More than 175 inmates were subject to eat without washing their hands, detained for 42 days of 24 hours while chained with their bed, forced to sleep over cool cement floor, and detained in the dark rooms.[269] The accused detained about 37 persons in the dark room for about three to six months for the victim misbehave in the court room. FGA alleged that the accused also beat or cause to be beaten 20 victims in Ziway and detained them in dark room called Era'ero.[270] All those torturous acts were committed to extract information and confession about the incineration of kilinto rehabilitation center. Since the burning of kilinto occurred in recent year after the enactment of crimes of corruption proclamation the FGA brought the charge based on 9 (3) of the proclamation for abuse their power.

Finally, in the case between *FGA v. Commander Alemayehu Hailu et al.* investigators and team leaders of investigation in the federal police investigation and Shewa robit rehabilitation center total of 10 accused were charged for total of 78 charges each of them at least with minimum of 8 charges. According to the FGA indictments, the charge includes major acts committed in between 2010-2019 against persons who were under the control of the accused as suspect of crime of terrorism, being member of group labeled as terrorist (G7 and OLF), take part in Islamic extremist movement and suspected of burning kilinto rehabilitation center.

[267] Elaborative discussion conducted with the prosecutors (anonymous) who were handling the case during the study.
[268] *Officer Geberemariam Weliday Abirha et al.* (Indictment of 19 March, 2019) FGA file No. 175/11.
[269] ibid Fifth charge.
[270] ibid Seventh charge.

Seeking their confession, coercing to sign on their statement made by force, other information relating to terrorism and the then terrorist groups[271], their testimony against their peers[272], the accused employed different method of investigation which includes torturous acts listed above in the indictment against *Getachew Assefa et al.* and *Officer Gebremariam Weliday et al*. The difference between the indictments against *Getachew Assefa et al.* and these accused is that the latter directly committed the acts and the former order the acts. In addition, the articles used to charge the two are different. The latter accused based on article 424 for crime of use of improper method, whereas the former accused based on article 407 for abusing or exceeding their legal power for the purpose of injuring the rights of another. Besides, the latter accuseds were charged for committing grave willful injury under article 555 in concurrent with article 424.[273]

From the above revealed that due to the absence of separate offence of torture the FGA charged act which constitute torture under international law as crimes of grave willful injury, abuse of power (crimes of corruption) and use of improper method (crime against public office).

Regarding whether crime of abuse of power under the criminal code and proclamation 881/2015 applied to bring charge for grave violation of human rights in the charge against the high officials of NISS and rehabilitation centers, the researcher thinks that it is open for legal doubt. This is because, first and for most it could be argued that crime of torture or abuse of power under both the criminal code and proclamation No. 881/2015 are for crimes against economic interest or rights. Particularly this is supported by the preamble of the later which states the purpose of the proclamation as:

> It has become necessary to include similar acts committed by the private sector particularly by those *who administer funds collected from the public or collected for public purposes in the category of corruption offence*.[274]

---

[271] *Commander Alemayehu Hailu et al.* (Indictment of 19 March 2019) FGA file No. 175/11, 21-23.
[272] ibid 17, 43-46 (64th charge).
[273] ibid, see For instance 1st and 2nd charges, 6th and 7th charges, 28th and 29th charges, 39th and 40th charges, and 48th and 49th charges. The provision of article 424 (1) allows charging perpetrators with other criminal provisions under its second paragraph. Based on this the FGA indicted the accused with crime of use of improper method in concurrent with grave willful injury.
[274] A Proclamation to Provide for the Crimes of Corruption, Proclamation No. 881/2015, Federal Negarit Gazette, Year 21, No. 36, 3rd April, 2015, (Here in after corruption crimes proclamation) Preamble, Para 2 (Emphasis added).

This indicates that the criminal code only criminalizes corruption committed by public officials, thus necessary to make corruption crime when it is committed by private sector employees and corruption is related to money or economic interest or rights. It seems that the term "rights" in article 407 (1) and 9 (1) misconceived by the FGA as including human rights recognized under the FDRE constitution. Such understanding and interpretation of the term is not logical to extend to civil and political rights.

Secondly, the above argument is well supported by the second paragraph of the preamble of the proclamation which state Ethiopia ratified international and African anti-corruption conventions. The conventions referred in the preamble define in their respective article 2 and 1 (use of term) the 'proceed of the crime' as *any property or any asset* obtained by the commission of abuse of power, bribery, embezzlement, illicit enrichment and misappropriation of property.[275] In the above two indictments torturous acts were committed for the purpose of obtaining different kind of information and confession or statement of the victim, not property gain, not even to injury their economic interest or rights.

Third, the criminal code and the proclamation did not define what means by rights or injuring right means. Rather the later defines 'advantage' as 'any interest or *rights in money or in another valuable item or property*'.[276] This mainly signify that corruption crimes is committed to gain or injure economic interest in illegal manner than causing grave violation of civil and political rights like right not to be subject to torture. Furthermore, the crime of corruptions under article 407 is crime committed against the public office not against the person of the victim. In corruption crime committed by public servant or officials the victim are mostly the larger population or the community. It is why the criminal code it-self titled the Chapter 'crimes against the public office or community'. In the case at hand the alleged victims are not the community or the state, rather individuals as victim of 'grave human rights violation'.

[275] United Nations Convention against Corruption (adopted on 31 October 2003, entered in to force on 14 December 2005) 2349 U.N.T.S. 41, Article 2 (e); African Union Convention on Preventing and Combating Corruption (adopted on 11 July 2003, entered in to force 5 August 2006) 43 I.L.M. 5, Article 1, Para 8 (Emphasis added).
[276] Corruption crimes proclamation, Art. 2 (13) (Emphasis added).

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1. Conclusion

The practice of torture is known since ancient time. Since the middle age the practice of torture as a treatment or/and punishment began to be considered as acts against human dignity. It is from this time on ward the scholars tried to define what torture means. However, the legal essence of torture and international movement against the practice of torture trace back to the 19th century international community's movements.

Now a day torture is outlawed by several international and regional human rights as well as humanitarian laws. Accordingly, international instruments like UDHR ICCPR, UNCAT, CRC, CERD, CRMW and Refugees Convention and regional human rights standards such as ACHPR, ECHR, and IACHR similarly outlaws torture. Besides, torture is now considered as customary international law and attained the status of *jus cognes*. Furthermore, member states to the ICCPR and UNCAT are under obligation to criminalize torture as a separate offence and prosecute acts of torture in their domestic legal system.

The prohibition of torture is absolute. International laws prohibit practices of torture under any circumstance and impediment for its prosecution. Both ICCPR and UNCAT provides that no limitation or derogation on rights against torture allowed under any circumstance even in the time of state of emergency. So that state cannot limit or derogate the right against torture. Even if not clearly provided under international laws, the jurisprudences of the human rights bodies' clarify that defense of necessity and legitimate act cannot be raised as a defense for torture. Although those international laws did not spell out that torture is not subject to different legal and factual impediments of prosecution and sentencing, the jurisprudences of human rights bodies' shows grant of amnesty and pardon, protection of immunity and provision of statute of limitation to torture is not allowed to commute torture. This is because such impediments on criminal liability of torture perpetrator are against non-derogabile or absolute nature of prohibition of torture and victims right to get remedy.

In addition, it is generally agreed that torture has four elements; (1) nature of the act (severe pain/suffering), (2) intention, (3) prohibited Purpose and (4) status of perpetrator. This elements of torture is found under the definition of torture provided by UNCAT. However, the definition under UNCAT is not representatives of definition of torture under customary international law, rather limited to the purpose of the convention. Besides, UNCAT itself does not prohibit extended definition by international or national laws. Even if all international bodies agreed on the first three elements, the ICCPR committee and ICTY extended the scope of elements of perpetrator to non-state actors including individuals which were limited to state officials under UNCAT.

As member of ICCPR and UNCAT Ethiopia is under obligation to prohibit torture absolutely and criminalize as well as prosecute torture in compliance with these conventions. Based on this the FDRE Constitution guarantee the right against torture under article 18 and ensure it is non-derogablity during state of emergency as well as put no limitation grounds. However, subsidiary law (the criminal code of 2004) that enforces the general provisions of the Constitution does not criminalize torture as a separate offence; rather it subsumed torture as war crimes and crimes of use of improper method. The practice show that, due to this, acts constituting torture under international laws have been and are being prosecuted as crimes of abuse of power, grave willful injury and use of improper method.

Besides, existing laws that governs the grant of amnesty, pardon and provision of statute of limitation do not exclude torture from their application, but the constitution does. Due to lack of separate provision under the CC the constitutional prohibition is not effective. Therefore, torture is subject to amnesty, pardon and statute of limitation in Ethiopia.

The country has no law that comprehensively regulates issues of immunity of foreigners and domestic state officials in general and relating to crimes of torture in particular. The practice with regard to foreign state officials and diplomats show that Ethiopia strictly adheres to the immunity protection. Nonetheless, national state officials are immune from prosecution for torture until their immunity stripped away by HPR.

The criminal code does not provide definition for torture, but elements of torture can be inferred as it criminalize torture as underline offence under crimes of use of improper method. To say use

of improper method is committed by torture (1) there must be act, (2) intention, (3) prohibited purpose and (4) status of perpetrator. Regarding the first element torture can be committed both by commission or omission as per article 23 of CC. Torture is also can be physical or mental as per article 424 (1) of CC. However, the CC did not provide any threshold (severity) to distinguish what make different torture with other acts like cruelty. Concerning the second element the code impliedly require the torture to be committed intentionally.

Regarding the third element, the CC under its article 424 (1) provides lists of purpose to be achieved by using improper investigation methods such as 'obtain a statement or a confession, or to any other similar end, or…to makes him give a testimony in a favorable manner…' Even if the lists are not exhaustive, they do not lead to the conclusion that purpose of discrimination on any ground, punishment for an act he or third person has committed or is suspected of having committed can be included. Whereas the researcher appreciates the CC for introducing additional purpose –'to makes him give a testimony in a favorable manner'. Lastly, in Ethiopia, the CC under article 424 (1) limits the commission of torture by only public servant as use of improper method and exclude torture by private actors. Even state officials who do not have the power to arrest, custody, supervision, escort or interrogation of a person are not liable under article 424. Rather as the practice of the prosecution shows they have been and are being prosecuted under provision governing corruption (abuse of power) and grave willful injury as per article 407 and 555 of the CC respectively.

Therefore, the law and practice in Ethiopia regarding criminalization and prosecution of torture is not in compliance with her duty to prohibit torture absolutely, criminalize torture as a separate offence and to hold persons criminally liable for committing acts amounting torture under international laws.

5.2. Recommendations

In order to address torture properly and avoid possibility of impunity, as well as to enable the country to comply her duties to criminalize and prosecute torture in light with international laws particularly UNCAT and ICCPR, based on the above findings and conclusion the researcher recommends the following solutions.

- The legislature should enact a new and separate anti-torture law that criminalize crime of torture and come up with a definition of torture.
- In so doing the legislature should comprehensively address (prohibit) the issue of defense of justifiable acts, application of amnesty, pardon, statute of limitations and immunities.
- In addition in defining torture the legislature should include all the purposes listed in the UNCAT and developed through human rights bodies.
- Further, the legislature should avoid requirement of state official capacity. Rather it should make effort to ensure the wider protection from torture based on Ethiopia obligation under ICCPR.
- As the Federal General Attorney is mandated with power to initiation and drafting laws, and as agent for enforcing criminal laws the institution should take the responsibility for initiating the anti-torture law.

BIBLIOGRAPHY

Books

- A. Boulesbaa, *The U.N. Convention on Torture and the Prospects for Enforcement* (Hague: Martinus Nijhoff Publishers 1999)
- Black's law dictionary (8th ed. 2004)
- B. Marc, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff Publishers 1987)
- D. Steven, *The Signature of Evil: (Re)Defining Torture in International Law* (Cambridge: Intersentia Publisher 2011)
- E. Peters, *Torture: Expanded Edition* (Philadelphia: University of Pennsylvania Press 1997)
- G. Phillip, *An Introduction to the Ethiopian Criminal Law (Article 1-84 Penal Code)* (Nairobi: Adiss Abeba University and Oxford University press 1965)
- I. Chris, *The UN Committee against Torture: An Assessment* (Kluwer Law International 2001) 342.
- K. Jan, *International law* (Cambridge: Cambridge University Press 2013)
- L. Hantrais, *International Comparative Research: Theory, Methods and Practice* (Red Global Press 2009)
- M. Ruthven, *Torture: the Grand Conspiracy* (London: Weidenfeld and Nicolson press 1978)
- M. Johannes, *The universal declaration of human rights: Origin, drafting, and Intent* (Philadelphia: University of Pennsylvania Press 1999)
- N. Sir Rodley, *The Definition of Torture under International Law* (Oxford: Oxford University Press 2002)
- N. Manfred and M. Elizabeth, *The United Nations Convention against Torture: A Commentary* (Oxford: Oxford University Press 2008)
- O. Fatash, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Hague: Kluwer Law International 2003)
- S. William, *The Death Penalty as Cruel Treatment and Torture: Capital Punishment Challenged in the World's Courts* (Northeastern University Press 1996)

Journals

- A. Adem Kasssie, 'Human Rights under the Ethiopian Constitution: A Descriptive Overview' (2011) 5 (1) *Mizan Law Review* 41
- Ahcene B, "*An Analysis of the 1984 Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*" (1986) 4 Dickinson Journal of International Law 185
- D. Akande and S. Sangeeta, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21(4) *EJIL* 815
- B. Marc Cherif,, 'Accountability of International Crime and Serious Violations of Human Rights: International Crimes: Jus Cogens and Obligation Erga Omnes' (1996) 59 *LAW & CONTEMP. PROBS* 63
- B. Habtesilasie, 'Constitutional Development in Ethiopia' (1966) 10(2) *Journal of African Law* 74
- B. Thomas, 'The Normative and Institutional Evolution of international Human Rights' (1997) 19 *HRQ* 705
- B. Thomas, 'The Evolving International Human Rights System' (2006) 100 (4) *AmJIL* 783
- C. Amani Ezechiel, 'Does the United Nations Convention Against Torture Oblige States Parties to Criminalize Torture in their Domestic Laws' (2018) 2 *African Yearbook of Human Rights* 1
- C. Antonio, 'When May Senior State Officials Be Tried for International Crimes? Some comments on the Congo v Belgium Case' (2002) 13(4) *European Journal of International Law* 853
- Clapham and others '*Torture by Private Actors and 'Gold-Plating' the Offence in National Law: An Exchange of Emails in Honour of William Schabas*', Arcs of Global Justice: Essays in Honour of William Schabas, in Margaret M. deGuzman and Diane Marie Amann (ed.) (2018). Available at: https://ssrn.com/abstract=3099614
- C. Steve, 'Non-governmental Organizations and International Law' (2006) 100 *AmJIL* 348.
- D. Joshua, 'Is the United States Bound by Customary International Law of Torture?' (2006) 6 *Chicago Journal of International Law* 803
- D. Edward, 'The Prohibition of Torture is an International Norm of Jus Cogens and Its Implications for National and International Customary Law' (2004) 15 *EUR.J. INT'L. L* 97

- Fernandez L & Muntingh L, 'The criminalization of torture in South Africa' (2016) 60(1) Journal of African Law 83
- F. Mengistu, 'Highlights of the Constitution of the Peoples' Democratic Republic of Ethiopia (PDRE)' (1988)14(2) *Review of Socialist Law* 129
- F. Katharine, 'Rape as torture: An evaluation of the Committee against Torture's attitude to sexual violence' (2008) 4(3) *Utrecht Law Review* 145
- Girmachew AA, 'Apology and Trial: The Case of the Red-Terror Trial in Ethiopia' (2006) 6 (1) *AHRLJ* 64
- A. Girmahew A, 'The Anatomy of Special Prosecutor v. Colonel Mengistu Hailemariam et al. (1994-2008)' (2009) 4 (1&2) *International Journal of Ethiopian Studies* 1
- I. Ibrahim, 'The Place of International Human Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution' (2000) 20 *Journal of Ethiopian law* 113
- K. Meskel, 'Interpretation of article one of the Convention against torture in Light of the Practice and Jurisprudence of International Bodies*'* (2014) 5 *Beijing Law Review* 49
- K. Barry, 'The Definition of Torture in International Law*'* (1978) 51 *Temple Law Quarterly* 449
- L. Mathew, 'The Development and Drafting of the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*'* (1994) 17 *Boston College International and Comparative Law Review* 275
- L. Rachel, 'The Liability of Non-State Actors for Torture in Violation of International Humanitarian Law: An Assessment of the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' (2003) 4 *Melbourne Journal of International Law*1
- M. Damulira Jamil., 'An analysis of the approach to the right to freedom from torture adopted by the African Commission on Human and Peoples' Rights*'* (2006) 6(2) *AHRJ* 423
- N. Sir Rodley and P. Matt, 'Criminalization of Torture: State Obligations under The United Nations Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment' (2006) 2 *EHRLR* 120
- N. Yasmin, 'Amnesty for War Crimes: Defining the Limits of International Recognition' (2003) 85 (851) *IRRC* 583

- P. Niels, 'Customary law without custom? Rules, Principles, and the role of state practice in international norm creation' (2008) 23 *AmUILR* 276
- R. H. Paul., 'Fair notice and Fair Adjudication: Two Kinds of Legality' (2005) 154 *University of Pennsylvania Law Review* 355
- S. Colin, 'Common article 3 of the geneva conventions as a minimum standard in international humanitarian law' (2005)13 *Irish Students Law Review* 168
- Takele S. B, 'The Monist-Dualist Divide and the Supremacy Clause: Revailing the Status of Human Rights Treaties in Ethiopia'(2009) 23 (1) *Journal of Ethiopian* 132
- V. D. John, 'Positivism and the Rule of Law, Formal Systems or Concealed Values: A Case Study of the Ethiopian Legal System' (1994) 3 *J. Transnat'l L. & Pol'y* 165
- W. David and H. Cheryl (2011) 'Defining Torture and Cruel, Inhuman, and Degrading Treatment', 29 *Law & Ineq.* 343. Available at: http://scholarship.law.umn.edu/faculty_articles/366.
- W. Getachew Asefa, 'The Place of International Law in the Ethiopian Legal System' (2016) 1(1) *Ethiopian Yearbook of International Law* 61
- T. Yohannes Gerbi, 'Immunities and Privileges of UN Agencies in Ethiopia: Problem and Possible Remedies' (2018) 6(1) *International Journal of Advanced Research*143

Unpublished Works

- A. Tesfaye Tadesse, 'Freedom from torture, inhuman or degrading treatment or punishment: the case of some selected prisons of oromia national regional state' (2011) (*LL.M Thesis, Addis Ababa University*, (unpublished))
- H. Gebrehiwot, 'The legal limits to police custody interrogation methods: a comparative look at the British and Ethiopian interrogation laws' (2014) (*LL.M Thesis, European University*, unpublished)
- T. Tasew, 'Human Rights Violation in Ethiopia from 1991-2017: The Case of Torture and Ill-Treatments' (2019) available at: <https://www.academia.edu/38195835/Human_Rights_Violation_in_Ethiopia_from_1991-2017_The_Case_of_Torture_and_Ill-Treatments> (accessed on 3 April 2019)

International laws

- African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered in to force 21 October 1986) 21 ILM 58

- African Union Convention on Preventing and Combating Corruption (adopted on 11 July 2003, entered in to force 5 August 2006) 43 I.L.M. 5
- American Convention on Human Rights, adopted in 22 November 1969, O.A.S.T.S. No. 36 (entered into force 27 August 1978).
- 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)
- Universal Declaration of Human Rights (adopted on 10 December 1948) General Assembly Resolution, 217 a (III)
- UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted on 9 December 1975)UNGA Res 3452 (XXX)
- UN Convention Relating to the Status of Refugees (adopted in 28 July 1951, enter in to force 22 April 1954) 189U.N.T.S.137
- UN Vienna Convention on the Law of Treaties (adopted in 23 May 1969, entered in to force 27 January 1980) 1155 U.N.T.S. 331
- UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (adopted on 26 November 1968, entered in to force 11 November 1970) 754 U.N.T.S 73
- UN Covenant on Civil and Political Rights (adopted in Dec. 1966, enter in to force 1976) 999 U.N.T.S. 171
- UN Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 Dec. 1965, entered into force 4 Jan. 1969) 660 U.N.T.S. 195
- UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered in to force in June 26, 1987) 1465 U.N.T.S. 85
- UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted in 18 Dec. 1990, entered in to force 1 July 2003) 2220 U.N.T.S. 3
- UN Convention on the Rights of the Child (adopted in Nov. 1989, entered in to force 2 Sept. 1990) 1577 U.N.T.S. 3

- UN Convention on the Rights of Persons with Disabilities (adopted in 13Dec. 2006, enter in to force 3 May 2008) 2515U.N.T.S.3
- UN Security Council, *Rome Statute of the International Criminal Court* (last amended 2010)
- UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002)
- UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as amended on 13 October 2006)
- Statute of international court of justice (ICJ), 1954, Art. 38
- UN General Assembly, Vienna Declaration and Programme of Action (adopted on 12 July 1993) A/CONF.157/23.
- UN Convention against Corruption (adopted on 31 October 2003, entered in to force on 14 December 2005) 2349 U.N.T.S. 41

International Cases

✓ Human rights bodies

- *Rodríguez vs. Uruguay*, Communication No. 322/1988, HRC, judgment of 1994.
- *Laureano v. Peru*, Communication No. 540/1993, HRC, judgment of 16 April 1996.
- *Osbourne v. Jamaica*, Communication No. 759/97, HRC, judgment of March 2000.
- *Pryce v. Jamaica*, Communication No. 793/1998, HRC, judgment of March 2004.
- *Paez v. Sweden*, Communication No. 63/1997, CAT, Judgment of 1997.
- *Sadiq Shek Elmi v. Australia*, Communication No. 120/98, CAT, judgment 25 May 1999.
- *Dragan Dimitrijevic v Serbia and Montenegro*, Communication No. 207/2002, CAT, judgment of 2004.
- *Hajrizi Dzemajl et al. v. Federal Republic of Yugoslavia*, Communication No. 161/2000, CAT, judgment, November 2002.
- *Guridi vs. Spain*, Communication No. 212/2002, CAT, judgment of 2005.
- *Danilo Dimitrijevic v Serbia Montenegro*, Communication No. 172/2000, CAT, judgment of 2005.
- *Jovica Dimitrov v Serbia and Montenegro*, Communication No. 171/2000, CAT, judgment of 2005.
- *Kepa Urra Guridi v. Spain*, Communication No. 212/2002, CAT, judgment of 17 May 2005.
- *Guengueng et al. v. Senegal*, Communication No.181/2001, CAT, judgment of 19 May 2006.

- *EN v. Burundi*, Communication No. 578/2013, CAT, judgment of February 2016.
- *Selmouni v France*, Application no. 25803/94 (ECHR, judgment of 28 July 1999)

✓ Criminal Tribunals and ICJ Cases

- *Nicaragua v. United States of America*, (Military and Paramilitary Activities in and against Nicaragua, Judgment, I. C. J. Reports of 1986
- International Court of Justice, Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*), Judgment, Merits, 41 ILM 536 (2002)
- *Prosecutor v Delalić, Mucić, Delić and Landžo* (Judgment) ICTY–96–21–TC (16 Nov.1998)
- *Prosecutor v. Anto Furundzija* (Judgment) ICTY-95-17/1-TC (10 Dec.1998)
- *Prosecutor v. Kunarac et al.* (Judgment) ICTY-96-23 & 23/1-TC (22 Feb. 2001)
- *Prosecutor v. Kvocka*, (Judgment) ICTY -98-30/1-TC (Nov. 2, 2001)
- *Prosecutor v. Kunarac et al* (Judgment) ICTY -96-23/1-AC (12 June 2002)
- *El Sayed Jemil v prosecutor* (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging) STL-11-01/I- AC (16 February 2011)

General Comments and Concluding Observations

- Committee against Torture, General Comment No. 2: *Implementation of Article 2 by States Parties*, 6, U.N. Doc. *CAT/C/GC/2* (Jan. 24, 2008).
- Committee against Torture, General Comment No. 3: Implementation of Article 4 by States Parties (13 December 2012), UN Doc. CAT/C/GC/3
- Human rights committee; CCPR General Comment 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment, UN Doc HRI/GEN/1/Rev.5 (2001).
- Human Rights Committee, General Comment No. 24 , UN Doc. CCPR/C.21.Rev.1/Add.6 (1994).
- Human Rights Committee, General Comment No. 29: Article 4: Derogation during a State of Emergency, UN doc. CCPR/C/21/Rev.1/Add.11 (2001).
- Human Rights Committee, "General Comment no. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant," UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), Para 18 [Herein after HRC GC No. 31]
- CAT, Concluding Observations on Chile, UN Doc. CAT/C/CR/32/5, 2004.

- CAT, Concluding Observations on Cambodia, UN doc. CAT/C/CR/31/7, 2005.
- CAT, Concluding Observations on Bahrain, UN Doc. CAT/CO/34/BHR, 2005.
- CAT, Concluding Observations on the U.S., UN doc. CAT/C/USA/CO/2, 2006.
- CAT, Concluding Observation on the first periodic reports of Ethiopia, CAT/C/ETH/CP/1, 20 Jan 2011.
- CAT, concluding observation on the fourth periodic reports of Turkey, CAT/c/Tur/co/4, 2 June 2016.
- CAT, Concluding Observations on Rwanda, UN Doc. CAT/C/RWA/CO/2, 2017.
- CAT, concluding observation on Vietnam, UN Doc. CAT/C/VNM/CO/1, 2018.
- HRC, Conclusions and Recommendations: El Salvador, ICCPR/CO/78/SLV, 2003.
- HRC, 'Concluding Observations of the Human Rights Committee: Israel', CCPR/CO/78/ISR, 2003
- HRC, Concluding Observations on the 5th Periodic Report of Canada, UN Doc. CCPR/C/CAN/CO/5, 2 November 2005.
- HRC Concluding Observation on Yemen, UN Doc. CCPR/CO/84/YEM, 2005.
- HRC, Concluding Observation on the Fourth Periodic Report of the United States of America, CCPR/C/USA/CO/4, 2014.

Domestic Legislations and Cases

- Ethiopian Constitution of 1931, Established in the reign of His Majesty Haile Sellassie I, 16th July 1931
- Revised Constitution of Ethiopia, proclamation No.144/1955, Negarit Gazetta, Year 15, No. 2.
- The Constitution of the People's Democratic Republic of Ethiopia, proclamation No. 1, 1987, Nagarit Gazetta, Year 47, No. 1.
- Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, 1st year No.1, 21st August, 1995
- The Penal Code of 1930, Enacted in the reign of His Majesty Haile Sellassie I, September 1930.
- The Penal Code of the Empire of Ethiopia, Proclamation No. 158/1957, Federal Negarit Gazeta, 16th year No. 1, 23rd July 1957.
- Criminal Procedure Code of Ethiopia, Proclamation No. 186/1961.

- The Federal Democratic Republic of Ethiopia Criminal Code, Proclamation No.414/2004 (become effective in 9th May, 2005)
- Proclamation for the establishment of the Special Prosecutor's Office, Proclamation No. 22/1992, Negarit Gazetta, No. 18.
- Proclamation on Anti-Terrorism, proclamation No. 652/2009, Federal Negarit Gazetta, 15th years, No. 57
- Proclamation to Provide for the Crimes of Corruption, Proclamation No. 881/2015, Federal Negarit Gazette, Year 21, No. 36
- Proclamation to provide for the procedure of granting and executing pardon, proclamation No. 840/2014, Federal Negarit Gazetta, 20 years, No. 68
- A proclamation to grant Amnesty for people who are involved in different crimes, proclamation No. 1096/2018.
- *Mengistu et al.* (Revised Indictment of 27 November 1996).
- *Special Prosecutor v. Colonel Mengistu Haile- Maria et al,* Federal High Court, File No. 1/87.
- Appellant (*SP0) v. Respondents (Colonel Mengistu Hailemariam et a.),* Federal Supreme Court, File No. 3018126, May, 2008.
- *SPO v. Shaleka Melaku Tefera,* Federal High Court, File No. 03112, Dec. 2005
- *Commander Alemayehu Hailu et al.,* FGA file No. 175/11 (Indictment of 19 March, 2019)
- *Getachew Assefa et al.,* FGA file No. 198/2011, (indictment of 7 May, 2019)
- *Officer Geberemariam Weliday Abirha et al.,* FGA file No. 175/11 (Indictment of 19 March, 2019)*FGA v. Getachew Assefa et al*., Federal High Court (Ruling on Preliminary Objection of July 2019), file No. 23840.

Reports and Other Sources

- Amnesty international world report, January 2018, available at: https://www.hrw.org/worldreport/2018/country-chapters/ethiopia [accessed on 2 Mar, 2019]
- HUMAN RIGHTS COUNCIL – HRCO (Ethiopia), *142nd Special Report: Human Rights Violations Committed During the State of Emergency in Ethiopia: Executive Summary* 6 – 11 (May 28, 2017), https://ehrco.org/wp-content/uploads/2017/07/HRCO-142nd-Special-Report-English-Executive-summary-2.pdf

- Human Rights Watch, World Report 2018, available at: https://www.hrw.org/world-report/2018/country-chapters/ethiopia [accessed on April 8, 2019].
- CAT, Third periodic report of the United Kingdom of Great Britain and Northern Ireland and dependent territories, CAT/C/SR. 354 (18 November 1998)
- *Dem Yazele Dossie'* (Special Prosecutor's Office, Final Report, 2010).
- HRC, *Consideration of reports submitted by States parties under article 40 of the Covenant, First periodic report of States parties: Ethiopia*, July, 2009, CCPR/C/ETH/1
- OHCHR, *Human Rights Fact Sheet: No. 4 Combating Torture* (May 2002)
- OHCHR, Rule-of-Law Tools for Post-Conflict States, Amnesties, HR/PUB/09/1 (2009). Available at: https://www.ohchr.org/Documents/Publications/Amnesties_en.pdf
- United Nations, *"Fact Sheet No.2 (Rev.1),The International Bill of Human Rights",* 1996 http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf (Accessed: Apr. 5, 2019
- UNCHR, 'Report of Special Rapporteur on Torture' (2010) UN Doc A/HRC/13/39 Add.5
- United Nations Voluntary Fund for Victims of Torture, '*Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies'* (2011). Available at: https://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf
- Jurisprudence of the CAT, Part IV, at 206-7, *available at*: http://www.omct.org/files/2006/11/3979/handbook4_eng_04_part4.pdf.
- Association for Human Rights in Ethiopia, '*Ethiopian Political Prisoners and Their Accounts of Torture'* (February 2018). Available at: https://ahrethio.org/wp-content/uploads/2018/02/Ethiopian-prisoner-and-their-accounts-of-torture.rep2018.pdf [accessed on 7 April, 2019]
- Association for the Prevention of Torture, '*Key Issues in Drafting Anti-Torture Legislation, Expert Meeting, Report: Experience, Advice and Good Practices*' (2013)
- Association for the Prevention of Torture (APT) and Convention against Torture Initiative (CTI) *'A Guide on Anti-Torture Legislation',* (2016). Available at: https://www.apt.ch/content/files_res/anti-torture-guide-en.pdf [accessed on 28 June 2019]
- **የኢትዮጵያ ፌደራላዊ ዲሞክራሲያዊ ሪፐብሊክ የተሻሻለው የወንደል ህግ ሐተታ ዘምክንያት**. Available at: https://abyssinialaw.com/online-resources/codes-commentaries-and-explanatory-notes [accessed on 8 May 2019]

Web Sites

- https://www.ezega.com/News/NewsDetails/4495/Ethiopian-State-Minister-in-Custody-After-Parliament-Strips-Immunity [accessed on 5 June 2019].
- https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx [accessed on 15 May 2019]
- Amhara Mass Media documentary film, "የፍትህ ሰቆቃ" part I and II, available at https://www.youtube.com/watch?v=3JKZs7Kk3CY&list=WL&index=3&t=0s and https://www.youtube.com/watch?v=c48h55XR3ns&list=WL&index=1; [accessed on 15 May 2019]