

The Principle of Universal Jurisdiction for Massive Human Right Violation of the Past: An International and Ethiopian Perspective

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Abstract

Confronting egregious human rights violations and repressive past is an arduous and necessary task to end the cycle of impunity. Bearing in mind Ethiopia's notable contribution to the peace and security in the Horn of Africa and beyond, Ethiopia and the region at large can benefit from showing support to institutions that aim to establish accountability for grave human rights violation. Ethiopia needs to champion and redefine its support of accountability by exercising universal jurisdiction. Where the domestic judicial system is unable or unwilling to deal with grave crimes committed within its national jurisdiction or against its nationals, other countries' institutions can serve as safeguard and fallback options to establish accountability, thereby significantly contributing to the protection of human rights. Thus, it is very crucial to the fight against impunity that Ethiopian laws providing for universal jurisdiction should be set in motion. In this comment, the scope, development, role and challenges of the principle of universal jurisdiction with proper reference to practical cases are discussed. Furthermore, the scope of universal jurisdiction under Ethiopian law is compared with international law and African model Universal Jurisdiction Law to indicate its implication to the Horn of Africa.

Key terms

Transitional justice · Accountability · Universal jurisdiction · Ethiopia · Justice · Horn of Africa

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Introduction

In a transition from massive human right abuses of the past to a new democracy, countries in transition face the question of how they can come to terms with the past injustices. Dealing with such abuses serves the purpose of rectifying the damage and builds public trust that such atrocities will never happen again.¹ In such cases, the state undergoing a transition would need to adopt different transitional mechanisms that fit the context.

The new governments in societies under transition can opt to deal with the past by holding the perpetrators accountable for their crimes through prosecution.² Criminal investigation and prosecution of the past atrocities can be carried out in the state of commission by the domestic machinery of the state in question, by internationalised mechanism or by a third state through the utilisation of universal jurisdiction. This comment is meant to discuss the scope, development, role and challenges of the principle of universal jurisdiction with proper reference to practical cases available.

1. Universal Jurisdiction: an Overview

1.1 The notion of universal jurisdiction

Jurisdiction is the legal authority of the state in the exercise of subjecting a person or his property to domestic courts.³ There are five widely recognised grounds of jurisdiction. Four of these grounds are (i) the *territoriality principle* which applies if the offence is committed in the territory of the forum state; (ii) the *active personality principle* applicable if the suspect is national of the forum state; (iii) the *protective principle* applicable to conduct that violates the vital security and economic interests of a state; and (iv) the *passive personality principle* which relates to cases whereby the victim is a national of the forum state.⁴

Universal jurisdiction is the fifth category which accords jurisdiction to a court over crimes even though the forum state does not have a directly affected

¹ Roht-Arriaza N (2006), "The New Landscape of Transitional Justice" in the Roht-Arriaza N & Mariezcurrena J (ed) *Transitional Justice in the Twenty-first Century: Beyond Truth Versus Justice*, Cambridge University Press, Cambridge, pp. 1-6.

² Kritz N (1995), *Transitional Justice*, US Institute of Peace Press, p. xix-xxx. Roht-Arriaza N, *supra* note 1, p. 2. Wustenberg R (2006), "On the Truth, Dignity and Reconciliation in South Africa- A Theological Perspective" in the Werle G (ed) *Justice in Transition- Prosecution and Amnesty in Germany and South Africa*, BWV Verlag Berlin, pp. 132-133. Werle G & Jessberger F (2014) *Principles of International Criminal Law*, Oxford University Press, Oxford, Para 240.

³ Boczek B (2005), *International Law: a Dictionary*, Scarecrow Press, Lanham, para 87.

⁴ Malone L (2008), *International Law*, Aspen Publishers Online, pp.55-56.

interest in relation to the commission of the crime.⁵ It is invoked in the absence of another jurisdictional basis to address the deficiencies of the primarily concerned states. In such cases, a state conducts prosecution as an agent of the international community.⁶

The two forms of universal jurisdiction are *pure* or *absolute* universal jurisdiction and *conditional* universal jurisdiction.⁷ *Pure* or *absolute* universal jurisdiction is exercised without any subordinate procedural requirement regarding the presence of the perpetrator in the investigating state.⁸ The investigation commences *in absentia*.⁹ In conditional universal jurisdiction, however, the presence of the person under investigation is a prerequisite for the initiation of the investigation.¹⁰

1.2 The rationale of universal jurisdiction

There are circumstances in which prosecution of perpetrators at the place of commission might not be successful because of the unwillingness of the territorial state, lack of resource, or the suspect might have already fled to another state. In such case, an exercise of jurisdiction by third states redresses victims for the violations they have suffered.¹¹

Accordingly, the rationale for universal jurisdiction is a notion that atrocities should not be left unpunished¹² and perpetrators should not have any safe haven.¹³ This reaffirms the idea that mass violation of human right affects the interests of the international community.¹⁴ Universal jurisdiction also decentralises the enforcement of international criminal law thereby contributing to the fight against mass violation of right.¹⁵

⁵ Inazumi M (2005), *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Intersentianv, p. 25 & 103. Bassiouni MC (ed) (2008) *International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms* volume II,3 ed., Nijoff, Katwijk, p. 187.

⁶ Cassese, A. et al (2009), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, p.556.

⁷ Cassese, A. (2003), *International Criminal Law* Oxford University Press, Oxford, p. 285.

⁸ Id., p. 286.

⁹ Ibid. See section 4 of this comment for details

¹⁰ Id., p. 285.

¹¹ Inazumi, *supra* note 5, p. 210.

¹² Heinze E (2009), *Waging Humanitarian War: The Ethics, Law, and Politics of Humanitarian Intervention*, University of Michigan Press, Michigan, p. 86.

¹³ Inazumi, *supra* note 5, p. 210.

¹⁴ Panakova J (2011), "Law and Politics of Universal Jurisdiction", *Amsterdam Law Forum* v.3, No.3. p. 49. Inazumi, *supra* note 5, para. 213.

¹⁵ Werle, *supra* note 2, para. 222.

1.3 Views against universal jurisdiction

The first argument against universal jurisdiction states that it violates state sovereignty. This argument was raised before the British House of Lords in the *Augusto Pinochet case*, and it was also raised in *Sokolovic case* at the German Federal High Court in which both courts rejected the assertion.¹⁶ The reason for rejection is that massive human right violations should not be left to the exclusive concern of that state.¹⁷ In this regard, the ICJ decision, in the *Barcelona Traction case*, confirms that some matters are shared concerns of all states.¹⁸

The second objection to universal jurisdiction relates to the preference of the territorial state of commission for the trial.¹⁹ It is true that the state of the commission is convenient for the investigation and prosecution of any offence. As noted in the *Eichmann case*, however, the very reason of invoking universal jurisdiction is the failure of the territorial or other states to prosecute the perpetrators.²⁰

The third objection is related with the fear of tension between states and political manipulation. This, however, is unconvincing and exaggerated as no state so far has entered into such tension merely for that reason.²¹ The African Union, for instance, raises this fear of politically motivated prosecution against leaders from Africa.²² However, the same summit that condemned the abuse of universal jurisdiction, adopted African model law on universal jurisdiction which is much broader than the universal jurisdiction under international law.²³ Such inconsistencies render the summit's position unconvincing.

¹⁶ Williams S. (2012), *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues*, Hart Publication, Oxford, p. 20. Cassese, A. *supra* note 5, p. 292. *Regina v Bartle and Commissioner of Police, Ex parte Pinochet* (1999) 2 W.L.R. 827, 38 LLM. 581 U.K. House of Lords 600 (Herein after the Pinochet Case).

¹⁷ Cassese, *supra* note 7, p. 284-5.

¹⁸ *Barcelona Traction, Light and Power Company, Limited (Advisory Opinion and Orders)* [1970] ICJ Rep 3. Para 33.

¹⁹ Hall CK (2003), "Universal Jurisdiction: New Uses for an Old Tool" in Lattimer M & Sands P (eds) *Justice for Crimes Against Humanity*, Hart Publishing, Oxford, p. 56.

²⁰ *Attorney-General of the Government of Israel v Eichmann* (1962), Israel Sup.Ct. Int'l L. Rep., vol. 36, 1968 (English translation) 303 (Herein after the Eichmann case).

²¹ Hall, *supra* note 19, p. 57. Cassese, *supra* note 7, p. 291.

²² Decision on Africa's Relationship with the International Criminal Court (ICC), AU Extraordinary Session, 2013 Addis Ababa, Ext/Assembly/AU/Dec. 1 (Oct. 2013) Para 3. See also Jeßberger F (2014), "On Behalf of Africa': Towards the Regionalization of Universal Jurisdiction?" in the Werle G, Fernandez L & Vormbaum M (eds) *Africa and the International Criminal Court*, Springer, Berlin, p.159.

²³ *Id.*, 160.

Thus, the arguments against universal jurisdiction do not seem to be valid. As Werle notes, the world community has the right to defend common values through universal prosecution of the culprits.²⁴

2. The Development of Universal Jurisdiction

The seventeenth-century marks the beginning of universal jurisdiction which developed in relation to a crime of piracy.²⁵ Pirates are regarded as *hostis humani generis*, i.e. the enemy of mankind.²⁶ Accordingly, all states can prosecute pirates as it is of mutual concern for all irrespective of a perpetrator's nationality or place of occurrence of the piracy.²⁷ Likewise, the prohibition of the slave trade has acquired *jus cogens* status, and hence, universal jurisdiction applies.²⁸

It is only after the Second World War that this principle was shaped in such a way that it applies to other crimes of international concern. The principle of universal jurisdiction is made part of four Geneva Conventions of 1949,²⁹ the 1984 Convention against Torture,³⁰ and other³¹ treaties³² with the aim of protecting universal values.³³ Case laws have also contributed to the development. In the Lotus case, the Permanent Court of International Justice (PCIJ) affirmed that states could exercise jurisdiction unless there is an international prohibition to the contrary.³⁴ Accordingly, the trials of Nuremberg relied on this principle.³⁵

²⁴ Werle, *supra* note 2, para 213.

²⁵ Cassese, *supra* note 7, p. 284.

²⁶ Ibid. Bassiouni M (2001) "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", *Virginia Journal of International Law*, v. 42. p.108.

²⁷ Cassese, *supra* note 7, p.284..

²⁸ Kraytman Y (2005), "Universal Jurisdiction—Historical Roots and Modern Implications" *Brussels Journal of International Studies*,. Vol. 2, P. 99.

²⁹ Articles 49, 50, 129, and 146 of the First, Second, Third, and Fourth Geneva Conventions (1949) respectively.

³⁰ Article 7, the Convention against Torture (1984).

³¹ Article 4, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970). Article 4, the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973). Article 10, the Convention on the Safety of United Nations and Associated Personnel (1994). Article 9, the International Convention for the Protection of all Persons from Enforced Disappearance (2006).

³² Cassese, *supra* note 7, p. 284-5.

³³ Ibid

³⁴ The Lotus Case (France v. Turkey) [1927] PCIJ (Ser A) No. 9.

³⁵ Kraytman, *supra* note 8, p.107.

3. The Scope and Legal Status of Universal Jurisdiction

Crimes subject to universal jurisdiction at the national level partly depend on the domestic legal framework. From the perspective of international law, however, the concept of universal jurisdiction relates to concepts of *jus cogens* indicating, among other things, which crimes are subject to the principle of universal jurisdiction and *obligatio erga omnes* (i.e. the obligations of states that are owed towards the international community as a whole) indicating the duty of states to take action.³⁶ The crimes subject to universal jurisdiction are limited in scope, serious in nature and gravity.³⁷

3.1 Universal jurisdiction for international crimes: an option or duty?

The core crimes under international law include genocide, crimes against humanity, and war crimes all of which forms part of *jus cogen* norms. According to the Genocide Convention, states can prosecute perpetrators based on the principle of territoriality or a person can be tried at the international penal court.³⁸ Under this Convention, there is no express third-party state duty to exercise universal jurisdiction. These, however, cannot be construed to exclude universal jurisdiction as every state is permitted to prosecute individuals who have violated a universal value under the customary international law.³⁹ Furthermore, the general undertaking to prosecute genocide offenders provided in Article 1 of the Convention could justify the exercise of universal jurisdiction.⁴⁰

In regard to crimes against humanity, there is no treaty-based foundation for the exercise of universal prosecution. The judicial practice and numerous writings forming *opinion juris* on the matter indicate that universal jurisdiction for a crime against humanity is *permissible* under customary international law.⁴¹ This can be strengthened by the argument that this crime currently forms part of *jus cogen* norms.⁴² There is not, however, mandatory practice of universal jurisdiction for this crime.

The Geneva Conventions incorporate the principle of *aut dedere aut judicare*, i.e. the duty to either extradite or prosecute perpetrators in relation to

³⁶ Thompson R, (2015), *Universal Jurisdiction: The Sierra Leone Profile*, Vol. 3., Springer, Berlin, p.70.

³⁷ Cassese, *supra* note 7, p. 285.

³⁸ Article 6, the Convention on the Prevention and Punishment of the Crime of Genocide (1948). See also Principle 1(1), the Princeton Principles. Werle, *supra* note 7, para. 218.

³⁹ Id., Werle, Paras. 214 & 216.

⁴⁰ *Jorgic v Germany* (2007) ECHR No. 74613101, para 68.

⁴¹ Bassiouni M, (2001) 119.

⁴² Aksar Y (2004), *Implementing International Humanitarian Law: From the Ad Hoc Tribunals to a Permanent International Criminal Court*, Routledge, Abingdon, p. 263.

war crimes.⁴³ It should be observed that according to the ICJ decision, prosecution is a duty while extradition is an option left to the states.⁴⁴ As in the case of other core crimes, however, customary international law is permissive for breach of Geneva Convention which does not constitute a grave breach. It has been argued that the Geneva Convention only provides for universal jurisdiction of the belligerent state as opposed to other states.⁴⁵ But, there is no basis for such a restricted interpretation of the Convention. It is important to note that torture and enforced disappearance are other offences of international concern over which universal jurisdiction is mandatory if the alleged offender is present in the territory of that state and has not been extradited.⁴⁶

3.2 Universal jurisdiction cases

One of the notorious universal jurisdiction cases is the Adolf Eichmann Case. He was in charge of the ‘final solution for the Jewish question’ which encompasses execution of the six million Jews.⁴⁷ In 1961, the Israeli government agents apprehended and abducted him from Argentina where he was hiding.⁴⁸ Although the state of Israel was non-existent at the time of the commission of the crime, the Israeli Supreme Court affirmed that courts in Israel can exercise jurisdiction as agents of the international community.⁴⁹ As a ground-breaking case, the case contributed to the increase of legislation providing for universal jurisdiction.⁵⁰ Amnesty International’s study indicated that following this case, seventy-five percent of the countries of the world incorporated universal jurisdiction in their domestic legislation.⁵¹

⁴³ Articles 49, 50, 129, 146 of the First, Second, Third, and Fourth Geneva Conventions respectively provides for universal jurisdiction for international armed conflict while Article 85 of Additional Protocol I provides for non-international armed conflict.

⁴⁴ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Advisory Opinion and Orders) [2012] ICJ Rep Para 94 (Herein after *Belgium v Senegal* ICJ).

⁴⁵ Kravtman, *supra* note 28, p. 110.

⁴⁶ Article 9(2), *International Convention for the Protection of All Persons from Enforced Disappearance* (2006). Article 7, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

⁴⁷ Amnesty International (2012), “Eichmann Supreme Court Judgment: 50 years on, its Significance Today” p.12. Available at: <https://www.amnesty.org/en/documents/ior53/013/2012/en/> (Accessed, August 17, 2018), p. 4. Goti J. (2010), “Editorial Note: A Turbulent Past and the Problem with Memory”, *International Journal of Transitional Justice*, V. 4 No. 2, p. 159.

⁴⁸ *Id.*, Amnesty, p.4.

⁴⁹ *The Eichmann Case*, *supra* note 20, p. 304.

⁵⁰ Amnesty International, *supra* note 47, p. 10.

⁵¹ *Ibid.*

The other famous case is the *Augusto Pinochet* case who was the former Chilean dictator president from 1974 to 1990.⁵² He is accused of committing crimes against humanity including killing, kidnapping, and disappearance targeting political opponents.⁵³ The accountability of *Pinochet* was affected because of amnesty provided to him.⁵⁴ He was arrested in the UK as he arrived for medical purpose after which the Spanish Court judge *Baltasar Garzon* issued an arrest warrant for the alleged crimes.⁵⁵ The issue of extraditing the former president of Chile to Spanish court became an issue of contention in UK court. The court rejected lack of jurisdiction stating that as a prohibition against torture forms part of *jus cogens* prohibition, and it noted that the exercise of universal jurisdiction is justified based on a duty to prosecute or extradite the suspect.⁵⁶

The prosecution of *Pinochet*, as stated earlier, was initiated as he went to the UK for medical purpose. The same can be observed in relation to former Ethiopian dictator *Mengistu Haile Mariam* who attended a medical institution in South Africa in December 1999.⁵⁷ At this time, different human right institutions had pushed the South African government to prosecute or extradite Mengistu without success as he absconded before any attempt on the part of the government.⁵⁸

In Africa, one of the famous universal jurisdiction cases was a case against *Hissene Habre* who was the former president of Chad from 1982 to 1990.⁵⁹ Under his leadership a large number of people are killed and tortured.⁶⁰ Although Senegal's Cour de Cassation ruled that there is no legal basis to exercise universal jurisdiction,⁶¹ ICJ has decided that Senegal has an international duty to prosecute or extradite *Hissene Habre*.⁶² Following this

⁵² Ball H (2011), *Genocide: A Reference Handbook*, Calif ABC-CLIO, Santa Barbara, p.125.

⁵³ *Id.*, 136.

⁵⁴ Ensalaco M. (2000), *Chile under Pinochet: Recovering the Truth*, University of Pennsylvania Press, Pennsylvania, p.129.

⁵⁵ Lattimer M & Sands P (ed) (2003), *Justice for Crimes Against Humanity*, Bloomsbury Publishing London, p. 8.

⁵⁶ *Ibid.*

⁵⁷ Bass G. (2014), *Stay the Hand of Vengeance: the Politics of War Crimes Tribunals*, Princeton University Press, p.328.

⁵⁸ Vande Lanotte J. & Haeck Y. (2001), *The Principle of Equality: A South African and a Belgian Perspective*, Maklu Publishers, Antwerpen, p. 94.

⁵⁹ Inazumi, *supra* note 5, p. 90.

⁶⁰ Brody R (2005), "Chad: the Victims of Hissène Habré Still Awaiting Justice", Human Rights Watch v. 17, No. 10 (A), p.1.

⁶¹ Jeßberger, *supra* note 22, p.169.

⁶² Inazumi, *supra* note 5, p. 93-97. Belgium v Senegal ICJ (2012), paras 15–41. Para 117.

decision, Senegal agreed with the African Union to establish 'Extraordinary African Chambers' integrating it within the national system.⁶³

In another case, the *Southern Africa Litigation Centre (SALC) and the Zimbabwe Exiles Forum (ZEF)* requested the South African authority to investigate an alleged claim of systematic torture committed in Zimbabwe.⁶⁴ The authorities, however, declined to investigate the situation. The South African courts ruled that South Africa's authority failed to comply with their duty of investigation under international and South Africa's law and indicated that no political implication should be taken into account and the physical presence of suspects is not required.⁶⁵

A case connected to Ethiopia is Alemu Eshete's case who is a former aide to Mengistu Hailemariam.⁶⁶ Alemu Eshete is one of the perpetrators who were convicted to the death sentence in the Red-Terror perpetrators trial in Ethiopia.⁶⁷ He, however, took exile to the Netherlands before the beginning of Ethiopian transitional justice during the transition. Alemu Eshete was indicted at the district court in The Hague under the principle of universal jurisdiction.⁶⁸ This is the first time that universal jurisdiction is utilized for convicting Red-terror perpetrators.

4. Universal Jurisdiction in Absentia

This implies the absence of the perpetrators who are subject to investigation and prosecution from the forum state.⁶⁹ There is inconsistent practice among states in relation to universal jurisdiction in absentia.⁷⁰ Universal jurisdiction in *absentia* is not expressly provided under any international agreements.⁷¹

⁶³ Jeßberger, *supra* note 22, p. 170.

⁶⁴ Southern Africa Litigation Centre and Another v National Director of Public Prosecutions and Others 2012 (3) All SA 198 (GNP) (Herein after Zimbabwe Torture Case).

⁶⁵ *Id.*, Para 15.

⁶⁶ Henok Gabisa (2019). *Ethiopia's Red Terror Goes to Court in the U.S.* [online] Justiceinfo.net. Available at: <https://www.justiceinfo.net/en/justiceinfo-comment-and-debate/opinion/40409-ethiopia-s-red-terror-goes-to-court-in-the-u-s.html> [Accessed 5 Jul. 2019].

⁶⁷ *Ibid.*

⁶⁸ Rikhof, J. (2019). *Case Comment: Dutch Court Convicts Ethiopian War Criminal to Life Imprisonment – The Philippe Kirsch Institute.* [online] The Philippe Kirsch Institute. Available at: <http://www.kirschinstitute.ca/case-comment-dutch-court-convicts-ethiopian-war-criminal-life-imprisonment/> [Accessed 5 Jul. 2019].

⁶⁹ Poels A.(2005), "Universal Jurisdiction in Absentia" 23 *Netherlands Quarterly of Human Rights*. P. 72.

⁷⁰ Cassese, *supra* note 7, 286.

⁷¹ Rabinovitch R 'Universal Jurisdiction in Absentia' (2004) 28 *Fordham Int'l LJ* 506.

Some jurists have tried to argue in favour of universal jurisdiction in absentia, reasoning that it is an instrument of fighting impunity as the leaders receive the message that they might end up in prosecution if they commit atrocities.⁷² It also imposes psychological fear on the part of the perpetrators.⁷³ Some argued that although investigation in absentia is acceptable, prosecution, however, becomes problematic for an abuse of forum shopping.⁷⁴ Thus, presence of the suspect in the forum state should not be required for mere investigation while it should be required for trial.

5 Universal Jurisdictions under the Criminal Code of Ethiopia and its Implication for Horn of Africa

The extent of universal jurisdiction recognized under the 2004 Criminal Code of Ethiopia is wider than its scope under international law. There are three categories of crimes over which Ethiopia can assume universal jurisdiction. The *first* category relates to crimes that are international or transnational crimes in nature. According to Article 17(1) of the Criminal Code, Ethiopian courts can exercise jurisdiction over crimes *specified in any international treaty to which Ethiopia is a party*.

The second category of crimes over which Ethiopian courts can exercise universal jurisdiction specifies six crimes which, inter alia, include human or drug trafficking.⁷⁵ The *third* group is based on the extent of punishment attached to the crime entailing either ten years of imprisonment or death under Article 18(2) of the Code.

Under international law, universal jurisdiction is allowed for those crimes prohibition of which is a *jus cogens*. This includes crimes against humanity, genocide, war crimes and torture. It is only in relation to grave violations of Geneva Conventions, torture, and disappearance of person that mandatory universal prosecution is required. The universal jurisdiction provided under African model law is much broader than international law as it includes piracy, trafficking in drugs, and terrorism.

In comparison to the international law and African model law on Universal Jurisdiction, the Ethiopian law allows the exercise of universal jurisdiction in a broad range of areas as indicated above. It is, however, to be noted that there are qualifying requirements under the Ethiopian criminal law. First, in cases that require private complaint under the Ethiopian or the law of the place of commission of the crime, complaint must be submitted. Second, trial in absentia

⁷² Poels, *supra* note 69, p.78

⁷³ *Ibid.*

⁷⁴ Cassese, *supra* note 7, pp. 289 & 290.

⁷⁵ Articles 525, 599, 635, 636, 640 and 641 of the 2004 Criminal Code of Ethiopia.

is not allowed. Thus, the suspect needs to be present during the trial in Ethiopia. The same requirement of presence is embodied under the African model law on Universal Jurisdiction.⁷⁶

The Horn of Africa is notorious for conflicts. The crime which allegedly took place in Sudan for instance allegedly includes war crime which the law under international and Ethiopian law allow it to be prosecuted based on universal jurisdiction. Reports also indicate that crimes against humanity and war crimes have been perpetrated in South Sudan. The same holds true for conflicts in Somalia as a result of civil conflict and terrorist conducts. The Eritrean case is also an example as UN Inquiry finds crimes against humanity in Eritrea.

Ethiopia is required to prosecute grave violations of Geneva Conventions, torture, and disappearance of persons and is also allowed to prosecute in the case of other core crimes. Thus, as it has been the case in South Africa, civil societies should request the Ethiopian government to enforce these laws. Ethiopian law requires the prosecution to consult with the Minister of Justice (currently the Federal Attorney General) before instituting proceedings. It is not clear from the law, however, whether the Attorney General is given discretion to either allow or deny prosecution. The latter case seems to have considered the political implication of prosecution based on universal jurisdiction. If the Attorney General can prohibit such prosecutions, it portrays Ethiopia as a safe harbour for criminals. Thus, there is a need to clarify the role of the Attorney General in this regard.

As most countries in the Horn of Africa are newly emerging out of conflict, those who are most responsible for the crimes should be brought to justice. Confronting egregious human rights violations and repressive past is indeed an enormous task. Yet it is necessary to end the cycle of impunity. Furthermore, prosecution of foreign criminals deters potential and future offenders in the region.

6. Challenges to Universal Jurisdiction

The existence of legal impediments constitutes the first challenge in universal prosecution. This includes the lack of legal mechanisms providing for this type of jurisdiction or extradition.⁷⁷ In the *Hissene Habre* case, for instance, the Senegal court ruled at first that the courts lack jurisdiction for crimes committed

⁷⁶ Art. 4(a) of the African model law on Universal Jurisdiction adopted in July 2012 at the 21st Ordinary Session of the Executive Council of the African Union

⁷⁷ Hoover D. (2011), "Universal Jurisdiction Not So Universal: Time to Delegate to the International Criminal Court" *Eyes on the ICC*, v. 8, No. 1, pp. 89 & 97.

abroad.⁷⁸ Even if the laws are later to be amended, the due process challenge based on the principle of non-retroactivity of criminal law challenges the move towards accountability.⁷⁹ Accordingly, this poses a challenge to the exercise of universal jurisdiction.

Secondly, the challenge based on amnesty is raised in some cases.⁸⁰ The contemporary understanding indicates that amnesty at the national level will not be a bar to prosecution in third countries.⁸¹ It is also observed that sweeping (general) amnesty is unacceptable for international crimes.⁸² However, amnesty acceptable according to the laws of the country of residence might affect extradition or prosecution.

The third challenge of universal jurisdiction relates to immunity. For instance, an arrest warrant issued by Belgium based on universal jurisdiction was revoked by the ICJ by invoking the existence of immunity for sitting DRC Minister of Foreign Affairs under customary international law.⁸³ This decision limits the practice of universal prosecution. In the case of Pinochet, however, the UK House of Lords rejected the immunity claim as a former head of state.⁸⁴ From these two decisions, it can be said that the immunity can only be enjoyed if the diplomat or head of state is incumbent. Furthermore, the African Union Model Law provides that African states shall apply universal jurisdiction subject to any national or international law on immunities.⁸⁵ Accordingly, the existence of immunity is a challenge in the exercise of this principle.

Fourthly, the statute of limitation exerts another challenge. In some jurisdictions, international crimes are barred after the lapse of a certain period. For instance, the Danish national law provides ten years as a limitation, and after this time, a person cannot be prosecuted.⁸⁶ This poses a challenge to the exercise of universal jurisdiction and the fight against atrocities.

⁷⁸ The legislative organ of Senegal later changed the constitution to enable the exercise of jurisdiction. See Jeßberger, *supra* note 22, p. 169.

⁷⁹ Williams, *supra* note 16, pp. 183-4.

⁸⁰ Arajärvi N. (2011), "Looking Back from Nowhere: Is There a Future for Universal Jurisdiction over International Crimes?" *Tilburg Law Review*. 1 No. 16, p. 24.

⁸¹ Kritz, *supra* note 2, p. xxii.

⁸² *Ibid.*

⁸³ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Advisory Opinion and Order) [2002] ICJ Rep 3 Para 61. The same decision was reached in Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France) (Advisory Opinion and Order) [2008] ICJ Rep 161-180.

⁸⁴ Arajärvi, *supra* note, p. 26.

⁸⁵ Article 16 of AU, Model Universal Jurisdiction Law.

⁸⁶ Hoover D. (2011), "Universal Jurisdiction Not So Universal: Time to Delegate to the International Criminal Court" *Eyes on the ICC* v.8 No. 1, p. 92.

Fifthly, any political pressure applied by national governments is another challenge.⁸⁷ In this regard, political affiliation of the perpetrators to the new government poses challenge to the prosecution. If the perpetrators are still acting within the government system, the outcome of the case can be influenced. The sixth challenge relates to the collection of evidence. Most evidence is located in the place of occurrence unless the forum state has another connecting factor. Even if documentary evidence is presented to the court authentication of such document can be difficult.

Finally, there will also be a problem in relation to victim's participation. In post-conflict societies, one of the mechanisms towards healing the victim is through their participation in the judicial process such as their presence during hearings. Where third party state prosecutes such crimes, the victims' participation will be affected.

Conclusion

The rationale of universal jurisdiction relates to fighting atrocities and avoiding safe havens to offenders. In doing so, it plays a pivotal role in the prosecution of former regime officials for mass violations of human right. Although the scope of universal jurisdiction is determined in accordance with the national laws, it should, however, be observed that sovereignty is the limitation on its scope. For those crimes, prohibition of which is a *jus cogens*, prosecution through utilisation of universal jurisdiction is permissive under international law. These include crimes against humanity, genocide, war crimes and torture. A duty to prosecute or extradite, however, applies in relation to grave violations of Geneva Conventions, torture, and disappearance of person provided that the suspect is present in the forum state.

The Ethiopian law providing for universal jurisdiction is much broader than the international law and African model law on the subject. So far, however, the provisions are not put to use, and perpetrators of crimes (that can be adjudicated in Ethiopia under universal jurisdiction) are freely walking in and out of the country. Thus, the need for any concerned party to claim the enforcement of these rules with the view of fighting impunity is self-evident. As countries in the Horn of Africa are mostly newly emerging from conflicts, Ethiopia needs to assist these countries in their transition by promoting accountability. ■

⁸⁷ Id., p. 89.
