COLLECTIVE CRIMINAL RESPONSIBILITY OF THE DERG MEMBERS IN THE CASE OF *SPECIAL PROSECUTOR V. COLONEL MENGISTU HAILEMARIAM ET AL*

By Yalemfiker Girma Moges

ADVISOR: GIRMACHEW ALEMU ANEME (LLB, MA, PHD)

MARCH 2010

ACKNOWLEDGMENTS

I’m deeply grateful to my advisor Dr. Girmachew Alemu Aneme for his invaluable input in planning and undertaking the present study. In addition, I would like to thank Senior Prosecutor Yosef Kiros (The Special Prosecutor’s Office) and Mr. Firew Kebede Tiba (Postdoctoral Fellow at University of Hong Kong) for providing me with relevant information and documents. I also appreciate the Ethiopian Special Prosecutor’s Office (SPO) for a valuable input for this study. Last but certainly not least, I would like to say thank you to my classmates, family and friends for encouraging and supporting me when I was undertaking this research.

LIST OF ABBREVIATIONS AND ACRONYMS **IV**

CHAPTER ONE: INTRODUCTION **1**

1.1. Background of the Study **1**

1.2. Statement of the Problem **4**

1.3. Objective of the Study **10**

1.4. Research Methodology **11**

1.5. Significance of the Study **12**

1.6. Limitation of the Study **13**

1.7. Organization of the Thesis **13**

CHAPTER TWO: THE CONCEPT OF COLLECTIVE CRIMINAL RESPONSIBILITY IN THE PROSECUTION OF INTERNATIONAL CRIMES **15**

2.1 Introduction **15**

2.2 Crimes Against Humanity and Genocide **17**
2.2.1 Crimes Against Humanity under the Statutes of the International Tribunals: IMT, ICTY and ICTR 17
2.2.2 Genocide in the Statutes of the International Tribunals: IMT, ICTY and ICTR 21

2.3 Crimes Against Humanity and Genocide under Ethiopian Law **26**

2.4 The Notion of Collective Criminal Responsibility in the Trial of International Crimes **33**
2.4.1 Definition of Collective Criminal Responsibility 33
2.4.2 Debates on the Notion of Collective Criminal Responsibility 35
2.4.3 Principles of Individual Criminal Responsibility 39
2.4.4. Proper Applicability of Collective Criminal Responsibility: Based on Individual Participation 42

2.5 Conclusion **45**

CHAPTER THREE: APPROACHES FOR ATTRIBUTING COLLECTIVE CRIMINAL RESPONSIBILITY FOR INTERNATIONAL CRIMES IN IMT, ICTY AND ICTR **48**

3.1 Introduction **48**

3.2 The International Military Tribunal at Nuremberg **49**
3.2.1 The Nuremberg Tribunal Indictment and Proceedings 50
3.2.2 Criminal Responsibility under the Nuremberg Charter 53

3.2.3 The International Military Tribunal (IMT) Jurisprudence in Attributing Collective Criminal Responsibility 56
3.2.4. Conclusions on the IMT Jurisprudence in Attributing Collective Criminal Responsibility 82

3.3 International Criminal Tribunal for The Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) 83
3.3.1 Criminal Responsibility Provisions under the Statutes of the ICTR and ICTY 89
3.3.2 The ICTY and ICTR Jurisprudence in Attributing Collective Criminal Responsibility 92
3.3.3 Conclusions on the ICTY and ICTR Jurisprudence in Attributing Collective Criminal Responsibility: Joint Criminal Enterprise 111

CHAPTER FOUR: THE ETHIOPIAN COURTS APPROACH FOR ATTRIBUTING COLLECTIVE CRIMINAL RESPONSIBILITY FOR THE DERG MEMBERS IN THE CASE OF SPECIAL PROSECUTOR V. COLONEL MENGISTU HAILEMARIAM ET AL 113

4.1. Introduction 113

4.2. Background to the Red Terror Trials 114
4.2.1 Establishment of the Special Prosecutor Office (SPO) 115
4.2.2 Types of Defendants in the Red Terror Trials 116
4.2.3 Types of Indicted Crimes and Number of Defendants in the Red Terror Trials 117

4.3. Criminal Responsibility under Article 32 of the 1957 Ethiopian Penal Code 118

4.4. The Trial of Special Prosecutor v. Colonel Mengistu Hailemariam et al 121
4.4.1 Public Provocation and Preparation for the Commission of Genocide: A Charge under Article 286(a) and Article 32(1) (a) of the Ethiopian Penal Code of 1957 121
4.4.2 Commission of Genocide: A Charge under Article 281(a) and(c) and Article 32(1) (b) of the Ethiopian Penal Code of 1957 123
4.4.3. Preliminary Objections 125

4.5. Collective Responsibility of the Derg Members in Special Prosecutor v. Colonel Mengistu Hailemariam et al 128
4.5.1 Collective Responsibility of the Derg Members for the Charge of Public Provocation and Preparation for the Commission of Genocide under Article 286(a) and Article 32(1) (a) of the 1957 Penal Code 129
4.5.2 Collective Responsibility of the Derg Members for the Commission of Genocide under Article 281(a) and (c) and Article 32(1) (b) of the 1957 Penal Code 132

4.6. The Defenses on the Charges for the Commission of Genocide and Public Preparation and Provocation for the Commission of Genocide 136
4.6.1. The Collective Defense of the Defendants 136
4.6.2 The Federal High Court Ruling on the Collective Defense 137
4.6.3 Individual Defenses of the Defendants 140
4.6.4 The Rulings of the Federal High Court on the Individual Defenses 143
4.6.5. The Reasoning of the High Court for its Ruling on the Individual Defenses 149

4.7. The Reasoning of the Federal Supreme Court for Upholding the High Court's Ruling on Collective Criminal Responsibility of the Derg Members 151

4.8. Conclusion **154**

CHAPTER FIVE: ANALYSIS OF THE JURISPRUDENCE OF FEDERAL HIGH COURT AND SUPREME COURT IN ATTRIBUTING CRIMINAL RESPONSIBILITY ON THE DERG MEMBERS IN SPECIAL PROSECUTOR V. COLONEL MENGISTU HAILEMARIAM ET AL 158

5.1 Introduction **158**

5.2 Criminal Responsibility of Derg Members in Special Prosecutor v. Colonel Mengistu Hailemariam et al in Light of the Notion of Collective Criminal Responsibility **159**

5.3 Comparative Analysis of Criminal Responsibility of the Derg Members in Special Prosecutor v. Colonel Mengistu Hailemariam et al with the Jurisprudence of ICTY, ICTR and IMT at Nuremberg **161**

5.3.1 Comparison with the IMT Jurisprudence: Membership Liability in Criminal Organization and Common plan or Conspiracy Liability 161
5.3.2 Comparison with the Jurisprudence of the ICTY and ICTR: 168
Joint Criminal Enterprise 168

5.4 Conclusion **170**

CONCLUSIONS AND IMPLICATIONS 171

BIBILIOGRAPHY 180

Books **180**

Journal Articles **181**

Legal Instruments and Documents **183**
A. International/ Foreign 183
B. National 184

Court Cases **185**
A. International / Foreign Case law 185
B. National Court Cases 187

Other Documents **187**

List of Abbreviations and Acronyms

EPRDF	Ethiopian Peoples' Revolutionary Democratic Front
EPRP	Ethiopian Peoples' Revolutionary Party
JCE	Joint Criminal Enterprise
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
IMT	International Military Tribunal
MEISON	All- Ethiopia Socialist Movement(Amharic Acronym)
SPO	Special Prosecutor's Office
SS	Schutzstaffel (Hitlor's Bodyguards)
SA	Sturm Abteilung (Storm Troopers)
SD	Der Sicherheitsdienst
GESTAPO	Secret State Police

CHAPTER ONE: INTRODUCTION

1.1. Background of the Study

Military officers of the Ethiopian army formed the Derg[1] right before the beginning of the 1974 popular revolution. Following, the members of the Derg came to power in September 1974 on the event of the fall down of the Emperor regime through the widespread popular unrest.[2] In the same year, the Derg suspended the 1954 Constitution and set up a military government.[3] After coming to power, the Derg began aiming at individuals and groups likely to create a threat to the military rule.[4] First, Derg started to take measures on the ruling class of the Emperor regime. For instance, in a single incident, fifty-nine former officials of the imperial government were summarily executed on 23 November 1974.[5]

---

[1]. Derg was the name of a committee set up by military officers. It is also called Coordinating Committee of the Armed Forces. In different researches and articles, the number of the military officers who established the Derg varied. For example 108 members , in JV Mayfield 'The Prosecution of war crimes and respect for human rights: Ethiopia's balancing act' (1995)9 Emory of International Law Review 553, 557 ; 120 members in Girmachew A. Aneme, 'Apology and Trials :The Case of the Red Terror Trials in Ethiopia'(2006)6(1) African Human Rights Journal 64, 65 ; Mekonnen in his LLM thesis pointed out that even if usually the Derg had considered to have 120 members, it actually had 109 members. See Mekonnen Yimam Retta, 'Transitional Criminal Justice: The Ethiopian Experience in the Derg/WPE Trials'(LLM Thesis, Addis Ababa University Law Faculty, May 2009)74

[2]. Firew Kebede Tiba, 'The Mengistu Genocide Trial in Ethiopia' (2007) 5 Journal of International Criminal Justice 513

[3]. Yaqob Haile-Mariam, 'The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court' (1999) 22 Hastings International and Comparative Law Review 667, 674

[4] .Tiba (n2 above)516

[5]. Ibid

Subsequently, the Derg turned its focus on the 'anti-revolutionaries' and 'anti –unity' elements who were considered to be impairing the 'revolution'.[6] At the time, political parities flourished which soon resulted in a violent conflict between them and the Derg.[7] This period, spanning from 1975 to 1988 was described as a period of gross human rights violations.[8] In this period, the Derg have claimed that the Ethiopian Peoples Revolutionary Party (EPRP) began the 'White Terror'[9] with the support of most of the students and the elite.[10] Hence, the Derg declared it officially launched the Red Terror as a response to the 'White Terror' in November 1977 that lasted to 1980.[11] During Red Terror Campaign, as to the Amnesty International report, the total number of persons killed reached 150,000 to 200,000.[12] The entire Derg period was typified by massive human rights violations like 'summary execution, torture, arbitrary arrest and detention, disappearance, unlawful dispossession of property and forced settlement.'[13]

After 17 years on power, the Ethiopian People's Revolutionary Democratic Front (EPRDF) removed the Derg from power on 8 May 1991. The following year, a transitional government led by EPRDF decided to bring Colonel Mengistu and other

6. Tiba (n2 above)516
7. Ibid 517
8.Haile-Mariam (n3 above)677
9.The campaign of EPRP which begins in 1976 to assassinate Derg and MEISON was called by Colonel Mengistu Hailemariam the 'White Terror', in Human Rights Watch/Africa, 'Ethiopia: Reckoning under the Law' (November 1994) ,Vol. 16,No. 11, 7
10.Tiba (n2 above)517
11.JV Mayfield 'The Prosecution of War Crimes and Respect for Human Rights: Ethiopia's Balancing Act' (1995) 9 Emory of International Law Review 553, 559
12.Girmachew Alemu Aneme, 'Apology and Trials :The Case of the Red Terror Trials in Ethiopia'(2006)6(1) African Human Rights Journal 64,65
13. Ibid 67

Derg officials to trial for crimes committed during the Derg regime. The Special Prosecutor's Office (SPO) was established in August 1992.

The defendants in the case Special Prosecutor v. Colonel Mengistu Hailemariam et al were the first group of defendants composed of top policymakers and senior government and military officials of the Derg.[14] In this Trial, Colonel Mengistu Hailemariam, the former president, and his co-accused a total number of 106 high ranking officials were charged on October 1994,among other crimes, for the commission of genocide in violation of article 281 of the 1957 Ethiopian Penal Code.[15] This Special Prosecutor v. Colonel Mengistu Hailemariam et al trial, which is the center of this paper, is only one of the numerous trials set up for crimes committed during the Derg Regime.[16]

In Special Prosecutor v. Colonel Mengistu Hailemariam et al, fifty-four of the accused were found guilty of which 25 were tried in absentia for genocide and public incitement to commit genocide.[17] The Federal High Court passed life sentences on 47 defendants, 25 years' rigorous imprisonment on two defendants, and 23 years' rigorous imprisonment on

[14]. Girmachew Alemu Aneme, 'The Anatomy of Special Prosecutor v. Colonel Mengistu Hailemariam et al.(1994-2008)' (2009) 6 (1 and 2)International Journal of Ethiopian Studies 3
[15]. Ibid
[16]. All the Trials held for the prosecution of crimes occurred during the Derg Regime are known as the 'Red Terror' Trials
[17]. *Special Prosecutor v. Colonel Mengistu Hailemariam et al.* ,First Division Criminal Bench, Federal High Court, Verdict, (Judges Medhin Kiros, Nuru Seid and Solomon Emeru) File No.1/87,December 12,2006, Pp.469

five defendants.[18] The Federal High Court acquitted one defendant as he was found to have defended against all the charges.[19] Later, the Special Prosecutor Office (SPO) brought the case before the Federal Supreme Court on appeal on the sentencing of twenty-one of the convicted at the Federal High court. At the same time, twenty-three of the sentenced persons appealed on the judgment of the Federal High Court. Finally, the Federal Supreme Court ruled on both appeals and imposed death penalty on eighteen of the defendants including Colonel Mengistu Hailemariam.[20]

1.2. Statement of the Problem

The past century culminated the basics of a system of international criminal law.[21] Most importantly, international criminal law has developed over several decades from the establishment of the Nuremberg and Tokyo tribunal to try those who perpetrated atrocities in the course of WWII to the ad hoc International Criminal Tribunals of ICTY and ICTR.

Since the Nuremberg trial, and then the adoption of the 1948 UN Genocide Convention, the international community has shown interest in penalizing perpetrators of gross human

[18]. *Special Prosecutor v. Colonel Mengistu Hailemariam et al.* ,First Division Criminal Bench, Federal High Court, Verdict,2006(n17 above)Pp.479-481
[19]. Ibid 412
[20]. Judgment Appellant-*Special Prosecutor v. Respondents-Colonel Mengistu Hailemariam et al*., Federal Supreme Court, Judgment, Judges –Dagne Melaku, Amare Amogne and Kedir Aley, File No. 30181,26 May,2008,Pp.96-100
[21]. Thomas W. Simon, *The Law of Genocide: Prescriptions for a Just World* (Praeger Security International, London 2007) 35

rights violations.[22] After these times, significant numbers of international tribunals, although at ad hoc levels, have been established to punish gross violations of human rights including genocide and crimes against humanity. Along with these tribunals, quite a number of national courts have been engaged in the prosecution of genocide.[23] One of these national courts is the Ethiopian one that tried the Special Prosecutor v. Colonel Mengistu Hailemariam et al. case, which is the subject matter of this paper. On this trial, the Federal Supreme Court issued judgment on 11 January 2007 on Colonel Mengistu Hailemariam and his co-accused who had been tried, among others, on charge of genocide.

Prosecuting genocide is a complex matter. This is because of the fact that genocide and similar crimes usually involve the work of organizations, there by implicating countless individuals even though a single individual could carry out a partial extermination of a group.[24] In other words, a large number of people mostly carry out international crimes with different kind and degree of participation. Thus, as these crimes usually involve the concerted efforts of many individuals, allocating responsibility among these individuals' is of critical importance. However, every criminal trial has to ensure that only individuals who have participated in the commission of the crime are penalized. In other words,

[22]. Debebe Hailegebriel, 'Prosecution of Genocide at International and National Courts: A Comparative Analysis of Approaches by ICTY/ICTR and Ethiopia/Rwanda'(LLM Thesis, Makerere University 2003)1
[23]. Hailegebriel(n22 above)2
[24]. Simon(n21 above)38

every criminal trial have to make such declaration of criminality so far as possible in a manner to ensure that innocent persons will not be punished.[25]

Accordingly, international criminal law has been developed and refined some general principles including theories of criminal responsibility. It is now well established that a person bears responsibility for the commission of international crimes based on the principle of individual criminal responsibility.[26] Individual criminal responsibility embraces both commission of a crime in person and participation in a group criminality.[27]

Thus, there are different modes of participation that are applied by the international ad hoc tribunals, as well as national courts for attributing criminal responsibility like accomplice, conspirator, planner or abettor.[28] Consequently, the specific intent requirement of genocide should apply to these various forms of participation.[29] The doctrine of Joint Criminal Enterprise has also been developed under international

[25]. Nuremberg Trial Proceedings Vol. 1, Judgment: The Accused Organizations (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp > accessed 26 July 2009

[26]. Gunel Guliyeva, 'The Concept of Joint Criminal Enterprise and ICC Jurisdiction'(2008-2009) 5(1) Journal of International Criminal Justice59, 11

[27]. Ibid

[28]. William A. Schabas, *Genocide in International Law*(Cambridge University Press, Cambridge 2000)259

[29]. Schabas(n28 above)

criminal law especially by the ad hoc tribunals of the 1990s.[30] This doctrine attributes individual criminal responsibility through participation in a 'joint criminal enterprise'.[31]

The Federal High Court in the Special Prosecutor v. Colonel Mengistu Hailemariam et al case applied the Ethiopian Penal Code of 1957 for attributing criminal responsibility of the members of the Derg. Even though the Ethiopian law on genocide and crimes against humanity has its own peculiarities, in terms of its content it is based on and quite similar with the international one. In addition, since most of the penal code provisions in the charge owe their origin and include specific reference to international law, they shall be construed accordingly.[32] Furthermore, the Ethiopian Courts are to depend on foreign source materials as the provisions of the 1957 Penal Code on which the charges based are never applied in Ethiopian Courts.[33] Therefore, for the Trial the Ethiopian Courts may refer new developments in the law of crimes against humanity at international level.[34] Further, Mehari Radae puts his doubt on the competency of the Ethiopian Judges for handling these international crimes cases as follows:

> *Undeniably, Ethiopian judges have solid and reliable experience in dealing with ordinary crimes such as, homicide and robbery but it is highly doubtful*

[30]. Jacob Ramer ,'Hate by Association: Individual Criminal Responsibility for Prosecution in a Joint Criminal Enterprise' 7 Chicago Kent Journal of International and Comparative Law 31, 3
[31]. Ibid
[32]. Dadimos Haile, 'Accountability for Crimes of the Past and the Challenges of Criminal Prosecution: The Case of Ethiopia' (2000)Leuven Law Series 48
[33]. Mehari Radae, 'Revisiting the Ethiopian "Genocide" Trial: Problems' (2000)1(1) Ethiopian Law Review 7
[34]. Ibid

> *whether they can competently handle a state sponsored crime that has political and international dimensions.*[35]

Hence, it is worth to consider the approaches of this national court in applying the law for attributing criminal responsibility with the international Tribunals' established to adjudicate similar crimes.

The Federal High Court in Special Prosecutor v. Colonel Mengistu Hailemariam et al Trial ruled that all of the accused who were Derg members are collectively criminally responsible for genocide and crimes against humanity under article 281 and 32(1) (b) of the 1957 penal code.[36] The Court held that the evidences and witnesses brought before the Court, especially by the special prosecutor, had sufficiently proved that the Derg, which is a collection of its members and which would not exist with out its members, had a plan of carrying out the alleged crimes and it established different organs and sections for executing such plan.[37] According to the High Court ruling, the Derg members continued as members by accepting or by not protesting the actions that were carried out in the furtherance of the Derg criminal plan i.e. plan of committing genocide. Hence, they are legally responsible for the acts that were carried out in the name of the Derg. Based on this reasoning, the Federal High Court ruled that fifty- four of the defendants were criminally responsible for the commission of genocide.

---

[35]. Ibid 8

[36]. *Special Prosecutor v. Colonel Mengistu Hailemariam et al.* ,First Division Criminal Bench, Federal High Court, Verdict,2006(n17 above)Pp.461

[37]. Ibid.Pp.3-460, see also Appellant-*Special Prosecutor v. Respondents-Colonel Mengistu Hailemariam et al.*, Federal Supreme Court, Judgment, Judges –Dagne Melaku, Amare Amogne and Kedir Aley, File No. 30181,26 May,2008,Pp.16-31

The interpretation of the law and the reasoning of the Court in Special Prosecutor v. Colonel Mengistu Hailemariam et al. has been one of the least studied trials. In this trial, as was indicated before, the accused collectively were made criminally liable for the crimes in the charge based on their membership in the Derg, even though there was a variation on the kind of punishment imposed on them. Consequently, it is worth studying how the Ethiopian Courts interpreted and applied the laws on these international crimes in light with the international criminal law and the jurisprudence of selected international courts and tribunals in relation to the issue of collective criminal responsibility.

Hence, this research is mainly concerned with analyzing the jurisprudence of the Ethiopian Courts in this Special Prosecutor v. Colonel Mengistu Hailemariam et al in attributing collective criminal responsibility in line with the applied domestic law as well as the international criminal law and the jurisprudence of international courts and tribunals. The research questions in this study include:

- How does the Ethiopian Federal High Court[38] apply the law in this trial?
- How does the Court conclude that the Derg members are collectively liable for the alleged crimes?

[38]. Both the Federal High Court and the Federal Supreme Court, in which the case was brought on appeal , have similar reasoning for their rulings. The Supreme Court further clarifies the High Court reasoning for the latter ruling.

- What are the similarities and differences of this trial jurisprudence with that of International Courts and Tribunals on attributing collective criminal responsibility?
- Is the judgment in consonant with the principle of individual criminal responsibility under international and national criminal law?

1.3. Objective of the Study

This work has two main interrelated objectives. One of the objectives is to examine the collective criminal responsibility of the Derg members in the Special Prosecutor v. Colonel Mengistu Hailemariam et al in light with the Ethiopian law and the principle of individual criminal responsibility. In addition, this work analyzes comparatively and critically the approaches adopted by the Ethiopian Courts and the International Criminal Tribunals for attributing criminal responsibility, in view of revealing the differences that exist and their implications. Having this in mind, the work;

- Examines the Ethiopian Courts' application of the Ethiopian Penal Code of 1957 for attributing collective criminal responsibility for the Derg Members
- Evaluates the Courts' judgments and reasoning with their implications on criminal responsibility

- Compares the approaches of the Ethiopian Courts for attributing collective criminal responsibility in Special Prosecutor v. Colonel Mengistu Hailemariam et al. with that of other International Courts and Tribunals that are established for adjudicating similar cases
- Analyzes the Ethiopian Courts' jurisprudence in Special Prosecutor v. Colonel Mengistu Hailemariam et al. for attributing collective criminal responsibility in light of the Principle of Individual Criminal Responsibility and the notion of collective criminal responsibility

1.4. Research Methodology

The study analyzes court cases, international jurisprudence, review of legal documents and literatures. The study relies on primary sources of data such as international instruments, municipal statutes and case laws. The secondary sources used in this study comes from written sources such as books, articles from various international and national legal journals and other publications from the internet in the form of web journals. Most importantly, this work has extensively used the rulings of the Federal High Court and the Federal Supreme Court of Ethiopia in Special Prosecutor v. Colonel Mengistu Hailemariam et al. Subsequently, it analyzes the arguments raised by both the defendants and the Special prosecutor. When appropriate, it will also refer to relevant evidences brought before the Ethiopian Courts in this trial.

1.5. Significance of the Study

As this trial has been the first in its kind in Ethiopia and it was for the first time the 1957 Ethiopian Penal Code provisions on genocide and crimes against humanity have been applied, the interpretation of the laws by the courts and the reasoning of the Courts for reaching their judgments on the collective criminal responsibility of the Derg members are worth studying in depth.

Based on the stated objectives, the findings of this study are expected to serve:

- As a baseline or preliminary information sources for further researches on related issues on the Special Prosecutor v. Colonel Mengistu Hailemariam et al Trial.
- Provide relevant information and comparative analysis about the reasoning and interpretation approaches of the Court in making the Derg members collectively criminally liable for genocide in this specific trial.

The trial of Special Prosecutor v. Colonel Mengistu Hailemariam et al has many issues that provoke more researches, but this paper limits the study to the issue of collective criminal responsibility. As there are few researches on this trial, this thesis will contribute to fill the gap in the study of the Ethiopian Courts' approach in attributing criminal responsibility in Special Prosecutor v. Colonel Mengistu Hailemariam et al case.

1.6. Limitation of the Study

The focal point of this paper is the collective criminal responsibility of the Derg members in the Special Prosecutor v. Colonel Mengistu Hailemariam et al case. Hence, though different issues have been raised in the trial, this work particularly focuses on issues relating to collective criminal responsibility.

The other major limitation of the study is inaccessibility of relevant documents related to Special Prosecutor v. Colonel Mengistu Hailemariam et al case and other Red Terror Trials in both the Ethiopian Courts and other Offices like the SPO. This limitation seriously impedes this work. Nonetheless, this writer tried to fill this gap by using secondary sources.

1.7. Organization of the Thesis

With the purpose of achieving its stated objectives, this study consists of five chapters. Chapter one basically introduces the study. Chapter two presents the meaning and constitutive elements of genocide and crimes against humanity under Statutes of IMT, ICTY and ICTR as well as the Ethiopian Penal Code of 1957. Furthermore, this chapter deals with the notion of collective criminal responsibility in the prosecution of international crimes. The approaches followed by the IMT at Nuremberg, ICTY and ICTR in attributing collective criminal responsibilities are covered by the third chapter. The study in these international tribunals focuses on a few cases for showing the

tribunals' general approach in attributing criminal responsibility. The fourth chapter is devoted to the detail analysis of the approaches of the Ethiopian Courts in attributing collective criminal responsibility on the Derg members in the Special Prosecutor v. Colonel Mengistu Hailemariam et al case. Here, the study critically examines the arguments raised by the defendants and the rulings of the Federal High Court and Supreme Court. Then, the fifth chapter gives comparative analysis of the approaches taken by the Ethiopian Courts with the approaches taken by IMT, ICTY and ICTR. This same chapter will provide analysis of the Ethiopian's Courts Approach in attributing criminal responsibility in Special Prosecutor v. Colonel Mengistu Hailemariam et al with the notion of collective criminal responsibility. Finally, concluding remarks and few implications of the Ethiopian Courts' approaches in attributing collective criminal responsibility in the trial of Special Prosecutor v. Colonel Mengistu Hailemariam et al are provided.

CHAPTER TWO: THE CONCEPT OF COLLECTIVE CRIMINAL RESPONSIBILITY IN THE PROSECUTION OF INTERNATIONAL CRIMES

2.1 Introduction

As much as international crimes are violations of international law, they can also be violations of national law. Hence, national laws may criminalize these acts according to the general criminal law of a state or through particular norms of its criminal law providing sanctions against the violations of the rules.[1]

The rise of individual criminal responsibility directly under international law marks the modern approaches to human rights law and humanitarian law, and involves consideration of domestic as well as international law enforcement mechanisms.[2] Especially, following the experience of Nazis mass atrocities, a need was felt to extend the scope of international law so that it could protect the rights of not only the states but also individuals, and that it could hold individuals criminally responsible.[3] Perpetrators of international crimes have been regarded as guilty of crimes against international society and bear direct responsibility in international tribunals or in a state court of law.[4]

---

[1].Hans Kelsen, 'Collective and Individual Responsibility in International Law With Particular Regard to the Punishment of War Criminals'(1943) 31 *California Law Review* 530 ,531
[2].Malcolm N. Shaw, *International Law*(6th edn, Cambridge University Press, Cambridge 2008) 397
[3].David Hirsh**,** *Law Against Genocide: Cosmopolitan Trials*(The Glass House Press, London 2003) 1
[4].Shaw (n2 above)

Among the international crimes, the trial of Special Prosecutor v. Colonel Mengistu Hailemariam et al applied the laws on crimes against humanity and genocide. Application of the laws on these international crimes by the Ethiopian Court especially issues of collective criminal responsibility will be examined through out this paper. The examination on the Ethiopian Court jurisprudence in Special Prosecutor v. Colonel Mengistu Hailemariam et al includes comparison of the Ethiopian laws on crimes against humanity and genocide with laws of the three international tribunals that were established for the trials of international crimes.

For this reason, this chapter of the paper is devoted to provide general overview of genocide and crimes against humanity under the Charter of International Military Tribunal for Major War Criminals, the Statutes of International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), and the Ethiopian law. Consequently, it deals with definitions, elements and unique characteristics of those crimes in the Statutes of the three international tribunals in addition to the Ethiopian law. Most importantly, it shows what elements a court of law has to prove to show the commission of such crimes. Then, the chapter looks at the concept of collective criminal responsibility in the prosecution of international crimes. It shows the proper applicability of the notion of collective criminal responsibility in light of the fundamental principle of individual criminal responsibility.

2.2 Crimes Against Humanity and Genocide

2.2.1 Crimes Against Humanity under the Statutes of the International Tribunals: IMT, ICTY and ICTR

The concept of crimes against humanity was first articulated in Art 6(c) of the Charter of the Nuremberg tribunal in 1945.[5] Article 6(c) of the statutes asserts:

> *Crimes against humanity: namely murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.*

The list of offences in Article 6(c) of the Nuremberg Charter is not exhaustive. Consequently, acts that may constitute an 'attack' may include any other inhuman acts committed against any civilian population. To the contrary, list of offences in both the ICTY and ICTR statutes is both exhaustive and identical.[6] These two statutes included other than the acts expressly stipulated in the Nuremberg Charter; acts of imprisonment, torture and rape.

---

[5]. Ilias Bantekas and Susan Nash , *International Criminal Law* (2nd edn, Cavendish Publishing Limited, London 2003) 353

[6]. UNSC 'Statutes of the International Criminal Tribunal for The Former Yugoslavia' UN Doc.S/RES/827, annex, art. 5; UNSC 'Statute of the International Criminal Tribunal for Rwanda' UN Doc S/RES/955, annex, art. 3

The definition of crimes against humanity under the Nuremberg Tribunal also seems to situate most of these crimes in a war context. The law concerning crimes against humanity has evolved substantially since 1948. Accordingly, crimes against humanity may be committed in time of peace or war has been recognized in the case law of ad hoc international tribunals.[7] To this effect, Article 5 of the ICTY statute encompasses offences committed in armed conflict, whether international or internal in character, being part of an overall attack against any civilian population. Thus, the ICTY definition has retained the armed conflict nexus to the Nuremberg Charter but has accepted jurisdiction irrespective of the nature of the conflict. In contrast to the ICTY and Nuremberg Charter, article 3 of the ICTR statute does not require any nexus to armed conflict. A substitute for the war connection has appeared in the ICTR statute in that the ICTR has the power to prosecute persons for crimes *"when committed as part of a wide spread or systematic attack against any civilian population."*[8] The phrase 'a widespread or systematic attack', although not expressly articulated in article 5 of the ICTY statute, follows the customary definition of crime against humanity and was early elaborated by the ICTY chambers.[9] Consequently, the offences or list of acts enumerated in the ICTY and ICTR statutes constitute crimes against humanity when they are perpetrated against any civilian population in a wide spread or systematic manner. Evidence of either widespread or systematic element suffices.[10] In addition, international law requires that

[7]. William A. Schabas, *Genocide in International Law*(Cambridge University Press, Cambridge 2000)12
[8]. UNSC 'Statute of the International Criminal Tribunal for Rwanda' UN Doc S/RES/955, Annex, art. 3
[9]. Ilias Bantekas and Susan Nash(n5 above) 355
[10]. Ibid 357

only the overall attack and not the underlying offences be widespread or systematic.[11] This means that a single offence could be regarded as a crime against humanity if it takes place under the umbrella of a widespread or systematic attack against a civilian population.[12] Generally**,** the case law of the ad hoc tribunals for the former Yugoslavia and Rwanda have both clarified and enlarged the scope of 'crimes against humanity' in customary international law.[13]

Unlike Article 6 (c) of the Nuremberg Charter, there exists no requirement that crimes against humanity be connected to any other offences in ICTY and ICTR Statutes.[14] Further, the existence of a discriminatory intent on national, political, ethnic, racial or religious grounds is a requirement in the definition of crimes against humanity under article 3 of the ICTR Statute. Nevertheless, discriminatory intent in article 5 of the ICTY is only required in relation to the specific offence of persecution.

Basically criminal law analysis of an offence proceeds from a basic distinction between the material element (the actus reus) and the mental or moral element (the mens rea).[15] Hence, the definition above requires two conditions to be fulfilled before an individual can be held personally and criminally liable for committing crime against humanity. As

[11]. Ilias Bantekas and Susan Nash(n5 above) 357
[12]. Ibid
[13]. Schabas (n 7 above)
[14].UNSC 'Statutes of the International Criminal Tribunal for The Former Yugoslavia' UN Doc.S/RES/827, annex, art 5; UNSC 'Statute of the International Criminal Tribunal for Rwanda' UN Doc S/RES/955, annex, art. 3
[15]. Schabas (n 7 above)151

such, crime against humanity has two elements; material (actus reus) and mental (mens rea) which are prerequisites for conviction. Generally, the material element or acts constituting the crime against humanity are classified in to two broad categories, namely crimes against humanity of a murder type and crimes against humanity of a persecution type.[16] In general, these two elements are the prerequisite for the conviction for this crime.

To meet the element of mens rea for crime against humanity, the jurisprudence of international tribunals as well as international criminal law requires a combination of knowledge with intent.[17] To put it in another way, intent and knowledge constitute the mens rea required for crime against humanity; that is the intent to commit an act and the knowledge of the circumstances that make the act a criminal offence.[18]

Knowledge element of mens rea for crimes against humanity displays three aspects, namely knowledge of the criminal context, knowing participation in that context and proof of awareness.[19] The first aspect implies that the perpetrator knows the general context of a widespread or systematic attack against a civilian population. The second is the awareness of the perpetrator that his or her individual criminal conduct fits within this

[16].Faustin Z. Ntoubandi, *Amnesty for Crimes Against Humanity Under International Law* (Martinus Nijhoff Publishers, London 2007) 71
[17]. Ibid 70
[18]. Ibid 68
[19]. Ibid 69

general context of the attack. Lastly, evidence of mens rea is required before guilt can be ascribed.[20]

Another important aspect of mens rea for crime against humanity is intent. An act or omission is 'intentional' when it is voluntarily done or omitted in order to produce the consequences which it does in fact produce.[21] However, proof of intent for crimes against humanity differs according to the type of the criminal act involved.[22]

2.2.2 Genocide in the Statutes of the International Tribunals: IMT, ICTY and ICTR

Even though, the fact of genocide is as old as humanity, the law is younger.[23] The term 'genocide' was not mentioned in the Charter of the International Military tribunal and in the final judgment even though it appeared in the indictment. The indictment of the International Military Tribunal charged the defendants with 'deliberate and systematic genocide, viz., the extermination of racial and national groups ,against the civilian population of certain occupied territories in order to destroy particular races and classes of people ,and national ,racial or religious groups, particularly Jews, Poles, and Gypsies'.[24] Even though the term 'genocide' is not mentioned in the Nuremberg Charter,

[20]. Ntoubandi(n16 above) 70
[21]. Ibid 71
[22]. Ibid
[23]. Schabas (n 7 above) 1
[24]. Ibid 38

the phrase "crimes against humanity" in article 6(c) of the Charter included acts of genocide.[25]

Later, in 1946, the General Assembly of the United Nation passed a resolution recognizing genocide as an international crime.[26] This Resolution declares that 'genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to life of individual human beings'. [27] Two years after, in 1948, the General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the Genocide Convention) which has been the centerpiece in any discussion on the law of genocide under international law. Afterwards, elements of the Convention, and specifically its definition of the crime of genocide have been incorporated in the statutes of the two ad hoc tribunals created by the Security Council to judge those accused of genocide and other crimes in the Former Yugoslavia and Rwanda.[28]

The definition of genocide and enumeration of punishable acts in article 2 and 4 of the ICTR and ICTY Statutes constitutes a verbatim reproduction of Art. 2 and 3 of the 1948 Genocide Convention, with only slight technical modifications. Article 2 of the Genocide convention defines genocide as;

---

[25].Thomas W.Simon, *The Law of Genocide: Prescriptions for a Just World* (Praeger Security International, London 2007) 51
[26]. UNGA Res.96(I) (11 December 1946)
[27]. Ibid
[28]. Schabas (n 7 above) 4

. . . any of the following acts committed in the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such:

a) Killing members of the group;

b) causing serious bodily harm or mental harm to the members of the group;

c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

d) imposing measures intended to prevent births within the group

e) forcibly transferring children of the group to another group

Genocide as well has the two elements of mens rea and acts reus that set out the ground rules of the trial, determine what must be proved by prosecution for a case to succeed.[29] Mens rea in case of genocide is , 'the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such' and the criminal acts or the acts reus are the acts listed from a-e above. The mental state for genocide differs from the mental state required for individual criminal responsibility in state criminal law systems in that it has a less direct, more mediated connection to the criminal act.[30] A national criminal court wants to determine whether the accused thought about the criminal act.[31] An international criminal court, conversely, focuses on determining just whether the accused thought about the criminal act but also the accused planned or knowledgeably acted according to a preconceived plan developed within an organization.[32] Accordingly, the prosecution

[29]. Schabas (n7 above) 151
[30]. Hirsh (n3 above)38
[31]. Simon(n25 above)63
[32]. Ibid

should establish both elements beyond a reasonable doubt to secure conviction. Or else, if the defense casts reasonable doubt on even one 'elements of the offence', then the accused is entitled to acquittal.[33]

According to Schabas, three of the five acts defined in article II of the convention, i.e acts listed in a, b and e, require proof not only of the act but also of a result. Two of the acts enumerated in c and d do not demand such proof but requires a further specific intent: deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; or imposing measures intended to prevent births within the group.[34] Accordingly, the intent to destroy must be directed towards one of the enumerated groups: national, racial, ethnical or religious. Equally important is the fact that actus reus of an offence could be manifested either as an act of commission or omission.[35] This principle applies to all of the acts of genocide enumerated in article II of the Genocide Convention.[36] For example**,** while it is not contemplated in the convention, a commander or superior may possibly be found guilty of genocide for failing to intervene when subordinates are actually carrying out acts of genocide.[37]

[33]. Schabas (n7 above) 151
[34]. Ibid 155
[35]. Ibid 156
[36]. Ibid
[37]. UNSC 'Statutes of the International Criminal Tribunal for the Former Yugoslavia' UN Doc.S/RES/827, Annex, art 7(3); UNSC 'Statute of the International Criminal Tribunal for Rwanda' UN Doc S/RES/955, Annex, art. 6(3)

In relation to the crime of genocide, article 3 of the Genocide Convention extends criminal responsibility for conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide. The above-mentioned article essentially deals with criminal participation, and provides for liability of individuals other than the principal offender, such as accomplices, as well as for incomplete and inchoate offences, such as attempts and conspiracy, where there may be no principal offender at all because the ultimate crime never takes place.[38]

There have been critics that allege that genocide inheres within the broader concept of crimes against humanity. [39] One of the key arguments for such view is the fact that genocide is considered as a crime against humanity of a particular kind, which requires for its commission specific acts combined with a specific mens rea.[40] Nevertheless, a closer look at the elements of the two crimes may refute such idea. As it was demonstrated in the above section of this paper, for genocide to exist the acts must be committed with a special mens rea, i.e. the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such. In this sense, genocide differs from the crime against humanity by persecution. In crimes against humanity by persecution, the perpetrator targets its victims merely because they belong to a distinct group and without seeking to destroy such a group. To the contrary, genocide denies the existence

[38]. Schabas (n 7 above) 257
[39]. Ibid 12
[40]. Ntoubandi(n 16 above) 70

of a group as such and seeks its partial or total destruction.[41] Indeed, this distinction highlights the difference between the two offences. Nevertheless, despite such clear difference between the two crimes, many commentators hold the view that genocide is crime against humanity in its more aggravated form.[42] Because of the requirement of specific intent in the case of genocide, from prosecutor's standpoint, it is easier to prove crimes against humanity than to prove genocide.[43]

2.3 Crimes Against Humanity and Genocide under Ethiopian Law

The new Criminal Code of the Federal Democratic Ethiopia, which was promulgated in 2004, repealed the 1957 Penal Code.[44] The new Criminal Code of 2004 includes provisions on genocide analogous to the 1957 Penal Code.[45] However, the trial of Special Prosecutor v. Colonel Mengistu Hailemariam et al was based on the provisions of the 1957 Penal Code unless the provisions of the 2004 Criminal Code are more favorable to the defendants.[46]

---

41. *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T,T Ch I (2 September 1998) para 522
42. Ntoubandi (n 16 above) 89
43. Schabas (n 7 above) 12
44. Frode Elgesem and Girmachew Alemu Aneme , 'The Rights of the Accused: A Human Rights Appraisal' in Kjetil Tronvoll and others, *The Ethiopian Red Terror Trials: Transitional Justice Challenged* (Indiana University Press, US 2009) 36,See also Proclamation No.414/2004,The Criminal Code of The Federal Democratic Republic of Ethiopia, Negarit Gazeta,No.414,2004,Addis Ababa, preface
45. Ibid, See also Proclamation No.414/2004,The Criminal Code of The Federal Democratic Republic of Ethiopia,art.269-270
46. Ibid, See also Proclamation No.414/2004,The Criminal Code of The Federal Democratic Republic of Ethiopia,art.5(1),6

Notwithstanding the existence of relevant national law, the Ethiopian authorities had a long deliberation on the issue that which law, whether the national criminal law or the international humanitarian law should be employed for the trial. Finally, they made a decision to employ mainly the Ethiopian Penal Code of 1957 and to use the international humanitarian law to fill the gaps in the national law. Hence, whenever the Ethiopian Penal Code of 1957 does not cover a particular act, then international humanitarian law as embodied, among others, in the Geneva Conventions of 1949, the Genocide Convention and the Charter of International Military Tribunal (Nuremberg Charter) would apply.[47] Despite such deliberations, the indictments of Special Prosecutor v. Colonel Mengistu Hailemariam et al made no reference to international humanitarian law and were exclusively based on the Ethiopian Penal Code of 1957.[48] In fact, all the charges on this trial have been based on the national laws of Ethiopia.[49]

The provision dealing with genocide and crimes against humanity under the Ethiopian Criminal Code of 1957 reads as follows:

> Art. 281. Genocide; Crimes against Humanity
>
> *Whosoever, with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, organizes, orders or engages in, be it in time of war or in time of peace:*

[47]. Yaqob Haile-Mariam, 'The Quest For Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court' (1999) 22 Hastings International and Comparative Law Review 667 ,709

[48]. *Special Prosecutor v. Colonel Mengistu Hailemariam et al*., Charge as amended on November 28,1995 and December 2,2002

[49]. Elgesem and Aneme(n44 above)36

> *(a) killings, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever; or*
>
> *(b) measures to prevent the propagation or continued survival of its members or their progeny; or*
>
> *(c) the compulsory movement or dispersion of peoples or children, or their placing under living conditions calculated to result in their death or disappearance, is punishable with rigorous imprisonment from five years to life, or, in cases of exceptional gravity, with death.*

The heading of the above article speaks for itself in that both genocide and crimes against humanity were assimilated in the previous Penal Code of Ethiopia. Because of its heading, it is argued that the provision should not be tested against the definition accorded only to just one of these two classes of crimes under international law.[50] Obviously, the article expressly prohibits both genocide and crimes against humanity.[51] However, the elements of the crime described under Article 281 under this Code were more or less similar to the definition given by the Genocide Convention for genocide.[52]

This assimilation of the two offences in the 1957 Penal Code led to two distinct interpretations. The first is that the article applied only to genocide while the second way of interpretation maintained that the provision is relevant both to genocide and to crimes

[50]. Firew Kebede Tiba, 'The Mengistu Genocide Trial in Ethiopia' (2007) 5 Journal of International Criminal Justice 513,522

[51]. Frode Elgesem and Girmachew Alemu Aneme (n 44 above)

[52]. Debebe Hailegebriel, 'Prosecution of Genocide at International and National Courts: A Comparative Analysis of Approaches by ICTY/ICTR and Ethiopia/Rwanda' (LLM Thesis, Makerere University 2003)15

against humanity. To put it another way, the second interpretation claimed that the provision enclosed the two distinct crimes that have exactly the same elements.[53]

The first kind of interpretation is partly based on the argument that there is a common practice to view acts of genocide as acts of crimes against humanity.[54] In fact, as it was discussed in the previous section there have been scholars who take genocide as a subset of crimes against humanity. Jean Graven, the drafter of the Ethiopian Penal Code of 1957, has also shared this view. Apparently, Jean Graven believed that genocide and crimes against humanity overlap each other.[55] This view of Graven has been implied from the fact that he combined the two into one provision and more importantly from his writings of genocide as the most serious and moral typical of crimes against humanity.[56]

Critics who supported the first view do claim holding the second way of interpretation poses legal problems.[57] Their key argument with this regard is that having the same elements for both genocide and crimes against humanity will narrow down the definition of the latter only to include groups and acts listed in the provision.[58] And in turn, such assimilation would make the provision contrary to the international humanitarian law which has distinct elements for both crimes.

---

[53]. Human Rights Watch/Africa, 'Ethiopia: Reckoning Under the Law' (November 1994,Vol 16,No. 11) 28-31
[54]. Hailegebriel (n52 above)18
[55]. Haile-mariam (n47 above)706
[56]. Ibid
[57]. Hailegebriel (n52 above)19
[58]. Ibid

The second interpretation was mainly based on two arguments. The first one focuses on the wordings of the provision in that the heading clearly indicated that it has included both crimes. However, critics alleged that the reason the heading of the provision uses a semicolon instead of a conjunction indicated that the offence was one.[59] The critics further elaborated that, 'genocide' is the offence and 'crimes against humanity' was used as explanatory to the crimes of genocide.[60] In view of the above, if the legislators' intention has been to penalize further crimes against humanity besides genocide, they would have used the conjunction 'and' between the words 'genocide' and 'crimes against humanity'.[61] In support of this, the Central High Court of the Transitional Government in Special Prosecutor v. Colonel Mengistu Hailemariam et al stated that the phrase 'crimes against humanity' in the title of article 281 was put only for clarification purpose.[62] Further, the Central High Court confirmed that genocide is one kind of crimes against humanity.[63]

The second argument for this interpretation is extension of the scope of protection to include 'political group', which makes the provision incompatible with the UN Genocide

[59]. Hailegebriel (n52 above)20
[60]. Ibid
[61]. Ibid
[62]. *Special Prosecutor v. Colonel Mengistu Hailemariam et al.* , Central High Court of the Transitional Government (Judges: Desalgne Alemu Kibret, Girma Tilahun and Tegene Getaneh)File No.1/87,Rulings on Preliminary Objections,8 October 1995 ,106
[63]. Ibid

Convention.[64] Accordingly, the provision defined 'population transfer or dispersion' as amounting to genocide which goes beyond what is provided in the genocide convention in addition to 'political group'. This issue of inconsistency has been raised at the preliminary stage of the Special Prosecutor v. Colonel Mengistu Hailemariam et al trial. The Central High Court ruled that, the provision was not in contradiction with the Genocide Convention because it does not minimize the protection of rights specified by the Convention.[65] The Court also added that usually international instruments provide only the minimum standards and it is the duty of the country to enact laws for their implementation.[66] Therefore, the fact that the provision provides a wider range of protection than the Genocide Convention does not make it contradictory with the latter.[67]

As it is shown above, Article 281, treated acts designed to eliminate 'political groups' and 'population transfer or dispersion' as amounting to genocide. Schabas, in relation to this says that even though the drafters of the Genocide Convention intentionally excluded 'political groups' from its scope; there have been some countries like Ethiopia which attempt to enlarge the definition of genocide by appending new entities to the groups already protected by the Convention.[68] In contrast, in the Genocide convention and in the Statutes of ICTY and ICTR acts targeting 'political groups' are excluded from

[64]. Hailegebriel (n52 above)20
[65]. *Special Prosecutor v. Colonel Mengistu Hailemariam et al.*, Ruling on Preliminary Objections,1995(n62 above)83
[66]. Ibid
[67]. Ibid
[68]. Schabas (n 7 above) 5,102

criminal acts of genocide. Instead, the protection of these groups is covered in crimes against humanity by persecution.

No matter what kind of interpretation is employed to the Article 281 of the Ethiopian Penal Code of 1957, proving the stated elements in the article is imperative to secure conviction. This is the center of this section's discussion. Hence, article 281 extends protection to ethnic, national, religious and political groups. Like the Genocide Convention, it needs special intent to destroy in whole or in part the specified groups for its commission. Thus, under the Ethiopian law, the requisite intent of *dolus specialis* must be proven for guilt under article 281. Therefore, the prosecutor needs to prove that the intent of the perpetrators was to exterminate or destroy in whole or in part the members of these groups. In particular, the extermination of political groups under this provision needs proof of special intent, which made the prosecutors work tough. In contrast, in international law or other tribunals for crimes against humanity by persecution there has been no requirement of *dolus especialis*. Thus, under international law, even if one does not find in the widespread and systematic murder of members of a certain political group the necessary genocidal intent, the crimes committed by the perpetrators could have easily been classified as crimes against humanity. The reason is that, for crimes against humanity in international law, the special intent, i.e. destruction of groups in whole or in part is not a necessary element. In relation to this, some scholars argues that adding other groups is not necessary because crimes against humanity will encompass crimes on other groups. Schabas, on this point, emphasized the idea that atrocities committed against

other groups that were not covered by article II of the genocide convention are adequately addressed by the prohibition of crimes against humanity.[69]

Further, Article 286 of the same penal code provides for provocation and preparation for genocide and crimes against humanity. This article stipulates that '*whosoever, with the object of committing, permitting or supporting any of the acts provided for in the preceding articles: publicly encourages them, by word of mouth, images or writings; is punishable with rigorous imprisonment not exceeding five years*'. [70]

2.4 The Notion of Collective Criminal Responsibility in the Trial of International Crimes

2.4.1 Definition of Collective Criminal Responsibility

Collective responsibility or collective guilt is a primitive concept.[71] It is also a theory of liability for attributing criminal responsibility. As a theory of liability, it links punishment to individual wrongdoing based simply upon association with wrongdoers.[72] Under this notion, whole communities or whole group may be held collectively guilty. In other

[69]. Schabas (n 7 above) 150
[70]. Penal Code of the Empire of Ethiopia, Negarit Gazeta- Extraordinary Issue, No.1, 1957, Art. 286(a)
[71]. Jacob Ramer, 'Hate by Association: Individual Criminal Responsibility for Persecution Through Participation in a Joint Criminal Enterprise' Chicago Kent College of Law, (2005)<http://www.kentlaw.edu/perritt/courses/seminar/lonb-home-2005fall.htm> accessed 27 November 2009
[72].Allison Martson Danner and Jenny S. Martinez, 'Guilty Associations, Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (January 2005) 93 California Law Review 75,85

words, collective criminal responsibility is blanket generalization under which all the members of a particular ethnic group, nationality, political body or party are held responsible and blamed for the crimes committed by a small number of individuals from with in the group.[73] Hence, under this notion, an entire population or group is held accountable for the serious human rights violations perpetrated by some members of the group.[74]

There are propositions how this concept can be used for attributing criminal responsibility in international crimes. In relation to this, Bernay's plan[75] is usually cited as a typical example. Under Bernays's plan, once the guilt of the organization was determined in the international tribunal, for punishment in secondary national trials, proof of membership in that organization, without more, is sufficient to establish guilt of participation in the mentioned crimes. To put it in another way, under this plan, national courts would only need to prove that an individual was a member of a criminal organization in order to secure a conviction for participation in the illegal conspiracy. Moreover, once the conspiracy was established, "each act of every member thereof during its continuance and in furtherance of its purposes would be imputable to all other

[73].Eugene Nindorera, 'Justice and Reconciliation as Instruments of National Reconstruction' <http://69.94.11.53/ENGLISH/africandialogue/papers/nindorera.pdf > accessed on September 23,2009
[74].Ibid
[75].Lieutenant Colonel Murray C. Bernays is a Jewish Lawyer in the United States War Department's three –man "Special Project Branch" who had been given in September 1944 the job of developing a post war justice system for Europe ,cited in Ramer (n71 above)

members thereof".[76] Under this arrangement, Bernay sought through to cast a wide net for accountability that would impose guilt on an individual regardless of actual responsibility for a specific illegal act.[77] In sum, under Bernay's plan criminal responsibility is attributed to individuals through membership per se.

2.4.2 Debates on the Notion of Collective Criminal Responsibility

There are debates on the application of this notion of collective criminal responsibility for the prosecution of international crimes. These debates are generally based on the nature of international crimes and the principle of individual criminal responsibility.

Mass atrocities such as crimes against humanity and genocide are committed by masses, and are often facilitated by the institutions of the state.[78] Given this nature of the crimes, advocates of this collective criminal responsibility argue that attempts at justice that focus on individuals are insufficient.[79] In other words, a criminal trial that is designed to deal with individual responsibility is often overwhelmed and ultimately rendered inadequate to handle crimes committed by massive numbers of citizens.[80] Thus**,** this view claims that there should be some way to capture within the law the reality that individuals commit atrocities in groups, and that groups committing atrocities carry out their crimes with the

[76]. Saira Mohamed, 'A Neglected Option: The Contributions of State Responsibility for Genocide to Transitional Justice'(Spring 2009) 80 University of Colorado Law Review 327,1
[77]. Ibid
[78]. Ibid
[79]. Ibid 3
[80]. Ibid

assistance of administrative structures such as political parties, media outlets, or government bureaucracies.[81] This implicit acknowledgment that international crimes tend to be group crimes suggests that the idea of holding a collective responsible for those crimes rather than solely holding individuals guilty is not a radical step.[82]

Further more, the incorporation of innovative substantive crimes and theories of liability in the IMT, ICTY and ICTR are considered as evidences that this theory has been accepted in the tribunals. The supporters further added that the substantive crime of conspiracy to commit genocide and the joint criminal enterprise theory of liability indicates the inadequacy of substantive crimes and theories that consider only individual action.[83] Moreover, they reveal the tribunals' need to address the reality that mass atrocity is most often the result of mass collective action. Here they rightly reasoned that, the tribunals may take into consideration the nature of these crimes, that is, the crimes are a result of mass action.

This notion of collective criminal responsibility has been highly criticized for many reasons. One of the key criticisms generally focuses on the potential violation of the principle of personal culpability and the accompanying objection to guilt by association. First, criminal liability is attributed to individuals. In other words, individual

[81]. Mohamed(n76 above)12
[82]. Ibid
[83]. Danner and Martinez (n72 above)86

accountability is a feature of criminal justice.[84] Thus, this collective responsibility theory replaces the responsibility of individuals. Under this theory, like collective culpability and other blanket generalizations the presumption of guilt will be substituted for the presumption of innocence.[85] Second, which related to the first criticism, calling an entire people guilty of the acts that only a subset undertook disregards that actions are taken by individuals, based on their own choices, and that an individual must not be tainted by those with whom she is associated on the basis of her ethnicity, race, religion, nationality or, indeed ideology.

Third, collective guilt encourages communities to cultivate hatred against each other from one generation to the next. Such an idea necessarily impedes recovery from conflict, as atrocities continue to be attributed to whole groups rather than to the individuals who commit them.[86] Individual accountability serves ultimately to promote reconciliation by "*breaking the cycle of the collective attribution of guilt*" that often results in mass atrocity. [87] Hence, by declaring the guilt of particular individuals, criminal trials declare the innocence of everyone else. For example, prosecuting particular individuals declares that not all Serbs committed murder, rape, and torture in the Former Yugoslavia, that not all Germans were responsible for the Holocaust. It can been seen that , after World War II, to avoid the prospect of declaration of collective guilt and the damaging consequences

[84].William A.Schabas ,*The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, Cambridge 2006) 70
[85]. Nindorera (n73 above)
[86]. Mohamed (n76 above) 18
[87]. Ibid 11

thereof, the Allies turned away from the idea of declaring the responsibility of an entire state, and focused instead on the notion that individuals, not states, were responsible for their crimes against the international community.[88]

In general, these criticisms do not object to the legal recognition of group perpetration of these kinds of mass atrocities. Instead, the criticisms question the expansion of criminal law that is taking place in response to this recognition. They favored that this legal recognition of the nature of the crimes should not weaken the fundamental truth that these crimes**,** as criminal offenses, require a finding of individual misconduct and responsibility.[89] Hence, it can be argued that the fact that the crimes are carried out by groups should be given legal recognition in the prosecution and conviction for these crimes. However, such legal recognition should not obscure the basic tenet of criminal law and criminal responsibility, that is, criminal liability is attributed to individuals based on personal culpability. Indeed, the ICTY Appeals Chamber has underscored that the "*basic assumption*" in international and national laws is that "*the foundation of criminal responsibility is the principle of personal culpability*". Actually, the culpability principle with other specific procedural and substantive criminal law doctrines helps to defend or distance the liberal trial from the charge of basing guilt on association alone.[90] Moreover, the judgment of the International Military Tribunal at Nuremberg, in its famous passage,

[88].Stefan Kirsch, 'The Two Notions of Genocide: Distinguishing Macro Phenomena and Individual Misconduct' 42 Creighton Law Review 347,1 **,**5
[89].Ibid
[90]. Mohamed (n76 above) 84

declares that the tribunal's conclusions were made "*in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishment should be avoided.*"[91]

All criticisms on application of collective criminal responsibility lie on its possible conflict with the principle of individual criminal responsibility. Hence, the following section offers the latter principle place in the prosecution of international crimes at the international and domestic level.

2.4.3 Principles of Individual Criminal Responsibility

2.4.3.1 Under International Criminal Law

One of the general principles of international law is the principle of individual criminal responsibility.[92] Under this principle, 'no one may be held accountable for an act he has not performed, or in the commission of which he has not in some way participated, or for an omission that can not be attributed to him'.[93] This principle, in turn, lies on the principle of individual independence whereby the individual is normally gifted with free will and the autonomous capacity to choose his conduct.[94]

[91].Nuremberg Trial Proceedings Vol. 1, Judgment: The Accused Organizations (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009
[92]. Antonio Cassese, *International Criminal Law* (Oxford University Press, United States 2003)136
[93]. Cassese(n92 above)
[94]. Ibid 137

The principle of individual criminal responsibility encompasses two ideas. First, nobody may be held responsible for criminal offenses perpetrated by other individuals.[95] Second, a person may only be held criminally liable if he somehow culpable for any breach of criminal rules.[96] Under the second notion, an individual may only be deemed accountable in either of two conditions. One, if he entertains a mental state that involves, or expresses, or implies his mental participation in the offence.[97]Alternatively, if he culpably negligent to prevent or punish the commission of crimes by his subordinates.[98] In this way, this principle helps to defend the liberal trial from charge of basing guilt on membership alone.[99]

The rationale behind the first notion is that in modern criminal law the notion of collective criminal responsibility is discarded.[100] To put in another way, a national, ethnic, racial, or religious group to which a person may belong is not answerable for acts performed by a member of the group in his individual capacity.[101] Likewise, a member of any such group is not criminally liable for violation of law performed by heads or other members of the group to which he is not pertinent.[102] From this notion, it follows that no

[95]. Cassese(n92 above)
[96]. Ibid 137
[97]. Ibid
[98]. Ibid
[99] .Danner and Martinez (n72 above)
[100].Cassese(n92 above)
[101].Ibid
[102].Ibid

one may be held responsible for acts or omissions of organizations to which he belongs, unless he bears personal accountability for a particular act or omission.[103]

2.4.3.2 Under the 1957 Ethiopian Penal Code

The principle of individual criminal responsibility is also embodied in Ethiopian Penal Code of 1957.Specifically Article 34 of the Ethiopian Penal Code of 1957 states that 'where an offense is committed by a group of persons the person who is proved have taken no part in the commission of the offense shall not be punished'. This means punishment is personal. This means, first, an individual may not be punished for a crime in which he does not participate with in the sense of the law.[104] Second, each individual who may have participated in an offense have to be punished for his won acts and "*according to the degree of individual guilt*".[105]

An issue arises how to reconcile the notion of collective criminal responsibility with this principle of individual criminal responsibility. The next section tries to find out if limitation can be put on the notion of collective criminal responsibility to be in harmony with this principle of individual criminal responsibility.

[103].Cassese(n92 above)137
[104].Philipe Graven, *An Introduction to Ethiopian Penal Law* (Haile Sellassie I University, Addis Ababa ,Ethiopia,1965)99
[105].Ibid ,See also Penal Code of the Empire of Ethiopia 1957(n70 above)art.86

2.4.4. Proper Applicability of Collective Criminal Responsibility: Based on Individual Participation

A crime could be committed either by one person or by several persons acting in the same or in different capacities.[106] Groups usually commit international crimes. In other words, many individuals involves in the commission of international crimes. Moreover, in international law, responsibility arises not only when a person materially commits a crime but also when she/ he engages in other forms or modalities of criminal conduct.[107] This also holds true for national legal systems. Hence, the two systems designed a method to capture all individuals who participate in some way in the commission of a crime. In fact, under both systems, participation in the commission of crimes is the reason for attributing individual criminal responsibility.

Under both laws, an individual is criminally answerable if he participates in some way in the commission of an offense. In national legal systems, the laws describe the various ways in which one may associate oneself with the commission of an offense.[108] In Ethiopia, the basic principle is that '*anyone is punishable who participates in an offense in whatever capacity and whatever the extent of his participation*'.[109] This is in line with the principle individual criminal responsibility since the principle entails the attribution

[106]. Graven(n104 above)93
[107]. Cassese(n92 above)179
[108]. Graven(n104 above)93
[109]. Ibid

of criminal responsibility based on individual participation in the commission of the crime/crimes.

Consequently, there are various ways of participation in the commission of a crime under international criminal law and domestic law. In the international sphere, there are various classes of participation in crimes based on the intrinsic features of each modality of participation including perpetration, participation in a common purpose or design, incitement or instigation, planning, ordering and conspiracy to commit genocide.[110] Comparably, in national legal systems, one may associate oneself with the commission of an offence in various ways.[111] For instance, under the 1957 Ethiopian Penal Code, an individual could participate in the commission of an ordinary crime as a principal offender, accomplice, inciter, or as an accessory after the fact.[112] All kinds of participation encompass material as well as psychological elements. For example, in a form of participation in a common purpose or design, all participants in a common criminal action are responsible if they (1) participate in the action whatever the position and extent of their contribution, and in addition (2) intend to engage in the common criminal action.[113] In participation through planning of a crime, the material element is deigning the commission of the crime at the preparatory and implementation phases. As for the requisite mental element, it is necessary for the author to intend that the planned

[110]. Cassese(n92 above)179-198
[111]. Graven(n104 above) 93
[112]. Penal Code of the Empire of Ethiopia 1957(n70 above)art.32-40
[113]. Cassese(n92 above)181-182

crime be committed or else he must be aware of the risk that the planned crime would be perpetrated by him or by someone else.[114]

Accordingly, in a single offense a number of individuals could participate either in the same or different capacity. Hence, the individuals who participated in the commission of the crime in any of modalities of participation can be collectively criminally responsible for the same crime. For instance, participation in the common criminal plan entails responsibility for all the acts flowing from the criminal plan. Hence, as in most national legal systems, in international criminal law a group of persons who participate in the common criminal action could be held collectively responsible.[115] In this way, collective criminal responsibility could be applied. However, this collective criminal responsibility is based on individual participation in the commission of a crime. In other words, many individuals can be collectively responsible for the commission of a crime/crimes based on their individual participation. This is the proper limits of collective criminal responsibility in light of individual criminal responsibility. Thus, for holding criminal responsibility, individual participation is a necessary element. As a result, one should not be criminally responsible for the mere reason that he belongs to a particular group or is a member of an organization that is engaged in criminal actions. This means, the individual participation in the commission of the crime should be proved for attributing criminal responsibility for that individual.

[114]. Cassese(n92 above) 193
[115]. Ibid 181-182

2.5 Conclusion

Under this chapter, the elements of genocide and crimes against humanity at the IMT, ICTY and ICTR have been discussed. As any crime, conviction under both crimes needs a material element and a moral element. The main difference between the two is that genocide requires a special intent to destroy in whole or in part of a protected group, which makes proof of it more difficult. Whereas the Ethiopian Penal Code of 1957 had two main distinct features that differentiate it from the International Tribunals' besides the Genocide Convention. Thus, the Penal Code provision 281 titling 'genocide; crimes against humanity' requires a special intent for the crimes prosecution under the provision. Hence, for prosecution under this article, the prosecutor has to show this special intent to destroy in whole or in part the protected group. The protected group under this article includes political groups, which makes it distinct from the Genocide Convention and the International Tribunals' provision on genocide. For this reason, prosecuting genocide cases for political groups under this article entails to prove a special intent which is difficult to prove. This is because of the fact that preferably it could be prosecuted under crimes against humanity by persecution. Most importantly, a conviction may lie in both crimes only if the prosecution can establish all the elements of the offences beyond a reasonable doubt.

Finally, the chapter dealt with the concept of collective criminal responsibility. This concept, at its extreme level, attributes responsibility for individuals just by association with wrongdoers or by mere membership in an organization. The application of this concept, at its extreme level, is against the core principles of criminal law; the culpability principle and criminal guilt is individual. Yet, advocates of collective criminal responsibility strongly argue that the nature of such mass atrocities forced the application of it.

Individual criminal responsibility principle does not refute the application of collective criminal responsibility based on individual participation in the commission of a crime. In fact this principle entails the attribution of criminal responsibility based on individual participation in the commission of a crime/crimes. Usually in international crimes, a group of individuals may participate in the same or various capacities. Hence, according to the individual criminal responsibility principle, each participant in the commission of the crime is held liable. This means, many individuals may be held collectively responsible in the commission of the crime based on their individual participation. A typical example for this kind of collective responsibility is common criminal purpose liability. In common criminal purpose liability, all participants are held criminally responsible for all the acts that follow from the common criminal plan. Thus, proper limits of the notion of collective criminal responsibility necessitate individual participation in some way within the boundary of the law in the commission of the crimes.

Therefore, at this point there is a need to discuss the international tribunals approach to attributing criminal responsibility in international crimes. Accordingly, the next chapter deals with the jurisprudence of each of the three tribunals in attributing criminal responsibility with the aim of showing the extent to which collective criminal responsibility have been applied .

CHAPTER THREE: APPROACHES FOR ATTRIBUTING COLLECTIVE CRIMINAL RESPONSIBILITY FOR INTERNATIONAL CRIMES in IMT, ICTY and ICTR

3.1 Introduction

The goal of a court of law, which deals with criminal matters, is to attribute criminal liability in consonant with justice.[1] There are various tribunals at the international and domestic level that deals with gross human right violations. The Ethiopian High Court's indictment in this Special Prosecutor v. Colonel Mengistu Hailemariam et al. had focused on persons at policy levels.[2] For this reason, this chapter has entertained the jurisprudence of selected international tribunals in attributing criminal responsibility for individuals at policy levels. As a result, a comparison will be made between the international jurisprudence and the decisions of the Ethiopian Federal High Court in Special Prosecutor v. Colonel Mengistu Hailemariam et al.

Moreover, this chapter investigates the approach followed by the international tribunals in attributing criminal responsibility from the viewpoint of one of the fundamental principles of criminal law i.e. the principle of individual criminal responsibility. Hence,

[1]. Brenda M. Baker 'Theorizing About Responsibility and Criminal Liability' (1992) 11 Journal of Law and Philosophy 403

[2]. The SPO charged three groups of alleged perpetrators in the Red Terror Trials. This one is the first group of defendants who were policy makers and senior government and military officials of the Derg Government, in Dadimos Haile, 'Accountability for Crimes of the Past and the Challenges of Criminal Prosecution: The Case of Ethiopia' (2000)Leuven Law Series 27

the jurisprudence of the IMT for Major War Criminals and of the ICTY and ICTR will be studied. The case studies in these tribunals have focused to demonstrate the general pictures of attribution of criminal responsibility particularly on conviction of policy level defendants.

3.2 The International Military Tribunal at Nuremberg

The Nuremberg Tribunal was the first international criminal tribunal.[3] It affirmed that international law imposes duties and liabilities upon individuals as well as upon states 'as crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.[4] In addition, a number of war crimes trials were instituted within Allied-occupied Germany under the authority of Control Council Law No.10.However, this paper discussion focal point is the Tribunal for Major war criminals at Nuremberg.

The International Military Tribunal was established for the trial and punishment of the major war criminals of the European Axis in accordance with the Charter of the International Military Tribunal, also known as the Nuremberg Charter.[5] The Tribunal has jurisdiction over crimes against peace, war crimes and crimes against humanity. The trial

[3].Malcolm N. Shaw, *International Law*(6th edn, Cambridge University Press, Cambridge 2008)399
[4].Nuremberg Trial Proceedings Vol. 1, Judgment: The Accused Organizations (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009
[5].Charter of the International Military Tribunal, Annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis'(also known as Nuremberg Charter) (August 8,1945) 82 U.N.T.S 279,art. 1

was started on 20 November 1945 and finished on 1 October 1946.[6] From the leading Nazis, Adolf Hitler, Josef Goebbels and Heinrich Himmler were dead and did not appear before IMT and Gustav Krupp was found by IMT as mentally incompetent.[7] Except these leading Nazis, all who were arrested were on trial.[8]

3.2.1 The Nuremberg Tribunal Indictment and Proceedings

The prosecution at Nuremberg charged 24 defendants on four accounts; conspiracy, crimes against peace, war crimes and crimes against humanity.[9] Count one , conspiracy, charged all twenty-four defendants with participation in a common plan to prepare and execute the substantive crimes enumerated in count two, count three and count four.[10] Besides the individual defendants, the prosecution charged six German organizations. These had been; The Reich Cabinet; The Leadership Corps of The Nazi Party; The SS including the "SD"; The Secret State Police, commonly known as the "GESTAPO"; The "SA"; and The General Staff of the High Command of the German Armed Forces.[11]

---

[6]. David Hirsh**,** *Law Against Genocide: Cosmopolitan Trials*(The Glass House Press, London 2003) 40
[7]. Ibid
[8]. Ibid
[9]. Nuremberg Trial Proceedings Vol. 1, Indictment: Appendix A(Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009
[10].Nuremberg Trial Proceedings Vol. 1, Indictment :Count one (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009
[11].Nuremberg Trial Proceedings Vol. 1, Indictment: Appendix B(Lillian Goldman Law Library Document ,Yale Law School) < http://avalon.law.yale.edu/imt/count.asp > accessed 26 July 2009

The indictment on the six organizations stated that the prosecution will rely on the structures, activities, powers and role of each organization in planning and carrying out of the crimes set out in the four counts for the criminality of the organizations.[12] Hence, the indictment spells out the structures, powers, activities and role of each of the six organizations in relation to the crimes in the indictment. Similarly, the indictment of the twenty-four individual defendants set the specific positions and time of membership of each defendant in the six organizations, their power in the organizations in relation to the crimes, the extent of their personal relation with the Fuehrer and their specific activities in relation to each counts. The prosecutions rely on these matters in establishing the individual responsibility of the defendants. [13]

On November 20, 1945, the trials of the major war criminals commenced and were carried out over 284 days. The prosecution produced 2,630 documents, and the defense produced 2700, the court took statements from 240 witnesses, and received 300,000 affidavits.[14] Finally, the IMT at Nuremberg delivered its judgment on 30 September 1946 and sentences were pronounced on 1 October 1946. Of the twenty-two defendants, three were acquitted from all four counts, four received prison terms not exceeding twenty years, two were sentenced to life in prison, and thirteen were

[12]. Nuremberg Trial Proceedings Vol. 1, Indictment: Appendix B(Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

[13]. Nuremberg Trial Proceedings Vol. 1, Indictment: Appendix A (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

[14]. Kevin R. Chaney, 'Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials' (Fall, 1995) 14 Dickinson Journal of International Law57, 4

sentenced to death.[15] Three of the six accused organizations were found to be criminal.[16] The Tribunal declared that the SS (Hitler's Bodyguards) and its subsidiary the SD, the Gestapo and the Leadership Corps of the Nazi Party were criminal. The SA (Storm Troopers), the Reich Cabinet and the High Command were acquitted without prejudice to the individual liability of their members.[17]

The conspiracy or common plan liability and the criminal liability of organizations in these Trials of IMT were sometimes labeled as a vehicle for mass conviction by ignoring the basic principle of criminal responsibility i.e. individual guilt.[18] Actually, the obvious purpose of these theories of liabilities was to broaden the net of criminal responsibility.[19] Specifically, conspiracy liability has the dual purpose of establishing criminal responsibility for those who had only been involved in the preparation of international crimes and connecting the masterminds with the main perpetrators who had done the dirty work.[20] Next, the Tribunal jurisprudence in relation with criminal responsibility provisions of the Charter is examined.

---

[15]. Nuremberg Trial Proceedings Vol. 1, Judgment: The Sentences (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

[16]. Nuremberg Trial Proceedings Vol. 1, Judgment: The Accused Organizations (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

[17]. Ibid

[18]. Chaney (n 14 above) 13

[19]. Harmen Van Der Wilt, 'Joint Criminal Enterprise :Possibilities and Limitations' (2007) 5(1) Journal of International Criminal Justice 91, 2

[20]. Ibid

3.2.2 Criminal Responsibility under the Nuremberg Charter

The Nuremberg Charter that is annexed to the Agreement for the prosecution and punishment of the Major war criminals defines offences and sets out the parameters for individual criminal responsibility with regard to these offences. Specifically Articles 6, 7 and 8 of the Charter established the legal basis for individual liability for all crimes under the Charter i.e. crimes against peace, war crimes and crimes against humanity.

Article Six of the Nuremberg Charter, which stipulates the jurisdiction of the tribunal, states that the Tribunal could try persons "as individuals or as members of organizations." [21] More importantly, Article 6(c) of the Nuremberg Charter listed the types of participation in crimes under the Charter including crimes against humanity that entails individual criminal responsibility. According to this provision "*leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.*" [22] This indicates that any person who participates in any one of these forms of participation will be responsible for the acts performed by any other person in furtherance or execution of such plan. This provision does not refer conspiracy as a substantive crime for crimes against humanity and war crimes but instead provides that conspirators should be liable for all crimes committed in

[21]. Nuremberg Charter (n5 above) art. 6
[22]. Ibid

execution of a "common plan or conspiracy". [23] To put it in another way, conspiracy is a form of liability not a substantive crime by itself for crimes against humanity and war crimes under the Nuremberg Charter. However, conspiracy is a substantive crime for crime against peace in article 6(a) of the Charter. Thus, conspiracy as an inchoate crime was only recognized and applied in respect of crimes against peace, while the conspiracy-complicity version covered all three crimes under the jurisdiction of the Tribunal.[24]

In sum, conspiracy in the Nuremberg Charter played a role both as a as a theory of liability and as a substantive crime. Hence, according to the Nuremberg Charter a group of individuals could be made liable if they agree to commit a crime, whether or not the crime itself is committed.[25] Moreover, under this Charter, an individual may be punished for participation in conspiracy to commit a crime only to the extent that the underlying crime is committed.[26]

Further, the Nuremberg Charter went on to develop the extent of individual criminal responsibility for the offences set out in Article 6 by specifically excluding the individuals official position or the fact that the accused were acting under orders as a

[23]. William A. Schabas, *Genocide in International Law*(Cambridge University Press, Cambridge 2000)262
[24]. Van Der Wilt (n 19 above)
[25]. Schabas (n 23 above)260
[26]. Ibid

defense. [27] Hence, official position had been irrelevant for all crimes listed in the Charter while the defense of superior order for the crimes was rejected.

Significantly, the Nuremberg Charter provided for the determination by the Tribunal of the criminal character of indicted German organizations.[28] Article 9 of the Charter provides for criminal liability of organizations. Consequently, the trial may declare that the group or organization of which the individual was a member was criminal. In cases where a group or organization is declared criminal by the tribunal, the competent national authority of any signatory of the Charter shall have the right to bring the individual to trial for membership therein before national, military or occupation courts.[29] In such cases, the criminal nature of the group or organization is considered proved and shall not be questioned.[30] As the Nuremberg Tribunal was only called upon to try the 'big shots', it could suffice with declaring an organization 'criminal', leaving the trial of the 'smaller fish' to national courts.[31] The penalization of the membership of Nazi organizations reflected the idea that those who had swelled the ranks of those organizations had at least given moral support to the outstanding crimes and, by doing so, had sustained the miserable enterprise.[32] Nevertheless, criminal organization is not defined in the Nuremberg Charter. Hence, this was left to the trial. By the construction incorporated in

[27]. Nuremberg Charter (n5 above)art.7,8
[28]. Ilias Bantekas and Susan Nash , *International criminal law*(2nd ed, Cavendish Publishing Limited, London 2003) 322
[29]. Nuremberg Charter (n5 above)art.10
[30]. Ibid
[31]. Van der Wilt (n 19 above) 2,3
[32]. Ibid 2

Articles 9 and 10 of the Nuremberg Charter, criminal prosecution of the organizations as legal entities was not intended. Instead, these provisions were designed to serve as a means to convict the minor figures against whom evidence of personal fault was difficult to adduce.[33]

Thus, at this point it can be concluded that the Nuremberg Charter provided for membership liability in addition to incorporating aspects of conspiracy law. Similarly, as it is clearly articulated in the definition, there should be 'common plan or conspiracy' for individual criminal responsibility in cases of crimes against humanity under article 6(c). Again, this element is not defined in the Charter. The Tribunal's application of this element is discussed in the next section in relation to forms of liabilities under the Nuremberg Charter.

3.2.3 The International Military Tribunal (IMT) Jurisprudence in Attributing Collective Criminal Responsibility

After establishing the Tribunal, the unresolved issue was whom to try and how to manage the logistics of adjudicating the liability of the thousands of Germans who the

[33].Van der Wilt (n 19 above)3

Allies believed were guilty of participating in Nazi schemes.[34] On this issue, Jacob Ramer stated;

> *The Nuremberg Tribunal, faced with the task of adjudicating the responsibility of leaders physically far removed from fields of battle and concentration camps, considered several distinct doctrines that are important in understanding the foundations of responsibility for the conduct of another in modern international criminal law.*[35]

The IMT applied the membership liability in a criminal organization and common plan or conspiracy liability under the Nuremberg Charter. Both liabilities are types of collective criminal responsibility that were designed with the aim of attributing responsibility collectively for many individuals that were allegedly involved in the mass atrocities. Especially, membership liability in criminal organizations is a means of attributing guilt for countless individuals. Following, the paper explores the Tribunal jurisprudence in applying these forms of liabilities.

[34].Allison Martson Danner and Jenny S. Martinez, 'Guilty Associations, Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (Jan 2005) 93 California Law Review 75, 113

[35].Jacob Ramer, 'Hate by Association: Individual Criminal Responsibility for Persecution Through Participation in a Joint Criminal Enterprise' (2005) Chicago Kent College of Law,<http://www.kentlaw.edu/perritt/courses/seminar/lonb-home-2005fall.htm>accessed 27 November 2009

3.2.3.1. Common plan or Conspiracy Liability

Bernay's Proposal for the Common Plan or Conspiracy Liability

In relation to common plan or conspiracy charge, Colonel Murray C. Bernay's, who had been given the job of developing a post war justice system for Europe, in his original proposal wrote:

> *The Nazi Government and its party and state agencies …should be charged before an appropriately constituted international court with conspiracy to commit murder, terrorism, and the destruction of peaceful populations in violation of war. . . Once the conspiracy is established, each act of every member thereof during its continuance and in furtherance of its purpose would be imputable to all other members thereof.*[36]

By this proposal, Bernay gave a broader reach to the concept of conspiracy. Under this proposal, conspiracy is explicitly described as the legal vehicle through which mass convictions would follow.

Common Plan or Conspiracy Charge: Count One of the Indictment

In contrast to Bernay's plan, count one of the indictment, i.e. the common plan or conspiracy count alleged that;

> *All the defendants, with divers other persons, during a period of years preceding 8 May 1945 ,participated as leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy to commit ,or which involved the commission of , Crimes Against Peace ,War*

[36]. Danner and Martinez (n 34 above)114

> *Crimes, and Crimes Against Humanity, as defined in the Charter of this Tribunal, and in accordance with the provisions of the charter ,are individually responsible for their own acts and for all acts committed by any pe*rsons in the execution of such plan or conspiracy. [37]

This count one of the indictment spells out the particulars of the nature and development of the common plan or conspiracy.[38]

The Judgment of the IMT in Count One: Common Plan or Conspiracy Charge

On count one, the Nuremberg Tribunal ruled that its own jurisdiction under the Nuremberg Charter extended only to conspiracy to commit crimes against peace and not conspiracy to commit war crimes or crimes against humanity. [39] To put it in another way, the Tribunal ruled that article 6 of the Nuremberg Charter did not define, and therefore could not support, the crimes of conspiracy to commit war crimes and crimes against humanity.[40] Even though the Charter of the Tribunal makes participation in common plan or conspiracy an autonomous crime for crimes against peace, the judges at Nuremberg take it as a form of participation for crime against peace, not a distinct crime by itself.[41] The Tribunal states articles 6(b) and (c) do not refer to conspiracy as a substantive crime but instead provides that conspirators should be liable for all crimes committed in

[37]. Nuremberg Trial Proceedings Vol. 1, Indictment: Count one (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009
[38]. Ibid
[39]. Nuremberg Trial Proceedings Vol. 1, Judgment : The Law as to the Common Plan or Conspiracy (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009
[40]. Ibid
[41]. Schabas (n 23 above) 262

execution of a "common plan or conspiracy". Further, the Tribunal generally addressed the conspiracy and aggression counts together, further collapsing the former into the latter.[42]

As conspiracy was taken by the Tribunal only as a theory of liability for crimes against peace, each defendant could be convicted of any acts under Article 6(1) committed by others "in the execution of such plan or conspiracy". Even in this case, the French senior judge Renaud Donnedieu de Vabres, argues that the prosecution had failed to prove the existence of a huge 25-year conspiracy beginning in the early 1920s.[43] Furthermore he contended that, it had failed to establish that there was a common plan to prove that a group of people had, at a specific time and place, agreed on definite criminal objectives and the criminal methods they intended to use to attain them.[44] Instead, in view of the above, the prosecution had merely gathered up various expressions of Nazi principles such as passages from the party programme and quotations from Mein Kampf,[45] contending that these were the core of a fixed criminal plan.[46] The French senior judge argued that there had been no master plan, but a development of policy. Contrary to this argument, Hirsh, a writer, contended that Nazi

[42]. Nuremberg Trial Proceedings Vol. 1, Judgment : The Law as to the Common Plan or Conspiracy (Lillian Goldman Law Library Document , Yale Law School)< http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009
[43]. Hirsh(n6 above)41
[44]. Ibid
[45]. Main Campf is the Adolf Hitler's only completed book published in two volumes in 1925 and 1926 in Hirsh (n6 above)41
[46]. Hirsh(n6 above)41

policy, for example in relation to the Jews, was not planned in advance but developed through time.[47] The prosecutor asserted that the tribunal should accept this count of the charge.[48]

In fact, conspiracy or common plan can be developed or refined through time. Hence, as the French Senior Judge argued it is not necessary for the conspirators to develop concrete plan at specific time and place. Actually, history has shown that plans for carrying out mass atrocities could be enhanced through a period of time and proved from seemingly unrelated details.[49]

Application of Common plan or Conspiracy Liability in Crimes Against Peace

The International Military Tribunal identified the 'common plan or conspiracy' element in the waging of aggressive war going as far back as 1919, with the formation of the Nazi party. Among its elements the Tribunal said, 'the persecution of the Jews' was one of the steps deliberately taken to carry out the common plan.[50] However, the Tribunal considered this conception too broad for the terms of its statute and states that;

---

[47]. Hirsh (n6 above)41
[48]. Ibid 40
[49].Thomas W. Simon, *The Law of Genocide: Prescriptions for a Just World* (Praeger Security International, London 2007) 78
[50]. Nuremberg Trial Proceedings Vol. 1, Judgment : The Law as to the Common Plan or Conspiracy(Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

> *The conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning ,to be criminal ,must not rest merely on the declarations of a party programme, such as are found in the twenty-five points of the Nazi Party, announced in 1920,or the political affirmations expressed in 'Meins Kampf' in later years. The tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan.* [51]

The IMT held that any significant participation in the workings of the Nazi Party since Nazi inception in 1919 did not prove involvement in a conspiracy to commit the offences that were within the Tribunals jurisdiction. One writer in support of this ruling claimed everyone who supports a political program is not to be labeled a criminal conspirator merely because, in the perspective of history, the program seems a coherent unity leading to criminal ends.[52] Accordingly, the Tribunal ruled that even substantial pre-1937 participation in war planning was outside the Tribunal's jurisdiction.[53] The same was true for conspiratorial planning that came too late.[54] The Tribunal discarded the common law rule that imputes responsibility for all acts attributable to a conspiracy to latecomers to that conspiracy.[55] In relation to this, in one subsequent proceeding case, a court declared that criminal liability was limited to

[51].Nuremberg Trial Proceedings Vol. 1, Judgment : The Law as to the Common Plan or Conspiracy(Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009
[52].Herbert Wechsler, 'The Issue of The Nuremberg Trial' (March 1947)62(1)Political Science Quarterly 20
[53].Ibid 22
[54].Nuremberg Trial Proceedings Vol. 1, Judgment : The Law as to the Common Plan or Conspiracy(Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009
[55]. Wechsler (n 52 above) 15

"*persons, who individually, played a substantial part in the planning, preparation, initiation, or waging of aggressive war*". [56]

According to the Tribunal, this common planning still exists where there is complete dictatorship.[57] Hence**,** a plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them.[58] Moreover, those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it.

IMT Judgment in Common Plan or Conspiracy Charge: Based on Individual Participation in the Common Plan or Conspiracy

The Tribunal judgment in this count was based on the knowledge element of the conspiracy. Knowledge or participation of the defendants in the conspiracy for crimes against peace were inferred from a variety of evidences. If there is conclusive evidence that a defendant involved or participated in person or through his or her representative[59] in at least one of the planning conference for crimes against peace, then he or she was

---

[56]. United States v. Krupp, 9 T.W.C. (1948)

[57]. Nuremberg Trial Proceedings Vol. 1, Judgment : The Law as to the Common Plan or Conspiracy(Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

[58]. Nuremberg Trial Proceedings Vol. 1, Judgment : The Law as to the Common Plan or Conspiracy(Lillian Goldman Law LibraryDocument,Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

[59]. Nuremberg Trial Proceedings Vol. 1, Judgment : Funk (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

going to be made liable.[60] To this effect, the Tribunal relied on some key conferences, meetings and discussions in which planning were made for the commission of crimes against peace.[61] Additionally, knowledge of the defendant of this conspiracy for crimes against peace can also be inferred from other acts of the defendant that indicates his knowledge of the planning. For instance, his memorandum sent to Hitler about having an aggressive war evidenced Ribbentrop's knowledge of the planning.[62] In other cases, the knowledge element can be inferred from the position of the defendant in the Nazi Party. According to the Tribunal, if knowledge can be conclusively inferred from the positions the defendant held in the party, conviction lies.[63] Thus, even if the defendant did not attend one of the important conferences, he would be convicted if his position in the Nazi gives him access to this knowledge. Nevertheless late comers to such positions were acquitted on this count.[64] For instance, in Bormann case the Court states that**:**

> *… the evidence does not show that Bormann knew of Hitler's plans to prepare, initiate or wage aggressive wars. He attended none of the important conferences when Hitler revealed piece by piece these plans for aggression. Nor can knowledge be conclusively inferred from the positions he held. It was only when he became Head of the Party Chancellery in 1941, and later in*

[60].Nuremberg Trial Proceedings Vol. 1, Judgment : Von Schirach; Fritzsche ; Raeder; Von Neurath and Keitel (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

[61].The main ones are Conferences on The 23rd November ,1939 and The 5th November, 1937 (Nuremberg Trial Proceedings Vol. 1, Judgment : The Nazi Regime in Germany (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009)

[62]. Nuremberg Trial Proceedings Vol. 1, Judgment : Ribbentrop (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

[63]. Nuremberg Trial Proceedings Vol. 1, Judgment : Bormann (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

[64]. Nuremberg Trial Proceedings Vol. 1, Judgment : Bormann and Speer (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

> *1943 secretary to the Fuehrer when he attended many of Hitler's conferences, that his positions gave him the necessary access. Under the view stated elsewhere which the Tribunal has taken of the conspiracy to wage aggressive war, there is no sufficient evidence to bring Bormann within the scope of Count One.* [65]

Using the above criteria, the judges found that the evidences established some of the defendants had common plan to prepare and wage war.[66] Only eight were convicted among the twenty-two defendants charged with conspiracy, and conspiracy did not figure significantly in the sentences ultimately imposed. [67] Consequently, a Tribunal that plainly disfavored conspiracy acquitted fourteen of twenty-two defendants charged with conspiracy on this count.[68] As a result, the judgment is said to be restricted to its interpretation of cooperation to those directly partaking in preparation of specific acts of aggression at the highest level, notably in a direct contact with Adolf Hitler.[69]

Moreover, the judgment does not mention either conspiracy or common plan liability in its discussion of the individual defendants' convictions for crimes against humanity.[70] Additionally, although the term "common plan", which is used synonymously in

---

[65]. Nuremberg Trial Proceedings Vol. 1, Judgment : Bormann (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

[66].Nuremberg Trial Proceedings Vol. 1, Judgment : The Law as to the Common Plan or Conspiracy (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

[67]. Danner and Martinez (n 35 above)116

[68]. Nuremberg Trial Proceedings Vol. 1, Judgment : Defendants (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

[69]. Saira Mohamed, "A Neglected Option: The Contributions of State Responsibility for Genocide to Transitional Justice"(Spring,2009) 80 University Of Colorado Law Review327, 14

[70]. Nuremberg Trial Proceedings Vol. 1, Judgment : Defendants (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

contemporary international criminal law cases with “joint criminal enterprise”, appears at Nuremberg Charter, indictment, and judgment, it was not discussed in these documents separately from conspiracy.

Conclusions on the IMT Approach of Attributing Collective Responsibility in the Common Plan or Conspiracy Charge

The judgment on this count one of the indictment primarily started with whether or not there was a common plan or conspiracy to commit crimes against peace. For its judgment, the Tribunal required proof for the existence of a concrete plan for the commission of crimes against peace. According to the Tribunal, a common plan to commit crimes against peace could not be deduced from the Nazi Party Programme or policy. After it was proved that there was a common plan or conspiracy to wage war, then the Tribunal identified the persons who participated in the common plan or conspiracy with knowledge of it. Hence, the Tribunal deduced the knowledge element from various evidences like attendance in the planning conferences and meetings and other actions of the defendants. The Tribunal’s judgment for each defendant on this count was based on proof of individual knowledge or participation in the common plan or conspiracy. Proofing the whole case and individual knowledge or participation in the common plan or conspiracy had always been on the shoulder of prosecutors.

3.2.3.2. Membership Liability in a 'Criminal Organization'

Since the criminal nature of the organization and the criminal liability of individual members were separate questions under the Nuremberg Charter, the Nuremberg Tribunal and subsequent Courts determined individual and group criminality in bifurcated trials. The first Trial was on organizations. Hence, the next section covers the organization charge and the Tribunals ruling. Then, the individual's trials for membership liability will be discussed in subsequent sections.

The Charge on Organization

Concerning criminal organizational liability under article 9 and 10 of the Charter of the IMT, the prosecution charged six organizations with being "criminal organizations". These are: The Reich Cabinet; The Leadership Corps of The Nazi Party; The SS including the "SD"; The Secret State Police, commonly known as the "GESTAPO"; The "SA"; and The General Staff of the High Command of the German Armed Forces which comprised Germany's army, navy and air force commanders in chief. [71] These organizations were labeled criminal due to their role in the perpetration of acts of aggression, war crimes, and crimes against humanity, the three substantive crimes within the Tribunal's jurisdiction.[72] However, the indictment laying out the prosecution's charges did not provide a definition of a criminal organization as was also

[71]. Nuremberg Trial Proceedings Vol. 1, Indictment : Appendix B (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009
[72]. Ibid

the case for the Nuremberg Charter. Members of organizations deemed criminal by the Nuremberg Tribunal were prosecuted for their membership in the organizations during subsequent trials held in Nuremberg. Under the law of subsequent proceedings i.e. Control Council Law No. 10, membership in a criminal organization was one of the punishable crimes.[73]

Bernay's Proposal for the Charge on Organizations

Bernays, who was given the assignment of developing a post war justice system for Europe, had a plan for individual criminal responsibility based solely on the individuals' membership in an organization.[74] Under Bernay's Plan**,** organizations would be charged and tried at the Nuremberg Tribunal alongside with the twenty-two individual defendants. Hence, the Tribunal should judge that the Nazi government, party and agencies such as the SS and the SA were conspiracies to commit murder and other crimes.[75] In other words, the judges would have to determine whether the organizations engaged in criminal actions to be designated as a criminal organization. Subsequently, Military Trials would be held for individual defendants, in which they would have to defend against their membership in the organization.[76] On these second trials, the Courts will try individuals considered representative of those organizations who would then be found guilty of the same offences on the grounds of their

[73]. Control Council Law No. 10, Dec. 20, 1945, Control Council for Germany, Official Gazette, January 31, 1946, at 50 < http://www.yale.edu/lawweb/avalon/imt/imt10.htm.>accessed 16 November 2009
[74]. Ramer (n 35 above) 4
[75]. Hirsh (n6 above)40
[76]. Ibid

membership of these organizations alone.[77] As a result, any member of these criminal organizations could then be arrested and found guilty simply by virtue of their membership. This plan was meant to facilitate convictions, and to deal with mass numbers of people involved in criminal activity. Once an organization was deemed criminal, later judges only had to determine whether the accused joined the organization voluntarily. Defendants would be unable to assert their ignorance as to the organization's criminal purpose.[78] To put in another way, in the secondary proceedings, the burden would be on defendants to prove that they did not join the organizations voluntarily, and a defendant's lack of knowledge of the organization criminal purpose would not constitute defense.[79] Consequently, punishment could be summarily imposed on hundreds of thousands of members of the organizations. Within the ambit of the charges against organizations that are indicted at Nuremberg, at least two million people were included.[80]

This membership charge under this plan has two important advantages from the side of prosecutors. First, they would get efficiency, by not having to re-litigate against each person the criminal character of the SS and, in reference to particular units or campaigns, the facts where known of what the unit did.[81] Second, they would get ease of proof, by not having to prove a particular officer in that unit was present during a

[77]. Hirsh (n6 above)40
[78]. Ramer (n 35 above)5
[79]. Danner and Martinez (n 34 above)113
[80]. Ibid
[81]. Jonathan A. Bush, "The Prehistory Of Corporations And Conspiracy In International Criminal Law: What Nuremberg Really Said" (June 2009)109 Columbia Law Review1094, 20

killing spree at which the unit was known to have participated avoiding defendant's claim that he was back in his quarters.[82] Thus, the defendant would be able to rebut the presumption of membership guilt by showing one of several things: that he was coerced into membership, that the personnel record denoted another person of the same name, or that he had been discharged before the atrocity occurred.[83] This means the burden of proof has shifted onto the defendant after membership in criminal organization had been proven.

The prosecutor debated that as the conspiracy count , criminal organization approach in the Bernay's plan is helpful in order to 'reach a great many of the equally guilty persons against whom evidence of specific violent acts might be lacking although there is ample proof that they participated in the common plan or enterprise or conspiracy'.[84] Also conceived by Murray Bernays, organizational guilt was designed to answer the practical problem of how to try not merely the 'big fishes' like SS chieftains but the huge number of ordinary men and women who participated in the commission of the crimes denounced by the charter.[85]

[82]. Bush (n81 above)
[83]. Ibid
[84]. Hirsh (n6 above)41
[85]. Bush(n 81 above)19

IMT Judgment on Organization

Both the provisions of the Nuremberg Charter on organization and Bernay's plan had played a little role in the IMT judgment.[86] The Tribunal recognized that the law on criminal organization was a "far reaching and novel procedure" that "unless properly safeguarded, may produce great injustice."[87] Recognizing that "the Tribunal should make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished" [88] the Tribunal defined criminal organizations narrowly.[89]

As stated in the judgment,

> *A criminal organization is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the charter. Since the declaration with respect to the organizations and groups will, as has been pointed out ,fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the state for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the*

[86]. Avi Singh, 'Criminal Responsibility for Non-State Civilian Superiors Lacking De Jure Authority: A Comparative Review of the Doctrine of Superior Responsibility and Parallel Doctrines in National Criminal Laws' (Winter, 2005) 28 Hastings International and Comparative Law Review 267, 9

[87]. Nuremberg Trial Proceedings Vol. 1, Judgment: The Accused Organizations (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

[88]. Ibid

[89]. Catherine H. Gibson, 'Public and Private Law in the Global Adjudication System: note: Testing The Legitimacy of the Joint Criminal Enterprise Doctrine in the ICTY: A Comparison of Individual Liability for Group Conduct in International and Domestic Law' (Symposium) (spring, 2008)18 Duke Journal of Comparative & International Law 521, 5

organization. Membership alone is not enough to come within the scope of these declarations. [90]

Therefore, according to the Tribunal, a criminal organization and conspiracy are equivalent as they hold individuals united for common criminal purposes. For both of them, there must be a group bound together and organized for a common purpose. These groups must be either formed or used in connection with the commission of crimes denounced by the charter.

Criteria for a 'Criminal' Organization

The criminal nature of organizations was judged based on three criteria. In other words, according to the tribunal ruling, three findings must be established before judging an organization to be criminal.[91] These findings are; the existence of a common criminal purpose; membership on a voluntary basis; and knowledge of membership. Additionally, since the Tribunal justified its criminal organization findings on judicial efficiency grounds, the group's size also proved relevant.[92]

[90]. Nuremberg Trial Proceedings Vol. 1, Judgment: The Accused Organizations (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009
[91]. Gibson (n89 above)
[92]. Ibid

Common Criminal Purpose

The existence of common criminal purpose requires the proof that most of the organization's members shared that purpose. For this, the organization's public activities must have included one of the crimes falling within Article 6 of the Nuremberg Charter. A majority of the members must have been knowledgeable or conscious of the organization's criminal activities or purpose.[93] In other words, under this criterion, the judges ruled that, to be found criminal, the criminal objectives of the organization had to be pervasive and shared among its members. Thus, the Leadership Corps was deemed a criminal organization because its members were generally involved in "*the Germanisation of incorporated territory, the persecution of the Jews, the administration of the slave labour programe, and the mistreatment of prisoners of war*." [94] The SA, however, was not declared criminal because, though some members "*took part in the beer hall feuds and were used for street fighting in battles against political opponents,*" their participation was not shown to be part of a specific plan to wage aggressive war.[95]

Voluntary Membership

Under this criterion, the organization's majority members have to be volunteers. Voluntary participation, the Tribunal's second consideration, was not judged on the basis of absolute voluntariness but rather on a failure to protest assignment to a particular

[93]. Ramer(n35 above) 7
[94]. Nuremberg Trial Proceedings Vol. 1, Judgment: The Accused Organizations (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009
[95]. Ibid

group.[96] Therefore, membership in the Gestapo and the SD was deemed voluntary even though the members of these organizations "*did not have a free choice of assignments within that organization and the refusal to accept a particular position ... might have led to serious punishment*."[97] Since "*all members of the Security Police and SD joined the organization voluntarily under no other sanction than the desire to retain their positions as officials*," the tribunal found that membership in these organizations was sufficiently voluntary.[98]

Knowledge of membership

For this third criterion, the Tribunal required that membership was known to the members. In declining to declare the General Staff and High Command a criminal organization, the Tribunal distinguished that group from the SS, stating;

> *When an individual became a member of the SS ... he did so ... certainly with the knowledge that he was joining something. In the case of the General Staff and High Command, however, he could not know he was joining group or organization, for such organization did not exist except in the charge of the Indictment. He knew only that he had achieved a certain high rank in one of the three services, and could not be conscious of the fact that he was*

[96]. Gibson (n89 above)
[97]. Nuremberg Trial Proceedings Vol. 1, Judgment: The Accused Organizations (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009
[98]. Ibid

becoming a member of anything so tangible as a "group,' as that word is common used. [99]

Size of the Organization

The organization's size also played a role in the Tribunal's criminal organization findings as a means of balancing of individual rights against judicial economy.[100] As the Tribunal stated, "*where an organization with a large membership is used for such criminal purposes, a declaration of criminality obviates the necessity of inquiring as to its criminal character in the later trial of members who are accused of participating through membership in its criminal purposes and thus saves much time and trouble. There is no such advantage in the case of a small group*."[101] Hence, the Reich Cabinet was not deemed a criminal organization because the group was "*so small that members could be conveniently tried in proper cases without resort to a declaration that the Cabinet of which they were members was criminal*."[102]

Actually, the Cabinet had an estimated 48 members, eight of whom were dead and 17 of whom were on trial before the Nuremberg Tribunal.[103] Since declaring the Cabinet a criminal organization would therefore play a role in the cases of only 23 individuals, the

[99]. Nuremberg Trial Proceedings Vol. 1, Judgment: The Accused Organizations (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009
[100]. Gibson (n89 above)
[101]. Nuremberg Trial Proceedings Vol. 1, Judgment: The Accused Organizations (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009
[102]. Ibid
[103]. Ibid

tribunal declared nothing would be accomplished to accelerate or facilitate their trials by declaring the Reich Cabinet a criminal organization.[104]

Under the above criteria, the Nuremberg Tribunal declared three organizations criminal: the Leadership Corps of the Nazi Party, the Gestapo/SD and the SS. The IMT judges acquitted the remaining three indicted organizations.[105]

3.2.3.3. Criteria for Membership Liability in a 'Criminal' Organization

For the Trial for membership in the three criminal organizations, the Tribunal set two criteria's. Specifically, the IMT judgment diminished the implications of the organizational charges by requiring the prosecution to prove voluntary membership and individual knowledge in subsequent prosecution of members of criminal organizations.[106]

Because of the shift of burden of proof and the ruling, in subsequent proceedings, the prosecution must prove that any person prosecuted for membership in a criminal organization joined the organization voluntarily and knew that the organization engaged in crimes within the jurisdiction of the Nuremberg Charter. In relation to this, the IMT judgment justified these limitations by stating that they were "*in accordance with well*

[104].Nuremberg Trial Proceedings Vol. 1, Judgment: The Accused Organizations (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009
[105].Ibid
[106].Ibid

settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishment should be avoided."[107]

In the subsequent proceedings, if the prosecution could not demonstrate the individual's knowledge, the prosecution had to show that the defendant personally participated in such crimes.[108] With this ruling, the IMT effectively negated the procedural benefits to the prosecution that Bernay had anticipated would flow from conviction of criminal organizations. The prosecution was now forced to bear the burden of proving each individual's voluntary and knowing participation in a group with criminal aims. This the tribunal approach is, sometimes, criticized for giving individuals wide latitude in excusing their role in a criminal organization.[109]

As it is indicated, in subsequent proceedings, to convict individuals for membership in an organization deemed criminal by the Nuremberg Tribunal, Courts required to show that the individual knew of the organization's criminal activities but did not require a showing that the defendant had participated in or contributed to the organization's crimes. Therefore, some defendants were convicted of a criminal offense simply because they knew the organization criminal purpose. [110] For example, Joseph Altstoetter, a judge in the Bavarian and Reich Ministries of Justice and a member of the legal staff of the SS

[107].Nuremberg Trial Proceedings Vol. 1, Judgment: The Accused Organizations (Lillian Goldman Law Library Document , Yale Law School) < http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009
[108].Ibid
[109]. Simon(n49 above)131
[110].Gibson (n 89 above)

main office, was convicted of membership in criminal organization because the activities of the SS and the crimes which it committed are of very wide a scope that no person of the defendant's intelligence could have been unaware of its illegal activities, particularly a member of the organization from 1937 to the surrender. [111] As the tribunal further explained,

> *Altstoetter not only had contacts with the high ranking officials of the SS ... but was himself a high official in the Ministry of Justice stationed in Berlin from June 1943 until the surrender. He attended conferences of the department chiefs in the Ministry of Justice and was necessarily associated with the officials of the ministry, including those in charge of penal matters.*[112]

As the Court noted, "*surely whether or not he took part in such activities or approved of them, he must have known of that part which was played by an organization of which he was an officer ... Notwithstanding these facts, he maintained his friendly relations with the leaders of the SS.*"[113] On these facts, Altstoetter was convicted for his membership in a criminal organization.[114]

---

[111]. United States Holocaust Memorial Museum "Subsequent Nuremberg Proceedings: The Justice Case" Holocaust Encyclopedia. <http://www.ushmm.org/wlc/en/index.php?ModuleId=10005143> (accessed 27 October 8, 2009).
[112]. Gibson (n 89 above)
[113]. Ibid 6
[114]. Ibid

Other individuals were convicted because their membership had by itself benefited the organization.[115] For example, in the Flick Case, defendants Friedrich Flick and Otto Steinbrinck were both charged with the crime of membership in the SS. [116] Each defendant had contributed more than 100,000 Reichsmarks for cultural projects and other "special purposes" of Heinich Himmler, Reichsfuehrer of the SS, and each had participated in a small group called the Friends of Himmler.[117] Despite their similar monetary contributions and participation, the Court found Steinbrinck, but not Flick, guilty of membership in a criminal organization. As the Tribunal explained, Flick had joined the SS and donated to Himmler partially to compensate for his prior public support of Hitler's political rivals.[118] Steinbrink, on the other hand, was "*an outstanding naval officer of the First World War who was respected and admired by the public*" and who had been a member of the organization in a purely honorary fashion.[119] Thus, in finding Steinbrinck guilty of membership in the SS, the Tribunal justified that he "*justly reproached for voluntarily lending his good reputation to an organization whose reputation was bad.*"[120]

According to Bassiouni, despite the apparent connection between conspiracy law and membership liability in the IMT judgment, the notion of group or collective

[115]. Gibson (n 89 above)6
[116]. Ibid
[117]. Ibid
[118]. Ibid
[119]. Ibid
[120]. Ibid

responsibility had no basis under international law at the time and it did not satisfy the principle of legality.[121]Another writer on the same point comments that collective punishment is disregarded by the very judgment of International Military Tribunal.[122] The evidence is that since the declaration with respect to the organizations and groups will fix criminality of its members, the definition excluded persons who had no knowledge of the criminal purposes or acts of the organization and those were drafted by the state for membership, unless they were implicated in the commission of acts declared criminal. Membership alone is not enough to come within the scope of these declarations. In fact, from the perspective of the principle of individual guilt, criminal responsibility for mere membership of an organization was questionable.[123] Although the Nuremberg Tribunal, by requiring awareness of the criminal intentions and voluntary access, mitigated its harshest effects, the construction remains a suspicious example of collective criminal responsibility as it negates the importance of contributory fault.[124]

[121]. Ramer(n35 above)7
[122]. Ibid
[123]. Van Der Wilt(n19 above) 3
[124]. Ibid

Conclusions on the IMT Approach of Attributing Collective Responsibility for Membership in 'Criminal' Organization

According to Article 10 of the Nuremberg Charter, membership in a criminal organization directly entails criminal responsibility. However, the Charter did not give definition for a criminal organization. The IMT stated this law on criminal organization should be safeguarded to avoid collective punishment of innocent persons. Accordingly, it defines criminal organization as criminal conspiracy and set three criteria's for criminal organization. First, according to the Tribunal, criminal organization was taken as a form of unity of individuals for common criminal purpose. Second, the criminal nature of organizations was judged based the criteria of the existence of a common criminal purpose; membership on a voluntary basis; and knowledge of membership. For the trial of membership in criminal organization, the tribunal also set two criteria's. According to these criteria, the prosecution must proof that any person prosecuted for membership in criminal organization joined the group voluntarily and knew that the organization engaged in criminal activities within the jurisdiction of the Nuremberg Charter. In one case studied in this section, the individual knowledge was inferred from the position held by the defendant in the party. In addition, in both the organization and membership trials the burden of proof was always on the prosecutor.

Hence, according to the Tribunal ruling, membership in a criminal organization alone is not enough for criminal liability. Voluntary membership in criminal organization with

individual knowledge of the organization criminal activities was the requirement for attributing criminal liability to individuals.

3.2.4. Conclusions on the IMT Jurisprudence in Attributing Collective Criminal Responsibility

As chapter two of this paper explores earlier, collective criminal responsibility is disregarding the principle of individual guilt and making a person liable by membership or association with wrongdoers alone. Admittedly, both conspiracy and membership liability in the IMT judgment have an element of collective criminal responsibility since they symbolized the collective dimension of and common purpose behind the mass atrocities, and were served as a tool to attribute criminal liability to all persons who were engaged in the common enterprise. In both, participation or knowledge of the criminal purpose of the conspiracy or organization was considered as fault and lead to criminal responsibility. In other words, the knowledge or participation of individuals in the common plan or 'criminal' organization is regarded as contribution to the commission of a crime. However, these liabilities construction in the Tribunal judgments limits their outcome by requiring knowledge or participation in the conspiracy charge, and voluntary membership and knowledge of the organization's criminal purpose in the membership liability.

3.3 International Criminal Tribunal for The Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR)

The gross human right violations in the Former Yugoslavia and the Rwanda massacres of 1994 led to the establishment of two specific tribunals by the UN Security Council.[125] The ICTY has the power to prosecute those responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia since 1991.[126] Even if ,the Trial chamber of the ICTY in *Delalic* case found that the Tribunal has jurisdiction over the executioners as well as the planners, the little fish and the big fish[127] ; the ICTY has concentrated on the prosecution and trial of the most senior leaders while referring other cases involving intermediate and lower rank accused to national courts.[128] Whereas, the ICTR was established with the power to prosecute persons responsible for serious violations of international humanitarian law in the territory of Rwanda and as well for those committed on Rwandan citizens in the territory of neighboring states between 1 January 1994 and 31 December 1994.[129] Likewise**,** ICTR focus its attention on a limited number of offenders particularly on the leaders.[130]

---

[125].Shaw(n3 above)403
[126].UNSC 'Statutes of the International Criminal Tribunal for The Former Yugoslavia' UN Doc.S/RES/827, Annex, art. 1,8
[127].Simon(n49 above)79
[128].Shaw(n3 above)407
[129].UNSC 'Statute of the International Criminal Tribunal for Rwanda' UN Doc S/RES/955 , Annex, art.1
[130].William A. Schabas, "Redefining International Criminal Law: New Interpretations And New Solutions: Criminal Law: State Policy As An Element Of International Crimes" (Spring, 2008)98 Journal of Criminal Law & Criminology 4

Unlike the IMT, both the jurisdiction of ICTY and ICTR is over natural persons and not over organizations, political parties, army units, administrative entities or other legal subjects.[131] The ICTY has authority to prosecute and try individuals on four categories of offences: grave breaches of the 1949 Geneva conventions; violations of the laws or customs of war; genocide and crimes against humanity.[132] The ICTR was established for the prosecution of genocide and for other serious violations of international humanitarian law.[133]

Particularly, the ICTR was established primarily to address the issue of genocide and, in the Akayesu case, the Tribunal authoritatively determined that genocide against the Tutsi did, in fact, taken place in Rwanda in 1994.[134] In 1994, atrocities of a scale many times over those perpetrated in the Former Yugoslavia were reported taking place in Rwanda in the form of genocide against the Tutsi minority by extremist Hutu elements.[135] The estimated number of dead because of this genocide was between 500,000 and one million.[136] Specifically, from April 6 to July 26, 1994, Hutu Militants massacred 800, 000, mostly Tutsis, children, women and men.[137] Extremist Hutus organized the Interhamwe that largely carries out the Genocide.[138] In Rwanda, the Tutsis were painted

[131]. UN ICTY, "Mandate and Jurisdiction" < http://www.icty.org/sid/320>accessed 27 October 2009; UN ICTR, "General Information" < http://www.ictr.org/deafult.htm >accessed 27 October 2009
[132]. UN ICTY, "Mandate and Jurisdiction" < http://www.icty.org/sid/320>accessed 27 October 2009
[133]. UN ICTR, "General Information" < http://www.ictr.org/deafult.htm >accessed 27 October 2009
[134]. Prosecutor v. Akayesu (Judgment)ICTR -96-4-T,T Ch I(2 September 1996)Para 126
[135]. Bantekas and Nash(n28 above) 340
[136]. Ibid
[137]. Simon(n49 above)78
[138]. Ibid 141

as foreign intruders and exploiters who kept the Hutu majority in bondage.[139] Hence, the killings were carried out to establish a homogeneous ethnic power through ethnic cleansing.[140]

War crimes, crimes against humanity and genocide are usually perpetrated by groups of individuals, at different level acting in unison or in pursuance of a policy.[141] In particular, these international crimes necessarily involve a collective perpetrator, generally a state, army, or similar authority.[142] International crimes also characteristically involve a collective or corporate mental state, a consciousness of action on behalf of or in furtherance of a collective project.[143] The occurrence in Rwanda in 1994 was a typical illustration of these group elements of international crimes. The mass atrocities in Rwanda were undertaken largely by local militia i.e. Interhamwe in pursuance of establishing homogenous ethnic power through ethnic cleansing.

It is difficult to imagine the mass killings on the scale of genocide taking place in the absence of an organization's direction and coordination.[144] Historically, states, the most

[139]. Yaqob Hailemariam, 'The Quest For Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court ' (1999) 22 Hastings International and Comparative Law Review 667 ,688
[140]. Hailemariam(n139 above)
[141]. Antonio Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise' (March 2007) 5(1)Journal of International Criminal Justice 109, 2
[142]. Robert D. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (Winter, 2007) 43 Stanford Journal of International Law 8
[143]. Ibid 9
[144]. Simon(n49 above) 77

dangerous form of organization, have been the most active agents of violence.[145] An evidence for this is the founding of the UN Commission of Experts "*overwhelming evidence to prove that the acts of genocide against Tutsi ethnic group were committed by Hutu elements in a concerted, planned, systematic and methodical way*."[146] Indeed, it takes an incredible mobilization at the state level to carry out the scale of mass killings for over one hundred days in Rwanda.[147] Only states, with their legitimate monopolies on violence, possess the power and resources needed to kill vast numbers of people over a sustained period.[148] Government authorities who used the armed forces and militia to execute their plans carefully planned these killings in Rwanda.[149] Government forces and the militia carried out the massacres with the knowledge and approval of the authorities.[150] Moreover, closer investigations of the Rwandan case exposed a well-organized incitement of genocide generated through state-supported structures including a hate propagating radio station.[151]

Similarly, large-scale crimes, in the context of armed conflicts in the Former Yugoslavia often involved coordinated action between various enforcement agencies like police,

[145]. Simon(n49 above)78
[146]. The United Nation Commission of Experts(December 4,1994)
[147]. Simon(n49 above)79
[148]. Ibid 77
[149]. Hailemariam(n 139 above)
[150]. Ibid
[151]. Simon(n49 above)78

military and civilian authorities.[152] From the systematic or widespread nature of some of the crimes it can be inferred that the actions of the physical perpetrators were coordinated, organized and involved high-ranking military as well as civilian officials.[153] Actually, the criminal liability of high-ranking civilian and military leaders sharing the intent and acting together to achieve the criminal result carried out by the physical perpetrators may have seemed clear. Nevertheless, one of the main questions for the ICTY was to decide what form of participation best captures the high-ranking officers' criminal conduct.[154] This has been necessary for the fact that the senior leaders or those regarded most responsible for serious violations of the international humanitarian law may not often involved in the physical commission of the crime. In addition, not all participants acted in the same manner, but rather each of them may have played a different role in planning, organizing, instigating, coordinating, executing or otherwise contributing to the criminal conduct.[155] Thus, when such crimes are committed, it is extremely difficult to pinpoint the specific contribution made by each individual participant in the collective criminal enterprise.[156] Further, in such cases the evidence relating to each individual's conduct may prove difficult if not impossible to find.[157]

[152]. Carla Del Ponte, 'Investigation and Prosecution of Large-scale Crimes at the International Level: The Experience of the ICTY'(July 2006)4(3) Journal of International Criminal Justice 539, 5
[153]. Del Ponte(n152 above)
[154]. Ibid
[155]. Cassese(n141 above)
[156]. Ibid
[157]. Ibid

Subsequently, the group elements of mass violence i.e. the perpetration of mass violence by groups of individuals acting in union for furtherance of a common plan prompted some development in the jurisprudence of the international tribunals. For example, the ad hoc tribunals have availed themselves of theories of liability that contemplate group dynamics. For this reason, the ICTR has considered the collective element to be relevant to certain crimes of primary responsibility, such as conspiracy, complicity, and direct and public incitement to commit genocide, and secondary theories such as aiding and abetting genocide.[158] Moreover, the prosecutors for the ICTY and ICTR used principles of command responsibility. Furthermore, in dealing with such crimes, the two Tribunals used other forms of participation other than explicitly stipulated in article 7(1) and 6(1) of ICTY and ICTR Statutes.[159] The most important of these was the 'joint criminal enterprise'. Describing the concept, the ICTY Appeals Chamber explained, "*International criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design.*"[160] Some scholars like Danner and Martinez express concern over the hunger with which the ad hoc tribunals adopt these collective theories of liability, in particular the use of joint criminal enterprise.[161]

[158].Mark A. Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity'(Winter 2005) 99 Northwestern University Law Review 539, 10
[159].Cassese(n141 above)
[160].*Prosecutor v. Tadic*(Appeal Judgment)ICTY IT-94-1-A(July 15, 1999).Para 193
[161].Drumbl(n158 above)

3.3.1 Criminal Responsibility Provisions under the Statutes of the ICTR and ICTY

Article 2 to 5 of the ICTY Statute lay down the crimes on which the Tribunal can exercise jurisdiction. These are grave breaches of the Geneva Convention of 1949, violations of the laws or customs of war, genocide and crimes against humanity. Similarly, the ICTR has jurisdiction over crimes stipulated under Article 2 to 4 of its statute: genocide, crimes against humanity and violations of article 3 common to the Geneva Conventions and of Additional Protocol II.

As participation is a basis of individual criminal liability for international crimes, Article 6(1) and 7(1) of both the ICTR and ICTY statutes set out the forms of participation by which an accused can be liable for a crime. These articles address various ways in which an individual may incur liability for participating in a crime or otherwise for contributing significantly to the commission of a crime.[162] In fact, the plain language of these articles could be construed to limit the liability of an individual defendant to his own actions. Both articles state, "*a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred in article 2 to 5 of the present statute shall be individually responsible for the crime*." These

[162].Faustin Z. Ntoubandi, *Amnesty for Crimes Against Humanity Under International Law* (Martinus Nijhoff Publishers, London 2007) 93

articles are a general complicity provisions applicable to all the offences over which the two Tribunals have subject matter jurisdiction, including genocide.

On its face, the above provisions encompass five kinds of liability. These liabilities can be broadly categorized as participation by the commission of a crime and participation by complicity in a crime.[163] Even though the governing Statutes only empower prosecuting officials for the commission of genocide and crimes against humanity, the ad hoc tribunals interpret the Statutes to mean these crimes may be committed by means of an act or an omission.[164] Under participation by the commission, mainly low-level executioners are likely to be directly involved in these offences.[165] On the other hand, participation by complicity in a crime includes co-perpetration i.e. jointly with another person and perpetration by means i.e. through the instrumentality of another person.[166] This form of participation includes acts such as ordering the commission of a crime: aiding or abetting, planning and inciting. These five forms of liability in both the ICTR and ICTY statutes usually referred to as "direct responsibility," to distinguish them from command responsibility or superior responsibility.

The common general principles provision of the ad hoc tribunals addresses two defenses for crimes against humanity and genocide, and in both cases, the provision

[163]. Ntoubandi(n 162 above)94
[164]. Simon (n49 above)52
[165]. Ntoubandi (n 162 above)94
[166]. Ibid

seeks to prohibit them. These are the defenses of superior orders and of official status. Criminal responsibility can be attributed to a subordinate whether or not the person acted pursuant to an order of a government or of a superior.[167] In other words, a person who committed those crimes cannot raise the defense that he or she acted pursuant to an order. Moreover, the official position of an individual has been excluded as a defense to crimes under the jurisdiction of the Tribunals.[168] Further, the command responsibility provision of the ICTR and ICTY statutes Article 6(3) and 7(3) respectively, provide for another form of liability, namely that a person possessing command authority. This criminal responsibility concerns whether a civilian or a military leader may also be responsible for crimes committed by his subordinates if the leader fails to prevent the crimes or fails to punish the crimes once they occur.

In addition to the general complicity provisions, the crime of genocide also contains its own liability provision under the two Statutes. This additional form of liability for genocide in the Statutes is exhaustive and much more specific than that of the common liability provisions. Accordingly, Articles 4(3) of ICTY and Article 2(3) of ICTR not only provides for liability of individuals other than the principal offender, such as accomplices, but also stipulates for incomplete or inchoate offences, such as attempts and conspiracy, where there is no principal offender at all because the ultimate crime

[167].UNSC 'Statutes of the International Criminal Tribunal for The Former Yugoslavia' UN Doc.S/RES/827, Annex, art. 7(4); UNSC 'Statute of the International Criminal Tribunal for Rwanda' UN Doc S/RES/955, Annex, art. 6(4)

[168].ICTY Statute(n 167 above)art .7(2);ICTR Statute(n 167 above)art.6(2)

never takes place. Article 4(3) (e) of the ICTY Statute and Article 2(3) (e) of the ICTR statute particularly criminalize "complicity in genocide". More importantly, conspiracy as an inchoate crime has only survived in connection with genocide. In these two ad hoc Tribunals, conspiracy for genocide is a distinct crime by itself, and punishable. This means, as in the common law, conspiracy in genocide is a substantive crime in the two Statutes. Hence, as a distinct crime, conspiracy may be charged in tandem with an indictment for genocide per se.

3.3.2 The ICTY and ICTR Jurisprudence in Attributing Collective Criminal Responsibility

Although not identified as such in the Statutes of the ad hoc Tribunals, the judges have developed a potent theoretical model of accomplice liability known as joint criminal enterprise. The concept of JCE has provided the legal basis for many convictions at the International Criminal Tribunal for the Former Yugoslavia (ICTY) and increasingly has played a similar role at the International Criminal Tribunal for Rwanda (ICTR).[169] One indication of its centrality in the jurisprudence of the two tribunals is the frequency with which indictments have rested the accused's liability on this basis. At the ICTY alone 64% of the indictments filed between June 25, 2001, and January 1, 2004, relied explicitly on joint criminal enterprise and about 81% can be read to rely on it implicitly.[170] As of December 2007, 63 out of 130 ICTY indictments, or 48%,

[169]. Elies Van Sliedregt, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide' (March 2007) 5(1) Journal of International Criminal Justice 184, 1

[170]. Jenia Iontcheva Turner, 'Defense Perspectives on Law and Politics in International Criminal Trials' (Spring, 2008)48 Virginia Journal of International Law 529, 12

explicitly relied on joint criminal enterprise.[171] At the ICTR, the number is much lower- as of December 2007, thirteen out of eighty-five indictments were based on JCE.[172]

In practice, prosecution of genocide cases will involve identifying a plan or policy and then prosecuting those most responsible for its implementation.[173] This is because the intent needed to prove the crime of genocide is not the mental state of an individual but rather the plans and polices of an authoritative organization, primarily the organization known as a state.[174] Genocidal intent lies within a complex network of many seemingly isolated details.[175] For example, numerous bureaucratic directives support the presence of corporate intent in Rwanda.[176] The reason is that perpetrators seldom explicitly and publicly express their intent to commit genocide.[177] From the Nazis' Holocaust as well as for the Rwandan genocide, there is 'no smoking gun'.[178]

In fact, a genocidal plan is not a legal ingredient of the crime of genocide, but ICTY Chambers have consistently argued that it could nonetheless provide evidential assistance in proving intent of the authors.[179] In support of this view, the ICTR Trial Chamber in the case of *Prosecutor v. Kayishema* noted that, "*Although a specific plan*

---

[171]. Turner(170 above)
[172]. Ibid
[173]. Schabas(n 130 above)15
[174]. Simon (n49 above)75
[175]. Ibid 78
[176]. Ibid
[177]. Ibid
[178]. The United Nations Commission of Experts (December 4, 1994) Para 7.2
[179]. *Prosecutor v. Krstic* (Judgment) IT-98-33-T (2 August 2001)Para 572;*Prosecutor v. Jelsic* (Appeals Judgment) ICTY IT-95-10-A (5 July 2001)Para 48

to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out genocide without a plan or organization."[180] Furthermore, the Chamber pointed out that the existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide.[181]

As it was mentioned before, in the case of genocide, the judicial assessment of the *douls specialis* by the ad hoc tribunals begins by first examining the existence of a genocidal plan and the commission of genocide, and then inquiring into the genocidal intent of the accused, which is distinct but yet interrelated to that of the underlying plan.[182] The *douls specialis* of genocide necessitates that the intention to commit this crime be formed prior to the execution of genocidal acts, although the individual offences themselves do not require such premeditation.[183] Consequently, the execution of genocide involves two levels of intent: that of criminal enterprise as a collectivity and that of the participating individuals.[184] In such cases of joint participation, the intent to commit genocide must be discernible in the criminal act itself, apart from the intent of particular perpetrators.[185] The next step is to establish whether the accused shared the intention that genocide be carried out.[186] There will be no direct proof of genocidal intent in most cases, and so this must be inferred through circumstantial

[180]. *Prosecutor v. Kayishema* (Judgment) ICTR-95-1-T (21 May 1999)Para 91
[181]. Schabas(n 130 above)7
[182]. Bantekas and Nash(n29 above)360
[183]. *Prosecutor v. Kayishema* (n 180 above)
[184]. Bantekas and Nash(n28 above) 361-362
[185]. Ibid
[186]. *Prosecutor v. Krstic* (n179 above)Para. 549

evidence.[187] Bearing in mind this general approach of the Tribunals in proofing genocide, the next section discusses joint criminal enterprise (JCE) modes of liability in the ICTY and ICTR.

3.3.2.1 Joint Criminal Enterprise (JCE)

Since Tadic Appeal Case, wherein the International Criminal Tribunal for The Former Yugoslavia (ICTY) first spelled out the doctrine of joint criminal enterprise (JCE) as a modality of criminal liability, the same Tribunal and the ICTR have relied upon this doctrine. In this first time, it was enunciated in a case involving a low-level offender who had joined associates in a raid on a village as part of a campaign of ethnic cleansing.[188]

This joint criminal enterprise is considered as additional forms of criminal participation to the participation stipulated in Article 7(1) of the ICTY.[189] Although Article 7(1) does not explicitly provide for common purpose liability, the ICTY Appeals Chamber in the Tadic case established this form of liability was derived from customary law and could be inferred from the statute.[190] It is claimed that though the form of liability must be provided for in the ICTY Statute, it does not need to be explicit to come within the purview of the Tribunal's jurisdiction. [191] According to the ICTY, the fact that the ICTY

[187]. Bantekas and Nash(n28 above)362
[188]. *Prosecutor v. Tadic*(n 160 above)Para 232
[189]. Del Ponte (n152 above)1
[190]. *Prosecutor v. Tadic*(n 160 above) Para.190
[191]. Del Ponte(n152 above)5

Statute sets out in somewhat general terms the jurisdictional framework within which the Tribunal operates does not prevent the clarification and interpretation of the elements of individual forms of participation. Indeed, the Appeals Chamber has confirmed that participation in a JCE is a form of 'commission' under Article 7(1) of the Statute, whether or not the participant physically perpetrated the crime.[192]

The notion of JCE denotes a mode of criminal liability that appears particularly fit to cover the criminal liability of all participants in a common criminal plan.[193] The underlying rationale of a JCE, its core feature, is the combined, associated or common criminal purpose of the participants in the enterprise.[194] This notion is based on the assertion that in the case of collective criminality where several persons engage in the pursuit of a common criminal plan or design, all participants in this common plan or design may be held criminally liable for the perpetration of the criminal act, even if they have not materially participated in the commission of the said act. [195]

The Three Categories of Joint Criminal Enterprise (JCE)

[192].*Prosecutor v. Krnojelac*(Appeals Judgment)ICTY IT-97-25-A (17 September 2003)Para.73 : *Prosecutor v. Milutinovic* (Decision on Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise) ICTY IT-99-37-AR72 (May 21, 2003) Para. 18

[193]. Cassese(n141 above)

[194]. Kai Ambos, 'Joint Criminal Enterprise and Command Responsibility' (March 2007) 5(1) Journal of International Criminal Justice159, 4

[195]. Cassese(n142 above)2

The JCE doctrine actually encompasses three different forms of liability which were articulated in the Tadic Appeal case. In all three, the prosecution must show "*a plurality of persons*", "*the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the ICTY Statute*" and "*participation of the accused in the common design.*"[196] Consequently**,** the group requirements necessary for establishing JCE liability in the ICTY are minimal.

The first requirement, a plurality of persons may be satisfied by a relatively informal group. As the ICTY Appeals Chamber has stated, the plurality of persons "*need not be organized in a military, political, or administrative structure.*"[197] Thus, the plurality of persons element is satisfied when the prosecution proves that the group "*included the leaders of political bodies, the army, and the police who held power in a given area*" without a showing that persons in these disparate groups were acting together in an organized fashion.[198]

The second requirement, the existence of a common criminal purpose may be established even if that purpose was not "*previously arranged or formulated*."[199] In these cases, "*the*

[196]. *Prosecutor v. Tadic* (n 160 above) Para. 227
[197]. *Prosecutor v. Vasiljevic* (Judgment) ICTY IT-98-32-A (Feb. 25, 2004)Para. 100
[198]. *Prosecutor v. Stakic*(Judgment)ICTY IT-97-24-A(Mar, 22, 2006)Para. 69
[199]. *Prosecutor v. Vasiljevic*(n197 above)

purpose may materialize extemporaneously and be inferred from the facts."[200] Generally, no formal agreement is required to satisfy the common purpose element.[201]

Third, to be convicted of a crime by JCE, an individual must have participated in the JCE and have acted with the requisite mens rea.[202] A showing of minimal contribution to the group in question fulfills the participation requirement. As the Appeals Chamber has stated, "*once a participant in a joint criminal enterprise shares the intent of that enterprise, his participation may take the form of assistance or contribution with a view to carrying out the common plan or purpose.*" [203] Further, the presence of the accused when the crime is committed is not necessary to establish guilt in JCE liability.[204]

With regard to establishing intent for each type of JCE liability, the required showing of mens rea differs.[205] In discussing the mens rea element for murder as a war crime, an ICTY Trial Chamber in Stakic case maintained that in addition to shared intent *dolus eventualis* i.e. recklessness or advertent recklessness might also suffice to hold all participants in the common plan criminally liable.[206] In such forms of liabilities, all actors are culpable, even though the differing degrees of guilt may be taken into account at the

[200]. *Prosecutor v. Vasiljevic*(n197 above)
[201]. *Prosecutor v. Brdanin* (Appeal Judgment) ICTY IT-99-36-A (Apr. 3, 2007)Para. 417
[202]. Gibson (n89 above)5
[203]. *Prosecutor v. Krnojelac* (Judgment) ICTY IT-97-25-A (Sept. 17, 2003) Para. 81
[204]. Ibid
[205]. Gibson (n89 above)2
[206]. *Prosecutor v. Stakic* (Judgment) ICTY IT-97-24-T(31 July 2003)Para.587

stage of sentencing.[207] However, the Trial Chamber emphasizes that the concept of *dolus eventualis* does not include a standard of negligence or gross negligence.[208]

First Category Joint Criminal Enterprise (JCE I): Intent Element

The first mode of liability i.e. JCE I is sometimes called liability for a common intentional purpose to emphasize the fact that all participants shared the intent to commit the concerted crime, although only some of them may have physically perpetrated the crime.[209] Hence, this first category of JCE (JCE I) requires that there be a shared intent on the part of all members of the group to perpetrate a certain crime.[210] For this liability, the prosecution must prove that the perpetrator acted with "*the intent to perpetrate a certain crime.*"[211] In other words, the prosecutor must show that "*the accused ... voluntarily participated in one aspect of the common design*" *and* "the accused, even if not personally effecting the crime ... intended this result."[212]

An individual to be convicted under this first category of JCE ,it should be proven that he or she participates in that enterprise with a plurality of persons and has the specific intent to achieve a common criminal purpose. These facts can be inferred from the

[207]. Cassese(n141 above) 2
[208]. *Prosecutor v. Stakic*(n 206 above)
[209]. Cassese(n141 above) 2
[210]. *Prosecutor v. Tadic*(n 160 above)Para 228
[211]. Ibid
[212]. Ibid Para 196

following cases. In 2001, in *Krstic* case, an ICTY Trial Chamber held that the defendant had participated in a JCE to commit genocide. In this case, the Court explained at length that initially Krstic had only taken part in a common plan to expel forcibly Muslims from the area of Srebrenica. However, later on, when it became apparent that various military leaders in fact were planning the killing of thousands of military-aged men, the defendant showed, through his various acts and behavior, that he shared the genocidal intent to kill the men. The Chamber, therefore, found Krstic guilty of genocide and sentenced him to 46 years in prison.[213] The Appeals Chamber held instead that Krstic was only guilty of complicity in genocide, for he had not shared the genocidal intent but simply aided and abetted genocide. As a result, it reduced his sentence to 35 years' imprisonment.[214]

Based upon the ICTY's JCE jurisprudence, the ICTR appeal chamber had found that JCE might also be used at the ICTR.[215] Likewise, in another case where the prosecution had similarly charged Mpambara with JCE to commit genocide and extermination, an ICTR Trial Chamber held instead that no proof beyond a reasonable doubt had been tendered that the accused possessed the intent to be part of a JCE. It consequently acquitted him on all counts of the indictment.[216] On the other hand, in *Simba* case, in 2005, an ICTR Trial

[213]. *Prosecutor v. Krstic* (Judgment) ICTY IT-98-33-T (2 August 2001)Para. 621-645
[214]. Cassese(n141 above)8
[215]. *Prosecutor v. Ntakirutimana* (Appeal Judgment)ICTR IT-96-10-A(Dec.13,2004))Para.468
[216]. *Prosecutor v. Mpambara* (Judgment) ICTR IT-01-65 (11 September 2006),Para.13-14, 38-40, 76, 113, 164

Chamber held that the accused was guilty of JCE to commit genocide and extermination.[217]

In sum, under this first form of JCE liability**,** an individual defendant may be held responsible for the actions of a JCE if he participates in that enterprise with a plurality of persons and has the specific intent to achieve a common purpose that violates the ICTY and ICTR Statutes.

Second Category Joint Criminal Enterprise (JCE II): Intent Element

The second category of JCE relates to "systems of ill-treatment," primarily concentration camps which is alternatively named as participation in an institutionalized common criminal plan.[218] This form of JCE liability is recognized when an individual holds a position of authority in a military or administrative unit and participates in some way in an organized system of criminality perpetrated by that unit.[219] The modality of liability in this category is that of responsibility for carrying out a task within a criminal design that is implemented in an institutional framework such as detention or a concentration camp. For instance, according to this mode, in an internment camp where inmates are severely ill-treated and even tortured, not only the head of the camp, but also his senior aids and

[217]. *Prosecutor v. Simba* (Judgment)ICTR-01-76 (13 December 2005)Para.386-396, 411-419, 420-426
[218]. Cassese(n141 above)3
[219]. *Prosecutor v. Tadic*(n 160 above)Para 202

those who physically inflict torture and other inhuman treatment are responsible.[220] Similarly, those who discharge administrative duties such as registering the incoming inmates, recording their death, giving them medical treatment or providing them with food are responsible as they are indispensable for the achievement of the camp's main goals.[221]

In the second form of JCE liability, the accused must have "*personal knowledge of the system of ill-treatment*" and "*intend to further this common concerted system of ill-treatment.*"[222] In general for this mode of liability no previous plan or agreement, a formal or informal, is required.[223] Hence, it differ from the first kind of JCE in that the latter needs at least prior informal agreement. In the second category of JCE, the participants bear responsibility so long as they were aware of the serious abuses being perpetrated i.e. knowledge and willingly take part in the functioning of the institution.[224] It is argued that if those persons want to avoid criminal responsibility, they should have asked to be relieved of their duties and to discharge other duties elsewhere. This kind of decision was possible and was sometimes made; although, it involved, of course, being sent to dangerous zones.[225] So in effect, these persons are made criminally liable for not taking the necessary action for avoiding criminal responsibility. However, Cassese

[220]. Cassese(n141 above) 3
[221]. Ibid
[222]. *Prosecutor v. Tadic*(n 160 above)Para 228
[223]. *Prosecutor v. Krnojelac* (Appeal judgment) ICTY IT -97-25-A (Sept17,2003)) Para. 96
[224]. Cassese (n141 above)3
[225]. Ibid

claimed that exceptions of this mode of criminal liability are made for those who, for example, merely sweep the streets or clean the laundry, for they do not make a considerable contribution to implementing the common criminal purpose.[226] Therefore, it can be concluded that in the first and second categories, all members of the JCE may be found criminally responsible for all crimes committed that fall within the common design.

Third Category Joint Criminal Enterprise (JCE III): Intent Element

In contrast to the one and two categories, the third category of JCE involves criminal act that fall outside the common design.[227] This mode of liability only arises if the participant, who did not have the intent to commit the 'incidental' offence, was nevertheless in a position to foresee its commission and willingly took the risk. Cassese referred this kind of responsibility as incidental criminal liability based on foresight and voluntary assumption of risk.[228] This form of liability was illustrated by the facts in Tadic case, in which the accused was found guilty under JCE III liability for the murder of five men. Despite the absence of proof that Tadic physically participated in the killings, his guilt was based on his membership in a group of armed men that had the common criminal purpose to rid the Prijedor region of non-Serbs, the forseability of the killings in

[226]. Cassese (n141 above)3
[227]. Danner and Martinez (n34 above)106
[228]. Cassese (n141 above)3

light of this purpose and his willing participation in the plan despite his awareness of the risk that the killings would take place. [229]

The appeal chamber did not clearly specify the criterion by which the forseeability component of this category should be assessed i.e. objectively or subjectively. Danner and Martinez stress that the distinction seems unimportant since proving subjective foreseeability is difficult.[230] One scholar asserts that the requirement in this case is not that the secondary offender actually foresaw the criminal conduct likely to be taken by the primary offender; the test is rather whether a man of reasonable prudence would have foreseen that conduct under the circumstances prevailing at the time.[231] In other words, the defendant could be convicted even for crimes he did not himself foresee. Hence, in view of the above, the requirement is objective foreseeability. Indeed, some chambers have interpreted foreseeable to mean "objectively foreseeable". For instance, one ICTR Trial Chamber has suggested that the accused may be responsible for crimes that were objectively foreseeable, even if he did not himself foresee them.[232]

Thus, the third category allows the conviction of an individual who did not actually intend for the crime to be committed or have actual knowledge that his or her accomplices would commit it. Contrary to this Tribunals approach, commentators and

[229]. *Prosecutor v. Tadic*(n 160 above)Para 232
[230]. Danner and Martinez (n34 above)106
[231]. Cassese (n141 above)3
[232]. *Prosecutor v. Kayishema* (Judgment) ICTR-95-1-T (May 21, 1999) Para. 203-04

defense attorneys have noted these interpretations lower the mental state required for culpability to recklessness, or in the case of the "objective foreseeability" test, to negligence.[233] Moreover, the Association of Defence Attorneys at the ICTY has criticized the doctrine as too broad and "*susceptible to overreaching and abuse.*"[234] In fact, the objective forseeability test is contrary to the personal culpability principle because the person is convicted for crimes he did not foresee. This means he is probably made criminally liable for his negligence.

In Brdanin in 2004, the ICTY Chamber noted that for both I and III categories of JCE to materialize, a proof that one or more participants in such common plan had perpetrated the crimes was required in addition to the existence of a common criminal plan. However, in the above case, members of the army, police and paramilitary groups that had not participated in the criminal plan or enterprise had committed the crimes.[235] For this reason, the Chamber dismissed the applicability of the notion of JCE to the crimes at issue. In support of this ruling, Cassese asserts extending criminal liability to instances where there was no agreement or common plan between the perpetrators and those who participated in the common plan would seem to broaden the notion excessively, which is always premised on the sharing of a criminal intent by all those who take part in the common enterprise.[236] The consequence of such a decision was to confine the doctrine to

[233]. Turner(n170 above)
[234]. Ibid
[235]. *Prosecutor v. Brdanin* (Judgment) ICTY IT-99-36-T (September 2004)Para.345
[236]. Cassese (n141 above)8

small groups and to exclude its relevance to large-scale criminal plans in which the primary perpetrator may even be ignorant of the overall intentions of the leaders and organizers.[237]

Nevertheless, the Appeals Chamber reversed the legal findings of the Trial Chamber, thereby holding that joint criminal enterprise was applicable not only to small cases but to large-scale criminal enterprises involving primary perpetrators or offenders who are personally outside of the common plan.[238] Referring to two post-Second World War cases, the Appeals Chamber asserted that it found strong support for the imposition of criminal liability upon an accused for participation in a common criminal purpose "*where the conduct that comprises the criminal actus reus is perpetrated by persons who do not share the common purpose.*" There is no requirement of proof "*that there was an understanding or an agreement to commit that particular crime between the accused and the principal perpetrator of the crime*."[239] It further declares that for these types of JCE, "*what matters ... is not whether the person who carried out the actus reus of a particular crime is a member of the JCE, but whether the crime in question forms a part of the common purpose*." [240]

[237]. Cassese (n141 above)8
[238]. *Prosecutor v. Brdanin* (n235 above) Para.355-356
[239]. *Prosecutor v. Brdanin* (n201 above)Para. 394
[240]. Ibid Para. 410

However, when holding members of a JCE responsible for crimes committed by outsiders, "*it has to be shown that the crime can be imputed to one member of the joint criminal enterprise, and that this member - when using a principal perpetrator - acted in accordance with the common plan.*"[241] This means, according to the Appeal Chamber, JCE liability is possible when JCE members use non-members as "tools" to effectuate the common plan, as long as there is direct link between at least one JCE member and the physical perpetrator. The Appeal Chamber in this case did not discuss in-depth the nature of the relationship between the physical perpetrator and one member of the JCE necessary to impute liability throughout the JCE, stating that such a determination involves a "case-by-case" analysis. Thus, it is now established that the joint criminal enterprise theory applies to large-scale atrocity crimes.[242]

Indeed, those crimes like genocide and crimes against humanity will involve leaders who apply policies, even if those who actually carry them out are unwitting participants.[243] Under JCE doctrine, establishing mens rea requires two components. The first one is "Was there a policy"? then, "Did the perpetrator know of the policy and act with the intent to further it?" the so-called gravity threshold is also of some relevance.[244] Thus, the extent of knowledge of the details of a plan or a policy to carry out the crime of genocide would vary depending on the position of the perpetrator in the governmental hierarchy or

[241]. *Prosecutor v. Brdanin* (n201 above)Para. 413
[242]. Schabas(n 130 above)15
[243]. Ibid
[244]. Ibid

the military command structure. This, however, does not mean that a subordinate who actually carries out the plan or policy cannot be held responsible for the crime of genocide simply because he did not possess the same degree of information concerning the overall plan or policy as his superiors.[245] Hence, the definition of the crime of genocide or crimes against humanity requires a degree of knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail of a broad plan or policy of genocide.[246] In sum, according to this theory, the individual who knows of the policy and intends to further it should be convicted of genocide.

Debates on Joint Criminal Enterprise Form of Liability

Application of Joint Criminal Enterprise in ICTY and ICTR has been very controversial for many reasons. The main debates on this form of liability are based on its possible conflict with the individual criminal responsibility principle and on claim that it is equivalent to collective criminal responsibility based on mere membership.

The common purpose element is alleged to be the collective element of the JCE doctrine and turns it into a theory of collective responsibility based on an institutional-participatory or systemic model of responsibility.[247] Consequently, the doctrine

[245]. Schabas(n 130 above)15
[246]. Ibid 7
[247]. Ambos(n 194 above)4

resembles the law of conspiracy[248] and the membership or organizational liability applied in Nuremberg.[249] In view of the above, the similarity is most obvious in JCE III since in this case a participant in a JCE can even be responsible for crimes of other participants not explicitly agreed upon beforehand if they are merely foreseeable.[250] Thus, his liability is essentially based on his membership in the group pursuing the JCE.

In fact, category three of JCE is controversial because it allows the prosecution to impute criminal liability to individuals for crimes they neither committed nor knew were taking place. Many national systems do not recognize the liability of participants in a common plan for crimes that fall outside the scope of the common objective.[251] Even in the few countries that accept liability for crimes that fall outside the scope of the common plan, such liability has often been criticized as guilt by association.[252] Seeking to preempt such critics on the doctrine, the Appeals Chamber of ICTY expressly stated that liability stemming from participation in a joint criminal enterprise is not tantamount to guilt by association. The Chamber distinguished JCE liability from liability based merely on membership in a criminal organization, pointing out that JCE involves participation in the crime committed by a group as opposed to mere membership in that group. [253]

[248]. Danner and Martinez (n34 above) 118-119
[249]. Ambos (n194 above)4
[250]. Ibid
[251]. Danner and Martinez (n34 above)109
[252]. Ibid
[253]. *Prosecutor v. Milutinovic* (n192 above)Para.26

The ICTY appeal Chamber has also rejected the arguments that joint criminal enterprise amounts to conspiracy.[254] Indeed, unlike joint criminal enterprise liability, conspiracy establishes liability without necessary proof that others committed some underlying offense. Further, the Tribunal emphasized that guilt by association charge would de-legitimize a principle of criminal law and completely rejected the notion of guilt by association in that membership in an organization does not provide jurisdiction to the Tribunal.[255] The same Tribunal then reaffirmed the importance of respecting the basic criminal law principle of individual culpability, i.e. criminal punishment must be based on individual wrongdoing: stating that "*nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (nulla poena sine culpa).*"[256]

Even though JCE liability contains this participation element that helps distance it from guilt by association, Danner and Martinez argue that where an alleged JCE is very wide in scope, it may become at least theoretically possible to assign criminal liability to low-level members of the JCE for the full array of crimes perpetrated by the enterprise.[257] In light of the dangers of an over-expansive JCE doctrine, efforts to limit the scope of the doctrine have been made within the ICTY. In support of this, Cassese argued that the ICTY cases that address the scope of JCE liability evidence a concern on the part of the

[254]. Danner and Martinez (n34 above)109
[255]. Report of The Secretary General pursuant to paragraph 2 of Security Council Resolution 808(Feb 22, 1993), UN Doc.S/25704, Para. 56
[256]. *Prosecutor v. Tadic* (n160 above)Para. 186
[257]. Danner and Martinez (n34 above) 51-52

Judges of the Tribunal that the doctrine not become over-expansive and thereby exceed acceptable and legitimate bounds of individual criminal liability.[258]

3.3.3 Conclusions on the ICTY and ICTR Jurisprudence in Attributing Collective Criminal Responsibility: Joint Criminal Enterprise

The JCE form of liability was not explicitly provided in the ICTY and ICTR Statutes. However, the ICTY chamber in the Tadic case holds that this form of liability could be inferred from its Statute and was also derived from customary law. After the Tadic case, the ICTY and the ICTR relied on this doctrine for deciding cases.

The notion of JCE signifies a mode of criminal liability that covers the criminal liability of all participants in a common criminal plan. This notion encompasses three different forms of liability that were articulated in the Tadic Appeal case. In all three, the prosecution must show a plurality of persons, the existence of a common plan that involves the commission of a crime provided for in the ICTY/ICTR Statutes and participation of the accused in the common design. A relatively informal group may satisfy the first requirement, a plurality of persons. The second requirement, the existence of a common criminal purpose may be established even if that purpose was not formulated before the commission of the crimes.

[258].Cassese (n141 above)8

For conviction under all the three forms of liabilities, an individual must at least have made little contribution in the commission of the crime with the required intent. The mental elements of all the three categories are different. In general, in the first and second categories, all members of the JCE may be found criminally responsible for all crimes committed that fall within the common design. In contrast, the third category allows the conviction of an individual who did not actually intend for the crime to be committed or have actual knowledge that his or her accomplices would commit it.

The application of this form of liability in the two ad hoc international tribunals has been very controversial for many reasons. One of the major reasons is that the Statutes of these Tribunals do not explicitly lay down this form of liability. The other claim is JCE liability amounts to guilt by association alone. However, the ICTY justified its use of the JCE by holding that unlike guilt by mere membership, JCE forms of liability needs some form of participation in the commission of the crime.

CHAPTER FOUR: THE ETHIOPIAN COURTS APPROACH FOR ATTRIBUTING COLLECTIVE CRIMINAL RESPONSIBILITY FOR THE DERG MEMBERS IN THE CASE OF SPECIAL PROSECUTOR V. COLONEL MENGISTU HAILEMARIAM ET AL

4.1. Introduction

This chapter, as well as the whole paper, focuses on the Special Prosecutor v. Colonel Mengistu Hailemariam et al i.e. a case against members of the erstwhile Derg government. Special Prosecutor v. Colonel Mengistu Hailemariam et al is one of the Red Terror Trials[1] that have been carried out all over the country. This trial was unique in African Continent as it was brought before a national court against a whole regime for atrocities committed while in power.[2]

In Special Prosecutor v. Colonel Mengistu Hailemariam et al, the defendants, among other crimes, were charged for genocide[3] under Article 281 of the Ethiopian Penal Code of 1957 as well as for provocation and preparation to commit genocide under Article 286

[1]. The massacre that was carried out in the form of a concerted campaign from 1977 until 1980 come to be known as "Red Terror". The trials on former Derg Officials are named after it and collectively known as 'Red Terror' Trials and the charges cover those crimes allegedly carried out by Derg officials during the Derg stay in power.

[2]. Firew Kebede Tiba, 'The Mengistu Genocide Trial in Ethiopia' (2007) 5 Journal of International Criminal Justice 513

[3]. Even if Article 281 of the Ethiopian Penal Code of 1957 incorporates genocide and crimes against humanity, the indictment only stated that the defendants were accused of genocide. See Amended Charge of December 2,2002 ,*Special Prosecutor v. Colonel Mengistu Hailemariam et al*.,

of the same Code. On this trial, fifty-four of the defendants were convicted for the charges of genocide and for provocation and preparation to commit genocide while one defendant was acquitted of all the charges.[4]

This chapter has two interrelated objectives: to investigate the reasoning of the Ethiopian High Court and Supreme Court for the convictions and the acquittal and as well to explore in depth the major issues linked to the approaches of the Courts in attributing collective criminal responsibility for the commission of genocide. Accordingly, the perspectives of the defendants and the SPO have been entertained. With these purposes in mind , the discussion in this chapter provides; a brief overview of the background to the Red Terror Trials; criminal responsibility under the 1957 Ethiopian Penal Code; summary of the charges on the commission of genocide and public provocation and preparation to commit genocide in the trial of Special Prosecutor v. Colonel Mengistu Hailemariam et al. Particularly, it offers an in depth discussion of issues of criminal responsibility in the trial and the Court's reasoning to reach to the final outcome.

4.2. Background to the Red Terror Trials

The Derg was overthrown on 8 May 1991 by the Ethiopian People's Revolutionary Democratic Front (EPRDF) at the culmination of 17 years of brutal human rights

[4]. *Special Prosecutor v. Colonel Mengistu Hailemariam et al.* ,First Division Criminal Bench, Verdict, (Judges Medhin Kiros, Nuru Seid and Solomon Emeru, File No.1/87,December 12,2006, Pp. 459-467

violations marked by terror and violence.[5] Shortly before the regime was toppled down by a coalition of rebels, in 1991 Colonel Mengistu Hailemariam fled to Zimbabwe. In 1992, the Transitional Government decided to bring Colonel Mengistu Hailemariam and his accomplices to trial for crimes committed during the Derg Regime.

4.2.1 Establishment of the Special Prosecutor Office (SPO)

Upon the establishment of the Transitional Government of Ethiopia, the Special Prosecutor's Office was established in August 1992 with the power "*to conduct investigations and institute proceedings in respect of any person having committed or responsible for the commission of an offence by abusing his position in the party, the government or mass organization under the Derg-WPE regime.*"[6] The task of creating a historical record of the abuses of the past was also assigned to the office.[7]

[5]. Girmachew A. Aneme, 'Apology and Trials: The Case of the Red Terror Trials in Ethiopia'(2006) 6(1) African Human Right Law Journal 67

[6]. Proclamation No.22/1992, The Proclamation for the Establishment of the Special Prosecutor's Office, ,Negarit Gazeta, No 18,1992 ,Addis Ababa, art. 6

[7]. Ibid Preamble

4.2.2 Types of Defendants in the Red Terror Trials

The SPO grouped the defendants "*according to their level of responsibility and the sphere of activity in which they were primarily engaged*."[8] For this task, the SPO designed a judicial strategy of grouping the alleged offenders into three categories.[9] These are:

-*The policy makers*: those who deliberated and designed the plan of genocide and other human right violations (senior government officials and military commanders i.e. top commanders and administrators, heads of police and security forces)

-*The field commanders*: those who were instrumental in the implementation of the plan by transmitting orders from the policy makers to the material offenders including their additional orders (investigation departments, mass organizations, committee of revolutionary guards)

-*the material offenders*: those involved in the material commission of the crimes in line with the nation wide plan (members of the revolutionary guard, death squads, members of Special Forces)[10]

[8]. Julie A. Mayfield, 'The Prosecution of War Crimes and Respect for Human Rights: Ethiopia's Balancing Act'(1995) 9(2) Emory International Law Review 567

[9]. Dadimos Haile, 'Accountability for Crimes of the Past and the Challenges of Criminal Prosecution: The Case of Ethiopia' (2000)Leuven Law Series 27

[10]. Aneme (n5 above)

According to the above categories, the first group is consisted of policy and decision makers. These individuals i.e. the policy makers, senior government officials and military officials, constitute the first group of detainees to be charged.[11] Thus, this part of the prosecution i.e. against policy makers resembled the approaches taken by the ICTR /ICTY and the IMT at Nuremberg as these latter trials also focused on policy makers. Besides the policy makers, the Ethiopian trials have two other groups of defendants. These last two groups were defined by the SPO, respectively, as military and civilian field commanders who carried out some orders as well as passed order down of their own ; and the individuals who actually carried out many of the brutal and deadly orders i.e. directly responsible for committing the alleged crimes.[12]

4.2.3 Types of Indicted Crimes and Number of Defendants in the Red Terror Trials

The charges brought against the defendants in the Red Terror trials include genocide and crimes against humanity, torture, murder, unlawful detention, rape, forced disappearances, abuse of power and war crimes.[13] The SPO's first indictment was filed in 1994 while the suspects have been in custody since 1991.[14] The SPO filed the first charges against 73 members of the Derg in 1994, and it filed charges against a total of

[11]. Mayfield(n8 above)
[12]. Haile (n9 above)
[13]. Aneme (n5 above)76
[14]. Tiba(n2 above)514

5198 public and military officials of the Derg government in 1997.[15] From the 5198 defendants, 2952 were charged in absentia and 2246 were charged in detention.[16]

The following section discusses the criminal responsibility provisions of the 1957 Ethiopian Penal Code on which this Special Prosecutor v. Colonel Mengistu Hailemariam et al trial was based.

4.3. Criminal Responsibility under Article 32 of the 1957 Ethiopian Penal Code

The Special Prosecutor v. Colonel Mengistu Hailemariam et al in particular and the Red Terror Trials in general were based on the provisions of the 1957 Penal Code.[17] The exception to this approach was where the provisions of the 2004 Criminal Code have been found more favorable to the defendants pursuant to the non-retrospective effect of criminal law that is stated in Article 6 of the same Criminal Code.[18]

Accordingly, the indictments as well as the Federal High Court and Supreme Court judgments on Special Prosecutor v. Colonel Mengistu Hailemariam et al case were

[15].Aneme (n5 above)76
[16].Ibid
[17].Frode Elgesem and Girmachew Alemu Aneme , 'The Rights of the Accused: A Human Rights Appraisal' in Kjetil Tronvoll and others, *The Ethiopian Red Terror Trials: Transitional Justice Challenged* (Indiana University Press, US 2009) 36, See also Proclamation No.1/57 ,Penal Code of the Empire of Ethiopia, Negarit Gazeta Extraordinary Issue,No.1,1957,Addis Ababa
[18].Ibid ,See also Proclamation No.414/2004,The Criminal Code of The Federal Democratic Republic of Ethiopia, Negarit Gazeta,No.414,2004,Addis Ababa, art. 5 and 6

based on the 1957 Penal Code. Specifically, the indictment and the judgment in Special Prosecutor v. Colonel Mengistu Hailemariam et al applied, from the general part of the Penal Code of 1957, Article 32(1) (b) for the commission of genocide and Article 32(1) (a) for public provocation and preparation to commit genocide. For this reason, this part is devoted to analyzing this specific criminal responsibility provision of the 1957 Penal Code.

Article 32 is concerned with participation in ordinary offences as a principal actor. According to this article, principal participation may take in any of the three forms stipulated in its sub-articles. According to article 32(1) (a), a person is deemed to act in a principal capacity when he/she does or omits to do an act which is a material ingredient of an offence. This commission of the crime could be made directly by the person or indirectly, for example, by means of an animal or a natural force. In this case, the person is deemed to take part in the actual carrying out of the crime or criminal design directly by him or indirectly through other means. According to Article 32(1) (c), a person would be regarded as a principal offender when he utilizes a mentally deficient person for the commission of an offense or knowingly force another person to commit an offense.

Most importantly, Article 32(1) (b) provides for another form of principal participation on which the charges and the judgment in Special Prosecutor v. Colonel Mengistu Hailemariam et al were based. According to this article 32 (1) (b) a person is deemed to act in a principal capacity when he fully associates himself with the commission and

intended result of an offense, though he plays no part in the performance of the act constituting the offence. That means it is not a requirement for the person to take part in the actual carrying out of the criminal design for such kind of criminal responsibility.

Hence, the above sub article extends the notion of principal participation to the so-called moral offenders who usually called "master minds".[19] The assessment for this principal participation lies in the full association between the moral offender and both the commission of the offense and the intended result.[20] The moral offender, even though he takes no part in the material perpetration of the offense, commits the offense in the sense that he fully sides with the material offender and adopts as his own the offence and the desired result. This means this kind of participation has two elements. First, he/she fully sides with the material offender and accepts the offence as his/her own. Second, such full association with the material offender of the offence should be accompanied by an intention to have the desired result. Consequently, a court of law should require the proof of both elements i.e. intention and full association with the material perpetrator of the offense to hold an individual liable under this form of participation in the commission of a crime.

[19].Philippe Graven, *An Introduction to Ethiopian Penal Law* (Haile Sellasssie I University, Addis Ababa Ethiopia 1965)94
[20].Ibid

4.4. The Trial of Special Prosecutor v. Colonel Mengistu Hailemariam et al

The Trial of Special Prosecutor v. Colonel Mengistu Hailemariam et al was started in the Central High Court in October 1994.[21] The Trial included 73 high-ranking officials of the Derg government. All of the seventy three Derg Officials in this Trial were charged for provocation and preparation under article 286(a) and the commission of genocide under article 281(a) and(c) of the 1957 Penal Code of Ethiopia. The following subsections provide review of these two charges i.e. public provocation and preparation to commit genocide, and commission of genocide that are the core of this paper.

4.4.1 Public Provocation and Preparation for the Commission of Genocide: A Charge under Article 286(a) and Article 32(1) (a) of the Ethiopian Penal Code of 1957

All of the of the defendants were charged as a principal offender for provocation and preparation under Article 32(1)(a) and Article 286(a) of the Ethiopian Penal Code of 1957.[22] Girmachew A. Aneme has summarized this charge as:

> *All the defendants were accused of causing the death of thousands of members of different political groups in Addis Ababa and throughout the country,which they labeled as 'anti-people' and 'reactionary', by arming and organizing leaders of Kebeles, Revolutionary Guards, Cadres and*

[21]. Girmachew A. Aneme, 'The Anatomy of Special Prosecutor v. Colonel Mengistu Hailemariam et al.(1994-2008)' (2009) 6 (1 and 2)International Journal of Ethiopian Studies 3

[22] .Amended Charge of December 2,2002 ,*Special Prosecutor v. Colonel Mengistu Hailemariam et al*., 6-7

> *'revolutionary comrades' as well as inciting and openly calling for the destruction of members of political groups through public speech, pictures and writings in the public media and in various public meetings on different dates and months from 1975 to 1983.*[23]

This charge, from its face, seems all were participated in provoking and preparing for the commission of genocide. This charge against the defendants alleged participations in the commission of the crimes as principal offenders. In other words, all the defendants i.e. a group of individuals, were accused for actually committing provocation and preparation for the commission of genocide since article 32(1) (a) of the 1957 Penal Code is about actually committing a material ingredient of an offence.[24] In fact, a group of individuals can be charged under this article if all of them materially carry out an offence, directly or indirectly. In this case, each of these individuals were considered to be involved in the commission of the crime under the same capacity.[25]

According to Article 34 of the 1957 Penal Code, when a group of persons commits an offense, the person who is proved to have taken no part in the commission of the offense shall not be punished. This confirms that punishment is individual and is based on individual participation in the commission of a crime. Therefore, for conviction to lie against all these individuals, the participation of each in the commission of provocation and preparation should be proved. Thus, section 4.5.1 of this chapter will analyze if the Federal High Court used this meaning of the law for its decisions on this charge.

---

[23]. Aneme(n21 above)3-4
[24] .Graven(n19 above) 93-94
[25]. Ibid 93

4.4.2 Commission of Genocide: A Charge under Article 281(a) and(c) and Article 32(1) (b) of the Ethiopian Penal Code of 1957

Under this charge, all the seventy-three defendants were charged as principal offenders under Article 32(1) (b) for the commission of genocide pursuant to article 281(a) and (c) of the Ethiopian Penal Code of 1957.This charge for the commission of genocide has been put by Girmachew A. Aneme as follows:

> *All the defendants established the Provisional Military Administration Council or Government as of September 2,1974 and organized themselves into a General Assembly, Standing Committee and Sub-Committees and while administrating the country solely and collectively, committed or caused to be committed killings, bodily harm or serious injury to the physical and mental health of members of political groups as well as displacement calculated to result in death and disappearance of members of political groups with intent to destroy in whole or in part political groups in violation of the provisions of Articles 32(1)(b) and 281(a) and (c) of the Penal Code by making plans and passing decisions, by establishing various institutions as well as hit squads and the 'Nebelbal' militia for investigating ,torturing and killing members of political groups, and by organizing and carrying out ferreting-out campaigns, summary executions and the Red Terror against members of political groups.*[26]

Under this charge all the defendants were charged for three different offenses under article 281(a) and (c) of the 1957 Penal Code. The charges were killings; placing under living conditions calculated to result in death and disappearances, and bodily harm and serious injury to the physical or mental health of members of opposition political

[26]. Aneme(n21 above)4

groups.[27] The number of individual victims under this charge for all the defendants was 409. Moreover, this indictment added 1,593 individuals who were allegedly killed by the order of the twelve defendants who were members of the Derg Standing Committee.[28]

The SPO presented alternative charges based on article 522 for aggravated homicide and based on article 538 for grave willful injury for all of the charges. These alternative charges were brought by the SPO to avoid proofing the special intent of the defendants for destroying the whole or part of opposition political groups pursuant to Article 281 of the 1957 Penal Code.[29]

All the defendants were indicted under this charge not for the material commission of the acts. Instead, they were accused for their full association with the killings, bodily harm and serious injury to the physical or mental health, and for placing under living conditions calculated to result in death and disappearances of the victims in this charge in accordance with Article 32(1) (b) of the 1957 Penal Code. This form of principal participation in the commission of an offence requires full association with the material offender of an offense and having the intended result in mind.[30] Hence, the SPO had to show that each defendant was fully associated with material offender/s of genocide and

[27]. Aneme(n21 above)6, For further detail see the 'Anatomy' of this charge and the whole Trial of Special Prosecutor v. Colonel Mengistu Hailemariam et al. in this writer Article of the Journal
[28]. Ibid 5
[29].Yacob Hailemariam, 'The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court'(1999) 22(4) Hastings International and Comparative Law Review 667,718
[30].Graven(n19 above)94

intended the results. In other words, the evidences of SPO had to show beyond reasonable doubt that all the defendants fully associate themselves with the actual commission of genocide with the intention of destroying opposition political groups. Hence, the High Court ruling on each defendant in this charge should be based on the finding of the ingredients of this form of participation and the special intent for the commission of genocide. Section 4.5.2 of this chapter will look at whether the High Court ruling was based on the finding of these elements of the charge in consonant with article 281(a)and(c) and article 32(1)(b) of the 1957 Ethiopian Penal Code .

4.4.3. Preliminary Objections

The defendants in their preliminary objection raised a variety of issues.[31] Especially, they claimed that some of the limitations of the indictments have prevented them from properly defending themselves against the charges. Two of these preliminary objections were; the lack of specificity and improper organization of the charges.[32]

The defendants raised many related issues under the two preliminary objections. For instance, they argued that the charges did not spell out the kind of individual participation

[31]. For the details of Preliminary objections, See Aneme(n21 above) 6-18

[32].*Special Prosecutor v. Colonel Mengistu Hailemariam et al*., Central High Court of the Transitional Government, (Judges: Desalgne Alemu Kibret, Girma Tilahun and Tegene Getaneh)File No.1/87,Rulings on Preliminary Objections,8 October 1995 ,Pp. 29-31, 103-104,112-115

in the commission of the offences.[33] The defense argued the charges did not specify the exact role and position of the individuals in the different committees of the Derg. In particular, it was argued by the defendant that the charges failed to show the chain of responsibility of the defendants in accordance with Article 40, 69, 70(1) of the 1957 Penal Code.[34] In fact, the accusations in the charges were solely based on the defendants' membership in the Provisional Military Council or Government. Thus, their individual roles in the Derg were not indicated though the charge claimed exceptionally that the first twelve defendants were members of the Standing Committee of the Derg. Accordingly, the defense alleged the above omission on indicating the defendants' individual roles would not enable to defend properly the charges based on chain of responsibility.[35] As a result, the defense claimed that the accused would not be able to defend the charges properly.

In relation to the organization of the charges, the defense argued that the simultaneous reference of sub articles (a) and (b) of Article 32(1) of the 1957 Penal Code for the same acts of the charges was incorrect. The reason for this claim is that sub-article (a) of Article 32(1) is concerned with direct or indirect participation in the commission of a crime while sub-article (b) is concerned with association with out direct or indirect

[33].*Special Prosecutor v. Colonel Mengistu Hailemariam et al*., Rulings on Preliminary Objections,8 October 1995 (n32 above)103
[34]. Ibid 28
[35]. Ibid

participation.[36] They argued that the types of participation by way of the two sub-articles are different and an individual cannot participate in both ways simultaneously in a criminal act.[37]

The Court, after hearing the Special Prosecutor's reply on the preliminary objections passed its rulings on the preliminary objections.[38] First in relation to the specificity of the charges, the Court reasoned that the subsequent proceedings of the trial will reveal the details of the charge. Second, in relation to the combination of Article 32(1) sub articles (a) and (b), the Court ruled that Article 32(1) sub-articles (a) and (b) of the 1957 Penal Code should have not been joined in the charges. Here the Court rightly reasoned that a defendant could not perform an offence at the same time under the two different forms of participation in these two sub articles of Article 32 of the 1957 Ethiopian Penal Code.

After no defendants who were presented in Court pleaded guilty, the Special Prosecutor was ordered by the Court to present its evidences on the charges.[39] After hearing the evidences presented by the Special Prosecutor, the Court ruled the collective criminal responsibility of fifty-four of the defendants for the charge of provocation and preparation for the commission of genocide and for the charge on the commission of

[36]. Ibid 113
[37]. *Special Prosecutor v. Colonel Mengistu Hailemariam et al*., Rulings on Preliminary Objections, 8 October 1995 (n32 above) 113
[38]. Ibid 70-120
[39]. Aneme (n21 above)18

genocide. The subsequent part of the paper discusses the Court's reasoning for collective criminal responsibility of the defendants who were all members of the Derg.

4.5. Collective Responsibility of the Derg Members in Special Prosecutor v. Colonel Mengistu Hailemariam et al

Upon the Court instruction, the Special Prosecutor Office presented a huge collection of visual, audio, and documentary evidences.[40] Besides, the SPO brought over seven hundred witnesses in support of the charges.[41] The evidences presented by the SPO for the provocation and preparation and commission of genocide charges are generally fall into three categories; evidence to prove that defendants made provocation and preparation to commit genocide ; evidence to prove that that the defendants committed genocide based on a plan and after setting up agencies to execute this plan as stipulated in the genocide charge ; and evidence to support each count of the genocide charge.[42] The High Court examined these evidences and ruled whether the defendants had a case to answer.[43]

[40]. Aneme (n21 above)18
[41] .Ibid
[42] .Ibid
[43]. Ibid

4.5.1 Collective Responsibility of the Derg Members for the Charge of Public Provocation and Preparation for the Commission of Genocide under Article 286(a) and Article 32(1) (a) of the 1957 Penal Code

Under this charge, the Court looked at the speeches on public media and operations made by members of the Derg for provoking and preparing the Ethiopian people for the extermination of political groups.[44] According to the Court, these preparations and provocations were made through public speeches and different operations.[45] The Court after examining the various speeches to the public made by the members of the Derg ruled that the Derg used to express its plan of destroying members of opposition political groups to the Ethiopian people. Moreover, according to the Court, the Derg had solicited the Ethiopian people for lending a hand for the concerted actions of destroying members of opposition political groups.[46]

According to the Court**,** one of the core public speeches was made on behalf of the Derg by Major Leggesse Asfaw on an Oath Taking Program in the Addis Ababa Council for inciting and calling the people to unite for destroying the political groups opposed to the Derg.[47] According to the Court, these various public speeches were made by members of

[44].*Special Prosecutor v. Colonel Mengistu Hailemariam et al.* ,First Division Criminal Bench, Verdict, 2006 (n4 above) Pp. 8 (This verdict contains the summary of the ruling of the Federal High Court on SPO evidence in 2003)
[45].Ibid
[46].Ibid 9
[47].Ibid

the Derg in the name and on behalf of the Derg.[48] The Court emphasized that these speeches were made, on behalf of the Derg, either by the members of the Derg themselves or through their approval.[49] Consequently, the Court ruled that there was a prima-facie case against the defendants based on their membership in the Derg. Thus, the Court ordered all the defendants to present their defense against this charge as members of the Derg.

For its ruling, the Court did not require individual participation of the defendants in the provocation and preparation to commit genocide. Rather, its ruling commenced with the finding of speeches made on public media by some members of the Derg for preparing and provoking the people for the commission of genocide. Following this finding, the Court based its ruling on two reasons. First, the Court pin pointed that these public speeches were made on behalf of Derg. Second, the Court held the view that these speeches were made to the public by the implied consent or by direct participation of the members of the Derg.

According to the Court, the Derg members who were not participating in the public speeches willingly accepted the public speeches being made on behalf of the Derg. Hence, for its ruling the Court did not require the direct participation of each defendant on the public provocation and preparation. Yet, Article 32(1) (a) of the 1957 Penal Code

[48].*Special Prosecutor v. Colonel Mengistu Hailemariam et al.* ,First Division Criminal Bench, Verdict, 2006 (n4 above) Pp. 8

[49].Ibid, unofficial translation of the Court Rulings by the writer of this paper

on which the charge was based requires each defendants actual carrying out the public preparation and provocation. For this reason, it can be concluded that the Court did not base its ruling with the meaning of this provision of the 1957 Penal Code.

Nonetheless, the Court's ruling was not altogether wrong for some of the defendants who were found directly provoking and preparing the Ethiopian people for the commission of genocide through their speeches on the public media.[50] This is because they were found by the Court of directly committing public incitement for genocide within the meaning of article 32(1) (a) of the 1957 Penal Code. However, the Court did not clearly state that this finding was a justification for its ruling on those specific defendants. Rather, the Court went to the extent that the rest of the defendants, who were not participated in the public provocation and preparation, were responsible for the acts of some members of the Derg. On the contrary, under article 32(1) (a), one can not be directly responsible for an offence unless he did actually carry out the material ingredient of an offence, directly or by other means like animal or natural force.[51] Article 32(1) (a) requires the Court for its ruling to establish that all the defendants participated in preparing and provoking the Ethiopian People for committing genocide. The Court did not. Instead, the Court based its ruling on membership of the defendants in the Derg.

[50]. However, note that, through out the Trial the defendants consistently argued that there was no intention on the part of the Derg to destroy opposition political groups under article 281 of the 1957 Penal Code.
[51]. Penal Code of the Empire of Ethiopia, 1957(n17 above) art.32(1)(a)

4.5.2 Collective Responsibility of the Derg Members for the Commission of Genocide under Article 281(a) and (c) and Article 32(1) (b) of the 1957 Penal Code

Under the charge for the commission of genocide, the Court affirmed that the Derg had decimated opposition political groups. Hence, all the defendants who were members of the Derg had to answer this charge.

For its ruling, the Court examined whether the Derg had a plan for the extermination of political groups.[52] In order to establish the existence of this plan for committing genocide, the Court looked at the execution of fifty-nine former officials of the Emperor Hailesellasie's regime and held that all the Derg members allowed this execution.[53] The SPO, on that occasion, presented a minute of the meeting held by members of the Derg that passed the decision on the execution of the officials.[54] However, the minute did not list the name of individuals that were present in the meeting. Nevertheless, the SPO alleged that all ninety- three members of the Derg were present on the meeting and the decision was passed by unanimous vote since the minute specified that the decision was passed by ninety- three votes.[55]

[52]. Aneme(n21 above) 19
[53]. Ibid
[54]. Documentary Evidence presented by SPO in Special Prosecutor v. Colonel Mengistu Hailemariam et al, Second Set of Document p. 268-269
[55].The SPO admitted that the minutes of the meeting did not have a signature protocol. However the presence of some defendants in that meeting were proved by witnesses of the SPO .See Appellant-Special Prosecutor v. Respondents, ,Federal Supreme Court Judgment, Judges –Dagne Melaku, Amare Amogne and Kedir Aley, File No. 30181,26 May,2008,Pp.21

According to the Court, a day after the execution of the fifty-nine officials, on Hidar 1974, a press release announced that all the members of the Derg agreed the execution of the officials and declared that all those opposed to the Derg would similarly be exterminated.[56] Mekonnen, word by word, quoted the announcement as:

> *We have said 'Ethiopia First without a single bloodshed'- - -however, execution taken on these officials and all similar executions in the future against those who opposed the right and freedom of the broad mass and against those oppressing officials who made injustice should not be considered as measures taken against the innocent, and we would not consider their blood as 'blood of innocent human beings'.* [57]

The court took this statement as an expression of the plan of the Derg to eliminate opposition political groups and the endorsement of the plan by all the Derg members.[58]

The Court further established that the Derg, after the execution of the fifty-nine former officials, held different meetings where it was apparent from the minutes of these meetings it passed decisions that proclaimed for the extermination of opposition political groups.[59] Few of these meetings, from the evidence presented by SPO, were general meetings; the others were exclusively held by some members of the Derg usually listing

[56].Aneme(n21 above)20
[57].Mekonnen Yimam Retta, 'Transitional Criminal Justice: The Ethiopian Experience in the Derg/WPE Trials'(LLM Thesis, Addis Ababa University Law Faculty, May 2009)73
[58].*Special Prosecutor v. Colonel Mengistu Hailemariam et al* ,First Division Criminal Bench, Verdict (n4 above)Pp.5
[59].Aneme(n21 above)20

the name of the participants of the meetings.[60] For instance, the Court declared that in the meeting held on *Hidar* 10, 1976, the Derg decided that all the Derg agencies and departments had the authority to destroy opposition political groups.[61]

As it was pin pointed by the Court, the decisions of these kinds of meetings were send out to different offices and administrative regions.[62] Furthermore, according to the Court, the Derg had established various bodies and killing forces at different times for organizing the actions carried out based on the genocidal plan.[63] Additionally, in the examination of the Court, many agencies of the Derg were set up for this same purpose.

From this ruling, it seems that the Court did not take presence in the various meetings in which the plan was discussed as a necessary requirement for showing the sharing of the common criminal plan. Thus, even if a member of the Derg did not present in specific meetings if he/she did not object to the decision of the meetings by his/her action, it is considered as a full consent.[64]

[60].Explanation of Documentary Evidence presented by SPO in Special Prosecutor v. Colonel Mengistu Hailemariam et al, First Section, ሃአግ1.185, p.1-5

[61].According to the SPO Documentary Evidence, this General meeting was held by seventy nine Derg members- See Documentary Evidence presented by SPO in Special Prosecutor v. Colonel Mengistu Hailemariam et al, Fifth set of Documentary Evidence, ሃአግ 8.109

[62].Aneme(n21 above)20

[63].Ibid

[64].*Special Prosecutor v. Colonel Mengistu Hailemariam et al.* ,First Division Criminal Bench, Verdict,2006(n4 above)Pp.5

Moreover, for the purpose of the Court, the continuing membership of defendants in the Derg after the Derg announcement of its plan was a proof of acceptance of the plan and decisions of the Derg by the members. Further, according to the Court, the Derg neither stand-alone or perform its actions without the active or passive support of its members.[65] In view of the Court, both the continuing existence of the Derg and implementation of its plans were dependent on the old and new coming members of the Derg.[66]

By these reasoning, the Court established the collective criminal responsibility of the defendants for the commission of genocide on opposition political groups. Consequently, all the defendants were ordered to enter their defense for the violation of Article 281(a) and(c) of the 1957 Penal Code on all but 25 counts under this charge.[67]

Following, upon examination of the defenses, the Federal High Court ruled that the defendants did not disprove these charges on provocation and preparation and on the charge of genocide.[68] As one of the objectives of this paper is to show the arguments of both sides in this trial, the next section outlines the defenses presented to rebut these two charges.

---

[65].Ibid
[66].Ibid
[67].According to the Ruling of the High Court ,the SPO did not establish criminal responsibility of the defendants on 25 counts and the SPO withdraw 3 counts when amending the charges in Aneme (n21 above)20
[68].*Special Prosecutor v. Colonel Mengistu Hailemariam et al.* ,First Division Criminal Bench, Verdict,2006(n4 above)Pp.461

4.6. The Defenses on the Charges for the Commission of Genocide and Public Preparation and Provocation for the Commission of Genocide

The Court stated that the defendants presented these defenses for rebutting the whole charges and some specific counts under the charges.[69] The Court in its approach classified the defendants' defenses in two categories: collective defense and individual defense. First, the Court passed its rulings on the collective defenses, and then on the individual defenses. Hence, the following sub-sections follow the same strategy in dealing with the ruling of the Court.

4.6.1. The Collective Defense of the Defendants

The defendants presented witnesses and various documentary evidences to disprove the Federal High Court's ruling after examination of the SPO evidences.[70] The defendants raised a variety of defenses to rebut the charge on public provocation and preparation, and the charge on the commission of genocide. In relation to these two charges, the defendants raised two major issues.

One of the major issues was the absence of genocidal plan on the side of the Derg. They defended that the Derg had no plan of destroying political groups. According to their

[69].Ibid 10

[70].For the defendants collective defenses, See *Special Prosecutor v. Colonel Mengistu Hailemariam et al.* ,First Division Criminal Bench, Verdict,2006(n4 above)Pp.10-110

defense, this claim can be discerned from the effort undertaken by the Derg to fulfill the needs of the Ethiopian people and to solve Eritrea's problem by peaceful means. Moreover, they raised the issue that the Derg used to give amnesty for members of illegal enterprises. Further, according to the defense, Derg's various institutions like the ones organized at the level of Kebeles, *Awerajas* and *Woredas* (districts), Higher Urban Dwellers Association and other security offices were established for other objectives not for the commission of genocide. Further, the defense debated that the Military Tribunal was established by law that made it legitimate. As such, there was no fraudulent act in the name of the Court.

The second major defense was the beginning of internal war by EPRP against the members of the Derg and its affiliates. Thus, the defendants claimed that the Derg in self-defense took actions to those attacks of the EPRP. The defense alleged that even if in this internal conflict the Derg had taken actions on individuals, these actions were solely based on the individuals' criminal acts.

4.6.2 The Federal High Court Ruling on the Collective Defense

On the collective defenses, the Court ruled that no evidences presented by the collective defenses disproved the facts proven by the evidence presented by the Special

Prosecutor.[71] The Court noted that what the defense had to prove was that the Derg did not have a plan of exterminating opposition groups. Thus, the Court emphasized that the evidences brought by the defenses targets to disprove the existence of this plan by only showing other objectives of the Derg. Further, the Court stated that some of the evidences brought by the defense were detrimental to the defendants as they were incriminating evidences.

In this regard, the Court depicted that the evidences presented by the defendants proved the release of some detained persons who had political attitudes opposed to the Derg. Consequently, the Court pin pointed that the evidences presented by the defendants showed that the release of the detainees was done only if the detainees did drop their opposition and stand on the side of the Derg. Therefore, these evidences did show that the Derg had an intention only to release among the detainees who supported its political stand rather than who were against.

The Court also examined the evidences brought to prove that the actions taken by Derg were legitimate. The defendants raised Proclamation No. 129/69 to prove that law permitted measures against opposition political groups. Nevertheless, the Court stated that the power given by the Proclamation to take measures against anti-revolutionaries is limited to times of war. In relation to this, the Court analyzed the evidences of the

[71]. *Special Prosecutor v. Colonel Mengistu Hailemariam et al.* ,First Division Criminal Bench, Verdict,2006(n4 above)Pp.110-118

defendants for proving that the actions of the Derg were self-defenses against the war started by EPRP on the Derg and its affiliates. The Court on this instance reasoned out that though the evidences proved the killing of some political supporters of the Derg, they did not show that EPRP or other opposition groups took these killings. In particular, the Court held that the evidences did not prove that the measures taken by Derg against the victims under this charge were taken based on the victims' individual acts and for the reason of self-defense. The Court noted that the evidence was expected to prove that.

In relation to the above, the Court also noted that the evidences had to but failed to show that other groups other than the Derg took the actions taken on the victims under this charge. Furthermore, the Court affirmed that there were various institutions, as evidenced by the defendants, which were established by Derg for other objectives. Nevertheless, this fact did not prove that the Derg had no intention for destroying political groups as an institution can have many objectives at the same time. With regard to the cause of the death of Emperor Hailesellassie, the Court rejected the evidence by the defendants which was the statement of the Derg as it was not supplemented by other neutral sources. Thus, the Court ruled that the collective evidences did not disprove the charges.

4.6.3 Individual Defenses of the Defendants

After ruling on the collective defenses, the Court continued to examine the evidences brought by the defendants on individual level.[72] The defendants individually raised the following major arguments as it was stated in the 2006 High Court ruling:

i. Most of the defendants argued that they were not in Addis Ababa or Ethiopia at the time of the commission of some of the acts in the charge to show that they had no role in the commission of such acts.

ii. Some argued that they were not present at the meeting in which decisions were passed to carry out some of the acts. They claimed any contrary evidence did not prove the contrary, hence, the decisions of such meetings were not their own.

iii. Some reasoned that there were no evidences brought against them for proving their individual participation in the crimes at the time of the ruling of the Court on the SPO evidence. One, in particular, argued that the SPO did not brought evidence for showing that the defendant gave expressive order for the commission of even a single crime in the charge.[73] Hence, they strongly argued that the ruling of the Court on the SPO evidence in

[72].For individual defenses of the defendants , see *Special Prosecutor v. Colonel Mengistu Hailemariam et al.*, First Division Criminal Bench, Verdict,2006(n4 above) Pp.118-459

[73].For his claim ,this defendant raised Article 69 and 24 of Ethiopian Penal Code of 1957, see *Special Prosecutor v. Colonel Mengistu Hailemariam et al.* ,First Division Criminal Bench, Verdict,2006(n4 above) Pp.331

2003 ignores the fundamental principle of criminal law i.e. beyond reasonable doubt standard.

iv. Some claimed that at the time of the alleged crimes they were doing other non- related works to the activities of the Derg. Hence, this fact disproves the allegation of their acceptance of the Derg plan or intention for exterminating opposition political groups.

v. One of the defendants argued that he expressed his unwillingness when he was chosen to be a member of the Derg in 1976(1967 E.C). However, he became a member for fear of the consequences of declining to take the post.[74] Thus, as he was coerced to become a member of the Derg, he argued to be free of the charges.

vi. Many of the defendants argued that they did not participate in any one of the commission of the crimes in the charge in any manner. They alleged that no evidence was presented to prove the otherwise. They claimed to be free of charge as the ruling of the court in 2003 attributed criminal responsibility to them only because they were members of the Derg.

vii. Many of the defendants argued that the power to take measures on who were labeled as 'anti-revolutionaries' was exclusively of the chair-man of the Derg. For their arguments the defendants raised article 8 (9) of Proclamation No.110/77 which states: *"the Chair man of the Council: in*

[74]. The defendant explained to the Federal High Court that he had a fear at that time that if he declined to accept the post he would be labeled as anti-revolutionary and get punishment

accordance with directives issued by the Congress, the Central Committee and the Standing Committee, shall have the power and responsibility to safeguard the peace and order of the broad masses and the unity of the country; take measures on anti-people and counter-revolutionary elements."[75]

viii. Some of the defendants argued that during the period of the commission of the crimes, they opposed the measures taken by the Derg on individuals who were labeled as 'anti-revolutionaries' and take action accordingly. Hence, they claimed their reaction shows their opposition of the Derg plan of eliminating opposition groups.

ix. Some other defendants argued that in other Red Terror Trials on the same charge, they were sentenced or they were sent free. Therefore, they should not have to go to trial for the same offence or be punished for the same offence.

x. Two claimed that they were in prison during the time in which the alleged crimes were carried out. Hence, they should not be guilty for those crimes allegedly done when they were in prison.

xi. One reasoned that his membership in the Derg was interrupted in *Yekatit* 1977(1969 E.C.) when he was imprisoned by Derg.[76]

[75]. Proclamation no. 110/77, 'Redefinition of Powers and Responsibilities of The Provisional Military Administration Council and the Council of Ministers Proclamation' No.13,Negarit Gazzeta,36th year,1977,Addis Ababa, Article 8(9)

[76]. The detail of this defendant case is analyzed under section 4.6.4.1 of this paper.

xii. One claimed that he directly carried out some of the offences because the Chairman of the Derg ordered him to do so. The defendant claimed he was under military order and raise Proclamation No. 129/69 Article 25 which states: *"Any person who fails to comply with or in any manner tries to evade or evades the duty imposed on him by order or regulation issued under this Proclamation is punishable with rigorous imprisonment up to five years and in more serious cases with rigorous imprisonment to life or with death."*[77] For this reason, the defendant maintained he should not be liable for what he had done because of superior order.

4.6.4 The Rulings of the Federal High Court on the Individual Defenses

At this stage of the trial, the Court gave its rulings on the defenses presented by the defendants individually.[78] Thus, the Court hold the view that the Derg at different times and in various ways conveyed its plan of exterminating opposition political groups. The Court also claimed that the Derg systematized and implemented this plan. At the same time, the defendants adopt this plan of the Derg by continuing as a member or by not protesting against it. This means, according to the Court, the defendants were maintaining

[77].Proclamation No. 129/77 , 'National Revolutionary Operations Proclamation' No.30,1977,Negarit Gazeta, 36th year, Addis Ababa,art.25

[78].For the Court ruling on individual defenses, See *Special Prosecutor v. Colonel Mengistu Hailemariam et al.* ,First Division Criminal Bench, Verdict,2006(n4 above) Pp.118-459

the actions of the Derg. Hence, the absence of some of the defendants in the meetings of the Derg that passed the decisions for the commission of some of the crimes was irrelevant for the case of attributing criminal responsibility. In this regard, the Court reasoned that if a member of the Derg did not protest against the decisions of such meetings and show his objection by his subsequent actions; then it is considered as he had fully accepted and adopted the decision of the meetings as his own.[79] Thus, he became liable.

Furthermore, the Court noted that the defendants were not indicted for material commission of the crimes. In other words, they were not charged for carrying out the crimes themselves by being present in person at the scene of the crimes. The Court took a stand that the defendants did not need to be present at the scene to carry out the offences in accordance with the order or give support in the material commission of the crimes. Consequently, the Court rejected the defendants evidences presented to prove that some of the defendants were not either in Addis Ababa or in Ethiopia at the time of the commission of the crimes.

The Court, in its ruling, also rejected the claim of the defendants of working different jobs in other government offices at the time of the commission of some of the crimes. The Court reasoned that even if some of the defendants proved they were in different

[79]. *Special Prosecutor v. Colonel Mengistu Hailemariam et al.* ,First Division Criminal Bench, Verdict,2006(n4 above) Pp.386

governmental offices at the time of the commission of the crimes, they can be free from liability only if their membership was interrupted or they protested against the Derg's plan for committing genocide. Moreover, the Court holds the view that the claim of few of the defendants of standing before other Red Terror Trials did not have relation with the current charge. The Court maintained that the defendants' charge in this trial did not cover charges brought on them in the other Red Terror Trials.

Subsequently, the Court analyzed the claim of some of the defendants that only the Chair man of the Derg had the power to take such measures against 'anti-revolutionaries'. The Court rejected this argument for two inter-related reasons. Firstly, this power was given to the chairman by the Derg in which all the defendants were members. The Court holds the view that the defendants delegated the chairman to take these measures on behalf of the Derg. Secondly, it was indicated in the Proclamation 129/77 that the chairman of the Derg take such measures in accordance with directives issued by the Congress in which all the defendants were members. In either of the two ways, according to the Court, the members agreed to exterminate opposition political groups.

In relation to the above point, the Court examined the allegation of one of the defendants based on the defense of superior order pursuant to Article 25 of the Proclamation No.129/77. The Court stated that this article of the Proclamation imposed duties on the individuals to comply with the Proclamation in which contravention would result in serious punishment. However, the Court reasoned that the members of the Derg willingly

imposed this duty on themselves, as they were the legislators of the Proclamation. As a result, the Court did not accept this defense. Further, the Court explained that most of the crimes in these charges were carried out before the promulgation of this Proclamation that imposed duties on all individuals including the members of the Derg. The Court added that the defendant was accused for associating himself with the offences not for performing some of the material offences. Thus, his defense is not compelling.[80]

With regard to the defense of one of the defendants on being coerced to become the member of the Derg, the Court discarded it on the grounds of lack of conclusive evidence as to what would have been the fate of the defendant if he disagreed to become a member. The Court held the view that, imprisonment could have been a possibility on the event of the Defendant's disagreement to be a member. Hence, the Court held that the evidence does not prove the defendant was coerced to become a member and become liable for the crimes carried out in accordance with the Derg plan.

The Court on this reasoning ruled that except one of the defendants all are failed to defend themselves against the charges for the majority of the counts.[81] Next, the defenses of the defendant who rebutted all the charges is going to be discussed .This case explains the approach followed by the Court in evaluating the individual defenses of the defendants.

---

[80].*Special Prosecutor v. Colonel Mengistu Hailemariam et al.* ,First Division Criminal Bench, Verdict,2006(n4 above) Pp.342

[81].Aneme (n21 above)22

4.6.4.1. The Court's Ruling on the 41th Defendant

This ruling shows the reasoning of the Court on attributing collective criminal responsibility on the members of the Derg. Only the 41th defendant, *Asir Aleqa* Begashaw Gurmesa Korcha, was acquitted for reason of protesting and abandoning the Derg. This shows that after the Court established that the Derg had a plan of destroying opposition political groups and carried out its plan, the only way of avoiding responsibility can be either by protesting the action of the Derg or by abandoning the Derg. This means membership in the Derg necessarily entails criminal responsibility. To put in another way, every member of the Derg was criminally responsible unless that member properly rebutted its membership in the Derg. The details of this case help to demonstrate all the defendants had little chance for evading responsibility after the Derg genocidal plan was established by the Court.

In the 41th defendant case, the Court ruled that the evidences brought by the defendant shows that in 1977, in the place where the he was appointed, the defendant used to release detainees who were imprisoned by the Derg government officials. Moreover, he

used to carry out different works i.e. non-related to the plan to commit genocide in various regions of Ethiopia. The evidence presented by the defendant, according to the Court, further proved in *Yekatit* 1977, the Derg put him into prison because he was labeled as a member of the EPRP. While he was serving jail time, his picture was exposed to the public in exhibition specified as an expelled member from the Derg. Finally, the Court stated that the evidence illustrates that he was released from jail in 1982 upon amnesty.

Because of the above evidences, the Court concluded that the defendant was labeled as 'anti-revolutionary' by the Derg beginning from *Yekatit* 1977.[82] The reason for this, according to the Court, was believed to be the defendant's behavior and action until his imprisonment. Thus, the Court stated that it can not be concluded that before his imprisonment the defendant actions' or behaviors' were in line with the Derg's plan.[83] Nevertheless, the Court stressed the necessity of examining further as to when these protestations of the defendant were occurred. The Court found it difficult to pin point the exact time when the defendant started to protest against the Derg's plan. Here, the Court come to the conclusion that even if it is difficult to identify the exact time, before the imprisonment, the defendant in general showed his objection to the Derg's plan in his actions i.e. by releasing prisoners of the Derg. He was also expelled from the Derg and

[82].Note that the acts in this charge covers the time between 1975-1986**,**see Amended charges *SPO V. Colonel Mengistu Hailemariam et al*., December 2,2002

[83].*Special Prosecutor v. Colonel Mengistu Hailemariam et al.* ,First Division Criminal Bench, Verdict(n4 above) Pp.412

put into jail in the belief that he was ‘anti-revolutionary’. Thus, according to the Court, it cannot be proved beyond reasonable doubt that the defendant adopted or agreed with the Derg plan at any point of time beginning from the time of expression of the plan. Hence, the evidences presented by the defendant created a doubt on the Court on whether the defendant agreed with the criminal plan of Derg. The Court further noted the fact that the membership of the defendant was interrupted since imprisonment strengthened this doubt. For these reasons, the Court ruled that the defendant defend all the charges of the case and acquitted him.

4.6.5. The Reasoning of the High Court for its Ruling on the Individual Defenses

This conclusion is derived from the Court’s reasoning in its ruling on individual defenses. As to the Court, a defendant to be free of the whole charge has to prove one of the following three reasons. One, the defendant by his evidences should show that he was coerced to be a member of the Derg. The Court raised the point that the defendant should present conclusive evidence to demonstrate that there were real consequences from declining the post like punishment through imprisonment.

The other defenses are abandonment of membership in the Derg before the commission of the whole crimes or protestation against the implementation of the Derg plan. This means, after becoming a member of the Derg, there are only two ways for defending membership. One is by way of proofing objection on the plan of the Derg or on the

commission of the alleged crimes pursuant to the Derg's plan. The objection has to be in action. Again, to be free of the charge, the protestation should begin from the time when the Derg plan of exterminating opposition political groups started to be expressed. For that reason, according to the Court, this period started from the time of the Derg meeting for the execution of the fifty-nine high-ranking officials of the Emperor. Another way is by proofing abandonment of membership in the Derg. Likewise, desertion of membership should occur before the time of execution of the fifty-nine high-ranking officials of the Emperor.

This the Court's approach entails that the burden of proof lies on the defendants at the time defense. Thus, the defendants had to show that they abandoned their membership ahead of the commission of the crimes or expressed their objection in action on the commission of the crimes. At this point, a question may arise whether all members of the Derg knew the plan of the Derg or knew every act done by other members of the Derg or in the name of the Derg. Because to oppose, first they had to exactly know the object of the protestation. It seems that the Court assumed all the defendants, at the time, knew the alleged plan of the Derg i.e. plan of exterminating opposition political groups.

Subsequently, the Court passed its judgment. The Court convicted all the defendants except the 41th defendant for the commission of genocide and public preparation and

provocation for the commission of genocide.[84]Then, the Court ruled on fifty-four of the defendants and sentenced them from 23 years rigorous imprisonment up to rigorous life time imprisonment. The 41th defendant was acquitted for his rebuttal against all SPO charges.

4.7. The Reasoning of the Federal Supreme Court for Upholding the High Court's Ruling on Collective Criminal Responsibility of the Derg Members

The defendants appealed on the Federal High Court's ruling on which they raised the issue of collective criminal responsibility.[85] They argued they were collectively held responsible for the whole charge based on their Derg membership alone.[86] The twenty-three defendants argued that they did not commit the crimes and their criminal responsibility was not supported by evidence.

The Federal Supreme Court, in its ruling on the appeal, examined whether the evidences of the Special Prosecutor established the participation of the defendants in the

[84].*Special Prosecutor v. Colonel Mengistu Hailemariam et al.* ,First Division Criminal Bench, Verdict,2006(n4 above) Pp.460-461

[85]. Here only few of the defendants' arguments on their appeal are discussed.

[86].Appellant-*Special Prosecutor v. Respondents-Colonel Mengistu Hailemariam et al*., Federal Supreme Court, Judgment, Judges –Dagne Melaku, Amare Amogne and Kedir Aley, File No. 30181,26 May,2008,Pp.10

commission of the crimes.[87] In relation to this, the Court also evaluated whether the defendants properly defend themselves against the charges. Then, the Court held that the evidences presented by the Special Prosecutor established the killings of many individuals as it was indicated in the charges.[88]

Following this, the Federal Supreme Court raised two major issues. One issue was the necessity of identifying the relation between the defendants and the Derg.[89] According to the Court, there had been a relation between the Derg and the defendants. The Court held that it was evidenced by the minutes of the Derg that the defendants themselves established the Derg in June 1974.The Court further relied on Proclamation No. 2/74 by which the Derg was proclaimed as a head of government. According to the Court, this Proclamation was declared by the agreement of Derg members and asserted that all Derg members collectively were heads of government.[90] For this reason, the Supreme Court held that the Derg decision was the decision of its members i.e. these defendants. The Court held that the Derg members by declaring Proclamation No.2/74 decided that all decisions made by the Derg from then on would be the decisions of each and every members of the Derg.[91] The Supreme Court concluded that all Derg actions were imputed to its members based on Proclamation No 2/74.[92]

---

[87].Appellant-*Special Prosecutor v. Respondents-Colonel Mengistu Hailemariam et al* ., Federal Supreme Court, Judgment,2008(n86 above) Pp.16
[88]. Ibid 19
[89]. Ibid 19-20
[90]. Ibid 21
[91]. Ibid
[92]. Ibid

This reasoning of the Supreme Court implies that the Court was going to attribute every action of the Derg to its individual members. The reason for this holding of the Court was the relation that exists between the Derg and its members. From this the Court's reasoning alone, it can be concluded that the Supreme Court concentrated on the fact of the defendants' membership in the Derg for its decision on this appeal of the defendants.

What came next in the Supreme Court reasoning was the issue of the Derg's plan for exterminating members of opposition political groups. The Supreme Court looked at the SPO evidence and concluded that the Derg had a plan of exterminating opposition political group. According to the Supreme Court, the evidences of the Special Prosecutor showed that at various times and in different places, some Derg members expressed the Derg plan of exterminating opposition political groups to the people.[93] The Court also held that the Derg instituted a variety of government offices for organizing the implementation of its plan. This Supreme Court reasoning for holding the existence of the genocidal plan on the side of the Derg was quite similar with the High Court's.

Finally, the Supreme Court upheld the rulings of the Federal High Court on the collective responsibility of the defendants for the commission of genocide and public provocation and preparation charges. For its ruling, the Supreme Court did not need the participation

[93]. Appellant-*Special Prosecutor v. Respondents-Colonel Mengistu Hailemariam et al* ., Federal Supreme Court, Judgment, 2008(n86 above) Pp.23

of the defendants in the crimes pursuant to article 32(1) (a) and (b) of the 1957 Penal Code in which these two charges were based. However, participation in the commission of an offence is basic for criminal liability.[94] Membership in the Derg could not be taken as principal participation per to article 32(1) (a) and (b) of the 1957 Penal Code.

4.8. Conclusion

Before going to evaluating the jurisprudence of the Ethiopian Courts in case of Special Prosecutor v. Colonel Mengistu Hailemariam et al, it is necessary to give summary of the whole trial. Hence, this section gives the summary of the trial.

The defendants who were members of the Derg were brought before the Central High Court, among other charges, for the commission of genocide and for public provocation and preparation for the commission of genocide in accordance with the 1957 Ethiopian Penal Code. Upon the Court order, the SPO presented its evidences for the charges. After the examination of the evidences presented by SPO, the Federal High Court held that the SPO evidence showed that Derg had a plan of eliminating political groups opposed to it. Further, according to the Court, the SPO proved that the Derg for implementing its plan of committing genocide established different agencies under it. The Court noted that as

[94].Graven (n19 above)93

the defendants were members of the Derg, they are responsible for the acts or plans of the Derg.

Hence, the Federal High Court concluded that there was a prima facie case against the defendants for the commission of genocide and public incitement to commit genocide based on Articles 32(1) (b) and Article 281(a) (c), and Article 32(1) (a) and Article 286(a) of the Ethiopian Penal Code of 1957. It is at this stage of the trial that the collective criminal responsibility of the defendants was established. For its ruling, the High Court did not require principal participation of each defendant in the commission of these crimes. According to the charge of public provocation and preparation, the Court should establish each defendants actually carrying out the public provocation and preparation pursuant to article 32(1) (a) of the 1957 Penal Code of Ethiopia. However, the Court did not establish that. Furthermore, for its ruling on the genocide charge, the Court had had to rely on the finding on full association of every defendant with the material offender of this crime with the intent to destroy opposition political groups pursuant to article 281 and article 32(1) (b) of the 1957 Penal Code. In spite of this, the Court based its decision only on its finding on the relation of defendants with the Derg. The Court found that all were members of the Derg. Hence, it ruled that all the defendants fully associated with the commission of genocide with the special intent of genocide. According to the Court, the defendants' membership in the Derg is sufficient for making them collectively liable.

Subsequently, the defendants presented their collective and individual defenses. The defendants in their collective defense argued that Derg had no plan to exterminate opposition political groups. Nevertheless, the Court noted that what was needed from the defendants was to challenge the conditions on which the existence of this criminal plan was proved. The Court held the defendants only showed that the Derg had many plans and objectives other than exterminating opposition political groups. Hence, the Court ruled that the defendants in their collective defense did not defend themselves. Then, the Court examined the individual defenses. The individual defenses were mainly revolved around the absence of participation in the commission of the crimes in the charge. The defendants argued that they did not participate in the material commissions of the acts as well as in designing the plan of exterminating political groups opposed to Derg. They brought various evidences to support their allegations.

After examination of the individual defenses, the Court set three conditions on which a defendant can be free from the whole charge. The first condition is if the defendant can establish that he/she was coerced to be a member of Derg. Second, if the defendant could prove that he/she abandoned his/her membership in the Derg beginning from the time of the start of the planning for exterminating opposition political groups. Third, if a defendant could prove that he/she protested against the actions of the Derg according to the plan. According to the Court, these three were the only way in which a defendant can make a doubt as to his/her acceptance of the Derg's plan or the commission of the crimes in accordance with the Derg plan. Upon this reasoning, the Court makes all the

defendants liable except the 41th defendant. The Federal Supreme Court also had similar reasoning to reach to its conclusion on the twenty-three defendants appeal on the ruling of the Federal High Court. Hence, according to the jurisprudence of the Courts', it can be concluded that membership in the Derg entails criminal responsibility unless;

- it was proven by the defendant that membership was abandoned at the right time i.e. at the beginning of the time at which the planning to eliminate opposition political groups was started by Derg ,or
- the defendant proved that he/she protested against the Derg plan or the commission of the crimes according to the Derg plan by his/her action beginning from the start of planning or the commissions of the crimes , or
- The defendant proved that he/she was coerced or drifted to be a member in the Derg. This is to show that membership is not voluntary.

As the above three conditions demonstrate, the burden of proof was on the defendants to prove the otherwise.

CHAPTER FIVE: ANALYSIS OF THE JURISPRUDENCE OF FEDERAL HIGH COURT AND SUPREME COURT IN ATTRIBUTING CRIMINAL RESPONSIBILITY ON THE DERG MEMBERS IN SPECIAL PROSECUTOR V. COLONEL MENGISTU HAILEMARIAM ET AL

5.1 Introduction

The approaches of the Ethiopian Federal High Court and Supreme Court in attributing criminal responsibility in Special Prosecutor v. Colonel Mengistu Hailemariam et al have been discussed in the previous chapter. The discussion pinpointed that both Courts had similar reasoning in attributing criminal responsibility to members of the Derg. In fact, the Supreme Court, on the appeal, gave only supplementary explanation on the reasoning of the Federal High Court. This section is going to evaluate the Courts' approach in their ruling on the Derg members' criminal responsibility.

The first part of this chapter will give the evaluation of the approach of the Courts' in Special Prosecutor v. Colonel Mengistu et al in relation with the notion of collective criminal responsibility while the second part provides a comparison of the Ethiopian Courts' approach to the IMT, ICTY and ICTR.

5.2 Criminal Responsibility of Derg Members in Special Prosecutor v. Colonel Mengistu Hailemariam et al in Light of the Notion of Collective Criminal Responsibility

As it was discussed in chapter two, a group of persons may collectively be held criminally liable for the commission of crime/crimes. However, this collective criminal liability had to have its limits. Particularly, a collective criminal responsibility that is based solely on membership in an organization or in any kind of group (religious, national, ethnic, racial or political etc) is against the principle of individual criminal responsibility. Thus, the whole ethnical, racial, political or any kind of group should not be liable for acts performed by a member of the group in his individual capacity. Consequently, this form of liability i.e. based on mere membership should be avoided as it is against the principle of individual criminal responsibility. Under this latter principle, no body can be liable for criminal offences perpetrated by other persons. This in turn entails that no one may be held answerable for acts or omissions of organization to which he belongs, unless he bears personal responsibility for a particular act, conduct or omission.[1] Hence, the principle of individual criminal responsibility entails the participation of the individual in some manner in the commission of the crime.

[1].Antonio Cassese, *International Criminal Law*(Oxford University Press,2003)137

To evaluate the High Court's ruling on collective responsibility of the Derg members against the proper limits of collective criminal responsibility, it is paramount to investigate whether the High Court did require the defendants' participation in some way in the commission of the crimes. By participation in this instance does not mean that the Court should require the participation of the defendants in the material commission of the crimes. But, whether there was a requirement on the side of the Court for proof of the participation of the defendants in some way in the commission of the crimes. The Federal High Court stated that the Derg had plan for the extermination of opposition political groups and the defendants were members of the Derg. Thus, according to the reasoning of the Federal High Court the defendants should defend against the charges as they were members of the Derg which had such criminal plan.

According to the Federal High Court, the participation of the defendants in the commission of the crimes was by way of fully associating themselves with the commission and the intended result of genocide.[2] This kind of participation requires full association with the commission of the crimes and an intention to have the end result of the crime. Thus, such reasoning beg the question that whether the Court did require proof of full association with the intention towards the end result on each defendant.

[2].Proclamation No.1/57 ,Penal Code of the Empire of Ethiopia, Negarit Gazeta Extraordinary Issue,No.1,1957,Addis Ababa, Article 32(1)(b)

Surprisingly, the High Court did not necessitate this kind of proof from the SPO. Instead, in its ruling, the Federal High Court was based on the connection between the defendants and the Derg. The Court ruled that as it was proved that the Derg had a plan to exterminate opposition political groups, and the defendants continued their membership in the Derg during the planning and the commission of the crimes, they were criminally responsible. It follows that the members of the Derg were held responsible for the activities of the Derg since the Derg was found to be engaged in criminal activities. Thus, it can be concluded that the Court attributed criminal responsibility on the Derg members collectively based solely on membership. For this reason, the approach used by the Federal High Court in attributing criminal responsibility was not with in the proper limits of collective criminal responsibility. To put it in another way, the Court's approach in attributing collective criminal responsibility is against the fundamental principle of individual criminal responsibility.

5.3 Comparative Analysis of Criminal Responsibility of the Derg Members in Special Prosecutor v. Colonel Mengistu Hailemariam et al with the Jurisprudence of ICTY, ICTR and IMT at Nuremberg

5.3.1 Comparison with the IMT Jurisprudence: Membership Liability in Criminal Organization and Common plan or Conspiracy Liability

This section compares the Ethiopian Courts jurisprudence in attributing criminal responsibility in the case of Special Prosecutor v. Colonel Mengistu Hailemariam et al with the IMT's at Nuremberg.

5.3.1.1 Common plan or Conspiracy Liability

Comparison between the approaches of IMT in its Common plan or Conspiracy Liability and the Ethiopian Courts in Special Prosecutor v. Colonel Mengistu Hailemariam et al begins with the types of the crimes. The common plan or conspiracy liability was used in the IMT for crimes against peace while the Special Prosecutor v. Colonel Mengistu Hailemariam et al case was on the commission of genocide.

The Ethiopian Federal High Court and the IMT at Nuremberg had comparable beginning in their trial in that both started with evaluating whether there was a plan for the commission of the crimes. Particularly, the Ethiopian Federal High Court began by evaluating the prosecutor evidence for the existence of a genocidal plan in the Derg. Consequently, the Court evaluated the SPO evidence to decide whether the defendants had cases to answer.

The IMT, on a similar manner began with identifying whether the prosecutor evidence shows that there was a common plan or conspiracy to wage war. After it was proved that there was a common plan or conspiracy to wage war, then the IMT went on identifying the persons who were participant in the common plan or conspiracy with knowledge of it. The IMT did not hold all members of the Nazi party liable under this form of liability rather it went on identifying those participated in the common plan or

conspiracy among the twenty-two defendants. In the process, the IMT required conclusive evidence from the prosecutor to prove defendant's participation in the plan or the defendant's knowledge of the plan. Accordingly, the IMT convicted eight of the twenty-two defendants.

In contrast, the Ethiopian Federal High Court, after examining the SPO evidence, found that the Derg in which the defendants were members had a plan of exterminating opposition political groups. The Court noted that the Derg designed and executed its genocidal plan by establishing different agencies. Upon this finding, the Ethiopian Court ruled that the defendants had to answer against the prima facie case, as they were members of the Derg. The Ethiopian Court did not require proof of individual participation of the defendants in the planning of the alleged genocide. By this ruling, the Federal High Court shifted the burden of proof to the defendants. For this reason, the defendants were required either to prove the absence of the genocidal plan on the side of the Derg or to defend against their membership in the Derg. Then, the Federal High Court examined the defendants' defense and ruled that not all the defendants defended against the charges except one. As a result, all the defendants, except the 41 th defendant were convicted for the commission of genocide.

The above comparison shows two main differences between the approaches of the IMT and the Ethiopian Federal High Court in attributing criminal responsibility. First, the Ethiopian Court did not require a proof of individual participation in the plan, whereas

the IMT did. Secondly, in the IMT, the burden of proof was always on the prosecutor to prove individual participation whereas the Ethiopian Court shifted the burden to the defendants after establishing genocidal plan of the Derg. As a result, the defendants in the Ethiopian Court had to prove the absence of the genocidal plan by the Derg or to prove their non-membership in the Derg.

5.3.1.2 Membership Liability in Criminal Organization

The IMT jurisprudence on membership liability in criminal organization was based on Articles 9 and 10 the IMT Charter that stipulated mere membership in a criminal organization was regarded as criminal. According to the Charter of the IMT, two set of trials were designed for the application of membership liability in criminal organization. The first trial decides on the criminality of organizations while the subsequent trials were designed to convict individuals who were members of the organizations that were declared criminal in the first trial. On the contrary, the Ethiopian Courts had only one trial i.e. trial of the Derg members.

According to the IMT Charter, an individual who was a member in any one of the criminal organizations would get punishment in the second set of the trials. Hence, for conviction in the second trials, only proof of membership suffices. In contrast to the

Nuremberg Charter, the Ethiopian Courts did not apply laws which authorize for imposing criminal liability based on mere membership in an organization.

Even if the IMT had laws for collective criminal responsibility by mere membership, the Tribunal limited such kind of collective liability and set some qualifications in the application of the law. Thus, firstly, the Tribunal held that the declaration of criminality of an organization should be in line with the principle of individual criminal responsibility. Second, the Tribunal reduced the notion of criminal organization to that of criminal conspiracy. Third, the Tribunal set three criteria for a criminal organization. The fourth and the most important one was that in cases where an organization was held criminal; only those two kinds of members of that organization were to be held criminally liable. Accordingly, those members of the organization who had had knowledge that the organization was being used for the commission of international crimes or those members who were personally involved in commission of such crimes would be liable. In both these cases ,to be held liable ,the members should not ceased to belong to the organization prior to 1 September 1939 i.e. the start of the war of aggression by Germany. Moreover, in both cases, voluntary membership in the organization is required. The burden of proof was on the prosecutor which meant the prosecutor had to prove voluntary membership and individual knowledge or personal implication in the commission of the crimes for conviction. On these four limitations, the IMT restricted the application of its laws to conform to the principle of individual criminal responsibility.

In the Ethiopian Courts, however the Derg was not brought before the Court as an organization like the IMT one. In the Ethiopian Courts, Derg was not held as an organization which was criminally liable. Instead, the defendants who were members of the Derg were brought before the Court and held criminally responsible. The Federal High Court after its finding that the SPO evidence proved the Derg had a plan to commit genocide, instructed the defendants to present their evidence to defend against the cases. The High Court for its ruling, unlike the IMT, did not require individual knowledge of the defendants that the Derg was being used for the commission of the crimes or personal implication of the defendants in commission of such crimes. With this regard, the High Court reasoned that the defendants had to defend against the charges by the mere fact that they were members of the Derg. As a result, the burden of proof against the existence of the plan to commit genocide was shifted from the prosecutor to the defendants. Similarly, the defendants bear the burden of proof of their disassociation with the Derg or their involuntary membership in the Derg. Thus, unlike the IMT, proving against participation in the commission of the crimes was imposed on the defendants.

Hence, in both the IMT and the Ethiopian Federal High Court , there was an element of voluntary membership in an organization. In the IMT, proving voluntary membership is the responsibility of prosecutors. However, in the Federal High Court the defendants had the burden to disprove their membership in the Derg. Moreover, both Courts applied collective criminal responsibility based on membership in an organization. The difference lies in the IMT besides proof of voluntary membership, individual knowledge of the

criminal activity of the organization should be proved by the prosecutor for conviction. In the IMT, membership in a criminal organization with knowledge of the criminal activity of the organization was considered as participation in the commission of the crime or as fault for attributing guilt. In the Federal High Court, voluntary membership alone suffices for conviction. In the Federal High Court, membership alone in the Derg was considered as participation in the commission of the crimes. In other words, in the Federal High Court, the defendants' ignorance of the Derg genocidal plan did not constitute a defense.

Therefore, the IMT in contrast to the Ethiopian Court did not declare that defendants had to be responsible because they were members of an organization. Instead, the IMT required individual knowledge of the criminality of the organization or personal implication in the commission of the crimes. On the contrary, the Ethiopian Court did not treat the individual participation element. Despite the fact that the Ethiopian Court did not require proof of full association as well as intent ; the Ethiopian law on which the judgment of the Court was based stated full association with the commission of the crimes with the intention must be fulfilled for conviction.[3] To put it in another way, the prosecutor did not require by the Court to present evidences to show individual participation of each defendant in the commission of the crimes. In consequence, for the Court, the evidence brought for the whole i.e. the Derg suffices to attribute criminal responsibility on the sum i.e. individual members of the Derg. Therefore, it can be

[3]. Proclamation No.1/57 ,Penal Code of the Empire of Ethiopia(n2 above)art.32(1)(b)

concluded that the Ethiopian High Court, unlike the IMT, used collective responsibility based on mere membership in the Derg.

5.3.2 Comparison with the Jurisprudence of the ICTY and ICTR: Joint Criminal Enterprise

The approaches of the ICTY/ICTR depicted some similarities as well as differences with regard to Joint Criminal Enterprise forms of liability from the approaches of the Ethiopian Courts in Special Prosecutor v. Colonel Mengistu Hailemariam et al. One of the similarities lied on the fact that both were concerned with liability of a group of persons who were alleged to share a common criminal plan. In the Special Prosecutor v. Colonel Mengistu Hailemariam et al, the group of individuals who collectively formed the Derg were accused of sharing a common plan of committing genocide. In like manner, in the case of JCE, there has been a plurality of persons even if an informal group may suffice. Thus, for the purpose of the ICTY/ICTR, the persons need not be organized in a military, political, or administrative structure for the case of Joint Criminal Enterprise liability. Secondly, both were used for accusing individuals at policy levels. As such, the members of the Derg were accused for planning and implementing genocide. Similarly, JCE form of liability in ICTY/ICTR was also used for policy makers. In both cases, the liability was extended to all participants in the common plan or design for the perpetration of the criminal act, even if they have not materially participated in the commission of the act. Moreover, in both cases, the presence of the

accused in the crime scene at the time of its commission was not necessary to establish guilt.

Despite the fact that there were plurality of persons and a common criminal plan in both cases, their requirement for individual conviction was different. For conviction to lie through participation in JCE, the ICTY/ICTR required the prosecutor to prove that the individual have participated in the JCE and have acted with the requisite mens rea .Hence, in the ICTY/ICTR, the defendants were treated on individual bases. In contrast, for conviction in Special Prosecutor v. Colonel Mengistu Hailemariam et al, the Ethiopian Courts did not require the Special Prosecutor to prove the individual participation and mens rea of each defendant. It seems the Ethiopian Courts assumed that all the defendants did participate in the commission of the crimes with the required intent through planning as they were members of Derg that had the specific plan of exterminating opposition political groups.

Additionally, the ICTY/ICTR and the Ethiopian High Court had distinct approaches as to where the burden of proof lies. In the ICTR/ICTY in JCE forms of liability, the burden of proof has always been on the prosecutor. Especially, in these tribunals, prosecutors had burden of proof for showing individual participation in JCE with the requisite mens rea. Whereas, in the Ethiopian Courts, the defendants have to prove their disassociation with the group i.e. the Derg which had a common criminal plan of committing genocide. In

other words, the Ethiopian Courts required the defendants to disprove they belonged to the group at the time of the planning as well as the commission of the crimes.

5.4 Conclusion

This chapter finds out the major disparity between the jurisprudence of the IMT and ICTY/ICTR and the Ethiopian Federal High Court in attribution of collective criminal responsibility. There have been many controversies over the issue of collective criminal responsibility in these international tribunals. However, all the three tried to justify their approaches to collective criminal responsibility within the boundary of their respective laws. One common thing among all these three international Tribunals is in their application of collective criminal responsibility, they required a proof of some kind of participation in the commission of the crimes in accordance with their laws or theories[4]. Where as the Ethiopian Federal High Court in Special Prosecutor v. Colonel Mengistu Hailemariam et al imposed liability on the defendants without necessitating a proof of participation of the defendants in the commission of the crimes with in the meaning of the law. Even though the Federal High Court found different forms and degrees of participation of some of the defendants in the commission of the crimes, it did not reason its ruling on participation. Instead, the Federal High Court based its ruling on membership of the defendants in the Derg.

[4]. Note that the application of JCE form of liability in the ICTY/ICTR has raised controversies as it was not stipulated in the individual criminal responsibility provisions of ICTY/ICTR Statutes. However, both Tribunals justify their use of this theory of liability by claiming that it was implied in the provisions and was part of customary law.

CONCLUSIONS AND IMPLICATIONS

Conclusions

Special Prosecutor v. Colonel Mengistu Hailemariam et al was the first case in the Ethiopian Courts history that applied the 1957 Ethiopian Penal Code provisions on genocide and crimes against humanity.[5] Moreover, it was the first time in Africa where a whole regime was brought before a state court for atrocities committed while in power.[6] In addition, the interpretation of the law and the reasoning of the Ethiopian Courts in Special Prosecutor v. Colonel Mengistu Hailemariam et al. have been one of the least studied trials. In fact, a few researches have been done on comparative analysis of the Ethiopian Courts approach in the adjudication of international crimes with the international tribunals.[7] Furthermore, in the Special Prosecutor v. Colonel Mengistu Hailemariam et al all the defendants who were members of the Derg except one were collectively convicted for the commission of genocide. These facts were the main reasons that initiate the writing of this paper.

[5]. Mehari Radae, 'Revisiting the Ethiopian "Genocide" Trial: Problems' (2000)1(1) Ethiopian Law Review 7

[6]. Firew Kebede Tiba, 'The Mengistu Genocide Trial in Ethiopia' (2007) 5 Journal of International Criminal Justice 513

[7]. See for e.g. .Debebe Hailegebriel, 'Prosecution of Genocide at International and National Courts: A Comparative Analysis of Approaches by ICTY/ICTR AND Ethiopia/Rwanda'(LLM Thesis, Makerere University 2003); Yaqob Haile-Mariam, 'The Quest For Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court ' (1999) 22 Hastings International and Comparative Law Review 667

Often in international crimes, a group of individuals may participate in the commission of crime/crimes in the same or various capacities. Accordingly, many individuals may be held collectively responsible in the commission of the crime. In relation to criminal responsibility of many individuals in the commission of crime/crimes, there is a notion of collective criminal responsibility that entails criminal responsibility should be based solely on association with wrong doers or on mere membership in an organization. This way of attributing criminal responsibility is against the principle of individual criminal responsibility. Moreover, modern international law rejects the notion of collective criminal responsibility based on mere membership or association with criminals.[8] Hence, chapter two of the paper concludes that collective criminal responsibility of individuals in the commission of crime/crimes should be based on individual participation.

As a result of a number of individuals participate in the commission of international crimes with different degrees of capacity and culpability, prosecution of such crimes is a complicated matter. In the Justice Jackson words, the prosecutor in the Nuremberg Trials, "*Courts try cases, but cases also try courts"*.[9] This holds quite true for trial of international crimes. In the Special Prosecutor v. Colonel Mengistu Hailemariam et al case, the prosecution was more complicated because of the peculiarity of the Ethiopian law on genocide and crimes against humanity. This peculiarity of the Ethiopian Penal Code of 1957 provision 281 'genocide; crimes against humanity' is its protection for

[8]. Antonio Cassese, *International Criminal Law* (Oxford University Press, United States 2003)136
[9]. Quoted in Telford Taylor, The Anatomy of the Nuremberg Trials: A Personal Memoir 45(1992)

political groups. Thus, prosecuting genocide cases for political groups under this article entails to prove a special intent to destroy in whole or in part the protected group. Nevertheless, in adjudicating international crimes, courts have to be more cautious to keep fundamental principles of criminal justice one of which is the principle of individual criminal responsibility.

International Tribunals that are established to adjudicate the commission of international crimes used different forms of liabilities that take into account this complex nature of international crimes. On the one hand, the IMT applied the Nuremberg Charter provisions on common plan or conspiracy liability and membership liability in an organization. On the other hand, ICTY and ICTR, among other forms of liabilities, applied Joint Criminal Enterprise form of liability that was allegedly implied in the individual criminal responsibility provisions of the ICTY and ICTR Statutes. All these three forms of liabilities were forms of collective criminal responsibility. A number of researches have been carried out worldwide in the application of each form of liabilities in the Tribunals. Upon studying few of the researches, this writer finds out that there are many controversies on the application of these three collective forms of liabilities i.e. common plan or conspiracy liability, membership liability in an organization and Joint Criminal Enterprise. One of the debates lies in their conflict with the principle of individual criminal responsibility. The other debate relates to the legality of the application of Joint Criminal Enterprise (JCE) in the ICTY and ICTR as it was not expressly stipulated in the individual criminal responsibility provisions of the two Statutes. Bearing this in mind,

cases from the international tribunals' jurisprudence have been consulted to demonstrate the attribution of collective criminal responsibility in practice.

Thus, this paper had focused on the general characteristics of these three forms of liabilities for comparing them with the Ethiopian Courts approach in attributing collective criminal responsibility in Special Prosecutor v. Colonel Mengistu Hailemariam et al. Chapter three of the paper demonstrated that the International Tribunals required some kind of participation in the commission of the crimes in applying these forms of liabilities.

Following this study investigated the case of Special Prosecutor v. Colonel Mengistu Hailemariam et al. in relation to the attribution of collective criminal responsibility.Unlike the approaches of International Tribunals, the Ethiopian Courts did not need some form of participation in the commission of crimes for attributing collective criminal responsibility for the members of the Derg in the trial of Special Prosecutor v. Colonel Mengistu Hailemariam et al. The Ethiopian Federal High Court required only proof of the relation between the defendants and the Derg for its ruling on the prima facie case against the defendants, after establishing the existence of a plan on the side of the Derg for exterminating opposition political groups. The Federal High Court ruled that all had a case to answer because of the SPO evidence which proved that all the defendants were members of the Derg. After this High Court ruling, the only three defenses that

liberated the defendants from the charges were involuntary membership, abandonment of the Derg and protestation of the Derg plan before the commission of the crimes.

Comparison of the Ethiopian Court approach with the IMT common plan or conspiracy liability demonstrated that the former did not necessitate a proof of individual participation in the criminal plan unlike the latter. Furthermore, the research pointed out that in IMT the burden of proofing individual participation was always on prosecutors whereas in the Ethiopian Courts the burden was shifted to the defendants after genocidal plan of the Derg was established.

Furthermore, assessment of the IMT membership liability in a criminal organization with the Ethiopian Courts approach in the Special Prosecutor v. Colonel Mengistu Hailemariam et al revealed a striking difference between the two. Even if, the IMT used collective criminal responsibility based on membership for conviction, it further required proof of individual knowledge of the defendant about the criminal activities of the organization. In contrast, the Ethiopian Courts in Special Prosecutor v. Colonel Mengistu Hailemariam et al did not necessitate proof of individual knowledge of the Derg genocidal plan. For conviction in the Ethiopian Courts, mere membership in the Derg sufficed. However, in both, IMT and Ethiopian Federal High Court an involuntary membership in the organization was taken as a valid reason for acquittal. Nevertheless, in the Ethiopian Courts', the burden of proving involuntary membership in the Derg lied on the defendants unlike the IMT in which it lied was on the prosecutors.

Moreover, the review of the Ethiopian Courts' approach on collective criminal responsibility with the ICTY/ICTR application of Joint Criminal Enterprise revealed that only the latter necessitates proof of individual participation with the requisite mens rea by the prosecutors for attributing guilt. Though the Ethiopian Court found different forms and degrees of participation of some of the defendants in the commission of the crimes, it did not reason its ruling on individual participation. Instead, the Federal High Court based its ruling on membership of the defendants in the Derg. In the Ethiopian Courts, a defendant had to show his separation with the Derg in order to be acquitted form the charges.

In contrast, the Ethiopian Penal Code provision on which the judgment in Special Prosecutor v. Colonel Mengistu Hailemariam et al. was based necessitates particular form of participation in the commission of the crimes. Especially, Articles 281 and 32(1) (b) of the 1957 Penal Code on which the genocide charge was based require the finding of full association of every defendant with the material offender of this crime with the intent to destroy opposition political groups.[10] Nevertheless, the Ethiopian Courts' judgment on the defendants in this specific trial was solely based on the defendants' membership in the Derg. For this reason, the research concludes that the Ethiopian Federal High Court

[10].Philipe Graven, *An Introduction to Ethiopian Penal Law* (Haile Sellassie I University, Addis Ababa ,Ethiopia,1965)94

and Supreme Court did not apply articles 32(1) (b) and 281 of the 1957 Penal Code within the meaning of the law.

In addition, the principle of individual criminal responsibility necessitates some form of participation in the commission of the crimes within the meaning of the applied law. Nevertheless, the Ethiopian Courts' approach of attributing responsibility in Special Prosecutor v. Colonel Mengistu Hailemariam et al. was a form of collective criminal responsibility based merely on membership. Thus, it is against the fundamental principle of individual criminal responsibility.

In sum, the Ethiopian Federal High Court and Supreme Court attributed collective criminal responsibility for the members of the Derg based on only in their membership in the Derg. Therefore, the Ethiopian Courts approach in attributing collective criminal responsibility for the Derg members was in contradiction with the fundamental principle of individual criminal responsibility that is the core principle of the Ethiopian Penal Code of 1957 and international criminal law. Further, the Ethiopian Courts' approach was not fully supported by the three international tribunals' jurisprudence with regard to attributing collective criminal responsibility.

The next section identifies the broad implications of the Ethiopian Courts approach in attributing collective criminal responsibility in relation with criminal justice and adjudication of similar cases in the future.

IMPLICATIONS

The Ethiopian Federal High Court and Supreme Court approach of attributing collective criminal responsibility to the defendants based only on membership in the Derg had two broad implications. These two implications are:

- As Mehari Redae pointed out '*the ultimate goal of prosecution is justice.*'[11] To fulfill this purpose, prosecution should serve convict and punish those individuals responsible for the crimes.[12] For conviction, the trial must require proof of the commission of the crimes by the individuals. Criminal Liability is personal.[13] Indeed, a person to be guilty of a crime, his/her participation in the commission of the crimes within the meaning of the law should be proved.[14] The Ethiopian Courts' rulings in the case of Special Prosecutor v. Colonel Mengistu Hailemariam et al did not require individual participation in the commission of the crimes within the meaning of the law. Hence, it follows that the rulings of the Ethiopian Courts' in Special Prosecutor v. Colonel Mengistu Hailemariam et al deny justice to the defendants.

[11]. Radae(n1 above) 23
[12]. Ibid
[13]. Penal Code of the Empire of Ethiopia, Negarit Gazeta-Extraordinary Issue, No.1, 1957, art 34
[14]. Philipe Graven, *An Introduction to Ethiopian Penal Law* (Haile Sellassie I University, Addis Ababa ,Ethiopia,1965)99

▪ Ethiopia basically follows the civil law tradition system. Meaning, except for the Cassation Courts, the Ethiopian Courts' interpretation, application of laws and decisions are not binding on other Courts of the country. Nevertheless, as it was the first time the Ethiopian Courts applied and interpreted the laws on genocide and crimes against humanity, the approaches of the Ethiopian Courts in Special Prosecutor v. Colonel Mengistu Hailemariam et al will take its part in jurisprudence of the country's courts. In the words of Justice Jackson at Nuremberg: '*We must never forget that the record on which we judge these defendants today is the record on history will judge us tomorrow'*.[15]

[15]. Haile-Mariam,(n3 above)743

BIBILIOGRAPHY

Books

Bantekas Ilias & Nash Susan, *International criminal law* (2nd edn, Cavendish Publishing Limited, London 2003)

Cassese Antonio, *International Criminal Law* (Oxford University Press Inc., New York 2003)

Graven Philipe, *An Introduction to Ethiopian Penal Law* (Faculty of Law Haile Sellassie I University in association with Oxford University Press, Addis Ababa 1965)

Hirsh David, *Law Against Genocide: Cosmopolitan Trials* (The Glass House Press, London 2003)

Ntoubandi Z. Faustin, *Amnesty for Crimes Against Humanity Under International Law* (Martinus Nijhoff Publishers, London 2007)

Schabas A. William, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, Cambridge, UK 2006)

_____, *Genocide in International Law* (Cambridge University Press, Cambridge, UK 2000)

Shaw N. Malcolm, *International Law* (6th edn. Cambridge University Press, Cambridge, UK 2008)

Simon W. Thomas, *The Law of Genocide: Prescriptions for a Just World*, (Praeger Security International publishers, London 2007)

Tronvoll Kjetil, Charles Schaefer & Girmachew Alemu Aneme (Eds.), *The Ethiopian Red Terror Trials: Transitional Justice Challenged* (Indiana University Press, United States 2009)

Journal Articles

Ambos Kai, 'Joint Criminal Enterprise and Command Responsibility' (March 2007) 5(1) Journal of International Criminal Justice 159

Baker M. Brenda, 'Theorizing about Responsibility and Criminal Liability' (1992) 11(4) Journal of Law and Philosophy 403- 430

Bush A. Jonathan, 'The Prehistory of Corporations and Conspiracy In International Criminal Law: What Nuremberg Really Said' (June 2009) 109 Columbia Law Review 1094

Cassese Antonio 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise' (March 2007) 5(1) Journal of International Criminal Justice 109

Chaney R. Kevin, 'Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials" (Fall, 1995) 14 Dickinson Journal of International Law 57

Dadimos Haile, 'Accountability for Crimes of the Past and the Challenges of Criminal Prosecution: The Case of Ethiopia' (2000)(Leuven University Press) Leuven Law Series

Danner A. Martson and Jenny S. Martinez, 'Guilty Associations, Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (January 2005) 93 California Law Review 75

Del Ponte Carla, 'Investigation and Prosecution of Large-scale Crimes at the International Level: The Experience of the ICTY' (July 2006) 4(3) Journal of International Criminal Justice 539

Drumbl A. Mark, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (Winter 2005) 99 Northwestern University Law Review 539

Firew Kebede Tiba, 'The Mengistu Genocide Trial in Ethiopia' (2007) 5 Journal of International Criminal Justice 513-529

Gibson H. Catherine, 'Public and Private Law in the Global Adjudication System: Note: Testing The Legitimacy of the Joint Criminal Enterprise Doctrine in the ICTY: A Comparison of Individual Liability for Group Conduct in International and Domestic Law' (Symposium) (spring, 2008)18 Duke Journal of Comparative & International Law 521

Girmachew A. Aneme, 'The Anatomy of Special Prosecutor v. Colonel Mengistu Hailemariam et al (1994-2008)' (2009) 6 (1 and 2) International Journal of Ethiopian Studies 1-53

_____, 'Apology and Trials: The Case of the Red Terror Trials in Ethiopia' (2006) 6(1) African Human Right Law Journal 64-84

Guliyeva Gunel, 'The Concept of Joint Criminal Enterprise and ICC Jurisdiction' (2008-2009) 5(1) Journal of International Criminal Justice 49

Human Rights Watch/Africa, 'Ethiopia: Reckoning under the Law' (1 December 1994), Vol. 16, No. 11, <http://www.unhcr.org/refworld/docid/45cc5ecez.html >

Kelsen Hans, 'Collective and Individual Responsibility in International Law With Particular Regard to the Punishment of War Criminals'(1943) 31 California Law Review 530

Kirsch Stefan, 'The Two Notions of Genocide: Distinguishing Macro Phenomena and Individual Misconduct' (April 2009) 42 Creighton Law Review 347

Mayfield V. Julie, 'The Prosecution of War Crimes and Respect for Human Rights: Ethiopia's Balancing Act' (1995) 9(2) Emory International Law Review 553-594

Mehari Radae, 'Revisiting the Ethiopian "Genocide" Trial: Problems' (2000) 1(1) Ethiopian Law Review 1-26

Mohamed Saira, 'A Neglected Option: The Contributions of State Responsibility for Genocide to Transitional Justice' (Spring 2009) 80 University of Colorado Law Review 327

Ramer Jacob, 'Hate by Association: Individual Criminal Responsibility for Persecution Through Participation in a Joint Criminal Enterprise' (2005) Chicago Kent

College of Law, <http://www.kentlaw.edu/perritt/courses/seminar/lonb-home-2005fall.htm> accessed 27 Novemebr2009

Schabas A. William, 'Redefining International Criminal Law: New Interpretations and New Solutions: Criminal Law: State Policy as An Element Of International Crimes' (Spring, 2008) 98 Journal of Criminal Law & Criminology 953

Singh Avi, 'Criminal Responsibility for Non-State Civilian Superiors Lacking De Jure Authority: A Comparative Review of the Doctrine of Superior Responsibility and Parallel Doctrines in National Criminal Laws' (Winter, 2005) 28 Hastings International and Comparative Law Review 267

Sloane D. Robert, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (Winter, 2007) 43 Stanford Journal of International Law 39

Turner J. Iontcheva, 'Defense Perspectives on Law and Politics in International Criminal Trials' (Spring 2008) 48 Virginia Journal of International Law 529

Van der Wilt Harmen, 'Joint Criminal Enterprise: Possibilities and Limitations' (2007) 5(1) Journal of International Criminal Justice 91-108

Van Sliedregt Elies, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide' (March 2007) 5(1) Journal of International Criminal Justice 184

Wagner J. Wienczyslaw 'Conspiracy in Civil Law Countries' (1951) 42 (2) The Journal of Criminal Law, Criminology and Political Science 171-183

Wechsler Herbert, 'The Issue of The Nuremberg Trial' (March 1947) 62(1) Political Science Quarterly 20

Yaqob Haile-Mariam, 'The Quest For Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court' (1999) 22 Hastings International and Comparative Law Review 667

Legal Instruments and Documents

A. International/ Foreign

Charter of the International Military Tribunal (Nuremberg Charter) (August 8, 1945) 82 U.N.T.S 279.

Control Council Law No. 10, Dec. 20, 1945, Control Council for Germany, Official Gazette, Jan. 31, 1946,
< http://www.yale.edu/lawweb/avalon/imt/imt10.htm.> accessed 16 November 2009

UN General Assembly Resolution No. 96 (I),The Crime of Genocide (11 December 1946)

UNSC 'Statutes of the International Criminal Tribunal for The Former Yugoslavia' UN Doc.S/RES/827

UNSC 'Statute of the International Criminal Tribunal for Rwanda' UN Doc S/RES/955

B. National

Proclamation No.1/57, Penal Code of the Empire of Ethiopia, Negarit Gazeta Extraordinary Issue, No.1, 1957, Addis Ababa

Proclamation No.414/2004, The Criminal Code of The Federal Democratic Republic of Ethiopia, Negarit Gazeta,No.414,2004,Addis Ababa

Proclamation No.22/1992, The Proclamation for the Establishment of the Special Prosecutors Office, Negarit Gazeta, No 18, 1992, Addis Ababa

Proclamation No.2/1974, 'A Proclamation to Declare the PMAC as Head of State and Head of Government and to Define the Powers of the Chairman of the PMAC and that of the Council of Ministers', Negarit Gazeta, No. 2,1974,34th year, Addis Ababa

Proclamation No. 129/77, 'National Revolutionary Operations Proclamation' No.30, 1977, Negarit Gazeta, 36th year, Addis Ababa

Proclamation No. 110/77, 'Redefinition of Powers and Responsibilities of The Provisional Military Administration Council and the Council of Ministers Proclamation' No.13,Negarit Gazzeta,36th year,1977,Addis Ababa

Court Cases

A. International / Foreign Case law

Indictment, Nuremberg Trial Proceedings, Vol. 1, (Lillian Goldman Law Library Document, Yale Law School)
< http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

Indictment: Appendix A, Nuremberg Trial Proceedings Vol. 1 (Lillian Goldman Law Library Document, Yale Law School)
< http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

Indictment: Appendix B, Nuremberg Trial Proceedings Vol. 1 (Lillian Goldman Law Library Document, Yale Law School)
< http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

Judgment: Bormann, Nuremberg Trial Proceedings Vol. 1, (Lillian Goldman Law Library Document, Yale Law School)
< http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

Judgment: Bormann and Speer, Nuremberg Trial Proceedings Vol. 1, (Lillian Goldman Law Library Document, Yale Law School)
< http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

Judgment: Defendants, Nuremberg Trial Proceedings Vol. 1, (Lillian Goldman Law Library Document, Yale Law School)
< http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

Judgment: Funk, Nuremberg Trial Proceedings Vol. 1, (Lillian Goldman Law Library Document, Yale Law School)
< http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

Judgment: Ribbentrop, Nuremberg Trial Proceedings Vol. 1, (Lillian Goldman Law Library Document, Yale Law School)
< http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

Judgment: The Accused Organizations, Nuremberg Trial Proceedings Vol. 1, (Lillian Goldman Law Library Document, Yale Law School)

< http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

Judgment: The Law as to the Common Plan or Conspiracy, Nuremberg Trial Proceedings Vol. 1, (Lillian Goldman Law Library Document, Yale Law School)
< http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

Judgment: The Nazi Regime in Germany, Nuremberg Trial Proceedings Vol. 1, (Lillian Goldman Law Library Document, Yale Law School)
< http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009)

Judgment: The Sentences, Nuremberg Trial Proceedings, Vol. 1(Lillian Goldman Law Library Document, Yale Law School)
< http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

Judgment: Von Schirach; Fritzsche ; Raeder,;Von Neurath and Keitel, Nuremberg Trial Proceedings Vol. 1, (Lillian Goldman Law Library Document , Yale Law School)
< http://avalon.law.yale.edu/imt/count.asp> accessed 26 July 2009

Prosecutor v Akayesu (Judgment) ICTR-96-4-T,T Ch I (2 September 1998)

Prosecutor v. Brdanin (Appeal Judgment)ICTY IT-99-36-A (3 April 3, 2007)

Prosecutor v. Brdanin (Judgment)ICTY IT-99-36-T (September 2004)

Prosecutor v. Jelsic (Appeals Judgment) ICTY IT-95-10-A (5 July 2001)

Prosecutor v. Kayishema(Judgment) ICTR-95-1-T (21 May 1999)

Prosecutor v. Krnojelac (Appeal Judgment) ICTY -IT-97-25-A (17 September 2003))

Prosecutor v. Krnojelac (Judgment) ICTY IT-97-25-A (Sept. 17, 2003)

Prosecutor v. Krstic (Judgment)ICTY IT-98-33-T (2 August 2001)

Prosecutor v. Milutinovic (Decision on Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise) ICTY IT-99-37-AR72 (May 21, 2003)

Prosecutor v. Mpambara (Judgment) ICTR-01-65 (11 September 2006)

Prosecutor v. Ntakirutimana(Appeal Judgment) ICTR-96-10-A (13 December 2004))

Prosecutor v. Simba (Judgment) ICTR-01-76 (13 December 2005)

Prosecutor v. Stakic(Judgment) ICTY IT-97-24-A (22 March, 2006)

Prosecutor v. Tadic (Appeal Judgment) ICTY IT-94-1-A (15 July,1999)

Prosecutor v. Vasiljevic(Judgment) ICTY IT-98-32-A (25 February 2004)

B. National Court Cases

Appellant-*Special Prosecutor v. Respondents-Colonel Mengistu Hailemariam et al*., Federal Supreme Court, Judgment, File No. 30181, May 26, 2008

Special Prosecutor v. Colonel Mengistu Hailemariam et al. ,First Division Criminal Bench, Federal High Court, Verdict, File No.1/87,December 12,2006

Special Prosecutor v. Colonel Mengistu Hailemariam et al., Charge as amended on November 28, 1995 and December 2, 2002

Special Prosecutor v. Colonel Mengistu Hailemariam et al., Central High Court of the Transitional Government, File No.1/87,Rulings,8 October 1995

Other Documents

Documentary Evidence presented by SPO in Special Prosecutor v. Colonel Mengistu Hailemariam et al, Second Set of Document

Explanation of Documentary Evidence presented by SPO in Special Prosecutor v. Colonel Mengistu Hailemariam et al., First Section, ሃአማ1.185, p.1-5

Eugene Nindorera, 'Justice and Reconciliation as Instruments of National Reconstruction' <http://69.94.11.53/ENGLISH/africandialogue/papers/nindorera.pdf> accessed on September 23/2009))

Report of The Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (Feb 22, 1993), UN Doc.S/25704, Para. 56

The United Nation Commission of Experts (4 December 1994)

UN ICTR, "General Information" < http://www.ictr.org/deafult.htm >accessed 27 October 2009

UN ICTY, ‘Mandate and Jurisdiction’ < http://www.icty.org/sid/320> accessed 27 October 2009

United States Holocaust Memorial Museum. “Subsequent Nuremberg Proceedings: The Justice Case” Holocaust Encyclopedia. <http://www.ushmm.org/wlc/en/index.php?ModuleId=10005143 > accessed 27 October 8, 2009

Unpublished Manuscripts/ Thesis

Debebe Hailegebriel, ‘Prosecution of Genocide at International and National Courts: A Comparative Analysis of Approaches by ICTY/ICTR and Ethiopia/ Rwanda’ (LLM Thesis, Makerere University 2003)

Mekonnen Yimam Retta, ‘Transitional Criminal Justice: The Ethiopian Experience in the Derg/WPE Trials’ (LLM Thesis, Addis Ababa University Law Faculty, and May 2009)

COLLECTIVE CRIMINAL RESPONSIBILITY OF THE DERG MEMBERS IN THE CASE OF *SPECIAL PROSECUTOR V. COLONEL MENGISTU HAILEMARIAM ET AL*

By Yalemfiker Girma Moges

In Partial Fulfillment of the Requirement for Masters Degree in Laws(LLM)in Public International Law, Addis Ababa University, Law Faculty, Postgraduate Studies

ADVISOR: GIRMACHEW ALEMU ANEME (LLB, MA, PHD)

MARCH 2010

APPROVAL SHEET

Position	Name	Signature
Graduate Committee, Chairman	_____	_____
Advisor	_____	_____
Reader 1	_____	_____
Reader 2	_____	_____

DECLARATION

I the undersigned, declared that the thesis is my original work and has not been presented for a degree in any other university and that all sources of material in the thesis have been duly acknowledged.

Declared by Yalemfiker Girma Moges

Signature _____

Confirmed by Girmachew Alemu Aneme(LLB,MA,PHD)

Signature_____

Date_____

DECLARATION

I, the undersigned, declared that the thesis is my original work and has not been presented for a degree in any other university and that all sources of material in the thesis have been duly acknowledged.

Declared by Yalemfiker Girma Moges

Signature _____

Confirmed by Girmachew Alemu Aneme(LLB,MA,PHD)

Signature_____

Date_____