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**Prosecution of Crimes against Humanity
and Genocide in Africa: A Comparative
Analysis**

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Prosecution of Crimes against Humanity and Genocide in Africa: A Comparative Analysis

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ACRONYMS

ICC	The International Criminal Court
UN	The United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
AU	The African Union
OAU	Organization for African Unity
EU	The European Union
ECOWAS	Economic Community of West African States
ASP	Assembly of State Parties
GoSL	Government of Sierra Leone
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
USA	United States of America
USSR	United Soviet Socialist Republics
UK	United Kingdom of Great Britain and Northern Ireland
DRC	Democratic Republic of Congo
CAR	Central African Republic
FDRE	Federal Democratic Republic of Ethiopia
JEM	Justice and Equality Movement

RUF	Revolutionary United Front
CDF	Civilian Defense Forces
OTP	Office of the Prosecutor
OSP	The Ethiopian Special Prosecutor's Office
TGE	Transitional Government of Ethiopia
CAT	Convention against Torture
ICCPR	International Covenant on Civil and Political Rights
ACHPR	African Charter on Human and Peoples' Rights
BIAs	Bilateral Immunity Agreements
ASPA	American Service Members' Protection Act

ABSTRACT

Despite years of impunity in Africa, the 1990s saw the perpetrators of some of the atrocities in the continent face trials. However, all these efforts are varied. Some countries went through prosecuting perpetrators of crimes against humanity and genocide through their domestic courts, while other perpetrators were brought before international ad hoc tribunals. Moreover, as of 1 July, 2002, the first permanent international criminal tribunal in the world's history, the International Criminal Court (ICC) had also pursued such perpetrators. These all efforts show the lack of uniform organized approach to dealing with crimes against humanity and genocide in the continent. This in turn leaves the issue of prosecution to the whim of governments and international organizations like the United Nations. This means prosecutions could only happen when these governments and organizations want it. This scenario encourages impunity as leaders of some governments seek to shy away from prosecuting such crimes for a reason of comradeship with the alleged perpetrators or fearing that they would one day face such prosecution themselves. On the other hand, it might happen that by prosecuting, governments want to send some political message to their opponents. The case of the United Nations Security Council is also not different. The taking of action by the Security Council depends on the political priority of the members as it is also a political organ. All in all, the consideration of prosecuting crimes against humanity and genocide would to a large extent be based on non-legal considerations, rather than ending the fight against impunity. The existence of impunity in the continent, in turn, creates a peace and security threat as victims look to the bushes rather than the court room to bring justice for the crimes they thought were perpetrated against them. This paper studies the legal frameworks or systems upon which the prosecutions took place, the challenges they faced or will face in the future and recommend the best system for prosecuting crimes against humanity and genocide in Africa by selecting five legal frameworks; the ICC, the Special Court for Sierra Leone, the Ethiopian Legal frame work for the prosecution of crimes against humanity and genocide, Senegal legal frame work for the Prosecution of Hissene Habre, and the Rwandan Legal frame work, including the ICTR.

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CHAPTER ONE

INTRODUCTION

1.1. Background

The words Genocide and Crimes against Humanity were not known before the Second World War in their current form. Although there were acts, after the 1945 events which would have been considered Genocide and Crimes against Humanity, they were not termed as such¹. They were recognized and identified as crimes of concern for the international community following the London Charter establishing the International Military Tribunal at Nuremberg.² However, under the Charter, what nowadays qualify as two separate offences were then under single Crimes against Humanity.³ The Charter had further introduced new concepts under international law which nowadays form the bedrock of the International Criminal Justice System. Some of these concepts include individual criminal responsibility⁴, responsibility of commanders⁵, inadmissibility of the defense of superior order except for mitigation of sentences⁶, no immunity for state officials.⁷ The Charter, including these fundamental principles, was subsequently endorsed by the UNGA in 1946.⁸ Shortly after the four victorious allied powers signed the Charter, the Tribunal started its work by indicting twenty two defendants including officers of the Nazi re-

¹ Raphael Lemkin, *Axis Rule in Europe: Laws of Occupation- Analysis of Government-Proposals for Redress*, (Carnegie Endowment for International Peace, 1944) Cited in Guenael Mettraux, *International Crimes and the ad hoc Tribunals*, (Oxford:UK, Oxford University Press,2005) 193.

² See the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and the Charter of the International Military Tribunal, London, 8 August,1945 available on <http://www.icrc.org/ihl.nsf/FULL/350?OpenDocument> accessed on 20 September, 2010. Note that there was also another Tribunal established by the allied powers of the Same Nature in Tokyo that aims to try and punish war criminals, perpetrators of crimes against humanity.

³ Ibid, Art. 6(c)

⁴ Ibid, Art.6

⁵ Ibid, Art. 7

⁶ Ibid, Art.8

⁷ Ibid, Art.7

⁸ Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, UNGA Resolution N^o 95(I), New York, December, 1946 available on http://untreaty.un.org/cod/avl/pdf/ha/ga_95-I/ga_95-I_ph_e.pdf accessed 23 November 2010.

gime.⁹ Out of these defendants, three were acquitted, seven were sentenced to prison terms between ten years to life, and twelve were sentenced to death by hanging.¹⁰

After the End of the Nuremberg tribunals and its counterpart in Tokyo, however, the world lost momentum on bringing perpetrators of mass violation of human rights to justice. The culture of impunity was much more widespread in Africa more than any place in the world with various civilian as well as military oppression resulted in acts constituting either Genocide or Crimes against Humanity with prosecutions virtually non-existent.¹¹

With the fall of communism and the beginning of the ‘new world order’, the perpetrators of some of such atrocities were put to justice around the world. An example of this effort in Africa are the UN International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (now onwards called the Special Court), and the International Criminal Court (ICC) internationally while Rwandan, Ethiopian and Senegalese courts moved to prosecute perpetrators of crimes against humanity and genocide in their own courts. This paper studies the frameworks within which these prosecutions took place and the challenges they faced and recommends a framework which will be best for the prosecution of the crimes in Africa in the future.

1.2. Statement of the Problem

Despite years of impunity in Africa, the 1990s saw the perpetrators of some of the atrocities in the continent face trials. However, attempt to deal with them through prosecutions were varied. They range from prosecution through an international tribunal to fully use the domestic court set up in order to put the perpetrators on trial. Starting from 1 July, 2002, these prosecutions have also involved a permanent international criminal court which currently has all of its cases from Africa.¹² As experience shows, the issue of prosecution of crimes against humanity and geno-

⁹ Richard Overy, “The Nuremberg Trials: International Law in the Making”, in *From Nuremberg to the Hague: the Future of International Criminal Justice*, ed. Philippe Sands, 1-29, (Cambridge: UK, Cambridge University Press, 2003) at 12

¹⁰ Mathew Lippman, “Nuremberg: Forty Five Years Later,” *Connecticut Journal of International Law* 7:1 (1991-1992):1- 64 at 27.

¹¹ There was one prosecution in the Equatorial Guinea following the overthrow of President Macias in September, 1979. See John Quigley, *The Genocide Convention: An international Law Analysis*, (Aldershot: UK, Ashgate Publishing Limited, 2006) at 31

¹² Currently the ICC has five cases from Africa; three of them (the DRC, Uganda, and Central African Republic) are referred to it by these countries themselves, while the Darfur case is referred to it by the UNSC under Art. 13(b) of the ICC’s statute and the Kenya case is through the use of prosecutor’s power to initiate investigations. See the

cide is left to the whim of governments and international organizations like the UN. This means prosecutions could only happen when these governments and organizations want it. This scenario, on the one hand, encourages impunity as leaders of some governments seek to shy away from prosecuting such crimes for a reason of comradeship with the alleged perpetrators or fearing that they would one day face such prosecution themselves. On the other hand, it might happen that by prosecuting, governments want to send some political message to their opponents. The case of the UNSC is also not different. The taking of action by the UNSC depends on the political priority of the members as it is also a political organ. All in all, the consideration of prosecuting crimes against humanity and genocide would to a large extent be based on non-legal considerations, rather than ending the fight against impunity. The existence of impunity in the continent, in turn, creates a peace and security threat as victims look to the bushes rather than the court room to bring justice for the crimes they thought were perpetrated against them. Hence, it is necessary to look back on the prosecutions which took place so far, the challenges they faced and will face in the future if they continue their work and recommend the best system for a court that could help end impunity in the continent.

1.3. Objective of the Research Paper

The aim of the paper is;

- to analyze the framework on which the prosecutions of crimes against humanity and Genocide in Africa have taken place so far;
- the challenges they faced and will face in the future if their use continues;
- recommend the best system for a court that could help end impunity in the continent.

1.4. Significance of the Research Paper

The paper is significant in:

- Showing the framework on which the prosecutions of Crimes against Humanity and Genocide in Africa have taken place.
- Pointing out the challenges these prosecutions had faced and will face.
- Recommending the best system that can help end impunity in the continent.

- Serving as an input for further research in the area.

1.5. Scope and limitation of the Research Paper

The Research paper is confined to studies of the Crimes against Humanity and the crime of Genocide. It does not indulge in the discussion of war crimes cases. Any mention of war crimes is incidental to the discussions of Crimes against Humanity and Genocide. In addition, the paper's studies and findings are only going to be confined to the case of Africa. The paper only seeks to study the system of prosecutions or the frame works within which the prosecutions have taken place. This means the legal system of the courts upon which the prosecutions were based. It does not seek to compare between individual cases entertained by such courts/tribunals. Any mention of specific cases is an attempt to illustrate part of the study of the legal frame work and should not be viewed as an attempt to compare such individual cases.

1.6. Methodology of the Paper

This paper is going to be a comparative Analysis. As such it seeks to make comparison between five legal systems/frameworks upon which the prosecution of crimes against humanity and genocide took place in Africa. They are the ICC as it is entertaining five African cases, the Special Court as it is prosecuting the perpetrators of the Sierra Leonean civil war, Senegal as it is entertaining the case of former Chadian dictator Hissene Habre, ICTR and the Rwandan Domestic courts as they are adjudicating cases of the perpetrators of the Rwandan Genocide(for reason of convenience they are be discussed under the same heading in the paper), and the Ethiopian Courts for their trial of members of the military dictatorship called the *derg* which ruled the country from 1974-1991 known as the Red Terror trials. The writer believes that these legal systems represent the approaches of prosecution taken by African countries. For the comparison, the writer had chosen the following criteria. They are; Definition of the crimes, Structure of the courts/tribunals, their Assumption of jurisdiction on the cases, Fair trial Guarantees, Rules of evidence, Sentencing for the crimes and Sources of funding. The comparison is based on primarily the Statutes, rules of evidences and other legislations. Books, Articles, and internet resources are also used.

1.7. The Research Questions

- What is the legal framework of the courts?
- What are the challenges the courts/tribunals have faced or will face?
- What will be the best system for the future prosecutions of Crimes against Humanity and Genocide and help end impunity in Africa?

1.8. Structure and Contents of the Paper

This paper is classified in to four chapters. This Chapter introduces the paper by discussing the background to the problem, the statement of the problems, and its aims and significances, the methodology and the research question. Chapter two discusses general backgrounds to the Crimes and the system of prosecutions. Under this Chapter, the paper discusses the development of Crimes against humanity and genocide, the purposes of prosecuting these crimes and the overview of prosecutions held around the world in the past. Under Chapter three, the paper studies the five legal frame works in light of Seven Criteria; Definition of the Crimes, Structure of the Courts/tribunals, Assumption of Jurisdiction, Fair Trial Guarantees, Rules of evidence, Sentencing of the Perpetrators, and Sources of Funding. Under the final and the fourth Chapter, the paper discusses the challenges faced and will be faced by the systems of prosecution of crimes against humanity and genocide in Africa. Finally the paper concludes and gives its recommendations as to the best system for prosecuting Crimes against Humanity and genocide in Africa.

CHAPTER TWO

GENERAL BACKGROUND

2.1. Development of The Concepts of Crimes Against Humanity and Genocide

In this section, the paper discusses how the concepts of genocide and crimes against humanity evolved in international law.

2.1.1. Crimes against Humanity

Crimes against Humanity, which generally involves acts of physical violence or persecution committed against vulnerable groups of individuals¹³, was first introduced as a category of international crimes after the end of WWII in the Nuremberg Charter.¹⁴ However, the term was first used by the French revolutionary leader Maximilian Robespierre when he described King Louis XVI as “*Criminel envers l’humanite*” which means Crimes against Humanity.¹⁵ In 1907, when the Hague Conventions on the laws and customs of War on land was drafted, Fedor Fedorovitch Martens, an international law expert and representative to the Hague conferences on the law of war, came up with what is later known as Martens Clause.¹⁶ This Clause mentioned ‘laws of Humanity’ as part of the Law of Nations.¹⁷ The term “crimes against humanity”, however, was used just after World War I, on 28 May, 1915, when the governments of the allied nations France, Great Britain, and Russia condemned the actions of their defeated enemy Ottoman Turkey against the Armenians as “crimes against civilization and humanity”.¹⁸ The allied powers then went on to establish the Commission on the authors of war and the enforcement of penalties known for short as ‘Commission of Fifteen’ to investigate and report on the alleged violations of

¹³ Dinah L. Shelton, Howard Adelman, Frank Chalk, Alexander Kiss, William A. Schabas eds., *Encyclopedia of Genocide and Crimes against Humanity*, s.v., “Crimes against Humanity”, (Farmington Hills: MI, Thompson Gale Publishers, 2005).

¹⁴ See Agreement for the Major War Criminals, Art.6(c)

¹⁵ *Encyclopedia of Genocide and Crimes against Humanity*, s.v. “crimes against humanity”

¹⁶ Mathew Lippman, “Crimes against Humanity”, *Boston College Third World Law Journal* 17:171(1997): 171-274, at 173.

¹⁷ Convention (IV) on Respecting the Laws and customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War On Land, The Hague, 18 October, 1907, paragraph 8 of the Preamble, available on <http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6> accessed on 23 November 2010.

¹⁸ Mohamed Elwa Badar, “From Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes against Humanity”, *San Diego International Law Journal* 5:73 (2004): 73-144, at 78.

international law by Germany and its allies.¹⁹ The Commission later on came up with the report on 29 March, 1919 which stated that Germany and its allies were responsible for ‘outrages of every description committed on land, at sea and in the air, against the laws and customs of war... and the laws of humanity.’²⁰ The treaty of Sevres, which was an agreement between the allied powers and Ottoman Turkey, obliged Turkey to hand over those responsible for the crimes described by the commission.²¹ However, this treaty was never ratified and was later replaced by the treaty of Lausanne in 1923 which went back on the developments of the past years and declared amnesty for the offences committed during the war.²² During the inter-war period, though, the belief that ‘crimes against humanity’ were not determinable as to be part of international law became stronger²³ despite the effort of various scholars and committees to develop a law with regard to it.²⁴ It was after the Second World War that Crimes against Humanity gained prominence in international law when it was included under art 6(c) of the agreement between the USA, UK, USSR and France known as the London agreement which has as its annex the Nuremberg charter which established the Nuremberg Tribunal to prosecute and punish the major war criminals of the European Axis.²⁵

This Article Stated that crimes against humanity includes acts of;

*“Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war or persecutions on political, racial or religious ground 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.”*²⁶

¹⁹ David Matas, “Prosecuting Crimes Against Humanity: The Lessons Of World War I,” 13 Fordham International Law Journal 13:86 (1989-90): 86-104 at 87.

²⁰ The report of the Commission of Fifteen cited in Lippman, “Crimes against Humanity”, at 174

²¹ Egon Schwelb, “Crimes against Humanity”, British Year Book of International Law 23:178 (1946): 173-226 at 183.

²² William Schabas, *Genocide in International Law: the Crime of Crimes*, (New York: NY, Cambridge University Press, 2000) at 22

²³ M.Charif Bassiouni, *Crimes Against Humanity*, in ed. M.Charif Bassiouni, *International Criminal Law: enforcement*, Vol.3, (New York:NY, Transnational Publishers, Inc. 1987) at 54

²⁴ William Schabas, *Genocide in International Law*, 22-24

²⁵ See Agreement for the Prosecution and Punishment of the Major War Criminals, Art.6(c)

²⁶ Ibid

Under this Article Crimes against Humanity may be committed only in time of War. However, subsequent developments over half-a-century have expanded this definition to include those cases of ‘murder, extermination, enslavement, deportation and other inhuman acts’ committed during peace time too.

Even though the statute of the international Tribunal for the former Yugoslavia (ICTY) also includes this requirement, the Appellate chamber in the Prosecutor Vs Tadic case rejected the claim of the appellant by saying that:

‘...it is now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict... Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the security council may have defined the crime in Article 5 more narrowly than necessary under customary international law...’²⁷

The other ad hoc tribunal, the International Criminal Tribunal for Rwanda (ICTR) has abolished this nexus to armed conflict in its statute.²⁸ Crimes against Humanity were later incorporated under Art.7 (1) the statute of the International Criminal Court (ICC) which entered into force on 1 July, 2002.²⁹ The definitions of Crimes against Humanity as incorporated under the ICC and other tribunals in Africa, will be discussed in the next chapter.

2.1.2. Genocide

During WWII, the extermination of the Jews had been described by Winston Churchill, the then Prime Minister of The United Kingdom, as a ‘crime without a name.’³⁰ The word Genocide was first introduced by a Polish jurist, Raphael Lemkin, in his book ‘*Axis Rule in Occupied Europe*:

²⁷ Prosecutor Vs. Tadic, Case No IT-94-1-AR72, *Decisions on the Defense Motion for the Interlocutory Appeal on Jurisdiction*, The Hague, 25 August, 1995, Para. 141.

²⁸ See The Statute of the International Criminal Tribunal for Rwanda (ICTR), annex to UNSC Resolution S/RES/955(1994), New York, 8 November, 1994 available on <http://www.un.org/ict/english/Resolutions/955e.htm> accessed on 23 November, 2010.

²⁹ <http://www.icc-cpi.int/Menus/ICC/About+the+Court/> accessed on 23 September, 2010.

³⁰ Leslie Alan Horvitz & Christopher Catherwood eds., *Encyclopedia of War Crimes and Genocide*, s.v. “Genocide”, (New York: NY: Facts on file Inc. 2006).

Laws of Occupation, Analysis of Government in 1944.³¹ He derived the word from the Greek word ‘*genos*’ which means race and ‘*caedere*’ which means ‘to kill’ in Latin.³² Following the intense lobbying by Lempkin and the failure of Nuremberg to recognize the crime of genocide, UN member states such as India, Cuba and Panama tabled a resolution to the first session of the UNGA resembling the approach of Lempkin which, inter alia, proposed Universal Jurisdiction for the Prosecution of Genocide.³³ This proposal was rejected because members could not agree on the use of Universal Jurisdiction but it launched the move towards an international Convention on Genocide which culminated in the adoption of the Convention on the Prevention and Punishment of the Crime Genocide on 9 December, 1948.³⁴ The Convention later on entered into force on 12 January, 1951.³⁵ It defines the crime of Genocide under Article II, as

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

- a) *Killing members of the groups;*
- b) *Causing serious bodily or mental harm to 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 of another group.”*³⁶

It also specifies the level of participation punishable in the commission of the crime and calls on states to take measures necessary to outlaw it under their domestic legislation and to cooperate in the extradition of perpetrators.³⁷ This definition is currently widely accepted by the international

³¹ Quigley, *The Genocide Convention*, at P.5

³² Schabas, *Genocide in International Law*, at 25

³³ William Schabas, “Origins of the Genocide Convention: from Nuremberg to Paris”, *Case Western Reserve Journal of International Law* 40:35 (2007-2009): 35-56, at 35.

³⁴ *Ibid*, at 36

³⁵ See http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en accessed on 23 September, 2010.

³⁶ Convention on the Prevention and Punishment of the Crime of Genocide, UNGA Resolution A/RES/260(III), New York, 9 December, 1948, Art. II

³⁷ See in general *ibid*

community as the definition of the term.³⁸ The Paper will discuss the definitions adopted under different tribunals/courts in the next Chapter.

2.2. The Purpose of Prosecution of Crimes against Humanity and Genocide

Before going into discussing about the prosecution of Crimes against Humanity in Africa, first of all the question of why Prosecution is necessary needs to be considered. Generally, there are two broad purposes for prosecuting crimes against humanity and Genocide which are Utilitarian and Retributive.³⁹ The Utilitarian purpose focuses on the future instead of the past while the Retributive is concerned with the past.⁴⁰ The Utilitarian purpose justifies its position based on deterrence and incapacitation while the retributive purpose focuses on the old adage ‘an eye for an eye’.⁴¹ Retribution is one purpose of criminal prosecution which stands on the argument that it is right to prosecute and punish those who commit a certain crime; however, it is differentiated from retaliation.⁴² It is considered as a way of expressing the anger of a society over a certain criminal conduct committed by a person.⁴³ Deterrence, on the other hand, is based on the assumption that the prosecution and the subsequent punishment is sanctioned to send a message to the perpetrator or the rest of the society that violating the law has dire consequences and thereby create compliance of law.⁴⁴ Incapacitation is somehow connected to the deterrence justification, but focuses on the person who commits the crimes.⁴⁵ It sets out the argument that to prevent the commission of further crimes, the person guilty of a crime should be kept locked-up.⁴⁶ In addition to this, there are other justifications of punishment like rehabilitation concerned with reformation of the perpetrator⁴⁷, reconciliation after conflicts⁴⁸, recording of history especially for international tribunals.⁴⁹

³⁸ To get a sense of how wide it is accepted by countries see generally John Quigley, *The Genocide Convention*, 15-19

³⁹ Dinah L. Shelton, Howard Adelman, Frank Chalk, Alexander Kiss, William A. Schabas eds., *Encyclopedia of genocide and crimes against humanity*, Vol.2, s.v. “Punishment”, (Farmington Hills: MI, Thompson Gale, 2005).

⁴⁰ Robert Cryer, Hakan Friman, Darryl Robinson & Elisabeth Wilmschurst, *An Introduction To International Criminal Law and Procedure*, (New York: NY, Cambridge University Press, 2007) at 18

⁴¹ *Encyclopedia of Crimes against Humanity and genocide*, Vol.2, s.v. “punishment”

⁴² Stanly A. Cohen, “An Introduction to the theory, justifications and modern manifestations of criminal punishment”, *McGill Law Journal* 27:73(1981-1982): 73-91, at74.

⁴³ Bentham, “Rationale of punishment,” quoted in *ibid*.

⁴⁴ Beyleveld, “Identifying, Explaining, and Predicting Deterrence,” *British Journal of Criminology* 19:205 (1979):205-224, at 207.

⁴⁵ Cryer et.al, *An introduction to International Criminal Law and procedure*, at 22.

⁴⁶ *ibid*

⁴⁷ Cohen, “Theory, justifications and manifestations of criminal punishment”, at78.

Under international Criminal Justice System, Retribution seems to be the dominant purpose for prosecuting persons suspected of committing serious violations of International Humanitarian law such as Crimes against Humanity and Genocide. Paragraph 4 of the preamble of the ICC statute stating that ‘the most serious crimes of concern to the international community must not go unpunished’,⁵⁰, Art.1 of the Statute for the Special Court of Sierra Leone and Art.1 of the Statute of the International Criminal Tribunal for Rwanda saying that each ‘has the power to prosecute those responsible for the serious violation of International Humanitarian Law’ in Sierra Leone and Rwanda, respectively⁵¹, suggest that they are predominantly established for Retributive purposes. The Trials of Hissene Habre, the Red Terror and the Rwandan Domestic Prosecution are also conducted with the objective of punishing those for the crimes they have committed.⁵²

2.3. Overview of Past Prosecutions of Crimes against Humanity and Genocide in the World

Although there were various kinds of atrocities committed in the world, prosecutions for them, however, are fairly recent phenomena.⁵³ It was only after the Second World War that prosecuting individuals for a ‘Crime against Humanity’ took place.⁵⁴ After their victory, the allied powers convened the London Conference on the possibility of prosecuting those responsible for one of the worst atrocities of the twentieth century⁵⁵, following the end of which, the USA, USSR,

⁴⁸ The Argument here is that if the perpetrators of crimes during a conflict are punished, then post conflict healing could be achieved. See Cryer et.al, *An introduction to International Criminal Law and procedure*, at. 24

⁴⁹ The logic behind this is if trials are to be held after conflicts, they could serve as a credible record for all the crimes committed during the atrocities. See *ibid*

⁵⁰ The Statute of the International Criminal Court, adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, Rome, 17 July, 1998, Para 4 of the Preamble

⁵¹ The Statute of the Special Court for Sierra Leone annexed to the Agreement Between the United Nation and the Government of Sierra Leone on the Establishment of A Special Court For Sierra Leone, signed on 16 January, 2002, Art.1 and also See ICTR statute, Art.1

⁵² For the case of Hissene Habre See Decision on Hissene Habre and the AU, AU Assembly of Heads of States and Governments, Assembly/ AU/Dec.127 (VII), Banjul, 2 July, 2006. For the Red terror Trials See Transitional Government Proclamation Establishing the Office of the Special Prosecutor, Proclamation N° 22/1992, Negarit Gazzetta, Addis Ababa, 8 August, 1992. Preamble, Paragraph 4. Although these trials have also the purpose of recording history (see Para.5 of the same proclamation). For the Rwandan domestic prosecution see Organic Law No.08/96 on the Organizations of Prosecutions for Offences Constituting the Crime of Genocide and Crimes against Humanity committed since 1 October, 1990, Kigali, 30 August, 1996, Art.1

⁵³ Matas, “Prosecuting Crimes against Humanity”, at.86

⁵⁴ *Ibid*

⁵⁵ Lippman, “Nuremberg: Forty Five Years Later”, at.21

United Kingdom, and France established the Nuremberg tribunal.⁵⁶ As seen under chapter one, the Nuremberg charter introduced some novel and fundamental concepts to the classical international law dominated by states before. The tribunal, subsequently after its establishment, indicted twenty-two defendants on seventy-four counts.⁵⁷ Initially the tribunal faced difficulty of which law to apply and which crimes to indict as there were no convention or laws of nations that outlawed crimes against humanity and Genocide.⁵⁸

After long debates concerning what law to apply (since the principle of legality is the most fundamental principles of criminal justice systems, they did not want to be seen overriding it) the American Prosecutor Robert Jackson, finally, convinced his counterparts that the only way to proceed is through a conspiracy to commit aggression and succeeded in doing so.⁵⁹ He did so by arguing that prosecuting the suspects with conspiracy to commit the crime of aggression solves the controversy surrounding the principle of legality while ensuring that the atrocities committed be prosecuted.⁶⁰ After overcoming such difficulties, the tribunal tried the case and finally delivered its judgment, acquitting three, sentencing seven of them to prison terms ranging from ten years to life and the rest twelve were sentenced to death by hanging.⁶¹ The principles of the Charter and the judgment were later endorsed by the UNGA in 1946 as principles of international law.⁶²

Mean while, there were similar trials in Tokyo for the punishment of major war criminals in the Far East whose tribunal was established by an American General in Charge of Japan at that time.⁶³

After this time, despite the existence of many atrocities, there were virtually no prosecutions. The next prosecution after Nuremberg and Tokyo was in Israel in which the former high-level

⁵⁶ See Agreement for the prosecution and punishment of Major war criminals

⁵⁷ Overy, "The Nuremberg Trials", at. 12

⁵⁸ Ibid, pp.14-22

⁵⁹ Overy, "The Nuremberg Trials", at 16

⁶⁰ ibid

⁶¹ Lippman, "Nuremberg Forty Five Years Later", at. 27

⁶² See UNGA Affirmations of the Nuremberg Principles

⁶³ The International Military Tribunal for the Far East (IMTFE) was established by an executive order of General Douglas MacArthur, Supreme Commander for the Allied Powers in Japan. This Executive order, Known as the Tokyo Charter, also had Crimes against Humanity and peace in it. See Antonio Cassese, *International Criminal Law*, (Oxford: UK, Oxford University Press, 2003), at. 332

Nazi-official, Adolf Eichmann, was tried by the law of Israel.⁶⁴ Israel, at that time, had ratified the Genocide convention and had a domestic legislation as per the convention but the prosecutor used another law named ‘punishment of Nazi and Nazi Collaborators Act’ which guaranteed retroactivity.⁶⁵ The most important principle to come out of this trial is that of the principle of universal jurisdiction asserted by the Israeli Supreme Court.⁶⁶ After that, there was a trial of former President of Equatorial Guinea, which was Africa’s first war crimes trial, in September 1979 following his overthrow the previous month.⁶⁷ President Macias was charged with Genocide and embezzlement among other things.⁶⁸

A trial of the same nature also took in Cambodia in which the rulers of the Khmer Rouge regime, Pol Pot and Iang-Sery, were charged, in absentia, for Genocide as per the Genocide Convention and a special decree entitled Decree Law I.⁶⁹ This trial was marred by the controversy over the necessity of legislation to effect the Genocide Convention and the non-retroactivity of criminal law.⁷⁰ However, after a study in 1999 by a UN commissioned experts, the UN established a special tribunal for Cambodia to try those responsible for the atrocities committed during the Khmer Rouge rule.⁷¹ There were also prosecutions in countries like Romania, Bolivia, Lithuania and Latvia for atrocities committed during the tenure of their repressive communist regimes.⁷²

After the fall of the Berlin wall, the ICTY became the first international tribunal after Nuremberg and was established to punish those responsible for the violation of international Humanitarian

⁶⁴ Stephen Landsman, “Those Who Remember the Past May not be Condemned to Repeat It”, *Michigan Law Review*, 100: 6 (2002):1564-90, Book Review, at.1573.

⁶⁵ Quigley, *The Genocide Convention*, P. 24

⁶⁶ Steven R. Ratner & Jason S. Abrams, *Accountability For Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2nd edition, (Oxford: UK, Oxford University Press, 2001), at.180

⁶⁷ Quigley, *The Genocide Convention*, at.31

⁶⁸ Ibid

⁶⁹ Yves Beigbeder, “International Justice against Impunity: Progress and New Challenges” , cited in Tessa V.Capeloto, “Reconciliation In the Wake of Tragedy: Cambodia’s Extraordinary Chambers Undermines the Cambodian Constitution”, *Pacific Rim Law & Policy Journal* 17:103(2008):103-132, at.107.

⁷⁰ Quigley, *The Genocide Convention*, at.27

⁷¹ Yves Beigbeder, “International Justice against impunity” , at.130. Recently the Court passed a guilty verdict and 30 years of imprisonment on a former prison guard and has also indicted other former top leaders of the khmer rouge. See ‘khmer rouge prison chief handed 30 years in jail,’ *AFP Global edition*, 26 July, 2010, available at <http://www.thefreelibrary.com/Khmer+Rouge+prison+chief+handed+30+years+in+jail-a01612284269> accessed on 22 November, 2010.

⁷² See generally Quigley, *The Genocide Convention*, pp.38-45

law norms in the territories of the former Yugoslavia following the latter's dismemberment.⁷³ It was established by the UNSC Resolution acting under Chapter VII mandate following a recommendation by the UNSG in 1993.⁷⁴ At the end of the decade, UN member countries gathered in Rome for the UN competence on the establishment of a permanent International Criminal Court, in which they adopted the statute of the court which entered into force in 1 July, 2002.⁷⁵ It has until now five cases, of which 3 were referred to it by member states one other by the UNSC. It also has a few cases by the prosecutor's own Motion.⁷⁶ In addition to the ICC, ICTY and ICTR, there is also the UN-the Special Court for Sierra Leone established for the prosecution of those perpetrators of crimes against humanity in Sierra Leone in the 1990s.⁷⁷

⁷³ Mettraux, *International Crimes*, at 3

⁷⁴ See UN Security Council Resolution S/RES/827(1993), New York, 25 May, 1993 available on <http://www.ohr.int/other-doc/un-res-bih/pdf/827e.pdf> last accessed on 23 November, 2010.

⁷⁵ See <http://www.icc-cpi.int/Menus/ICC/About+the+Court/> last accessed on 23 November, 2010.

⁷⁶ This is the case of Kenya, Which is a member state. There was election violence in 2007 following which alleged crimes against humanity happened. See "Kenya: A blow against Impunity", *Africa Confidential*, 2 April 2010, 1-2. Besides Kenya, the Office of the Prosecutor is currently conducting a preliminary examination in Afghanistan, Georgia, Guinea, Cote d'Ivoire, Colombia, and Palestine. See <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/> accessed on 23September,2010

⁷⁷ Joe A.D. Alie, "Reconciliation and Traditional Justice: Tradition-based Practices of the Kpaa Mende in Sierra Leone," in Luc Huyse & Mark Salter eds., *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, (Stockholm: Sweden, International Institute for Democracy and Electoral Assistance,2008), at131

CHAPTER THREE
SYSTEMS OF PROSECUTION OF CRIMES AGAINST HUMANITY AND GENOCIDE
IN AFRICA: A COMPARATIVE STUDY

Under this chapter, the Writer intends to discuss the legal framework based on which the prosecutions of crimes against humanity and genocide that have taken place across Africa. For the discussion, the writer has chosen five legal regimes; they are the ICC, the Special Court, The Senegalese, Ethiopian and the Rwandan legal regimes. For the sake of convenience the writer has included the discussion of the ICTR under the Rwandan legal regime together with the domestic legal system. These Legal regimes are discussed in light of the following seven criteria. They are Definition of the Crimes, Structure of the Courts/Tribunals, Assumption of jurisdiction, Fair trial guarantees, Rules of evidence, Sentencing of perpetrators and Sources of funding.

This Chapter has seven sections-one for each criteria.

3.1. Definition of the Crimes

This section tries to discuss the definitions of the crimes under the legal regimes upon which the prosecutions took place.

3.1.1 The ICC statute

The ICC statute, based on which the prosecutions of DRC, CAR , Kenya and Sudan are taking place, defines Genocide under its Art.6 as exactly as the Genocide Convention defines it under its Art.2⁷⁸, i.e., as acts of killing, seriously causing physical and mental harm, deliberately inflicting conditions of life calculated to bring about its physical destruction, imposing measures intended to prevent births and forcibly transferring children of a racial, ethnic, religious or a national group with an intent to destroy them in whole or in part.⁷⁹ The ICC statute also defines Crimes against Humanity under its Art.7. It says that for the purpose of the statute, crimes against humanity means committing acts of murder, enslavement, extermination, deportation or

⁷⁸Statute of the ICC, Art.6. See also the Genocide Convention ,Art. II

⁷⁹ Ibid

forcible transfer of populations, imprisonment or other means of severe deprivation of liberty contrary to fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other sexual violence of “comparable gravity”, persecution of identifiable group or collectivity on political, racial, ethnic, national, religious, cultural, gender or any other grounds universally recognized as impermissible under international law, enforced disappearance of persons, the crime of Apartheid, and other inhumane acts of a similar nature intentionally causing great suffering or serious injury to body, mind or physical health as part of a wide spread or systematic attack directed against a civilian population with the knowledge of the attack.⁸⁰ According to Art. 7(2)(a) of the Rome statute, ‘attack directed against a civilian population’ means ‘... a course of conduct involving multiple commission of acts referred under paragraph 1 (mentioned above) against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack.’⁸¹ Under the statute, a policy that aims at attacking a civilian population directly or tacitly (by deliberately allowing such attacks to continue or by ‘deliberately failing to prevent the attacks’) must exist to say there is a ‘widespread and systematic attack directed against a civilian population’.⁸² In addition, the attacks need not be military attacks.⁸³ Art. 7 also requires that these attacks be committed with ‘the knowledge of the attacks’, however, this requirement does not mean that the perpetrator must know ‘all the characteristics of the attack or the precise details of the plan or policy of the state or the organization.’⁸⁴

3.1.2. Statute of the Special Court for Sierra Leone

The Definition of Crimes against humanity under the Statute of the Special Court is derived from the ICTR’s Statute, not copied though, as could be seen as could be seen later in this subsection.⁸⁵ It states that persons who committed acts of murder, extermination, enslavement, deportation, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy,

⁸⁰ Ibid, Art. 7(1)

⁸¹ Ibid, Art. 7(2)(a)

⁸² Elements of Crimes of the International Criminal Court, adopted by the Assembly of State Parties, New York, 09 September, 2002. Art. 7 introduction paragraph 3 footnote 6 available at <http://www.iccpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Elements+of+Crimes.htm> last accessed on 23 November, 2010.

⁸³ Ibid, Art. 7 introduction, paragraph 3

⁸⁴ Ibid, Art. 7 introduction, paragraph 2

⁸⁵ Cryer et.al, *Introduction to International Criminal Law and Procedure*, at 152

any other form of sexual violence, persecution on political, racial, ethnic , religious grounds and other inhumane acts as part of a widespread and systematic attack against any civilian population can be prosecuted by the special court.⁸⁶ This definition is narrower than the ICC one as it does not include crimes like the Crime of Apartheid and enforced disappearance for obvious reasons as the former is an *ad hoc* court and only entertains serious violations of International Humanitarian Laws committed in the territory of Sierra Leone since 30 November, 1996⁸⁷, as opposed to the latter which is permanently established.⁸⁸ In addition, as opposed to the Rome statute, it leaves out the ‘knowledge of the attack’ element from its *chapeau*. The statute has no definition to Genocide because Genocide was not believed to be committed in Sierra Leone and because of the fact that it is an ad hoc court it only is established those believed to be committed.

3.1.3 Amendment law of the Penal Code of Senegal

Senegal was the first country to ratify the Rome statute of the International Criminal Court on 2 February, 1999.⁸⁹ However, it was not until 2007 that it has enacted implementation legislation.⁹⁰ Under this law, Crime against Humanity is defined, under Art.431-2, as acts of rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization and other forms of sexual violence of comparable gravity, killing, extermination, deportation, the Crime of Apartheid, slavery or massive and systematic practice of summary executions, kidnappings and disappearance, torture and other inhuman acts that intentionally cause great suffering or bring great harm to physical integrity and mental inspiration by the reason of political, ethnic, racial, cultural ,gender, religious nature on the occasion of widespread and systematic attack directed against any civilian population.⁹¹ The Senegalese Code, like the Statute of the Special Court of Sierra Leone, does not include the ‘knowledge of the attack’ requirement. It simply leaves it out. In addition, it leaves out the crimes of forcible deportation of populations and imprisonment and other forms of deprivation of liberty and the Crime of Persecution.

⁸⁶ Statute of the Special Court of Sierra Leone, Art.2

⁸⁷ Ibid, Art 1(1)

⁸⁸ ICC Statute, Art.1

⁸⁹ See http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en last accessed on 23 November, 2010.

⁹⁰ Mandiyaye Niang, “The Senegalese Legal Framework for the Prosecution of International Crimes”, *Journal of International Criminal Justice* 7:1047 (2009) 1047-1062, P. 1048. The law is referred to as Loi N° 2007-02 du 12 février 2007 modifiant le code penal en journal officielle de la Republique du Senegal.

⁹¹ Loi N° 2007-02 Modifiant le code penal en journal officiel de la Republique du Senegal, Dakar, 12 février 2007 Art.431-2

The Amendment law of the Senegalese Penal Code also defines the Crime of Genocide under Art.431-1 as exactly as the definition adopted under Article 2 of the Genocide Convention and Art. 6 of the Rome Statute.⁹²

3.1.4. The Ethiopian Criminal Code

Ethiopia, unlike the other countries under consideration, resolved to adjudicate the Red Terror Trials in front of its own Courts. The Transitional Government said the reason for this approach is based on Ethiopia's Duty to prosecute mass violations of Human Rights as embedded on Customary International Law.⁹³ However, this was not the only reason for the decision. Since the Transitional Government was at the helm of power; fresh from the victories it enjoyed on the Derg and with little or no experience in governing a country, it wanted to use the trials to show case to the people that the new leaders are up to the task.⁹⁴ The officials of the Derg regime are charged with mainly 'genocide'⁹⁵ as defined under the Ethiopian Penal Code and later under the Criminal Code.

Ethiopia is the first country to ratify the 1948 Convention on the prevention and punishment of the crime of Genocide.⁹⁶ After ratifying it, it has included it under the 1957 Penal Code of the Empire of Ethiopia under Art. 281.⁹⁷ According to this article, committing killings, bodily harm or serious injury to physical or mental health in any way whatsoever, or imposing measures to prevent the reproduction or the continued survival of the members of the group or their children, compulsively moving or dispersal of peoples or their children or placing them in conditions cal-

⁹² See *ibid*, Art.431-1

⁹³ E/CN 4/1994/103, Letter to the Assistant Secretary-General for Human Rights, letter dated from the permanent representative of the Transitional Government to the UN office in Geneva cited in Girmachew Alemu Aneme, "Apology and Trials: The Case of the Red Terror Trials in Ethiopia," *African Human Rights Law Journal*, 6:64, 64-84 at 75

⁹⁴ Kjetil Tronvoll, "The Quest for Justice or the Construction of Political Legitimacy?: The Political Anatomy of the Red Terror Trials," in *The Ethiopian Red Terror Trials: Transitional Justice Challenged*, eds. Kjetil Tronvoll, Charles Scafer & Girmachew Alemu Aneme, 84-97, African Issues, (Suffolk:UK, James Currey Publishers,2009) at 86-88

⁹⁵ Frode Elgesem & Girmachew Alemu Aneme, "The Rights of the Accused: A Human Rights Appraisal," in *The Ethiopian Red Terror Trials: Transitional Justice Challenged*, eds. KjetilTronvoll, Charles Schaefer & Girmachew Alemu Aneme,33-50(Suffolk:UK, James Currey,2009) at.38

⁹⁶ See http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en , accessed 23 November, 2010.

⁹⁷ The Penal Code of the Empire of Ethiopia, Proclamation No 158/1957, promulgated on 23 July, 1957,Art.281

culated to bring about their death or disappearance against national, ethnic, racial, religious or political group, whether in time of war or in time of peace, is considered as Genocide and is punishable with rigorous imprisonment of five up to life and exceptionally up to death.⁹⁸ According to this same article, planning, organizing and engaging in the above illustrated acts results in the same kind of punishment.⁹⁹

However, this was later repealed in 2004 by the new Criminal Code of the Federal Democratic Republic of Ethiopia.¹⁰⁰ With the exception of adding ‘color’ to the list of protected group, ‘causing members of the group to disappear’ to the list of underlying offences and shortening the default punishment to rigorous imprisonment of five to twenty five years and adding life imprisonment to the punishment of more serious cases, it largely retained the elements listed above.¹⁰¹ Unlike its 1957 counterpart, it does not mention Crimes against Humanity.¹⁰²

When the Trials finally concluded, there was a dissenting opinion on the issue of whether the mass killings perpetrated by the Derg against its rival political groups constitute Genocide. The dissenting Judge, Judge Nuru Seid said that the issuing of Proclamations 1/74, 110/77 and 129/77 by the regime has removed the ‘protection’ given under Art.281 for ‘political’ groups.¹⁰³ He further argued that since the Genocide Convention to which Ethiopia is a signatory does not include ‘political groups’ under the list of protected groups, the Defendants could not be judged to commit Genocide.¹⁰⁴ Hence, he held that the defendants should not have been charged with Genocide rather with Crimes against Humanity of Murder, Bodily Injury and Torture.¹⁰⁵ The writer, however, concurs with the opinion of the Majority because there is no express repeal of Art.281 and because the intention of those laws are not with the intention of repealing Art.281 rather to restore ‘order’ and ‘security.’

⁹⁸ Ibid, Art.281 Note this Article’s Caption says ‘Genocide and Crimes against humanity’ but the definition is close to that of genocide under the convention.

⁹⁹ Ibid

¹⁰⁰ The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No 414/2004 promulgated on 9 May, 2005, Introduction page V.

¹⁰¹ Ibid, Art.269

¹⁰² Ibid

¹⁰³ *Office of the Special Prosecutor Vs. Colonel Mengistu Hailemariam et al.*, First Division Criminal Bench, Verdict, Judges Medhin Kiros, Nuru Saiid and Solomon Emiru., File No 1/87, 12 December, 2006. Pp.745-6.

¹⁰⁴ Ibid

¹⁰⁵ Ibid

Finally, the Court delivered its judgment in the case twelve years later since the start of the Trial and sixteen years later since the defendants were detained.¹⁰⁶ The Court later delivered its Sentence ranging from 23 years to life in Prison on 11 January, 2007.¹⁰⁷ The OSP, however, appealed to the Supreme Court for the imposition of a Death Penalty claiming that the High Court's assessment of extenuating circumstances is are without legal basis.¹⁰⁸ After examining the requirements for the imposition of the Death penalty under the law thoroughly, the Supreme Court rendered its decision on 26 May, 2008.¹⁰⁹ The Court amended the sentence to that of Death for the 18 of the respondents.¹¹⁰

After two years of the conclusion of the Trial, religious leaders are now gathering support for the Government to pardon the former Derg Officials.¹¹¹ Such effort is unconstitutional. As per Art.28 of the FDRE Constitution, offences that are defined as Genocide, Torture, extrajudicial killings under domestic law or international law have no statute of limitation or will not be up for amnesty or pardon.¹¹² The only option available is commutation to life sentence under Art.28(2).¹¹³ Despite the nobility of the initiative by the religious leaders, the writer does not believe that it is the right thing to do. Although reconciliation is a good concept to always look after, it should not be at the expense of the progress, albeit modest, made in the respect of rule of law and justice for the victims. The victims' families waited for more than fourteen years for justice. This was something for which they longed for since they experienced the death, torture of their loved ones. Releasing those who were responsible for the death or suffering of their loved

¹⁰⁶ Firew Kebede Tiba, "The Mengistu Genocide Trial," *Journal of International Criminal Justice* 5:513, 513-528, at 514

¹⁰⁷ Ibid

¹⁰⁸ Kjetil Tronvoll, Charles Schaefer & Girmachew Alemu Aneme, "Concluding the Main Red Terror Trial: *Special Prosecutor Vs. Colonel Mengistu Hailemariam et.al.*," in *The Ethiopian Red Terror Trials: Transitional Justice Challenged*, eds. Kjetil Tronvoll, Charles Scafer & Girmachew Alemu Aneme, 136-152 African Issues, (Suffolk:UK, James Currey Publishers,2009) at 143

¹⁰⁹ Ibid at 144

¹¹⁰ Ibid at 149

¹¹¹ Merga Yonas, "Religious Leaders may need to Adjust the Course of Reconciliation," *Ethiopian Reporter*, posted on 08 January,2011 available on http://www.ethiopianreporter.com/english/index.php?option=com_content&view=article&id=1645:religious-leaders-may-need-to-adjust-the-course-for-reconciliation&catid=103:politics-and-law&Itemid=513 accessed on 9 January, 2010.

¹¹² Constitution of the Federal Democratic Republic of Ethiopia, Proclamation 1/95, *Negarit Gazetta*, Art.28(1)

¹¹³ Ibid, Art.28(2)

ones would be like adding insult to injury. In addition, if ever they were released, it would be against the clearly stipulated provision of the Constitution not to do so. This would not bode well for the Government's effort to create a society with the culture of respect for the rule of law and might even encourage the commission of such terrible massive violations of Human rights.

Both the Criminal and penal Codes, however, does not give a separate definition to Crimes against humanity. Although the 1957 one did mention the term under its caption, the definition as discussed above are more or less the definitions of Genocide under the Genocide Convention. The other important element in the Ethiopian definition is the addition of 'political group', which was omitted from the text of Art.2 of the Genocide Convention and 'color' in the list of protected groups, with the latter being introduced in the new code.

3.1.5. The Rwandan Legal Regime

Prosecutions of perpetrators were also held internationally through the auspices of the UN International Criminal Tribunal for Rwanda (ICTR) established under the UNSC resolution 955 on 8 November, 1994.¹¹⁴ The Statute of the Court adopted the definition of Genocide under Art.2 of the Genocide Convention without modification.¹¹⁵ On the other hand, it has restricted the requirement of 'widespread or systematic attack' on 'national, ethnic, political, racial grounds.'¹¹⁶ The full text of the article reads;

"The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

- a. Murder;*
- b. Extermination;*
- c. Enslavement;*
- d. Deportation;*
- e. Imprisonment;*
- f. Torture;*
- g. Rape;*
- h. Persecutions on political, racial and religious grounds;*
- I. Other inhumane acts."*¹¹⁷

¹¹⁴ See UN Resolution 955

¹¹⁵ See Statute of ICTR, Art. 2(2)

¹¹⁶ Ibid, Art.3

¹¹⁷ Ibid

This article more or less resembles the definition under the Statute of the Special Court, but different from the ICC one.

Rwanda is also a party to the Genocide convention and to the Convention on the Non-Applicability of Statute of Limitation to Crimes against Humanity and War crimes after it has ratified both Conventions in 1975.¹¹⁸ However, Rwanda did not have a domestic law for the punishment of these crimes until recently. In 1996, Rwanda enacted Organic law N° 08/96 to prosecute the perpetrators of the 1994 Genocide.¹¹⁹ This law provided that Genocide and Crimes against humanity be taken as defined under the Genocide Convention, the Convention to provide for the non-applicability of statutory limitation, both of which were ratified by Rwanda at the time of the Genocide.¹²⁰

Rwanda enacted a separate law entitled ‘the law repressing the crime of Genocide, Crimes against humanity and War Crimes’ on 6 September, 2003.¹²¹ With the exception of adding a ‘regional’ group, this law adopts the definition adopted by the Genocide Convention and the Rome Statute.¹²² On the other side, just like the ICTR, it restricts the requirements of ‘widespread and systematic attack’ to those only based on national, ethnic, racial, religious, political grounds.¹²³

This is a narrower definition than that provided under the Rome Statute. However, this definition removes the requirement of ‘knowledge of the attack’ enshrined under the statute of the ICC, just like the Special Court. Besides these differences, the underlying offences provided under Art.5 of the Rwandan Law are the exact copy of the one under the Rome Statute.

¹¹⁸ See Ratification of the Convention on the Prevention and Punishment of Genocide, Presidential Decree N° 8/75, O.G.R.R, N° 5 (1975), P .230, Kigali, 12 February, 1975.

¹¹⁹ William A. Schabas, “National Courts Finally begin to Prosecute Genocide, the ‘crime of crimes’,” *Journal of International Criminal Justice* 1:39 (2003): 39-63, at 45.

¹²⁰ Organic law n° 08/96 on organization of Prosecutions for offences constituting the crime of Genocide or crimes against humanity committed since 1 October, 1990, Kigali, 30 August, 1996, available at

<http://www.preventgenocide.org/law/domestic/rwanda.htm> accessed on 30 September, 2010, Art. 1(a)

¹²¹ See Law repressing the crime of Genocide, Crimes against Humanity and War Crimes, Law N° 33 BIS/2003, Kigali, 06 September, 2003 available at

http://www.amategeko.net/display_article.php?Motcle_ID=8832&Information_ID=1191&Parent_ID=30692296&type=public accessed on 30 September, 2010.

¹²² Ibid, Art.2

¹²³ Ibid, Art.5

Under this Chapter, the Writer had found out that while the definition of Crimes against Humanity under the ICC Statute is more comprehensive and wide enough to cover atrocities than the others and also included a new element to the Crimes against Humanity i.e. ‘knowledge of the attack’ which does not exist in the others. On the other hand, the ICTR and the Rwandan domestic laws have suffixed a requirement that an attack should be committed on a civilian population the ground of ‘national, ethnic, religious, political and racial,’ while this requirement is missing in other legal regimes. The Senegalese and the Special Court legal regimes define Crimes against Humanity in more or less the same manner as the ICC one. The Ethiopian Criminal Code, on the other hand, does not have any definition for Crimes against Humanity. As to the definition of Genocide, most of them adopted the definition taken by the Genocide Convention with the Exception of Ethiopia which has added ‘political’ and ‘color’ groups to the list of protected groups against whom Genocide could be committed.

3.2. Structure and Functions of the Courts/Tribunals

Under this section, the writer tries to see the structures of the courts/ tribunals in front of which the prosecutions took place or are taking place. Since the international tribunals had integrated the Office of the Prosecutor into their systems, it will be discussed under this section also. This section has two parts-the Courts/tribunals and the Office of the prosecutor. However, this section does not deal with the registry as its task is mostly administrative. The section aims at discussing the structure of the courts from two aspects; means of appointment of Judges and Prosecutors and the Power of the Courts and the Office of the Prosecutor.

3.2.1 The Courts

3.2.1.1 The ICC

Under the Rome Statute, the ICC is composed of the Presidency, the divisions, the Office of the Prosecutor, and the Registry.¹²⁴ The Presidency, which is made up of the President, first and second Vice-Presidents, is responsible for the proper functioning of the court and for other acts that are assigned to it under the statute.¹²⁵ The divisions of the court are three- Appeals, Trial and

¹²⁴ William A. Schabas, *An Introduction to the International Criminal Court*, 3rd edition, (New York: NY, Cambridge University Press,2007) at 342

¹²⁵ ICC Statute, Art. 38(3)

Pre-trial.¹²⁶ The Appeals division has five judges, one of which is the President of the court; while each the Trial and the Pre-Trial divisions comprise not less than six judges.¹²⁷ The divisions perform their judicial function by organizing themselves into chambers, which could be more than one in one division.¹²⁸ Judges with a background of criminal trials should predominantly comprise the Trial and Pre-trial divisions.¹²⁹ The divisions, in total, have 18 judges¹³⁰ who got the highest number of votes and two-thirds majority of the ASP present and voting in Secret Ballot.¹³¹ The judges are to be elected from among candidates who possess high moral character, impartiality and integrity with the qualification to be able to make them an appointee to the highest judicial office within their own country.¹³² In addition, they must have established competence in criminal law and procedure and the necessary relevant experience in criminal proceedings¹³³ or established competence in the fields of international humanitarian law or human rights law and with the necessary relevant experience that may help the court in its functions and in professional legal capacity.¹³⁴ Moreover, the candidates must be fluent at least in either French or English which are the working languages of the court¹³⁵ and be of a national of a state party to the statute.¹³⁶ The state parties have the right to nominate any judge who fulfills the requirements discussed above¹³⁷ with considerations of the representation of principal legal systems of the world, equitable geographical representation, a fair representation of male and female judges and the need to have special expertise on certain issues like gender based violence.¹³⁸ The

¹²⁶ Ibid art.34

¹²⁷ Ibid art.39

¹²⁸ Ibid art.39(2)

¹²⁹ Schabas, *An Introduction to the International Criminal Court* at 346

¹³⁰ ICC Statute, art.36(1)

¹³¹ Ibid, art 36(6) (a). In addition to these Chambers and the Office of the Prosecutor (OTP), the ICC also has a body Known as the Assembly of State Parties (ASP) which is the legislative and management body- in charge of amending the statute, enacting new laws and appointing the officials of the court-is composed of each member of the court who have equal votes in making decisions. See <http://www.icc-cpi.int/Menus/ASP/Assembly/> accessed on 3 October,2010

¹³² Ibid, art 36(3) (a)

¹³³ Ibid, art 36(3)(b)(i)

¹³⁴ Ibid, art 36(3)(b)(ii)

¹³⁵ Ibid, art 36(3)(c) and also see art.50(2) which declares that French and English shall be the court's working language.

¹³⁶ Ibid, art 36(4)(b)

¹³⁷ Ibid, art 36(4)(a)

¹³⁸ Ibid, art 36(8)(a) and (b)

judges once elected, are declared independent and are barred from engaging in activities that are likely to interfere in their independence.¹³⁹

The Pre-trial Chamber, which is empowered to discharge the pre-trial division powers, exercises powers that resemble that of the *juge d'instruction* of the civil law legal system¹⁴⁰, though its purpose is not to serve as such rather as an organ of judicial oversight.¹⁴¹ It has the power to issue warrants and orders that are deemed to be required for the purposes of the investigation when required by the prosecutor.¹⁴² However, the chamber must be satisfied, after hearing the evidence and other information submitted by the Prosecutor, that there are reasonable grounds to suggest that the person has committed a crime as defined by the court¹⁴³ and that the arrest is necessary to ensure personal appearance before the court, the person does not obstruct or endanger the investigation or court proceeding, or to prevent the continued commission of crimes under the jurisdiction of the courts.¹⁴⁴ It also has the power to issue orders that might aid the cause of the defendant, upon the request of the latter¹⁴⁵, provide for protection and privacy of victims and witnesses, arrested persons or for a person who appeared before the court upon summons, preservation of evidence and national security information¹⁴⁶, seek cooperation of states to take protective measures for the purpose of forfeiture.¹⁴⁷ It can also authorize the Prosecutor to take specific investigative steps in the territory of a state party without the consent of the state when it determined that the state is clearly unable to execute a request for cooperation.¹⁴⁸ In addition to all these, the pre-trial chamber is entitled to decide on issues of admissibility¹⁴⁹ and when the person for whose custody warrant of arrest /summons of appearance is presented before the court, to decide whether such person is informed of the charges with which he is accused of committing and

¹³⁹ Ibid, art 40(1) & (2)

¹⁴⁰ Schabas, *An Introduction to the International Criminal Court*, at 43

¹⁴¹ Michela Miraglia, "The First Decision of the ICC Pre-trial Chamber: International Criminal procedure Under Construction," *Journal of International Criminal Justice* 4:188, 188-195(2006) at 190.

¹⁴² ICC Statute, art 57(3)(a)

¹⁴³ Ibid, Art 58(1)(a)

¹⁴⁴ Ibid, Art 58(1)(b)

¹⁴⁵ Ibid, Art 57(3)(b)

¹⁴⁶ Ibid, Art 57(3)(c)

¹⁴⁷ Ibid, Art 57(3)(e)

¹⁴⁸ Ibid, Art 57(3)(d)

¹⁴⁹ Ibid, Art 19

whether he is informed of his rights under the statute¹⁵⁰, confirm the charges and commit to the Trial Chamber, reject the charges, or adjourn the hearing and request the Prosecutor to bring additional evidence.¹⁵¹ This shows that the Pre-trial chamber exercises rigorous surveillance on the power of the prosecutor. This is also the case when one looks at the decisions that the Pre-trial Chamber so far took. On 17 February, 2005, the Pre-trial Chamber I in the case *Prosecutor vs. Thomas Lubanga Dyilo*, without any request from the Prosecutor, convened a status conference citing there is a need to protect the witnesses and victims and evidence after the latter refused to hand over documents the former requested.¹⁵² It later ordered the stay of the Proceedings.¹⁵³ The Pre-trial Chamber also invoked the same reasoning in the Darfur situation when it invited a second opinion on the claim of the Prosecutor that he could not conduct investigations because of the security situations in the territory at that time.¹⁵⁴ Moreover, in deciding to issue an arrest warrant on the President of Sudan Omar Hassen Al-Beshir for alleged Crimes against humanity and war crimes, the Pre-trial Chamber denied the request to do so for the charge of Genocide stating that the Prosecutor did not provide ‘sufficient evidence’ as to warrant the issuance of an arrest warrant.¹⁵⁵

The Trial Chamber, on the other hand, is tasked with guaranteeing fair and expeditious trial with respect for the rights of victims, witnesses and the accused.¹⁵⁶ Upon the committal of the case to it by the Pre-trial Chamber¹⁵⁷, the Chamber is empowered to set out procedures, with consulta-

¹⁵⁰ Ibid, Art, 60(1)

¹⁵¹ Ibid, Art 61(7)

¹⁵² Miraglia, “The First Decision of the ICC Pre-trial Chamber,” at 189

¹⁵³ Heikelina verrijn Stuart, “The ICC in trouble: Editorial Comments on the Stay of Proceedings in Lubanga,” *Journal of International Criminal Justice* 6:409, 409-417,(2008) at 409.

¹⁵⁴ Schabas, *An Introduction to the International Criminal Court*, at 49

¹⁵⁵ See *Prosecutor vs. al-beshir*, Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar Hassen Ahmed Al-Beshir, ICC Pre-trial Chamber I ICC-02/05-01/09 Public Redacted version, The Hague, 4 March,2009, Para.206. Available at <http://www.icc-epi.int/iccdocs/doc/doc639096.pdf> accessed on 23 October, 2010. The Prosecutor subsequently appealed to the Appeals Chamber which reversed this decision of the Pre-trial Chamber stating that the latter has committed ‘an Error of Law’. See Judgment on the Appeal of the Prosecutor against “Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar Hassen Ahmed Al-Beshir,” the Appeals Chamber ICC-02/05-01/09-73, the Hague, 3 February,2010 available at <http://www.icc-epi.int/iccdocs/doc/doc817795.pdf> accessed on 30 October,2010, Para. 1.

¹⁵⁶ ICC Statute, art 64(2)

¹⁵⁷ Ibid, art.64(3)

tion of the parties, that it believed will enable fair and expeditious trial to be conducted¹⁵⁸, to determine the language to be used in the trial and to decide on the disclosure of documents not previously disclosed as per the relevant provisions of the statute.¹⁵⁹ It has also the power to decide on issues of admissibility of evidence presented in the course of the trial¹⁶⁰, decide on whether to accept any admission of guilt¹⁶¹, to deliver the verdict based on the charges and the presented evidence¹⁶² if possible with unanimous vote otherwise by majority of the judges in the chamber¹⁶³, and to sentence the convicted person based on the appropriate sentence and submissions made during the trial.¹⁶⁴ With respect to sentencing, the Trial Chamber is also empowered to hold a hearing to entertain evidence relevant to sentencing at the request of either the prosecutor or the accused¹⁶⁵

In case of Appeal proceedings, the Appeals Chamber is given all powers of the Trial Chamber which the latter exercises in the trial.¹⁶⁶ In addition to the powers of the Trial Chamber, the Appeals Chamber has the power to reverse or amend the decision or sentence of the Trial Chamber or order a new trial before a different Trial Chamber when it believes that the proceedings are unfair in such a way that it affects the decision or sentence appealed from or when the decision or sentence appealed from were materially affected by error of fact or law.¹⁶⁷ In either of the two decisions, the Appeals Chamber can remand a factual issue to the Trial chamber which entertains the case for it to determine the issue and report back to it or if it decides to determine the issue itself, can call evidence.¹⁶⁸ Besides entertaining appeals, the Appeals Chamber also hears application for the review of conviction or sentence presented to it by the convicted person or his authorized agents or by the prosecutor when there is new evidence discovered which was not available during the trial for reasons other than the fault of the applicant and the discovery and pre-

¹⁵⁸ Ibid, art 64(3)(a)

¹⁵⁹ Ibid, art 64(3)(b)&(c)

¹⁶⁰ Ibid, art 64(9)(a)

¹⁶¹ Ibid, Art 65

¹⁶² Ibid, Art 74 (2)

¹⁶³ Ibid, Art 74(3)

¹⁶⁴ Ibid, Art 76(1)

¹⁶⁵ Ibid, Art 76(2)

¹⁶⁶ Ibid, Art 83(1)

¹⁶⁷ Ibid, Art 83(2)

¹⁶⁸ Ibid

sentment of which would have been likely to have changed the outcome of the trial¹⁶⁹, when the evidence based on which the Trial Chamber rendered its verdict of conviction turned out to be false, forged, or falsified¹⁷⁰, one or more of the judges either in the Trial chamber or Pre-trial Chamber of the case have been involved in serious misconduct or serious breach of duty that would be a ground for removal of judges under Art.46 of the Statute.¹⁷¹ The Appeals Chamber, after hearing the application, has the power either to accept or reject the application.¹⁷² When it deemed the application as to have a merit, it has the power to either reconvene the Trial Chamber that first heard the case, or constitute a new Trial Chamber or entertain the case itself with the view that the decision be revised.¹⁷³

3.2.1.2. The Special Court for Sierra Leone

The Special Court for Sierra Leone is structured into three parts. They are; the Chambers, the Prosecutor and the registry.¹⁷⁴ The Chambers are the Trial and the Appeals Chamber¹⁷⁵, however, if the establishment of a second Chamber is needed after the establishment of the first trial Chamber, then such chamber can be established once six months had elapsed since the establishment of the first one.¹⁷⁶ The Chambers will be composed of eight to eleven judges in total, of which, five are to serve in the Appeals Chamber and three in the trial chamber.¹⁷⁷ Of the three judges to serve in the Trial Chamber, one is to be appointed by the GoSL while the rest are to be appointed by the UNSG upon the nomination of states especially members of the ECOWAS and the Common wealth Federation.¹⁷⁸ In the Appeals Chamber, on the other hand, the UNSG appoints three of the five judges, while the rest are appointed by the Government of Sierra Leone.¹⁷⁹ The Judges to be appointed to serve in the chambers of the Court need to have high

¹⁶⁹ Ibid, Art 84(1)(a)

¹⁷⁰ Ibid, Art 84(1)(b)

¹⁷¹ Ibid, Art 84(1)(c)

¹⁷² Ibid, Art 84(2)

¹⁷³ Ibid, Art 84(2)

¹⁷⁴ Statute of the Special Court of Sierra Leone, Art 11

¹⁷⁵ Ibid

¹⁷⁶ Agreement between the UN and the Government of Sierra Leone for the establishment of the Special Court,art.2(1)

¹⁷⁷ Statute of the Special Court for Sierra Leone, Art.12(1)

¹⁷⁸ Agreement for Sierra Leone Court, Art.2(2)(a)

¹⁷⁹ Statute of the Special Court for Sierra Leone, Art.12(1)(b)

moral character and integrity and be impartial, with qualities that could see them appointed to the highest judicial office in their native states.¹⁸⁰

On the Assignment of judges to the Chamber, both the UNSG and the GoSL take into account the judges' experience in international law particularly in international Humanitarian law and human rights law and in criminal law and juvenile justice.¹⁸¹ The Judges elected in the procedure discussed above serve for a term of three years and are eligible for re-appointment. Following their appointment, the judges in each Chamber elect a presiding judge; the Presiding Judge of the Appeals Chamber so elected being the president of the court¹⁸² with a vice-President elected from among the judges of the Appeals Chamber.¹⁸³ The judges of the Appeals Chamber also elect when the President of the Court demands that there be alternate judges, the GoSL and the UNSG appoint up to two alternate judges.¹⁸⁴ The judges that are so appointed to the Chambers are to be independent and are obliged not to take any orders or instructions from any government or anybody.¹⁸⁵ Although the judges so appointed are expected to be independent, in actuality, this could be difficult as they are appointed at the level of Under Secretary-General of the UN.¹⁸⁶ This will expose them to the UN's interference in the pursuit of its own agenda, unlike the ICC which is free from the influence of any such interference as the judges' position is not linked to any other organ. Moreover, as opposed to the ICC, the Sierra Leone Court does not have a Pre-trial Chamber in charge of supervising the investigations and checking the power of the Prosecutor, rather this job is left to the Pre-trial Chamber in the ICC is done by a 'designated judge' assigned from among the members of the Trial Chamber.¹⁸⁷

¹⁸⁰ Ibid, Art. 13(1)

¹⁸¹ Ibid, Art.13(2)

¹⁸² Ibid, Art.12(3)

¹⁸³ Rules of Procedure and Evidence of the Special Court for Sierra Leone

(subsequently amended), 16 January, 2002 , available on <http://www.sc-sl.org/LinkClick.aspx?fileticket=yNjqn5TIYKs%3d&tabid=176> accessed on 23 November, 2010, Rule 20

¹⁸⁴ Agreement for Sierra Leone Court, Art. 2(1)

¹⁸⁵ Ibid, Art.13(1). For information relating to the current judges see <http://www.sc-sl.org/PRESSROOM/PhotoLibrary/Judges/tabid/129/Default.aspx> accessed on 22 November, 2010.

¹⁸⁶ Tom Perriello and Mariek Wierda, The Special Court for Sierra Leone under Scrutiny, Prosecutions Case Studies Series, Report written for the International Center for Transitional Justice, New York, March, 2006. Available at <http://www.ictj.org/static/Prosecutions/Sierra.study.pdf> accessed on 1 November, 2010.

¹⁸⁷ Rules of procedure and Evidence Sierra Leone, Rule 28

The Trial and Appeals Chambers are mandated to ensure the holding of fair and expeditious trials with full respect for the right of the accused and that the trials are conducted as per the agreement, the Statute and the rules.¹⁸⁸ The Trial Chamber is empowered to issue warrants, orders, summons, subpoenas, and transfer orders considered necessary for investigation or Trial.¹⁸⁹ The judges in the Trial Chamber are also empowered to assign a ‘Designate Judge’ who, as seen above, will be responsible for the handling of all Pre-trial matters.¹⁹⁰ Since there is no Pre-trial Chamber, he is also empowered to issue warrants, orders, summons, subpoenas, and transfer orders that may be considered necessary for the investigation¹⁹¹, upon being satisfied that the indictment prepared by the Prosecutor alleges that the crimes committed are within the jurisdiction of the court and if proved would result in conviction.¹⁹² In other words, if the designated judge found that the indictment states that the suspect committed crimes against humanity and war crimes and other crimes within the jurisdiction of the court and such charges, if proved were to result in the conviction of the suspect (i.e. prima facie case), he would issue warrants and other orders. This is unlike the ICC’s Pre-trial Chamber which needs to fulfill the requirements of Art.58 including necessity of the arrest of the suspect and the existence of reasonable ground. In case where the accused entered a guilty plea, the Trial Chamber is obliged to examine whether it is made freely and voluntarily, whether the accused was fully informed about the guilty plea, whether it is the unequivocal assertion of the accused and whether the plea is based on sufficient facts for the crime and the participation of the accused in it.¹⁹³ Moreover, the Trial Chamber is also mandated to decide on various motions presented before it by the parties after the initial appearance based on only the written submissions or when it deems it necessary after hearing both sides in open court.¹⁹⁴ The Trial Chamber is also obliged to hold a Pre-trial Conference before the trial commences¹⁹⁵ and order the Prosecutor to submit a pre-trial brief addressing the legal and factual issues, statement of admissions and matters not contested, statement of matters contested, list of witnesses the prosecutor intends to call at the trial and list of exhibits the Prosecutor

¹⁸⁸ Ibid, Rule 26bis

¹⁸⁹ Ibid, Rule 54

¹⁹⁰ Ibid, Rule 28

¹⁹¹ Ibid, Rule 54

¹⁹² Ibid, Rule 47(e)

¹⁹³ Ibid, Rule 62

¹⁹⁴ Ibid Rule 73 (a)

¹⁹⁵ Ibid, Rule73 bis (a)

intends to present at the trial, before the Conference starts.¹⁹⁶ When the case for the Prosecution closes, the Trial chamber can hold a Pre-defense before the case for the defense commences.¹⁹⁷ In this conference, the Trial Chamber can order the defense to submit statement of admissions of the parties and other matters not contested statement of contested matters of law and fact, list of witnesses the defense intends to call and list of exhibits he intends to offer.¹⁹⁸ The Trial Chamber has also the power to allow *amicus curie* petitions¹⁹⁹, order medical, psychiatric, psychological examination of the accused²⁰⁰ and when the result of these tests prove to the satisfaction of the court that the accused is unfit to stand trial, adjourn the trial²⁰¹, order special protective measures for witnesses and victims.²⁰² After hearing the Evidence and conducting deliberations, the Chamber delivers its verdict in public and followed by a reasoned opinion in writing with separate and dissenting opinions, if any.²⁰³ It can also impose, on those it found guilty, sentences it deemed appropriate and by taking into account the practices of the ICTR and the domestic Courts of Sierra Leone.²⁰⁴

The Appeals Chamber hears grievances from either the Prosecutor or the person convicted by the Trial Chamber.²⁰⁵ It has the power to reverse, affirm or revise the decisions of the Trial Chamber.²⁰⁶ In addition, the Appeals Chamber entertains applications for the review of judgments of either the Trial Chamber or the Appeals Chamber²⁰⁷ based on newly discovered evidence which is decisive that, had it been discovered during the Trial, it would have changed the outcome of the case.²⁰⁸ The Chamber, if it considers it to be unfounded, can reject the application and if it finds that it has ground, it either reconvenes the Trial Chamber or retain jurisdiction over the

¹⁹⁶ Ibid, Rule 73 bis(b)

¹⁹⁷ Ibid, Rule 73 ter (a)

¹⁹⁸ Ibid, Rule 73 ter (b)

¹⁹⁹ Ibid, Rule 74

²⁰⁰ Ibid, Rule 74 bis (a)

²⁰¹ Ibid, Rule 74 bis (c)

²⁰² Ibid, Rule 75(a)

²⁰³ Statute Of the Special Court of Sierra Leone, Art.18

²⁰⁴ Ibid, Art 19(1)

²⁰⁵ Ibid, Art 20 (1)

²⁰⁶ Ibid, Art 20(2)

²⁰⁷ Ibid, Art 21(2)

²⁰⁸ Ibid, Art 21(1)

matter.²⁰⁹ The Chamber also delivers its verdicts in public and in writing with a reasoned opinion.²¹⁰

3.2.1.3 Courts of Senegal

According to the Senegalese constitution, Judicial power is vested on four bodies; *le Conseil Constitutionnel* (Constitutional Council), *le Conseil d'etat* (State Council), *le Cour de Cassation* (Court of Cassation) and the Courts.²¹¹ The Constitutional Court is given the power to adjudicate constitutionality of laws and international commitments, jurisdictional conflicts between executive and the legislative organs and between the state council and the Court of Cassation.²¹² The State Council has the exclusive power to adjudicate first instance and appellate cases of ultra vires by executive bodies and also entertains court decisions on budget discipline by way of judicial review.²¹³ It has the power to give final decisions on electoral matters and also entertains administrative decisions by way of cassation, unless this power is given to the court of cassation by an organic law.²¹⁴ The Court of Cassation is the highest judicial instance in the country and which exercises the power of cassation.²¹⁵ The Courts are classified into four tiers namely *Le Cour Supreme* (Supreme Court), *Le Cour d'appel* (Court of Appeals), *Les Tribunaux Regionaux* (regional tribunals), *Les Tribunaux Departmentaux* (Departmental Tribunals).²¹⁶ Judges, other than those to be the members of the Constitutional Council, are appointed by the President of the Republic after consulting the Superior Council of Magistrates.²¹⁷ The judiciary is proclaimed to be independent from any interference under the Constitution of Senegal²¹⁸ and is to be a guardian of rights and freedoms defined by the constitution.²¹⁹ However, by using his power of appointment, the President of the nation can make sure that he gets judicial decisions in his favor by appointing those who are loyal to him. As to the role of the Courts in the proceeding, the writer was unable to get the relevant legislations, despite his best effort.

²⁰⁹ Ibid, Art 21(2)

²¹⁰ Ibid, Art 18

²¹¹ La Constitution de la Republique du Senegal, 7 Janvier, 2001, Dakar, Senegal, Art. 80

²¹² Ibid, Art.82

²¹³ Ibid

²¹⁴ Ibid

²¹⁵ See courts and cases-Senegal available on <http://www.lexadin.nl/wlg/courts/nofr/oeur/lxctsen.htm> accessed on 21 October, 2010.

²¹⁶ Ibid

²¹⁷ Constitution of Senegal, art.80 *ter*

²¹⁸ Ibid 80

²¹⁹ Ibid 81

3.2.1.4 Ethiopian Courts

Ethiopia is a federal state, hence has a two-tier court system; Federal and Regional. Federal Courts in turn are divided into First-instance, High Court, and Supreme Court.²²⁰ The Federal Supreme Court is the highest and final judicial power²²¹ including the power of cassation.²²² In addition, it has first instance jurisdiction on offenses for which federal government officials are charged with committing offences for which foreign diplomats or consuls accused of committing without prejudicing diplomatic rules or on application of change of venue from one federal high court to another or to itself as the case may be.²²³ Judges are appointed by the House of peoples' Representatives upon the nomination of the Federal Judicial Administration Council presented to it by the Prime Minister²²⁴, while the President and Vice-president of the Supreme Court are appointed, upon the recommendation of the Prime Minister, by the House of Peoples' Representatives.²²⁵ The Federal Judicial Administration Commission nominates those who fulfill the requirements of being Ethiopians, loyal to the Constitution, have taken proper legal training or acquired adequate legal knowledge through experience, have good reputation for diligence, sense of justice and good conduct, consent to assume the position of judgeship and not less than 25 years of age.²²⁶ The Ethiopian appointment procedure, like that of Senegal, is also controlled by the executive power. Since Ethiopia adopts the Parliamentary system; in which the Party which won most of the seats in the House of Peoples' Representatives forms the government²²⁷, it is easy for the government to appoint those loyal to it for it also controls the Parliament.

The Ethiopian Courts, on the commencement of the trial, have the power to read the charges and to ask the accused whether he objects to the charge²²⁸ and if he does, the judge asks him to present his preliminary objections as per Art.130 and gives the chance to the prosecutor to state

²²⁰ FDRE Federal Courts Proclamation 25/96, Negarit Gazette, 2nd Year, N^o 13, Addis Ababa, 15 February, 1996, Art.2(4)

²²¹ Proclamation of the Constitution of the Federal Democratic Republic Of Ethiopia, Proclamation N^o 1/1995, Negarit Gazette, 1st year No.1, Addis Ababa, 21 August, 1995, Art.80(1)

²²² Federal Courts Proclamation 25/96, art.10

²²³ Ibid, Art.8

²²⁴ Constitution of the FDRE, Art. 81(2)

²²⁵ Ibid, Art.81(1)

²²⁶ Federal Judicial Administration Commission Establishment Proclamation No. 24/96, Negarit Gazette, 2nd year N^o 12, Addis Ababa, 15 February, 1996, Art.8.

²²⁷ Constitution of the FDRE, Art. 56

²²⁸ The Criminal Procedure Code of the Empire of Ethiopia, Proclamation N^o 185/1961, Negarit Gazette, Addis Ababa, 2 November, 1961. Art.129

his reply on the objection raised and decides on the matter.²²⁹ If the accused does not oppose the charge or if the objection is rejected, the Court then has the power to ask the plea of the accused and enters one of guilty or not guilty as per Art.133 and 134.²³⁰ The Court is also given the power to decide on whether to acquit the defendant or order him to present his case after hearing the evidence of the prosecutor.²³¹ The Court is also entitled to call additional witnesses it deems appropriate in the interest of justice²³², rule on objections of evidence²³³ and pass the verdict of guilty or not guilty and to determine the sentences appropriate to the punishment.²³⁴ From this it can be understood that courts in Ethiopia have an active role and hence can act as a check on the power of the Prosecutor.

3.2.1.5 Rwanda

The International Criminal Tribunal for Rwanda (ICTR) is organized into three organs; the Chambers (three trial and one appeals), the Office of the Prosecutor and the Registry.²³⁵ The Chambers are comprised of 16 permanent and a maximum of 4 *ad litem* judges, at the same time, of different nationality.²³⁶ From these, 3 of the permanent and a maximum of 4 of the *ad litem* make up the Trial Chambers.²³⁷ The Trial Chambers, in turn, can be classified into sections which contain three judges each, both permanent and *ad litem*, with powers the same as the Trial Chambers.²³⁸ The Appeals Chamber, on the other hand, is made up of seven of the permanent judges, but in hearing appeals five of them sit on the bench.²³⁹ Both the permanent and *ad litem* judges need to be persons of high moral character, integrity and be impartial with the qualification that enables them to be appointed for the highest judicial office in their countries, in order to be elected as a judge in the first place.²⁴⁰ Out of the 16 judges to be elected, 11 are elected by the General Assembly out of a list of nominees prepared by the UNSC.²⁴¹ The UNSG invites mem-

²²⁹ Ibid, Art.131

²³⁰ Ibid, Art.132

²³¹ Ibid, Art. 141

²³² Ibid, Art.143

²³³ Ibid, Art.146

²³⁴ Ibid, Art.149

²³⁵ Cryer et.al, *An Introduction to International Criminal Law and Procedure*, at113

²³⁶ ICTR Statute, Art.11(1)

²³⁷ Ibid, Art 11(2)

²³⁸ Ibid

²³⁹ Ibid, Art 11(3)

²⁴⁰ Ibid, Art 12

²⁴¹ Ibid, Art 12 bis

ber states and non-member States who have permanent mission in UN head quarters in New York to present nominations for judgeship in the ICTR with each state entitled to make two nominations of different nationalities, with a judge in the Appeals Chamber or to a judge elected and appointed to serve in the ICTY.²⁴² After receiving these nominations, the UNSG sends the list to the UNSC where the latter prepares and sends to the UNGA a short list of between 22 and 33 candidates with consideration for representation of all legal systems in the Tribunal.²⁴³ Those candidates that gathered absolute majority of the votes of member states and non-member states-who have a permanent mission at the head quarters are directly elected to be judges²⁴⁴ to serve in the Chambers of the ICTR for a term of 4 years being eligible for re-election.²⁴⁵ Where there is a vacancy in the Chambers of the Court, the UNSG can appoint a judge until the term of office for which the previous judge was elected to serve expires by consulting with the presidents of the UNSC and the UNGA.²⁴⁶ *Ad litem* judges are elected also by the UNGA after list of candidates was brought to it by the UNSC.²⁴⁷ After inviting and accepting members and non-members-who have permanent observer mission in New York to present up to 4 candidates maximum with fair representation of female and male candidates to the *ad litem* judge position, the UNSG forwards the list to the UNSC.²⁴⁸ The UNSC then makes a list containing a minimum of 36 candidates by taking into account geographical equity and representation of the principal legal systems of the world and then forwards it to the UNGA where it will be voted on by the members and non-members with permanent observer mission in New York.²⁴⁹ 18 candidates obtaining an absolute majority become an *ad litem* judges for ICTR out-rightly²⁵⁰ to serve for a four year period without being eligible for re-election.²⁵¹ This procedure of election of permanent and *ad litem* judges will ensure that the UNSC have the power to make sure that those who serve the interest of justice rather than the interest of its members are not put for election. In other words, the power of the UNSC to screen out candidates for the ICTR judgeship and send for approval will ensure that

²⁴² Ibid, Art 12 bis (a)&(b)

²⁴³ Ibid, Art 12 bis (c)

²⁴⁴ Ibid, Art 12 bis (d)

²⁴⁵ Ibid, Art 12 bis (3)

²⁴⁶ Ibid, Art 12 bis (2)

²⁴⁷ Ibid, Art 12 ter (1)

²⁴⁸ Ibid, Art 12 ter (1)(a)-(c)

²⁴⁹ Ibid, Art 12 ter (c)&(d)

²⁵⁰ Ibid, Art 12 ter (d)

²⁵¹ Ibid, Art 12 ter (e)

only those judges who have favorable view towards the interest of the UNSC, which may be political rather than legal at times, especially those of the five permanent members. This creates a loophole for undue political interference in the affairs of the court.

Just like the Sierra Leone Court and the ICC Trial Chambers, the Trial Chamber of the ICTR also is mandated to ensure fair and expeditious trials with full respect to the rights of the accused and due regard to the protection of the victims and witnesses.²⁵² The Trial Chamber, on the day of the first appearance, is duty bound to read the indictment for the accused and confirm that he understands the charges, to see to its satisfaction that the rights of the accused are respected, and order the accused to enter a plea and then set a date for the trial.²⁵³ The Chamber is also mandated to issue warrants, summonses, orders, subpoenas, and transfer orders deemed necessary for the investigation or for the trial either on its own motion or by the application of either party²⁵⁴, after it finds that there is a prima facie evidence to that effect.²⁵⁵ The Trial Chamber also rules on motions submitted before it before the initial appearance of the accused by either party²⁵⁶ based solely on briefs or a hearing when it decide to do it²⁵⁷, hold a pre-trial or pre-defense conference (not mandatory and after the case for the prosecution closes) before trial begins where it orders the Prosecutor/the defendant to present pre-trial brief on legal and factual issues, statement of admission, and contested matters between the parties, list of witnesses and exhibits he intends to introduce in the trial²⁵⁸, order medical examination of the defendant either on its own motion or at the request of a party²⁵⁹, invite or grant leave for an *amicus curie* intervention by any state, organization, or person to appear before it and make submissions on any issue before it²⁶⁰, order appropriate measures to be taken to protect witnesses and victims either on its own motion or by

²⁵² Ibid, Art 19 (1)

²⁵³ Ibid, Art 19 (3)

²⁵⁴ Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (subsequently amended), Arusha, 29 June, 1995. Available on <http://www.unictt.org/Legal/RulesofProcedureandEvidence/tabid/95/Default.aspx> accessed on 24 November, 2010, rule 54

²⁵⁵ ICTR statute, Art.18. Note this Article says to confirm an indictment made by the Prosecutor, the Trial Chamber requires *prima facie* evidence and when it has confirmed it upon the finding of *prima facie* evidence, it is given the power to issue warrants, orders and so on.

²⁵⁶ ICTR Rules of Procedure and Evidence, rule 73(a)

²⁵⁷ Ibid

²⁵⁸ Ibid, Rule 73 bis & 73 ter.

²⁵⁹ Ibid, Rule 74 bis

²⁶⁰ Ibid, Rule 74

application of interested parties or by the victims and witnesses themselves.²⁶¹ In addition, the Chamber can order a trial to be held in a closed session for reasons of public order or morality, safety, security, or for the non-disclosure of the identity of a witness or a victim when it decided so or in the interest of justice²⁶², order on its own motion the furnishing of additional evidence by either party and can also call witnesses²⁶³, order the release of the accused if after the prosecution's case is closed and it believes that there is no sufficient evidence produced to warrant a conviction and the accused filed a motion accordingly.²⁶⁴ After hearing the evidence presented before it, the Chamber deliberates and delivers its verdict in public and in writing and imposes sentences on those found guilty of the crimes they were charged on.²⁶⁵

The Appeals Chamber hears appeals from persons convicted by the Trial Chamber and the Prosecutor on the ground that there was an error on the issue of law which invalidates the decision or an issue of fact resulting in a miscarriage of justice.²⁶⁶ Once it has decided to hear the appeal, the Chamber has the power to affirm, revise, or reverse the decision of the Trial Chamber.²⁶⁷ Unlike the ICC and like the Special court for Sierra Leone, the ICTR does not have a Pre-trial Chamber solely devoted to handling pre-trial matters. However, like the Pre-trial Chamber of the ICC, the Trial Chamber can control the power of the Prosecutor when it issues warrants and other orders, albeit, to a lesser degree as it only requires prima facie evidence to issue such warrants and orders as opposed to the former and like the Special Court which must make sure the fulfillment of criteria laid down under Art.58 of the ICC Statute.

Domestically, as seen under the previous section, the prosecutions in Rwanda took place as per Organic Law N° 08/96.²⁶⁸ This law established Specialized Chambers with multiple benches within them to entertain exclusively crimes of genocide and Crimes against Humanity in the First Instance and Military Courts.²⁶⁹ These Specialized Chambers comprise career magistrates or auxiliary staff as they deemed necessary who are placed under the authority of the Vice-president

²⁶¹ Ibid, Rule 75(a)

²⁶² Ibid, Rule 79(a)

²⁶³ Ibid, Rule 98

²⁶⁴ Ibid, Rule 98 bis

²⁶⁵ Statute of ICTR, Art.22

²⁶⁶ Ibid, Art.24(1)

²⁶⁷ Ibid, Art. 24(2)

²⁶⁸ Organic law N° 08/96, Art. 1

²⁶⁹ Ibid, Art. 19

of the First Instance or Military Tribunals who will also be responsible for the organization of the Chambers or the assignment of judges to the case.²⁷⁰ Career Magistrates (from the magistrates in the Tribunal of First Instance) and the Presidents of the Specialized Chambers of the tribunal of First Instance are named by the order of the President of the Supreme Court after he consulted with the college of Vice-presidents and decided to do so.²⁷¹ The Benches under the Specialized Chambers are given the power to verify the confession made by the accused are voluntary and made with full knowledge of the case²⁷², receive the plea when it is satisfied of the legality of the confession²⁷³, dismiss the plea when it considers the requirements are not fulfilled and where the accused waived his right to invoke the guilty procedure²⁷⁴ and schedule a trial at a later date²⁷⁵ and also to alter the charges.²⁷⁶ Decisions of the Specialized Chambers could be subject to appeal and opposition.²⁷⁷ Under the organic law N° 51/2008 for determining the organization, functioning and jurisdiction of courts, all court structures, except the *Gacaca* are abolished in favor of the structures established under it.²⁷⁸ It has structured ordinary courts as-the Supreme Court, High Court, Intermediate Court and Primary Court and Specialized Courts like *gacaca*, military court.²⁷⁹ This law transferred the jurisdiction of trying genocide perpetrators to the intermediate court and the *gacaca* courts which was first assumed by the Specialized Chambers of the First Instance Tribunals.²⁸⁰ The Intermediate Courts are made up of the President, Vice-President, at least five other judges, registrar, and other staff as deemed necessary.²⁸¹ The President, Vice-president, and the other judges are appointed by the President of the Supreme Court after approval by the High Council of the Judiciary.²⁸² As opposed to the procedures of appointment of judges in Senegal and Ethiopia which gave the power to appoint judges to the Executive and leg-

²⁷⁰ Ibid Art. 20

²⁷¹ Ibid

²⁷² Ibid, Art.10(7)

²⁷³ Ibid, Art.10(10)

²⁷⁴ Ibid, Art.12

²⁷⁵ Ibid, Art.13

²⁷⁶ Ibid, Art.12

²⁷⁷ Ibid, Art.24

²⁷⁸ Organic law N°51/2008 of 09 September, 2008 Determining the Organization, Functioning, and Jurisdiction of Courts available on

http://www.amategeko.net/display_rubrique.php?Information_ID=2171&Parent_ID=30698993&type=public&Langue_ID=An accessed on 24 October,2010. Arts.1 & 2

²⁷⁹ Ibid, Art.2

²⁸⁰ Ibid, Art.89 (6)

²⁸¹ Ibid, Art.10

²⁸² Ibid, Art.11

islative powers, respectively, the Rwandan System chose to keep the appointment of judges within the Judiciary. This important as it ensures that the Judiciary is free from outside influences.

So far under this Sub-section, the writer discussed the structure and functions of the Courts of the five legal regimes from two perspectives; procedures of appointment of Judges and power of courts especially with respect to control of the power of the Prosecutor. As a result the writer had found that while the ICC judges are appointed after a nomination open to every member state by a two-third majority, in a secret ballot, of the members of the ASP present and Voting, the judges in Sierra Leone are appointed by the UNSG and the GoSL, after consultation between them and those of the ICTR are appointed by the UNGA from the list of applicants shortlisted by the UNSC. On the Other hand, in the domestic legal systems the Writer had found that judges in Senegal are appointed by the President of the Country after consulting with the college of magistrates while in Ethiopia they are appointed by the House of Peoples' Representatives after the nomination by the Federal Judicial Administration, and in Rwanda they are appointed by the President of the Supreme Court. As to the Power of the courts, the Writer had found that the Pre-trial Chamber of the ICC, which is charged with effectuating the Pre-trial matters of the court, has powers that enables it to control the broad powers of the Prosecutor (to be discussed in the next sub-section) and also exercised such powers in some cases that are before the court. The Special Court and the ICTR, on the other hand, do not have a Pre-trial Chamber and the Trial Chambers exercise the pre-trial matters of the courts. Even if it is so these Trial Chambers have the power to control the Prosecutor during the issuance of warrants and other orders, though the requirements are more lenient than the ICC one.

3.2.2 The Office of the Prosecutor

3.2.2.1 The ICC

The Office of the Prosecutor is another very important organ of the ICC. It is an independent organ within the court made up of the Prosecutor, deputy prosecutors and other staff as may be necessary.²⁸³ It is responsible for accepting referrals and information on crimes within the jurisdiction of the court, for examination and investigation of such information and referrals and prose-

²⁸³ ICC Statute, Art.42

cution of the perpetrators of them.²⁸⁴ The Prosecutor is the head of the office responsible for the administration and management of the staff, resources and facilities under the disposal of the office.²⁸⁵ The Prosecutor and his Deputies are to be those persons with high moral character, be highly competent with extensive practical experience in criminal litigation and be fluent in at least one of the working languages of the court.²⁸⁶ The Prosecutor is elected, if possible, by Consensus of the members of the ASP and if not, by the absolute majority of votes of the members of the ASP in secret ballot.²⁸⁷ On the other hand, the deputies are elected from among the list of candidates provided by the Prosecutor, in the same fashion to serve for a term of 9 years save provisions shortening their term when elected.²⁸⁸ In addition, the Prosecutor is obliged to hire legal experts as advisers in cases of sexual and gender violence and violence against children and other specific issues.²⁸⁹ The Prosecutor is duty bound to initiate investigation after making sure that there is a reasonable basis that the crimes within the jurisdiction of the court are being committed or have been committed, that such case is admissible under Art.17 of the Statute and when he believes with substantial reason that prosecution is in the interest of justice by taking into account the interest of victims and the gravity of the crime.²⁹⁰ In conducting the investigation, he is duty bound to make sure that it extends to cover all the facts and evidence surrounding the case that enable to reach the conclusion that there is criminal responsibility or not and investigate incriminating as well as exonerating circumstances equally.²⁹¹ He is also empowered to take appropriate measures to ensure the effective investigation of the case, but respect the situation of the victims and witnesses like their age, health and the nature of the crimes in which they have been a part of like crimes of sexual violence²⁹² and respect the rights of the accused.²⁹³ The Prosecutor is, in addition, authorized to conduct investigations in the territory of a State party when either it has cooperated as per Part 9 of the Statute or by the order of the Pre-Trial Chamber.²⁹⁴ In

²⁸⁴ Ibid, Art.42(1)

²⁸⁵ Ibid, Art.42(2)

²⁸⁶ Ibid, Art.42(3)

²⁸⁷ Procedure for the Nomination and Election of Judges, the Prosecutor, and Deputy Prosecutors of the International Criminal Court, the Assembly of State Parties Doc.ICC-ASP/1/Res.2, New York, September,2002,Para.33-34

²⁸⁸ ICC Statute, Art.42(4)

²⁸⁹ Ibid, Art.42 (9)

²⁹⁰ Ibid, Art.53(1)

²⁹¹ Ibid, Art.54(1)(a)

²⁹² Ibid, Art.54(1)(b)

²⁹³ Ibid, Art.54(1)(c)

²⁹⁴ Ibid, Art.54(2)

addition to all the above powers, the Prosecutor of the ICC can collect and examine evidence, request suspects, witnesses, and victims, ask any states or an intergovernmental body for cooperation, enter with agreements or arrangements that are necessary to facilitate the cooperation of a state, intergovernmental organization or person and consistent with the statute, refuse to disclose any information or document it obtained based on an agreement with the provider of evidence on the basis of confidentiality and merely for generating new evidence, and take necessary measures or ask for the necessary measures to be taken to protect any person, evidence, or the confidentiality of such information.²⁹⁵

As seen above, the Prosecutor of the ICC has some broad range of powers from accepting referrals from states and seeking their cooperation in apprehending perpetrators and enforcing sentences to commencing investigation on a certain situation in a member country or a national of such countries. He is appointed by two-thirds majority of the member states present and voting, in secret ballot, if consensus cannot be achieved. This ensures that a candidate on whom the members have confidence in his ability and the candidates' fulfillment of the requirements gets the post or in the case of disagreement secret voting enables countries to vote independently without fearing that anybody will find out.

3.2.2.2 The Special Court for Sierra Leone

The Office of the Prosecutor is the Organ of the court responsible for '...investigating and prosecuting those who have the greatest responsibility for serious violation of International Humanitarian Law and Sierra Leonean Law in the territory of Sierra Leone since 30 November, 1996.'²⁹⁶ It is composed of a Prosecutor, a Sierra Leonean Deputy Prosecutor and other necessary international and Sierra Leonean staff.²⁹⁷ The Prosecutor is appointed by the UNSG after consulting with the GoSL for a three year term with a possibility for a second term.²⁹⁸ On the Other hand, the Government of Sierra Leone after consulting the UNSG appoints a Sierra Leonean Deputy to the Prosecutor to assist the prosecutor in the Conduct of investigations and Prosecutions.²⁹⁹ They should also have some sort of experience in investigation of gender related and juvenile

²⁹⁵ Ibid, Art.54(3)

²⁹⁶ Statute Sierra Leone court, art.15(1)

²⁹⁷ Ibid, Art.15(4)

²⁹⁸ Agreement for the Court of Sierra Leone,Art.3(1)

²⁹⁹ Ibid, Art.3(2)

crimes.³⁰⁰ Both the Prosecutor and his Deputy must possess high moral character and the highest level of professional competence with extensive experience in criminal investigations and prosecutions.³⁰¹ They, in addition, are expected not to accept any instruction from any government or any other source whatsoever and remain independent in the performance of their functions.³⁰² In the conduct of the investigation or prosecution of a juvenile offender, the Prosecutor is required to consider whether such investigation or prosecution would not jeopardize the juvenile rehabilitation program or to consider whether the use of truth and reconciliation is better in the case.³⁰³ The Office of the Prosecutor is also empowered to question suspects, witnesses, and victims and to collect evidence and conduct on-site investigations.³⁰⁴

As seen above, the power of the Prosecutor is not that much broad as compared with that of the ICC's. In addition, the Prosecutor of the court is appointed by the UNSG. This also opens door for appointment of a Prosecutor who can the political interests of the UN like the maintenance of peace and security which might sometimes collide with an interest of prosecution rather than that of Justice. In addition

3.2.2.3 Senegal

Under Senegalese Criminal Procedure Code, the power of investigating a certain criminal offence rests with '*juge d'instruction*' or investigative judge, as is common in the Civil Law countries who cannot participate in the judicial process of the case he already participated in³⁰⁵, while the powers of prosecution is exercised primarily by a person called '*ministiere publique*' (Public Minister) who is given the power to entertain all public actions.³⁰⁶ The latter attends all jurisdictional debates and must be present when a decision is pronounced which he will be empowered to execute.³⁰⁷ In addition, he is represented in each jurisdiction. His powers in the '*cours departementaux*' (regional courts) are assumed by the prosecutor of the republic. The Prosecutor of the Republic accepts complaints and accusations and that all public officials, who came across with

³⁰⁰ Statute of the Special Court of Sierra Leone, art.15(4)

³⁰¹ Agreement, Art.3(3)

³⁰² Ibid

³⁰³ Statute 15(5)

³⁰⁴ Ibid 15(2)

³⁰⁵ Code de Procedure Penale Senegalais, Loi de Base N°65-6, Du 21 Juillet 1965, Dakar, Senegal, available on <http://www.justice.gouv.sn/droitp/ CPP.PDF> accessed on 24 October, 2010, Art. 39

³⁰⁶ Code procedure du Senegal, Art.24

³⁰⁷ Ibid

information concerning a certain crime or offence, are obliged to notify it to the prosecutor of the republic.³⁰⁸ The Public Minister is represented in the appellate and the assize (mobile) Courts by the '*procurer generale*' (Attorney-General) either in person or through his delegate.³⁰⁹ The writer, after exerting his due effort to find out the method of appointment of prosecutors, could not come up with any.

3.2.2.4 Ethiopia

In Ethiopia, the trial of the Dergue regime known as the Red terror trials were prosecuted from by a separate prosecutorial mandate given to the Office of the Special Prosecutor (OSP) because the existing prosecution office was thought to be part of the same machinery that is accused of committing the atrocities.³¹⁰ The OSP was established pursuant to Proclamation Number 22/1992 under the Transitional Government of Ethiopia (TGE) to investigate and prosecute those alleged to have committed 'offences' under Ethiopian law during the previous government.³¹¹ The Office is also charged with providing '...a just historical obligation to record for posterity the brutal offences... against the people of Ethiopia and to educate the people and make them aware of those offences in order to prevent the recurrence of such a system of government.'³¹² The Office is composed of the Chief of the Special Prosecutors, the Deputy and Assistant Chiefs of the Special Public Prosecutors, other Special Public Prosecutors as may be necessary.³¹³ The Office is accountable to the Prime minister of the Transitional Government.³¹⁴ The Chief and the deputy chief of the Special Prosecutors were appointed by the Council of Representatives after the recommendation of the Prime minister and the presentation by the President³¹⁵, while the assistant chiefs and other Special Public Prosecutors are appointed by the Prime minister after the Chief of the Special Public Prosecutors presented them.³¹⁶ To be appointed as a Special Public Prosecutor as per the above procedure, a person should be an Ethiopian, faithful to the Transitional Charter,

³⁰⁸ Ibid, Art.32

³⁰⁹ Ibid

³¹⁰ Mehari Redae, "Revisiting the Ethiopian " Genocide" Trial: Problems," Ethiopian Law Review, 1:1,1-26(2002) at 4

³¹¹ OSP Proclamation No 22/92, Art.6

³¹² Ibid, Preamble Para. 5

³¹³ Ibid, Art.2(3)

³¹⁴ Ibid, Art.2(2)

³¹⁵ Ibid, Art.3(1)

³¹⁶ Ibid, Art.3(2)

trained in law or acquired broad legal skills through experience and has the ability to render proper decision based on law, be a person of diligence, integrity and good conduct with no record of participation in the offences under the Offices' jurisdiction in any way and was not a member of the workers' party (the governing party at the time of the Dergue Regime) or security services.³¹⁷ The Office is also given the power to transfer a case to the regular Public Prosecutor's Office when it finds that it is outside its jurisdiction³¹⁸, or delegate to it in case of offences punishable by rigorous imprisonment when the Chief of Special Public Prosecutors and his deputies agree to this effect.³¹⁹

As can be seen above, the Prosecutor of the SPO was appointed by the Council of Representatives after the recommendation of the Prime Minister at the time and is accountable to the Government. This shows that the government can influence the independence of the Office either before appointment and/or after appointment.

3.2.2.5 Rwanda

Under the ICTR Statute, the Office of the Prosecutor is charged with '...the investigation and prosecution of persons responsible for serious violation of International Humanitarian Law committed in the territory of Rwanda and Rwandan citizens responsible for such violations in the territory of neighboring states between 1 January 1994 to 31 December 1994.'³²⁰ The Statute states that the Prosecutor of the ICTY also serves as the Prosecutor of the ICTR.³²¹ After 2003, however, the UNSC decided to separate the two Offices and appointed Mr. Hassen B. Jallow as a separate Prosecutor for the ICTR.³²² Currently, the Office is divided into two sections-the Prosecution Division and the Appeals and Legal Advisory Division.³²³ The former itself is divided into two-the Investigation Section (responsible for investigating a case) and Trial Section (respon-

³¹⁷ Ibid, Art. 5

³¹⁸ Ibid, Art.9

³¹⁹ Ibid, Art.10

³²⁰ ICTR Statute, Art. 15(1)

³²¹ Ibid, Art.15 (3)

³²² Security Council Reappoints Hassen B. Jallow as ICTR Prosecutor, See <http://ictr-archive09.library.cornell.edu/ENGLISH/PRESSREL/2007/531.html> accessed on 17 October, 2010. Note under Art.16(4) of the Statute of ICTY, the Prosecutor is to be appointed by the UNSC upon the Nomination of the UNSG.

³²³ See <http://www.unict.org/AboutICTR/ICTRStructure/OfficeoftheProsecution/tabid/104/Default.aspx> accessed on 17 October, 2010.

sible for handling the cases in trial).³²⁴ The Appeals and Legal Advisory division is responsible for handling all appellate cases and giving legal advice to the trial teams.³²⁵ The ICTR Prosecutor has the Power to initiate investigations either on his own motion or as a result of information obtained from the UN organs, governments, intergovernmental and non-governmental organizations or any other source, after having assessed the information and deemed it sufficient to warrant investigation.³²⁶ The Prosecutor, when it decides that it has sufficient ground to continue with the investigation, has the power to examine witnesses, victims and suspects and can conduct on-site investigations.³²⁷ In addition, after establishing *prima facie* case, the Prosecutor is empowered to prepare an indictment which it later submits to the Trial Chamber.³²⁸

As seen above, like the ICC's Prosecutor, the Prosecutor of the ICTR enjoys discretionary powers including initiating investigations by its own motion, but his appointment by the UNSC opens door for politically motivated appointments to take place and compromises the Prosecutor's independence.

As to the domestic prosecutions, there is a Prosecution Department solely concerned with cases of Genocide before the Specialized Chambers whose prosecutors are appointed by the Prosecutor-General of the Court of Appeals from among those who are already assigned to the Office of Prosecution with the supervision of a First Deputy to be appointed for this purpose.³²⁹ The Appeals Prosecutors are also appointed by the Prosecutor-General of the Court of Appeals with the supervision of the Prosecutor-General of the Supreme Court.³³⁰ For the Military courts, the Prosecutors are appointed by the Military Auditors.³³¹ The Prosecutor-General of the Supreme Court is given power, in the interest of justice, to petition the Court of Cassation for a judicial review of any case decided by the Appeals Court and when it deems is contrary to the law upon his own motion.³³² Under the 2006 Organic Law, Prosecutors in Rwanda are divided in to three catego-

³²⁴ Ibid

³²⁵ Ibid

³²⁶ Statute ICTR, Art.17(1)

³²⁷ Ibid, Art. 17(2)

³²⁸ Ibid, Art. 17(4)

³²⁹ Organic Law n° 08/96, Art.22

³³⁰ Ibid

³³¹ Ibid, Art.23

³³² Ibid, Art. 26

ries; Career Prosecutors, Auxiliary Prosecutors, and Military Prosecutors.³³³ The Career Prosecutors are those who are appointed as Prosecutor General of the Republic, the Deputy Prosecutor General of the Republic, the Prosecutors with jurisdiction over the whole country, the Prosecutor heading the Prosecution Service at Higher Instance level, the Prosecutor at Higher Instance level, the Prosecutor at Lower Instance level³³⁴, while the Military Prosecutors are those who are appointed as the Military prosecutor general, his deputy and Military Prosecutors.³³⁵ The Auxiliary Prosecutors are the Judicial Police that serve as the deputy of the prosecutor at the lower instance levels.³³⁶ The Prosecutor general and his deputy are appointed by the President of the republic³³⁷, while the rest of the Prosecutors are appointed by the Prime Minister.³³⁸ This law also requires a person who wishes to become a Prosecutor before ordinary courts that he has at least an LL.B, a certificate indicating that he passed the required exam to practice in the legal profession, at least 8 years experience for LL.B and 5 years for doctorate holder, irreproachable moral and conduct free from sectarianism and discrimination tendencies, and be impartial and independent minded.³³⁹ The above mentioned Prosecutorial organs are empowered to investigate offences which they are going to look into, to prosecute criminal offences (including Genocide and Crimes against Humanity), contribute to the formation of criminal investigation policies, to cooperate with other countries in criminal investigations, and other activities to be imposed upon them by other laws.³⁴⁰

Under this section, the writer discussed the structure of courts/tribunals including the Office of the Prosecutor from two perspectives; means of appointment of Judges and Prosecutors and their power in the proceeding. Accordingly, the Writer had found that the means of appointment of judges and Prosecutors in the ICC system is reliable as it does not allow small group of interests (States' interests) to dictate the entire working of the court including decisions as to who to indict. Since elections are to be held in secret ballot, even if such interests are powerful, States could choose who they believe would be fit for the job regardless of the lobbying of others.

³³³ Organic Law N° 15/2006, Art.4

³³⁴ Ibid, Art.5

³³⁵ Ibid

³³⁶ Ibid

³³⁷ Ibid, Art.9

³³⁸ Ibid, Art.10& 14

³³⁹ Ibid, Art.11&15

³⁴⁰ Ibid, Art.37

However, this is not the case for the ICTR and the Special Court as the judges are appointed by the UNGA (after the screening by the UNSC) and the GoSL and UNSG, respectively while the Prosecutors are appointed by the UNSC, and UNSG and GoSL, respectively. This leaves the door open to UNSC, UNSG, and the GoSL to interfere in the court's operation and decision making. The domestic courts are not different. The appointment of the Judges and Prosecutors is subject to the executive's direct (as in Senegal) and indirect (as in Ethiopia, through the legislative) control. As to the Powers of the Courts, all of them exercise powers that are expected of Courts differing on the power to control the Prosecutor. While the ICC established a Pre-trial Chamber that regulates the power of the Prosecutor, especially during issuing warrants rigorously, requiring the prosecutor to establish the necessity of the warrant beside the prima facie evidence, the Special court and the ICTR forwarded a more lenient requirement; only requiring the existence of prima facie evidence.

3.3. Jurisdiction of Courts/Tribunals

Under this section, the writer attempts to discuss the various ways of assuming jurisdiction under each legal system.

3.3.1. The ICC

The International Criminal Court assumes jurisdiction, as per its statute, when the crimes specified under Art.5, (i.e. the crimes of genocide, crimes against humanity, War crimes, and the crime of aggression when specifically defined and the condition of exercising it clearly set out³⁴¹) are alleged to have been committed within the territory of a state party to the court or by the national of a state party to the court³⁴² or when the crimes were allegedly committed either in the territory or by a national of a state who has accepted the jurisdiction of the court as per Art.12(3).³⁴³ The Court starts its exercise of jurisdiction as per the above criteria either when it is referred to it by the state itself or when the prosecutor starts investigation by his own motion (*proprio motu*).³⁴⁴ Even if the crimes are not committed within the territory of a state party or state which accepts the jurisdiction of the court, it can still exercise jurisdiction by the virtue of

³⁴¹ ICC statute, Art.5

³⁴² Ibid, Art 12(2)

³⁴³ Ibid, Art 12(3) such state will be bound by the rules cooperation under part 9 of the ICC statute.

³⁴⁴ Ibid, Art 13(a)&(c)

referral by the UNSC acting under its Chapter VII mandate.³⁴⁵ Though the court could exercise jurisdiction in these ways, prosecution will not commence if the case is deemed inadmissible under Art.17³⁴⁶, though this does not preclude the fact that the court has jurisdiction over the case.³⁴⁷ This article provides what is called the Principle of Complementarity which dictates that priority is given for the domestic prosecution of the crimes and the ICC is a Court of last resort.³⁴⁸ A case is said to be inadmissible under the Statute when it is in the process of investigation or prosecution by a state which has jurisdiction in a genuine effort to do so³⁴⁹, the state has genuinely investigated the case and decided not to prosecute it³⁵⁰, the suspect has already been tried for the crimes he is suspected of committing³⁵¹, and the case is of an insufficient gravity that does not warrant further action by the court.³⁵²

3.3.2 The Special Court for Sierra Leone

The Special Court has the jurisdiction to prosecute persons, who are alleged to have the greatest responsibility for the crimes committed after 30 November, 1996 in Sierra Leone including those who were obstructing the peace process.³⁵³ However, International Peacekeepers³⁵⁴ and children below 15 are excluded from the jurisdiction of the Court.³⁵⁵ The jurisdiction of the Special Court

³⁴⁵ Ibid, Art.13(b)

³⁴⁶ Ibid, Art.17 cum. Para.10 and Art.1

³⁴⁷ Markus Benzing, "The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight against Impunity," *Max Planck Yearbook of United Nations Law*, 7:591, 591-632, (2003) at 594 available at http://www.mpil.de/shared/data/pdf/pdfmpunyb/benzing_7.pdf accessed on 23 October, 2010.

³⁴⁸ Lijun Yang, "On the Principle of Complementarity in the Rome Statute of the International Criminal Court," *Chinese Journal of International Law*, 4:1,121-132,(2005), at 122.

³⁴⁹ ICC Statute, Art.17(1)(a) Under this Article, the statute makes admissible a case which the state concerned is 'unwilling or unable to genuinely carry out the investigation or prosecution'. For situations that may be called 'unwillingness and inability', see *ibid*, Art.17(2) and (3)

³⁵⁰ Ibid, Art.17(1)(b)

³⁵¹ Ibid, Art.17(1)(c)

³⁵² Ibid, Art.17(1)(d)

³⁵³ Statute of the Special Court of Sierra Leone, Art.1(1)

³⁵⁴ Ibid, Art.1(2). However, if the state of nationality of the soldiers for whose prosecution it is responsible is 'unwilling and unable' to prosecute them, then the Sierra Leone Court can prosecute them if the UNSC allows it. See Art.1(3)

³⁵⁵ Ibid, Art.7(3)

is concurrent with the National Courts of Sierra Leone³⁵⁶ with the former exercising primacy over the latter requesting the transfer of cases to it when it deems it necessary.³⁵⁷

3.3.3 Senegal

As seen above, Senegal was delegated by the AU to prosecute Hissene Habre in the ‘name of Africa’ after the AU received the report from the Panel of Eminent Jurists established by it to study ‘the options and implications of the Hissene Habre case as well as the options available for his trial...’³⁵⁸ Hissene Habre was present in Senegal during his arrest³⁵⁹ and the Panel recommended Senegal to prosecute him in its report as per its international obligations.³⁶⁰ One of such international obligations which allowed Senegal to assume jurisdiction was the Convention against Torture (CAT).³⁶¹ The CAT under its article 5(2) obliges Senegal to take measures that enables it to ascertain jurisdiction on a person suspected of committing torture where such person is present in its territory.³⁶² The convention also allows the exercise of ‘any criminal jurisdiction’ that the state may apply as per its domestic law on a suspected person.³⁶³ This exercise of jurisdiction is based on the principle of Universal Jurisdiction which is one of the principles for assuming jurisdiction applied when all other principles of jurisdiction are absent³⁶⁴ and which is

³⁵⁶ Ibid, Art.8(1)

³⁵⁷ Ibid, Art.8(2)

³⁵⁸ Decision on the Hissene Habre case and the African Union, Assembly/AU/Dec.103(VI), Assembly of Heads of State and Government, Khartoum, the Sudan, 24 January, 2006, available on http://www.africanunion.org/root/au/Documents/Decisions/hog/AU6th_ord_KHARTOUM_Jan2006.pdf accessed on 24 October, 2010, Paragraph 3

³⁵⁹ ‘Senegal moves closer to Habre Trial’, *AFP Global Edition*, 24 July, 2008, available on <http://www.thefreelibrary.com/Senegal+moves+closer+to+Habre+trial-a01611587969> accessed on 24 October, 2010.

³⁶⁰ Report of the Committee of Eminent African Jurists on the Case of Hissene Habre, Addis Ababa, May, 2006 available on http://www.hrw.org/justice/habre/CEJA_Report0506.pdf accessed on 24 November, 2010, Paragraph 29

³⁶¹ One of the charges against Habre is torture. See ‘14 file complaint against Chadian Ex-dictator Habre in Senegal’, *AFP Global Edition*, 16 September, 2008, available on <http://www.thefreelibrary.com/14+file+complaint+against+Chadian+ex-dictator+Habre+in+Senegal-a01611643932> accessed on 24 November 2010. Senegal is a member of the UN Convention against Torture see http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en accessed on 24 November 2010.

³⁶² UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA resolution A/RES/39/46, New York, 10 December, 1984, available on <http://www.hrweb.org/legal/cat.html> accessed on 24 November, 2010, Art.5(2)

³⁶³ Ibid, Art.5(3)

³⁶⁴ The other principles for assuming jurisdiction are Active Personality (Nationality of perpetrator), territoriality (the crimes committed within the territory of a state), and Passive Personality (nationality of the victims). See in general Michael Akehurst, “Jurisdiction in International Law,” *British Yearbook of International Law* 46:145(1972-1973):145-258.

based on the ideal that certain crimes due to their heinous nature should be prosecuted as a matter of obligation.³⁶⁵

3.3.4 Ethiopia

Currently under Ethiopian law it is the Federal High Court that has the first instance Criminal Jurisdiction on Crime of Genocide. This can be understood from Proclamation 25/96 which states under its Art.4(3) which says that the Federal High Court has jurisdiction to try ‘offences against Nations’.³⁶⁶ Since crimes against humanity and Genocide are offences against the law of nations, it can be safely concluded that the Federal High Court has jurisdiction over crimes against Humanity and genocide. However, the Ethiopian Red Terror Trials commenced before the enactment of Proclamation 25/96, under the Transitional Charter, before the Central Court.³⁶⁷ This anomaly was solved by Art.36 of the Proclamation which transfers all pending cases before the Central Courts to the Federal Courts established under it.³⁶⁸ As shown above it is the Federal High Court that has the Jurisdiction to try crimes of Genocide-the crimes the accused were charged with and hence, the Red Terror cases were then transferred to the Federal High Court accordingly.

3.3.5 Rwanda

The ICTR has jurisdiction to try those persons that bear the greatest responsibility for the crimes of Genocide, Crimes against Humanity and War Crimes committed in Rwanda and by Rwandan citizens in neighboring countries during the one year period starting from 1 January to 31 December, 1994.³⁶⁹ This jurisdiction is concurrent to be exercised with the Rwandan domestic courts³⁷⁰ with the former taking the primary role with the right to order the transfer of any case to it.³⁷¹

³⁶⁵ Tanaz Moghadam, “Revitalizing Universal Jurisdiction: Lessons from Hybrid Tribunals Applied to the Case of Hissene Habre,” *Columbia Human Rights Law Review* 39:471 (2007-2008) at 76.

³⁶⁶ Federal Courts Proclamation 25/96, Art.4(3)

³⁶⁷ It is the Central Court (later the High Court) that has jurisdiction over genocide and crimes against humanity. See First Schedule; places of Trial, Annexed to the Ethiopian Criminal Procedure Code of Ethiopia, p.77

³⁶⁸ Federal Courts Proclamation 25/96, art.36

³⁶⁹ ICTR Statute, Art.1&7

³⁷⁰ Ibid, Art.8(1)

³⁷¹ Ibid, Art.8(2)

The domestic courts, in addition to the concurrent jurisdiction they exercise with the ICTR for the crimes committed in violation of International Humanitarian Law, also exercise jurisdiction on those persons accused of committing crimes in violation of the penal code of Rwanda.³⁷² In addition, they also have the jurisdiction to prosecute the perpetrators of grave breaches of International Humanitarian Law before January 1994, going as far as 1 October, 1990.³⁷³

Under this section, the Writer had found that while the ICC, the Special Court and the ICTR are similar in that they have used the territoriality (crimes committed within a territory of a state concerned or a member state) and the Nationality (the suspect is a national of the state concerned) principles and in giving concurrency over the crimes to the domestic courts, they differ in that the Special Court and the ICTR have Primacy over the Domestic ones while ICC adopts the Principle of Complimentarity (in effect taking the opposite approach by giving the primary responsibility to the domestic ones). On the other hand, while the domestic courts of Rwanda and Ethiopia assumed jurisdiction based on Nationality and Territoriality principles, the Senegalese courts used Universal Jurisdiction to prosecute Hissene Habre.

3.4. Fair Trial Guarantees

The Concept of Fair trial is not a new phenomenon rather has been in the history books since the Roman Period where there were concepts like the presence of all parties involved during the trial.³⁷⁴ It gained more prominence, however, when it was embodied in the Magna Carta Document wherein it was specified every individual has the right to be judged by his peers (to mean Trial by Jury), habeas corpus, prohibition of arbitrary imprisonment, the right to be treated equally before the law³⁷⁵ and speedy and public trial.³⁷⁶

In this Paper in general, Fair Trial guarantees refers to a set of rights mentioned above and others that are aimed at achieving due process guarantees. The aim of this section is to show what the legal regimes provide for the accused in order for him to get a fair trial before the courts. As a

³⁷² Organic Law 08/96, Art.1(b)

³⁷³ Ibid

³⁷⁴ Judge Patrick Robinson, "The Right to a Fair Trial in International Law; with specific reference to the Work of the ICTY", *Publicist* 3:1, (2009):1-11, at 1.

³⁷⁵ Ibid at 2

³⁷⁶ Brian Ferrell, "Right to a Speedy trial before international Criminal Tribunals", *South African Journal on Human rights* 19:98 (2003):98-117, at 99.

result it discusses, the list of rights embodied under the statutes of the courts/tribunals and Constitutions of the countries by which the courts were established. The section, however, starts by first seeing the international³⁷⁷ and African standards of Fair Trial embodied under the ICCPR (the International Covenant on Civil and Political Rights) and ACHPR (the African Charter on Human and Peoples' Rights).

3.4.1 Brief Overview of the International Commitments of Fair Trial Right

3.4.1.1 The International Covenant on Civil and Political Rights

The ICCPR was adopted by the UNGA after years of deliberation on 16 December, 1966 and entered into force 13 years later on 28 March, 1979.³⁷⁸ It has so far 166 parties with 72 of them being signatories including the eight countries under consideration.³⁷⁹ It, under its Article 14, has envisaged multiple Fair Trial Guarantees.

Under the first paragraph of this Article, every human being is declared equal before the courts and tribunals and, in case a person is charged with a criminal offence, he is entitled to a fair and public hearing by a competent, independent and impartial court/tribunal established by law.³⁸⁰ In addition, such a person charged with a criminal offence has a right to be presumed innocent until proven guilty according to law³⁸¹, informed promptly and in detail in a language he understands about the nature and cause of the charges against him, have adequate time and facilities for the preparation of his defense and to communicate with the council of his choosing, tried without undue delay, tried in his presence and to defend himself in person through legal assistance of his own choosing, be informed, if he does not have legal assistance, of his right and to have legal assistance assigned to him, in any case, where the interest of justice so requires and, without any payment by him in case he does not have sufficient funds, examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under

³⁷⁷ International in this context is used to refer to human rights instruments of a global nature. The writer is not implicating that the statutes of tribunals or courts are not international. The provisions regarding rights of the accused will be discussed in the next sub sections.

³⁷⁸ See http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en accessed on 24 November, 2010.

³⁷⁹ Ibid

³⁸⁰ International Covenant on Civil and Political Rights, UNGA Resolution A/RES/2200A (XXI), New York, 16 December, 1966, available on <http://www2.ohchr.org/english/law/ccpr.htm> accessed on 24 October, 2010, Art.14(1)

³⁸¹ Ibid, Art.14(2)

the same conditions as witnesses against him, to have the free assistance of an interpreter, in case he cannot speak or understand the language of the court, not to be compelled to testify against himself or confess.³⁸² He has also the right to appeal his conviction or sentence or right to apply for a review by a higher court or tribunal³⁸³, to be compensated for erroneous detention³⁸⁴, and protection from double jeopardy.³⁸⁵

3.4.1.2 The African Charter on Human and Peoples' Rights (ACHPR)

The ACHPR was adopted by the Assembly of Heads of States and Governments of the OAU at its 18th summit in Nairobi, Kenya³⁸⁶ and entered into force on 21 October, 1986.³⁸⁷ So far 53 states have ratified the Charter including Kenya, Ethiopia, Sudan, DRC, CAR, Sierra Leone, Senegal and Rwanda whose cases were/are being entertained under the five legal systems chosen.³⁸⁸

The ACHPR under its Art.7 guarantees fair trial for those facing criminal charges. It gives a right to every African to have his cause heard, which includes the right to appeal to a competent national organs for acts violating his fundamental rights as recognized by conventions, laws, regulations, and customs in force, to be presumed innocent until proven guilty by a competent and impartial court/ tribunal, the right to defense including the right to be represented by a counsel of his choice, the right to be tried within a reasonable time by an impartial court or tribunal.³⁸⁹

3.4.2. The ICC Statute

The Rome Statute obliges the Trial Chamber to ensure the fairness and expediency of the Trial ‘... with full respect for the rights of the accused and due regard to the protection of witnesses and victims.’³⁹⁰ In addition to this duty on the Trial Chamber, the statute has also envisaged

³⁸² Ibid, Art.14(3)

³⁸³ Ibid,14(5)

³⁸⁴ Ibid, 14 (6)

³⁸⁵ Ibid, 14 (7)

³⁸⁶ http://www.achpr.org/english/info/history_en.html accessed on 24 October, 2010.

³⁸⁷ ACHPR information fact sheet no. 1, “establishment” available at www.achpr.org accessed on 24 November, 2010.

³⁸⁸ List of countries who have signed, ratified/acceded to the convention on ACHPR available at www.africa-union.org accessed on 24 November,2010.

³⁸⁹ ACHPR, Art. 7

³⁹⁰ ICC statute, Art. 64 (2)

rights of the suspects, arrested and accused persons. Under the statute, during an investigation process, any person subject to such investigation has the right not to incriminate himself or not to confess guilt, not to be subjected to any form of duress or coercion, torture, cruel, inhuman and degrading treatment or punishment.³⁹¹ In addition, such person has a right not to be subjected to arbitrary arrest or detention, be assisted with an interpreter if and when he was questioned by authorities who speak in a language he could not fully understand.³⁹² When a person is suspected of committing one or more of the crimes within the jurisdiction of the court and before being questioned by either the prosecutor or by national authorities has the right to be informed that there are reasons to suggest that he has committed the crimes, to remain silent, to have a legal assistance of his choice if he cannot afford one, the right to be assigned with an attorney, to be questioned in the presence of council.³⁹³ An accused person, under the statute, has the right to be presumed innocent until proven guilty before the court according to the law³⁹⁴, a fair and public hearing as per the procedure of the statute, to be informed promptly and in detail of the nature, cause and content of the charge in a language he fully understands and speaks, to have adequate time to prepare for his defense with counsel of his choosing, to be tried without undue delay, to be present in the trial unless the court decided otherwise, examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him and to raise defenses and to present other evidence admissible before the court under the statute, to be assisted with an interpreter free of charge, not to be compelled to testify against himself or confess, to remain silent, to make a written sworn testimony in his defense, not to carry the burden of proof³⁹⁵, to ask for the disclosure of any document under the possession of the Prosecutor which he believes to show his innocence.³⁹⁶

³⁹¹ Ibid, Art. 55(1)(a)&(b)

³⁹² Ibid, Art. 55(1)(c)&(d)

³⁹³ Ibid, Art. 55(2)

³⁹⁴ Ibid, Art. 66(1)

³⁹⁵ Ibid, Art. 67 (1)

³⁹⁶ Ibid, Art. 67 (2)

3.4.3. The Sierra Leone Court

Like the ICC statute, the ICCPR and ACHPR, the Statute of the Special Court for Sierra Leone also guarantees fair and public hearing for an accused charged with committing serious violation of the rules of International Humanitarian Law.³⁹⁷ The Statute also declares that the accused has the right to be presumed innocent until proven guilty as per the statute³⁹⁸ and that all accused are equal in the eyes of the court.³⁹⁹ In case he is charged, he has the right to be informed promptly and in detail in the language he understands the nature and the causes of the charge against him, to have adequate time and facility to prepare for him defense and have the right to communicate with the counsel of his choice, to be tried without undue delay, to be tried in his presence and to defend himself through a counsel of his own choosing and where he does not have funds to hire a counsel, has the right to be appointed with one without pay, examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, to have the free services of an interpreter in case he cannot speak the language of the court, not to be compelled to testify against himself or to confess.⁴⁰⁰

3.4.4. The Senegal Constitution

The Senegalese constitution, though, does not mention specifically the Fair Trial Guarantees, it provides that all Senegalese citizens are entitled to the respect of ‘their individual fundamental freedoms, their economic and social rights as well as their group rights’ which includes, *inter alia*, Civil and Political rights-the group of rights in which the Fair Trial Guarantees are included under the ICCPR.⁴⁰¹ In addition, Senegal is a party to both the ICCPR and the ACHPR.⁴⁰² Under Art. 98 of the Constitution, it is provided that a treaty or an agreement ‘duly ratified’ takes pre-

³⁹⁷ Statute of the Special Court of Sierra Leone, Art. 17(2)

³⁹⁸ Ibid, Art. 17(3)

³⁹⁹ Ibid, Art. 17(1)

⁴⁰⁰ Ibid, Art. 17 (4)

⁴⁰¹ Constitution of Senegal, Art. 8

⁴⁰² See <http://www.africaunion.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf> accessed on 24 November, 2010 for ACHPR and http://treaties.un.org/untc/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en accessed on 24 November, 2010 for ICCPR

cedence over local laws, upon its publication.⁴⁰³ This indicates that the provisions of the ICCPR and ACHPR dealing with fair trial are also domestically applicable.

3.4.5. The Ethiopian Constitution

The FDRE Constitution provides guarantees of fair trial under its Chapter three titled ‘Human rights and freedoms.’ Under Art.19, the Constitution provides that an arrested person has the right to be informed promptly and in the language he understand the reasons for his arrest and any charge against him⁴⁰⁴, the right to remain silent and the right to be informed, in a language he understands, that anything he said can and will be held against him⁴⁰⁵, the right to be brought before the court within 48 hours of his arrest⁴⁰⁶, to demand Habeas Corpus⁴⁰⁷, not to be compelled to confess or admit any thing that could be held against him in court⁴⁰⁸ and to demand bail as per the procedures of the law.⁴⁰⁹ In addition, the FDRE constitution also provides that an accused person has the right to a public trial by ordinary courts⁴¹⁰, to be informed of the sufficient particulars of the charge/s to be brought against him and to also be given in writing⁴¹¹, to be presumed innocent until proven guilty by the court and not to incriminate himself⁴¹², to fully access the evidence against him, cross-examine witnesses, to produce evidence and witnesses in their own defense⁴¹³, to be represented by a counsel of his choice and if they cannot afford it, be provided with one by the state⁴¹⁴, to request the assistance of an interpreter at the expense of the state⁴¹⁵, and to appeal to a competent court.⁴¹⁶ Under art 25 of FDRE Constitution, all Ethiopians are declared equal under the law.⁴¹⁷

⁴⁰³ Constitution of Senegal, Art. 98

⁴⁰⁴ FDRE constitution 19(1)

⁴⁰⁵ Ibid, Art.19(2)

⁴⁰⁶ Ibid, Art.19(3)

⁴⁰⁷ Ibid, Art.19(4)

⁴⁰⁸ Ibid, Art.19(5)

⁴⁰⁹ Ibid, Art.19(6)

⁴¹⁰ Ibid, Art.20(1)

⁴¹¹ Ibid, Art.20(2)

⁴¹² Ibid, Art.20(3)

⁴¹³ Ibid, Art.20(4)

⁴¹⁴ Ibid, Art.20(5)

⁴¹⁵ Ibid, Art.20(7)

⁴¹⁶ Ibid, Art.20(6)

⁴¹⁷ Ibid, Art.25

During the start of the Red terror trials, the FDRE Constitution was not in force and the law of the land was the Transitional Period Charter of Ethiopia which declares that the UDHR was applicable.⁴¹⁸

3.4.6. Rwanda

Under the statute of ICTR, an accused person is guaranteed the right to have a fair and public hearing without prejudicing the right of witnesses and victims.⁴¹⁹ In addition, all accused persons are considered equal before the ICTR⁴²⁰ and are presumed to be innocent until proven guilty as per the provisions of the Statute.⁴²¹ When the accused is charged with committing a criminal offence, he is entitled to be informed promptly and in detail in a language he understands about the nature and cause of the charges against him, to have adequate time and facility to prepare for his defense and have the right to communicate with the counsel of his choice, to be tried without undue delay, to be tried in his presence and to defend himself through a counsel of his own choosing after being informed of this right and where he does not have funds to hire a counsel, be appointed with one, examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, to have the free assistance of an interpreter in case he cannot speak the language of the Court, not to be compelled to testify against himself or to confess.⁴²²

Under the Rwandan Constitution, It is declared that all persons are equal before the law⁴²³ and when facing a criminal charge is presumed innocent until proven guilty by the Court in a fair and public hearing.⁴²⁴ Moreover, an accused has the right to be informed about the nature and cause of the charges and the right to defend himself before in various proceedings⁴²⁵ and to have a day

⁴¹⁸ See in general Transitional Period Charter of Ethiopia, Peaceful and Democratic Transitional Conference of Ethiopia, Negarit Gazette, Addis Ababa, 22 July, 1991.

⁴¹⁹ ICTR statute, Art.20(2)

⁴²⁰ Ibid, Art.20(1)

⁴²¹ Ibid, Art.20(3)

⁴²² Ibid, Art.20(4)

⁴²³ Constitution of the Republic of Rwanda, O.G. N^o Special of 4 June, 2003 P.119, 4 June, 2003, Art.16

⁴²⁴ Ibid, Art.19

⁴²⁵ Ibid, Art.18

before a competent court.⁴²⁶ In addition, Rwanda is a party to the ICCPR and ACHPR⁴²⁷ and hence all the provisions of fair trial are applicable in Rwanda also.

As can be understood from the reading of this section, the Statutes of the Courts/Tribunals and even the domestic trials replicated the fair trial guarantees under the ICCPR. In addition to the guarantees under these Statutes and Constitutions, the suspects and the accused are entitled these guarantees by the ICCPR and the ACHPR.

3.5. Rules of Evidence

In this Section, the paper tries to analyze the rules of evidence employed by the various Courts/Tribunals in their pursuit of prosecutions of Crimes against Humanity and Genocide. It tries to analyze them by discussing three aspects; Rules of presentation of Evidence in general, Rules of admissibility of evidence, and Rules relating to disclosure of evidence.

3.5.1. The ICC

Under the ICC statute, the parties are entitled to present any evidence that they deemed relevant to the case to the Trial Chamber.⁴²⁸ The Court then could make a decision as to the relevancy and/or the admissibility of the evidence⁴²⁹ by taking into account the probative value of the evidence and any prejudice it might cause to the trial's fairness or to the fair evaluation of the testimony of witnesses⁴³⁰, when the parties submitted their application to this effect or on its own motion.⁴³¹ In addition, the court could by its own motion, cause an evidence to be furnished when it deems it necessary for the establishment of the truth.⁴³² Parties are entitled to raise any issue of admissibility and relevancy at the time the evidence is presented to the Court or in any

⁴²⁶ Ibid, Art.19

⁴²⁷ See <http://www.africaunion.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf> accessed on 27 October,2010 for ACHPR and http://treaties.un.org/untc/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en accessed on 27 October,2010 for ICCPR

⁴²⁸ ICC statute, Art. 69(3)

⁴²⁹ Rules of Procedure and Evidence of the International Criminal Court adopted by Assembly of State Parties, New York,10 September, 2002, available on http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf accessed on 24 November, 2010, Rule 63(2)

⁴³⁰ ICC statute, Art.69(4)

⁴³¹ Ibid, Art.64(9)

⁴³² Ibid, Art.69(3)

case, at the time they know of such issue⁴³³, and any evidence ruled to be irrelevant or inadmissible cannot be considered by the Trial Chamber.⁴³⁴ As to the presentation of witnesses, a witness is required to give a solemn declaration that his testimony is truthful as per Rule 66 of the ICC Rules of Procedure and Evidence⁴³⁵ and testify in person.⁴³⁶ Exceptionally, the Court allows live testimony through audio or video technology if the testimony enables the witness to be examined by all parties⁴³⁷, recorded testimonies, written transcripts, and other documentary evidence of such a testimony can also be submitted provided that it does not adversely affect the rights of the accused⁴³⁸, both parties have an opportunity to examine the evidence presented. The witness whose testimony is so recorded is not present before the court on the day of presentation or having been present on such date does not object to the presentation of the previously recorded testimony and all parties have got a chance to examine him during the proceedings.⁴³⁹ When evidence is presented in violation of the Statute and International Human Right Standards, it should be held to be inadmissible when the court determines that it creates a substantial doubt on the evidence's reliability and when it determines that admitting the evidence would be incompatible and seriously damages the integrity of the trial.⁴⁴⁰ In cases of sexual violence, the Court adopts principles of presentation of evidence which include the non-inference of consent from a situation where the victim is forced, threatened with force, coerced, or been victimized by such a situation or non-inference of consent from the words or conducts of a victim in the situation, non-inference of consent by reason of lack of resistance or silence of the victim and the non-inference of credibility, predisposition to sexual conduct from the nature of prior or subsequent sexual acts.⁴⁴¹ The nature of a prior or subsequent sexual conduct is inadmissible before the court.⁴⁴² Witnesses can be either adults or children-when allowed by the chamber after believing that such a child understands the duty to speak the truth.⁴⁴³

⁴³³ Rules of Procedure of the ICC, Art. 64(1)

⁴³⁴ Ibid, Art.64(3)

⁴³⁵ ICC Statute, Art.69(1)

⁴³⁶ Ibid, Art.69(2)

⁴³⁷ Rules of Procedure of the ICC, Art.67(1)

⁴³⁸ Statute of ICC, Art.69(2)

⁴³⁹ Rules of Procedure of the ICC, Rule 68(1)

⁴⁴⁰ ICC statute, Art.69(7)

⁴⁴¹ Rules of Procedure of the ICC, Rule 70

⁴⁴² Ibid, Rule 71

⁴⁴³ Ibid, Rule 66(2)

Under the Rules of Evidence, both the Prosecutor and the defense are required to disclose any information at their disposal before the start of their case and within a sufficient period of time for the other to prepare his defense or rebuttal as the case may be.⁴⁴⁴ The Prosecutor is required to give the name of the witnesses he intends to present in the trial and copies of any statement they gave previously, if any, names of additional witnesses he intends to call at a later time with documents relating to their testimonies, in a language the accused can understand and speak.⁴⁴⁵ The prosecutor is also obliged to provide any materials, which are designed to be presented before the court in the trial or can serve as an important evidence for the defense, for inspection by the defense⁴⁴⁶ and the vice versa.⁴⁴⁷ The defense is also obliged to notify the prosecutor of his intention to raise the defense of an alibi specifying the place where the accused is alleging to be at during the time of the commission of the crime and his intention to raise defense of criminal irresponsibility.⁴⁴⁸ However, the rules relating to disclosure are not without an exception. Internal Documents like memoranda, reports and any material in the possession of the Prosecutor will not be disclosed when it is considered to prejudice further or ongoing investigation by the Court. In addition to this, evidence will not be disclosed, in case of measures of confidentiality have been taken to protect the safety of witnesses or victims and their families⁴⁴⁹, or where the consent of the provider of the material is required to produce the evidence before the court⁴⁵⁰ and information attained by a person on account of professional relationships.⁴⁵¹

In addition, the burden of proof lies on the Prosecutor⁴⁵² and the Court must find the accused guilty beyond reasonable doubt in order to convict him.⁴⁵³

Hence, under the ICC statute, evidence is presented by the parties themselves but the court will determine whether to admit them or not; however, the Chamber is given power to order the production of evidence. It has also rules of non-disclosure of evidence aimed at protecting victims

⁴⁴⁴ Ibid, Rule 76 & 79

⁴⁴⁵ Ibid Rule 76

⁴⁴⁶ Ibid, Rule 77

⁴⁴⁷ Ibid, Rule 78

⁴⁴⁸ Ibid, Rule 79(1)

⁴⁴⁹ Ibid, Rule 81

⁴⁵⁰ Ibid, Rule 82(1)

⁴⁵¹ Ibid, Rule 73

⁴⁵² ICC statute, Art.66(2)

⁴⁵³ Ibid, Art. 66(3)

and witnesses and protecting an on-going investigation and rules of disclosure aimed at ensuring fair trial.

3.5.2. The Special Court of Sierra Leone

The Rules of Procedure and Evidence of the Special Court provides the discretion to the Chambers to admit any evidence it deemed relevant to the case.⁴⁵⁴ However, evidence considered to damage the credibility of the process of administration of justice will not be admitted to the trial by the Chamber.⁴⁵⁵ The parties are entitled to call witnesses and present evidence which they deem useful to their case⁴⁵⁶ and the party who calls a the witness is obliged to examine-in-chief such witness but the judge can also ask him questions that he deemed necessary for the clarification of issues in the trial.⁴⁵⁷ A witness can be an adult⁴⁵⁸, a child whom the Chamber thinks to be mature enough to report what he has witnessed to the Chamber⁴⁵⁹, the accused himself if he chooses to be one.⁴⁶⁰ A witness gives testimony to the court either by being present during the hearing⁴⁶¹ or through such technologies such as video live transmissions or any other ways the court may order.⁴⁶² In addition, the Chamber may admit into evidence such documents and transcripts of testimonies of the witnesses made before the start of the hearing, if the witness is present when the evidence is presented, if the witness is available for cross-examination and the judge has a chance to ask questions and if the witness attests that such a testimony is true and it contains statements he has said upon examination.⁴⁶³ If such witness dies or is unable to be found after giving his testimonies before the Trial Chamber then his testimony could be admitted without further requirements unless the Chamber is satisfied that the person is unavailable and, having considered the conditions in which the recording was made, believes that the evidence is reliable.⁴⁶⁴ During the testimonies, a witness can refuse to give testimonies if it was going to incriminate him but the Chamber can force him to answer questions in which case the testimony he

⁴⁵⁴ Rules of Procedure and Evidence of the Special Court, Rule 89(C)

⁴⁵⁵ Ibid, Rule 95

⁴⁵⁶ Ibid, Rule 85(a)

⁴⁵⁷ Ibid, Rule 85(C)

⁴⁵⁸ Ibid, Rule 90(b)

⁴⁵⁹ Ibid, Rule 90(C)

⁴⁶⁰ Ibid, Rule 85(c)

⁴⁶¹ Ibid, Rule 90(a)

⁴⁶² Ibid, Rule 85(d)

⁴⁶³ Ibid, Rule 92 ter

⁴⁶⁴ Ibid, Rule 92 quarter

gives will not be held in evidence against him.⁴⁶⁵ Whenever an expert witness is called by a party, such a party is required to disclose his full statement to the opposing party as soon as possible and had to be filed to the Trial Chamber before 21 days of the testimony in court, however, such testimony could be made when the other party opposes the statement within 14 days of the filing of the statement to the court.⁴⁶⁶ If the other party does not oppose the statement, it will be entered as evidence without holding a hearing.⁴⁶⁷

As a matter of principle, the Prosecutor is obliged to disclose to the Defense copies of statements of witnesses he intends to call at the trial and, any other evidence to be presented at the trial within 30 days of the initial appearance of the accused⁴⁶⁸ and continue to disclose copies of statements of additional witnesses he intends to call to the trial until 60 days to the trial.⁴⁶⁹ In addition, the Prosecutor is obliged to provide for inspection any books, documents, photographs, and any other tangible objects at his disposal⁴⁷⁰ and disclose any exculpatory evidence which is in the possession of the Prosecutor which might be advantageous to the case of the defense.⁴⁷¹ The Defense, on the other hand, is obliged to notify his intention to raise the defense of alibi or, any other defense, based on diminished or lack of mental capacity.⁴⁷² However, the Judge can order the non-disclosure of evidence if he deems such measure as necessary for the protection of witnesses.⁴⁷³

Like in the ICC, in the Special Court it is the parties responsible to present evidence before the Chamber and it is the Chamber that has the power to determine the admissibility of evidence. However, unlike the ICC, it has not been given power to produce additional power but can pose any question it deems necessary to the witnesses called by the parties. In addition, it also has the power to take measures of non-disclosure to protect victims and witnesses and rules of disclosure aimed at ensuring fair trial, like the ICC.

⁴⁶⁵ Ibid, Rule 90(e)

⁴⁶⁶ Ibid, Rule 94 bis

⁴⁶⁷ Ibid, Rule 94 bis (c)

⁴⁶⁸ Ibid, Rule 66(a)(i)

⁴⁶⁹ Ibid, Rule 66(a)(ii)

⁴⁷⁰ Ibid, Rule 66(a)(iii)

⁴⁷¹ Ibid, Rule 68

⁴⁷² Ibid, Rule 67(a)(ii)

⁴⁷³ Ibid, Rule 75

3.5.3. Senegal

As seen above, the major player in the investigation process is the '*juge d'instruction*' or the Investigative Judge. Under the Criminal Procedure Code, there is established a judge in every regional tribunal.⁴⁷⁴ The Investigative Judge is charged with investigating information communicated to him that he deems are necessary in the demonstration of the truth.⁴⁷⁵ In the performance of his duties, the Investigative Judge is empowered to order all useful measures in the gathering of evidence such as medical examination⁴⁷⁶, call any person whose testimony he believes useful⁴⁷⁷, can call an interpreter above 21 years of age, if the person called cannot speak the language of the court an interpreter would be appointed to him.⁴⁷⁸ The witnesses testify separately in the presence of the accused and the Judge writes a report of their declaration.⁴⁷⁹ The witnesses swear to tell the whole truth, nothing but the truth, and the Judge asks them various questions about their situations.⁴⁸⁰ Each page of the record of their testimonies will be signed by the clerk, the Investigative Judge and the witness who will later be called to read his testimony in trial.⁴⁸¹ The witnesses will also take oath to appear at a later date.⁴⁸²

Hence, under Senegalese legal system, it is the Investigative Judge that has the power to call any witness deemed necessary to the investigation and produce other evidence as necessary, rather than the Parties.

⁴⁷⁴ Code Procedure Penal Senegalais, Art.40

⁴⁷⁵ Ibid, Art.72

⁴⁷⁶ Ibid

⁴⁷⁷ Ibid, Art.91

⁴⁷⁸ Ibid, Art.92

⁴⁷⁹ Ibid

⁴⁸⁰ Ibid, Art.93

⁴⁸¹ Ibid, Art.95

⁴⁸² Ibid, Art.97

3.5.4. Ethiopia

In the Ethiopian case, the applicable rule of evidence for the case of the Red-terror was the Criminal Procedure Code of 1965⁴⁸³, albeit, with some exceptions like provisions of limitation of actions, time limit concerning the submission of charges, evidence and pleadings to the charges⁴⁸⁴ and habeas corpus.⁴⁸⁵

Under the Criminal Procedure Code, after a date for trial has been set, the parties are required to submit to the registrar of the court the list of witnesses and experts, if any, they intend to call to testify in trial. The Court, in turn, sends summons for their appearance at the date of the trial.⁴⁸⁶ The parties are also responsible for ensuring all exhibits are in the disposal of the Court before the trial begins.⁴⁸⁷ After the accused enters his plea and, after the Prosecutor gives a brief opening speech about the charge and the nature of evidence he presents in the trial, the Prosecutor, then, calls his witnesses who would have to either swear or affirmed before they start their testimony.⁴⁸⁸ The witnesses will be examined-in-chief by the Prosecutor, cross-examined by the defense and may be re-examined by the Prosecutor⁴⁸⁹, and if it considers it necessary for the just outcome of the trial, the court can at any time ask the witness any question.⁴⁹⁰ However, any question in an examination-in-chief should avoid being a ‘yes or no’ and the answers of the question should be related to his ‘direct or indirect knowledge’.⁴⁹¹ The term ‘indirect’, hence, allowing the inclusion of hearsay evidence. If the court, after hearing the evidence of the prosecution, decides that no case against the accused have been made that would warrant his conviction it can order the release of the accused⁴⁹² and if not orders the defense to open its case.⁴⁹³ The defense opens its case by making a brief statement in answer to the charge and the evidence it is prepared to present to the court⁴⁹⁴ and afterwards call witnesses and experts, if any, who would have to

⁴⁸³ Proclamation of the Special prosecutor’s Office, Art.7(1)

⁴⁸⁴ Ibid, Art.7(2)

⁴⁸⁵ Ibid, Art.7(3)

⁴⁸⁶ Ethiopian Criminal Procedure Code, Art.124(1)

⁴⁸⁷ Ibid, Art.124(2)

⁴⁸⁸ Ibid, Art.136(2)

⁴⁸⁹ Ibid, Art.136(3)

⁴⁹⁰ Ibid, Art.136(4)

⁴⁹¹ Ibid, Art.137(1)&(2)

⁴⁹² Ibid, Art.141

⁴⁹³ Ibid, Art.142(1)

⁴⁹⁴ Ibid, Art.142(2)

either be sworn in or be affirmed.⁴⁹⁵ If the accused wishes to make a statement in his own defense, he can be allowed to do so, albeit, without being cross-examined by the prosecutor.⁴⁹⁶ Any question needed to clarify issues will only be asked by the courts.⁴⁹⁷ Moreover, during the proceedings the court has the power to call additional witnesses either on its own motion or on the application of either party for whose case the witness testifies-where the court is satisfied that such witness is material to the case and the application does not have the purpose of delaying the proceedings.⁴⁹⁸ The deposition of a witness can be admitted as evidence if such witness is dead, insane, cannot be found, is very ill as not to be able to attend the trial or is absent from the country.⁴⁹⁹ When each party objects to an admission of any evidence and the putting of question to a witness the court then is obliged to decide on whether the said evidence or the said question is admissible or not.⁵⁰⁰

Under the Ethiopian Criminal Procedure Code, there are no clear rules regarding the duty to disclose evidence held by the prosecutor to the defense. The FDRE Constitution, though, under Art. 20(4), guarantees such a right.⁵⁰¹ However, there are indications that evidence might be disclosed to the other party. Art. 124 states that before a trial commence each party must provide a list of witnesses they intend to call to the registrar of the court. This indicates that the list of witness can be available to the defense and vice versa, hence, the evidence is disclosed.

Under Art. 97 of the Criminal Procedure Code, all exhibits and depositions are to be presented to the trial are to be submitted to the Registrar of the Court which in turn marks and numbers them and keeps them in a safe place.⁵⁰² However, access to them is possible, solely, upon Court order.⁵⁰³

Therefore, under Ethiopian law, it is the parties that are responsible for producing evidence but the court can also call additional evidence and can ask any question to witnesses where it deems

⁴⁹⁵ Ibid

⁴⁹⁶ Ibid, Art.142(3)

⁴⁹⁷ Ibid

⁴⁹⁸ Ibid, Art.143

⁴⁹⁹ Ibid, Art.144(1)

⁵⁰⁰ Ibid, Art.146

⁵⁰¹ FDRE Constitution, Art.20(4)

⁵⁰² Ethiopian Criminal Procedure Code,Art.97

⁵⁰³ Ibid

it necessary in the interest of justice. Even if there are no clear rules regarding evidence, it can be inferred by the reading of Arts.97& 124 that evidence can be disclosed to the other side. Moreover, the Constitution, under Art. 20(4) guarantees such a right to a defendant in a criminal trial.

3.5.5. Rwanda

Under the ICTR's rules of procedure and evidence, the Chamber of the Court has the discretion to admit any evidence which it considered to have a probative value in the court⁵⁰⁴, however, it is obliged not to admit evidence which is obtained in methods which cast substantial doubt on the reliability of the court or which damages the integrity of the trials.⁵⁰⁵ Each party has the right to call witnesses and produce evidence.⁵⁰⁶ However, the Chamber, if it believed that additional evidence is needed to clarify matters has the power to order the parties to call additional evidence or summon witnesses by its own motion.⁵⁰⁷

Witnesses before the Chamber are, in principle, to testify directly in court unless it directs that a deposition be heard⁵⁰⁸ or when it accepts a written testimony in place of oral one.⁵⁰⁹ In principle, a witness can be any person who understands the consequences of the solemn declaration to be taken⁵¹⁰ except children; however, a child can be allowed to testify when the Chamber is satisfied that the child is mature enough to tell what he saw and understands the essence of telling the truth.⁵¹¹ Cross-examinations of a witness should not be on issues not raised under the chief examinations and should be limited to matters affecting the credibility of the witnesses, but the chamber can allow other questions to be asked.⁵¹²

In cases of sexual violence, the tribunal has guiding principles of evidence gathering when it entertains such cases. These include not corroborating their testimony unless they are child witnesses⁵¹³, not to take consent as a defense if the victim was threatened with violence or has had

⁵⁰⁴ Rules of Procedure of the ICTR, Rule 89(c)

⁵⁰⁵ Ibid, Rule 95

⁵⁰⁶ Ibid, Rule 85

⁵⁰⁷ Ibid, Rule 98

⁵⁰⁸ Ibid, Rule 90 (a)

⁵⁰⁹ Ibid, Rule 92 bis (a)

⁵¹⁰ Ibid, Rule 90 (b)

⁵¹¹ Ibid, Rule 90 (c)

⁵¹² Ibid, Rule 92 (g)

⁵¹³ Ibid, Rule 96 (i)

any reason to fear violence, detention, or any other psychological oppression⁵¹⁴, or the victim believed that if she did not submit she would be put in danger.⁵¹⁵ If there is a need, however, to admit consent as evidence, it will be put so only after the Trial Chamber satisfies itself that it can be admitted, *in camera*.⁵¹⁶ However, prior sexual conduct of a victim is in no case admissible.⁵¹⁷

Under the Rules of Procedure and Evidence, the Prosecutor is required to disclose within a month of the initial appearance of the accused supporting documents, manuscripts of any statements of the accused, copies of statements of all witnesses the prosecutor intends to call at trial, additional evidences after the permission of the Trial Chamber.⁵¹⁸ This duty also extends to the disclosure of books, documents, photos and other tangible objects which he intends to present in trial or is important for the preparation of the defense's case.⁵¹⁹ The Defense is also obliged to notify the prosecutor that he wishes to raise the defense of alibi and disclose the name of the witnesses that could testify that he was present at a different place during the commission of the crime, that he wishes to raise any special defenses like insanity⁵²⁰ and make available any books, documents, photographs and other tangible objects that the Prosecutor might wish to use at trial.⁵²¹ When each party discovers additional evidence that is relevant to the case, he must notify the other party and the Chamber the discovery of such evidence.⁵²² In addition to the above obligations, the Prosecutor is obliged to disclose any evidence which may suggest the innocence or otherwise mitigate the level of guilt or which may cast a doubt on the prosecution's case.⁵²³ The obligation to disclose evidence to the other party, however, is not without its exception. This is so when the materials under the possession of the prosecutor are considered to be so sensitive that their disclosure would jeopardize on-going or further investigations or affect public interest and the security of a state.⁵²⁴ In this case the Prosecutor applies to the Trial Chamber to be allowed not to disclose such which will then sit *in camera* upon the presentation to the Cham-

⁵¹⁴ Ibid, Rule 96 (ii)(a)

⁵¹⁵ Ibid, Rule 96 (ii)(b)

⁵¹⁶ Ibid, Rule 96(iii)

⁵¹⁷ Ibid, Rule 96(iv)

⁵¹⁸ Ibid, Rule 66(a)

⁵¹⁹ Ibid, Rule 66(a)

⁵²⁰ Ibid, Rule 67(a)(ii)

⁵²¹ Ibid, Rule 67(c)

⁵²² Ibid, Rule 67(d)

⁵²³ Ibid, Rule 68(a)

⁵²⁴ Ibid, Rule 66(c)

ber.⁵²⁵ Like in the ICC, the parties are obliged to produce evidence but the Chamber reserves the right to call additional witnesses. The Chamber of the ICTR also is the one who decides to admit the evidence produced and also has rules of disclosure and non-disclosure aimed at protecting the right of the accused and the victims and witnesses, respectively, like the ICC and the Special Court.

Domestically, the 1996 Organic Law 08/96 has introduced the Confession and Guilty procedure in which the accused confesses in return for a lighter sentence. Under this Procedure, a confession is admissible when it fulfills the requirements of providing the detailed descriptions of all offences the accused is charged with committing including date, place of commission and the name of victims present, information as to the identity of collaborators and other information useful for the exercise of prosecution, providing apology for the offences charged and offering of a guilty plea for the offences described under his application.⁵²⁶ The confession made as per these requirements will not, however, be admissible before the courts if the accused withdraws his application to be included in the procedure.⁵²⁷ The Court before accepting the confession verifies whether it was made voluntarily and with full knowledge of the case and the consequences of his acts.⁵²⁸ Under Organic law N^o 15/2004 of 2004 named the Organic law relating to evidence and its production, the court has the power to rule on the admissibility of any evidence presented to it based on legal and factual grounds.⁵²⁹ This law makes applicable the rules of evidence in civil cases to criminal cases too.⁵³⁰ Under the civil cases, any person is entitled to appear as a witness provided that they are above 14 years of age and are incapacitated.⁵³¹ When testifying, witnesses are heard separately in order to avoid the likelihood of bias and the Court has the power to re-examine or cross-examine them either by its own motion or by the application of the parties.⁵³² A witness whose testimony is thought to contribute to the determination of the case will be given a chance to testify and the court cannot stop his testimony and the parties

⁵²⁵ Ibid

⁵²⁶ Organic Law 08/96, Art.6

⁵²⁷ Ibid, Art.12

⁵²⁸ Ibid, Art. 10(7)

⁵²⁹ Organic law 15/2004, Art.119

⁵³⁰ Ibid, Art.120

⁵³¹ Ibid, Art.63

⁵³² Ibid, Art.68

cannot disqualify him.⁵³³ The testimonies of witnesses will be recorded, printed and read to him and will made to sign or affix finger prints.⁵³⁴

From the above discussion it can be understood that, under the Rwandan legal system, the power to determine the admissibility of evidence is given to the courts and that the courts play a limited role in the trial.

Overall, the ICC and the ICTR rules of procedures show that in evidence production, both the parties and the judges involve as the latter are also allowed to call for witnesses and the production of other evidence. This is the inclusion of the experience of the Civil law and Common law traditions in one legal system. Under the Common law tradition, the role of judges in the trial is limited to managing the trial process or refereeing the litigation and the parties are responsible for producing and presenting evidence, while under the Civil law system the judge actively participates in the gathering of evidence and interrogation of witnesses.⁵³⁵ Since the ICC and ICTR judges can call witnesses by their own motion and pose any question they deem relevant to the purpose of the trial, as well as allow the parties to produce evidence, they can be said to have a mixed rule of evidence embracing both the civil law and common law traditions. The inclusion of the powers of judges to call witnesses and interrogate them is particularly important in the prosecution of Crimes against Humanity and Genocide as it enables courts to uncover outstanding issues in a case that might otherwise might have been left unsaid and thereby serve as a tool for recording of the truth about the conflict and ultimately contribute to reconciliation efforts. Under the Special Court, on the other hand, the Judges have a much more limited role than those of the ICC and the ICTR; they had not been given the power to call witnesses or produce evidence but could pose questions to a witness called by the parties. Under the domestic legal systems, Judges in the Ethiopian Courts have a more similar role to that of the ICC and the ICTR because they allow evidence production and presentation to the parties while reserving a right to do so for their own. On the other hand, while the Senegalese system is purely of a civil law tradi-

⁵³³ Ibid, Art.71

⁵³⁴ Ibid, Art. 70

⁵³⁵ James G. Apple & Robert P. Deyling, *A Primer on the Civil Law System*, The Federal Judicial Center Publication, np-nd, available at [http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/\\$file/CivilLaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf) accessed on 10 November, 2010 at 37. For more regarding the difference of the two systems see Joseph Dainow, "The Civil law and Common Law: Some Points of Comparison," *American Journal of Comparative Law* 15: 419, 419-435, (1966-67) .

tion as demonstrated by the use of investigative judge who is in charge of the investigations with vast powers of producing and presentation (calling and questioning of witnesses). Under the Rwandan system, as opposed to all others, Judges have a very limited role resembling the Common law system.

3.6 Sentencing

Under this section, the writer tries to discuss the Sentences for Crimes against humanity and Genocide adopted under the five legal regimes.

3.6.1 The ICC

Under the statute of the ICC, the Trial Chamber is given the power to sentence the person convicted by taking into account the evidence presented before the trial, any statements and claims made during the trial that are relevant for sentencing⁵³⁶ and by holding a hearing if it deemed necessary for the determination of the sentence.⁵³⁷ The court then sentences the accused either with imprisonment in any case not exceeding 30 years⁵³⁸, life imprisonment when it found that the crime is grave⁵³⁹, a fine⁵⁴⁰, and forfeiture of fruits of the crime.⁵⁴¹ The court determines to impose one or more of these by making sure that they mirror the guilt of the convicted person⁵⁴², and by assessing the extent of damage, the degree of participation in the crime, the nature of the crime and the means used to commit it, the circumstances of the crime and the convicted person.⁵⁴³ The court also tries to accommodate the aggravating as well as the mitigating circumstances and of the circumstances of the convicted there may be.⁵⁴⁴ Mitigating circumstances include the diminished mental capacity which was not deemed to constitute criminal irresponsibility and the subsequent acts of the convicted person like compensating victims and efforts of co-

⁵³⁶ ICC Statute, Art. 76(1)

⁵³⁷ Ibid, Art. 76(2)

⁵³⁸ Ibid, Art. 77(1) (a) If there are multiple crimes that the accused is charged with, the court is expected to announce a sentence for each and the total sentence provided that the total should not be less than the highest sentence for one of the individual sentence and in any case not be greater than 30 years and life imprisonment as the case may be. See *ibid*, Art. 78(3)

⁵³⁹ Ibid, Art. 77(1)(b)

⁵⁴⁰ Ibid, Art. 77(2)(a) Any fine collected as per this provision will be transferred to the trust fund established under Art. 79 of the statute for the benefit of the victims-see Art. 79(2)

⁵⁴¹ Ibid, Art. 77(2)(b)

⁵⁴² Rules of Procedure and Evidence of the ICC, Rule 145(1)(a)

⁵⁴³ Ibid, Rule 145(1)(c)

⁵⁴⁴ Ibid, Rule 145(1)(b)

operation with the court⁵⁴⁵, while the aggravating ones include prior convictions for crimes under prosecutable instances by the court or other related crimes of the same nature, ultra-virus, where the convicted person committed the crime on a defenseless witness, the cruel commission of the crimes, the existence of multiple victims, the commission of the crime with the motive of discrimination against the victims, and any other circumstance of the same nature.⁵⁴⁶ In addition to these factors, the court also takes regard to the amount of time the convicted person already served going through the trial process.⁵⁴⁷

A term of sentence imposed by the court as per the above procedures is to be enforced by a state that has indicated their willingness to do so and are chosen to do so by the court from among the list of the applicant states.⁵⁴⁸ The state so chosen must, after wards, confirm its willingness to the court⁵⁴⁹ and any conditions of its acceptance that may likely affect its acceptance of the terms and extent for which the imprisonment might last.⁵⁵⁰ The designation of a state party to enforce the sentences should be made as per, inter alia, the principle of equitable distribution of responsibility to enforce sentences, the application of international treaty standards relating to the treatment of prisoners, the views and nationality of the sentenced person.⁵⁵¹ However, if the Court is unable to find a state willing to be able to enforce the sentence or if the state willing does not fulfill the above criteria or both, then the sentence will be referred to the Hague, the seat of the court.⁵⁵² The Court is empowered to transfer the prisoner to another country at any time⁵⁵³, to exclusively handle the applications of revision and appeals on the sentence⁵⁵⁴, supervise the enforcement of the sentence.⁵⁵⁵ The Court is also empowered to reduce the sentence after hearing the sentenced person⁵⁵⁶ who has served two-thirds of his sentence or in the case of life imprisonment who has served twenty five years⁵⁵⁷, if it finds that the sentenced person is cooperative

⁵⁴⁵ Ibid, Rule 145(2)(a)

⁵⁴⁶ Ibid, Rule 145(2)(b)

⁵⁴⁷ ICC Statute, Art.78(2)

⁵⁴⁸ Ibid, Art. 103(1)(a)

⁵⁴⁹ Ibid, Art. 103(1)(c)

⁵⁵⁰ Ibid, Art. 103(2)(a)

⁵⁵¹ Ibid, Art. 103(3) For the detailed rules, see Rules of Procedure and Evidence of ICC, Rules 200-205

⁵⁵² Ibid, Art. 103(4)

⁵⁵³ Ibid, Art. 104(1)

⁵⁵⁴ Ibid, Art. 105(2)

⁵⁵⁵ Ibid, Art. 106(1)

⁵⁵⁶ Ibid, Art. 110(2)

⁵⁵⁷ Ibid, Art.110(3)

in the work of the court, voluntarily assists in enforcement of the court's judgment and orders in other cases, and when he shows other changes that warrant the reduction of sentence.⁵⁵⁸ If the court decides to reject the review of the sentence, it can hear such an application within three year time or at any shorter period set by the judges in the hearing.⁵⁵⁹ With respect to fines and forfeiture also the state parties are responsible for their enforcement in accordance with their own national law and with regard to third party rights that may be attached to the properties in case of forfeiture.⁵⁶⁰ If the state parties could not be able to enforce the forfeiture, they are obliged to take measures that enable to recover their value.⁵⁶¹

Hence, under the ICC statute a person convicted of crimes against humanity and genocide will get imprisonment of not more than 30 years (for non-grave circumstances) to life (in grave circumstances only), fine and forfeiture of assets. However, this might be aggravated or mitigated upon the fulfillment of the requirements and the decision of the Judges.

3.6.2 The Sierra Leone Court

Under the Statute of the Court, the Trial Chamber is empowered to sentence a convicted person who is not a juvenile offender with imprisonment, fine and forfeiture of his assets acquired illegally.⁵⁶² In determining the sentence, the Trial Chamber takes into consideration aggravating and mitigating circumstances and the time already served by the convicted person in any court charged with the same act⁵⁶³ or served while in the process of the trial or appeal.⁵⁶⁴

The place of enforcement of sentences is, as a matter of principle, in Sierra Leone, unless the circumstances require that it be enforced at some other place in which case, the Court enters into agreements with other states which can host the sentenced person.⁵⁶⁵ The President of the Court

⁵⁵⁸ Ibid, Art. 110(4)

⁵⁵⁹ Rules of Procedure ICC, Rule 224(3)

⁵⁶⁰ ICC statute, Art. 109(1). For more detailed look at the procedure involving the fines and forfeitures, see ROP rules 217-222.

⁵⁶¹ Ibid, Art. 109(2)

⁵⁶² Statute of the Special Court, Art.19

⁵⁶³ Rules of Procedure of the Special Court. rule 101(B)

⁵⁶⁴ Ibid, Rule 101(D)

⁵⁶⁵ Ibid, Rule. 103(a)

has been given the power to designate such a state as the host that will imprison the convicted person in its own prison.⁵⁶⁶

Like in the ICC, in the Special Court, a person guilty of committing Crimes against Humanity gets imprisonment for a specified number of years, fine, forfeiture of assets. However, unlike the ICC, even if the circumstance is not grave, there is a chance that a convicted person might be sentenced to more than thirty years. In both cases, however, there is no Death Penalty for the crimes even if they are committed in such grave circumstances.

3.6.3 Senegal

The Penal Code Amendment Law of Senegal provides that elements of Crimes against Humanity and genocide that involve or cause death are punished with forced labor to life imprisonment, while in other cases they are punished with forced labor to 10-30 years of imprisonment.⁵⁶⁷

3.6.4 Ethiopia

Under the new as well as the old criminal codes, the crime of Genocide is punishable with a minimum of five years of imprisonment or to a maximum with death, in cases of exceptional gravity.⁵⁶⁸ According to the FDRE Criminal code, the court imposes such penalties by considering the lighter as well as the highest sentence⁵⁶⁹ based on the criteria of degree of the person's guilt, his dangerous disposition, his prior records, his motives and purposes, his personal circumstances and standard of education, the gravity of the crime and its circumstances.⁵⁷⁰ The sentence of death is pronounced exceptionally on dangerous criminals, specifically laid down as a punishment for a certain crime, such crime is a completed one (not attempted) without extenuating circumstances and the convicted person has already attained 18 years of age at the time of commission.⁵⁷¹ In addition, death penalty is not executed until confirmed by a Head of State and the case

⁵⁶⁶ Ibid, Rule 103(b)

⁵⁶⁷ Amendment Law of Senegal, Art. 431-6

⁵⁶⁸ See Penal Code of the Empire of Ethiopia, Art. 281 and FDRE criminal Code, Art. 269

⁵⁶⁹ FDRE Criminal Code, Art. 88(3)

⁵⁷⁰ Ibid, Art. 88(2)

⁵⁷¹ Ibid, Art. 117(1)

had been a subject of a clemency hearing.⁵⁷² This was also how punishments were determined by the courts under the repealed Penal Code of Ethiopia.⁵⁷³

Unlike the ICC, the Special Court and the Senegalese legal regimes, the Ethiopian Criminal Code imposes death penalty in grave circumstances, in addition to imprisonment.

3.6.5 Rwanda

Under the ICTR Statute, the Court can impose a penalty of imprisonment (either for certain number of years or life⁵⁷⁴) on a convicted person⁵⁷⁵ and forfeiture of property obtained by criminal conduct⁵⁷⁶ resorting to the practice of the Rwandan courts.⁵⁷⁷ The Court, in addition, considers factors like the seriousness of the offence, the personal circumstances of the convicted person⁵⁷⁸, aggravating and mitigating circumstances and the time already served either in the ICTR or in any other country.⁵⁷⁹ The imprisonment so imposed on a convicted person is to be served in either Rwanda or any other state that has disclosed its willingness to the UNSC and afterwards designated by the tribunal to do so.⁵⁸⁰ The Tribunal is also empowered to supervise each sentence of imprisonment or appoint a body in charge of such supervision.⁵⁸¹

Under the Organic Law N^o 08/96, the crime of Genocide is punishable with a minimum of seven to eleven years of imprisonment for those whose application for the confession⁵⁸² and guilty procedure has been accepted to the maximum of the death penalty.⁵⁸³ While under the law repressing Genocide, crimes against humanity and war crimes, crimes against humanity and Genocide are punishable with a minimum of 10-20 years of imprisonment⁵⁸⁴ and a maximum of death penalty.⁵⁸⁵ Rwanda later, however, acceded to the second optional protocol of the ICCPR on the

⁵⁷²Ibid, Art. 117(2)

⁵⁷³ See Penal Code, Art. 86 and Art. 116

⁵⁷⁴ Rules of Procedure and Evidence of ICTR, Rule 101(a)

⁵⁷⁵ Statute ICTR, Art.23(1)

⁵⁷⁶ Ibid, Art.23(3)

⁵⁷⁷ Ibid, Art.23(1)

⁵⁷⁸ Ibid, Art.23(2)

⁵⁷⁹ Rules of Procedure and Evidence of ICTR,rule101(b)

⁵⁸⁰ Statute ICTR, Art.26

⁵⁸¹ Rules of Procedure of ICTR, Rule104

⁵⁸² OG 08/96, Art.14(c) and Art.15-16

⁵⁸³ Ibid, Art.14(a)

⁵⁸⁴ OG n^o 33 bis/2003, Art.4&6

⁵⁸⁵ Ibid, Art.3&6

abolishment of the death penalty on 15 December, 2008⁵⁸⁶ which obliges state parties not to execute any person within its territory and take measures to abolish the death penalty as a form of punishment in their criminal justice system.⁵⁸⁷ Hence, death penalty is no longer a punishment for crimes against humanity and genocide in the domestic system too.

Hence, under this section, the writer found out that the ICC imposes imprisonment of a maximum of 30 years in non-grave situations, with the sentence increasing to life in case of grave ones. While the ICTR and the Special Court give the judge discretion in deciding the number of years of imprisonment up to life. In the domestic legal system, while the Ethiopian Criminal Code imposes up to Death Penalty on a convicted person, the Rwandan and Senegalese do not. Instead, the latter imposed imprisonment up to life, fine, forfeiture of assets and forced labor.

3.7. Funding

Under this section, the writer discusses the sources of funding of the five legal regimes as stipulated under their statute and other establishing documents.

3.7.1. The ICC

The International Criminal Court gets its funding mainly from two sources; the contribution of state parties and the UN, especially to cover the expenses of its referral.⁵⁸⁸ The Court, however, can accept voluntary contributions from individual governments, international organizations, individuals, corporations or from any other entity that wishes to contribute to the fund of the court.⁵⁸⁹ The contribution of state parties is assessed using the method the UN uses to assess the contribution of states for its regular budget.⁵⁹⁰ Hence, this makes the source of funding of the ICC diverse and if the fund from one source dries, then it can use the one it get from the other.

⁵⁸⁶ See http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4&lang=en accessed on 26 November, 2010.

⁵⁸⁷ Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, UNGA resolution 44/128, New York, 15 December, 1989, Art.1 available on <http://www2.ohchr.org/english/law/ccpr-death.htm> accessed on 26 November, 2010.

⁵⁸⁸ ICC statute, Art.115

⁵⁸⁹ Ibid, Art. 116

⁵⁹⁰ Ibid, Art.117

3.7.2. The Special Court

Under the agreement between the UN and the GoSL, the Special Court gets its funding from voluntary contributions from the international community in general.⁵⁹¹ The UNSG will be in charge of gathering contributions in order to finance the anticipated expenses of the court and when he deemed that such contributions are not sufficient, the UNSG will consider alternative sources of finance in consultation with the UNSC.⁵⁹² Unlike the ICC, the funding for the Special Court is entirely from voluntary contributions of governments and other players of the international community and hence, not diverse. Since all the eggs of the Special Court are in one basket, if the donors failed to contribute to the budget of the Court, then the work of the court will significantly be hampered.

3.7.3. Senegal

Senegal is empowered to prosecute Hissene Habre before its own courts in the name of Africa in 2006.⁵⁹³ The Assembly of Heads of States and Governments also decided that all members of the Union assist Senegal in its effort to prosecute the former Chadian President.⁵⁹⁴ The Assembly later extended this commitment to providing voluntary contributions to the fund for the Trial.⁵⁹⁵ In addition to that of the member states, the fund for the trial is expected to come from the European Union, other so called partner countries and institutions⁵⁹⁶ and the African Union itself and from a donor conference to be organized by both the AU and EU.⁵⁹⁷ Like the Special Court, the Senegalese Courts also put their eggs in one basket, waiting for the contribution of the international community especially the EU's.

⁵⁹¹ Agreement for Sierra Leone Court, Art.6

⁵⁹² Ibid

⁵⁹³ Banjul Decision on Hissene Habre Case, July 2006

⁵⁹⁴ Ibid

⁵⁹⁵ Decision on Hissene Habre Case, Assembly/AU/Dec.240(XII), Assembly of Heads of States and governments, Addis Ababa, 3 February 2009.

⁵⁹⁶ Ibid

⁵⁹⁷ Decision on the Hissene Habre Case, Assembly/AU/Dec.246(XIII), Assembly of Heads of States and Governments, Sirte, 3 July, 2009. As per this decision, the donors held the conference on 24 November, 2010 and pledged to raise 8.5 million dollars to fund the trial. See 'Senegal finally agrees to host Habre Trial,' *African Review*, 25 November, 2010 available at

<http://www.africareview.com/News/Senegal%20finally%20agrees%20to%20host%20Habre%20trial/-/979180/1060494/-/66qke5/-/login> accessed on 26 November, 2010.

3.7.4. Ethiopia

As seen in the previous sections, the Red Terror trials were carried out by the OSP established by Proclamation 22/92. As per the Proclamation, the office is accountable to the Prime Minister of the Transitional Government.⁵⁹⁸ From this it can be understood that the funding for the trials comes from the budget of the government. However, there were voluntary contributions aimed at supporting the work of the OSP from various governments and non-governmental organizations upon its request.⁵⁹⁹ Hence, the source of funding for the trials is primarily from the Ethiopian Government and from the voluntary contribution of the international community.

3.7.5. Rwanda

Under the ICTR statute, the expenses of the court are considered as the expenses of the UN and are covered from the budget of the UN⁶⁰⁰, after approval by the UNGA⁶⁰¹, which is collected from the member states as per the apportionment by the UNGA.⁶⁰²

Under this Section, the writer had found that the ICC has a diverse source of funding which is from the assessed contribution of members of the ASP (which is a mandatory) and any other voluntary contributions of anyone who wishes to do so. On the other hand, while the Special Court entirely depends on the voluntary contribution of governments, the ICTR's budget comes from the regular budget of the UN. The budget for Senegal is also dependent on the voluntary contribution of AU member states, the EU and other international donors. Unlike Senegal, though, the Ethiopian and Rwandan trial's budget mainly comes from the governments of those countries.

⁵⁹⁸ Proclamation of the Special Prosecutor's Office, art.2(2)

⁵⁹⁹ See Sarah Vaughan, "The Role of the Special prosecutor's Office" in *The Ethiopian Red Terror Trials: Transitional Justice Challenged*, eds. Kjetil Tronvoll, Charles Scafer & Girmachew Alemu Aneme, 51-67 African Issues, (Suffolk:UK, James Currey Publishers, 2009) at 53

⁶⁰⁰ ICTR statute, Art. 30

⁶⁰¹ Charter of the United Nations, adopted by the United Nations Conference on International Organizations, San Francisco, 26 June, 1945 available on <http://www1.umn.edu/humanrts/instree/auncharter.html> accessed on 26 November, 2010, Art. 17(1)

⁶⁰² Ibid, Art. 17(2)

CHAPTER FOUR

CHALLENGES OF PROSECUTING CRIMES AGAINST HUMANITY AND GENOCIDE IN AFRICA

The Writer has identified the following as challenges to the prosecution of crimes against humanity and genocide.

4.1. High Burden of Proof Required for the Crimes

As seen under the previous Chapters, Genocide is a crime committed with intent to destroy racial, national, ethnic, religious, or even political groups in full or partially by killing their members, deliberately putting them in situations calculated to bring about their destruction, inflicting serious mental or physical harm on their members and enacting measures that prevent their members from giving birth and Crimes against Humanity is defined as committing various ‘widespread and systematic’ attacks ranging from murder and torture to acts of sexual slavery and rape on a civilian population and such attacks must involve state policy or some other group’s policy. From the reading of the Articles, it can be drawn that in both crimes there are dual requirements which must be fulfilled cumulatively in order to say the crimes are committed which are the *Chapeau* requirements and the underlying offences. In the case of Genocide, the *Chapeau* requires that there be ‘an intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such’ when one or more of the underlying offences are committed. According to Professor William Schabas, a Prosecutor is required to prove that the accused intended to destroy the group, that he intended to destroy the group, in whole or in part and the group targeted for destruction by the accused must be defined in terms of nationality, ethnicity, race, and religion in light of the requirements of the underlying offences.⁶⁰³ According to professor Schabas, if the prosecutor manages to produce enough evidence that show these three requirements were fulfilled by the defendant, then he can be said to prove the intent to destroy or the Special intent requirement or the *mens rea*. Professor Schabas also states that in addition to fulfilling

⁶⁰³ Schabas, *Genocide in international Law*, at 228

these *chapeau* requirements, the Prosecutor must also prove the commission of the Killing, causing of physical or mental harm, and the forcible transfer of children (which he called crimes of result), and also the deliberate infliction of conditions of life and its calculation to bring about in the destruction of the group and the imposition of measures intended to prevent births (which he indicated not to need the achievement of a final result).⁶⁰⁴ This assertion is apparently supported by the provisions of the elements of Crimes of the ICC which also differentiates between offences of result and those of non-result.⁶⁰⁵

In practice, it is difficult to prove the existence of Genocidal intent for the simple reason that it is difficult to know what the person has in mind. Prosecutors rely on the evidence of the commission of the material act or the pattern of its commission to deduce that the perpetrators have such an intention.⁶⁰⁶ Hate speeches made before the commission of the acts against a specified group, the commission of similar attacks on a specified group in other areas by the same perpetrator or by others with common affiliation, the fact that the attacks are discriminatory and only directed against the selected group in exclusion of the others, the scale of the atrocities.⁶⁰⁷ In addition, the elements of crimes of the ICC lists the commission of the crimes ‘in the context of a manifest pattern of similar conduct directed against a group’ as one element of the crime of genocide in every underlying offences,⁶⁰⁸ with the word ‘context’ including the ‘initial patterns of an emerging pattern’⁶⁰⁹, thereby enabling the Prosecutor to prove it in order to prove the special intent required for the crime of Genocide.

As to Crimes Against Humanity, the Prosecutor is required to prove that the underlying offences are committed ‘as part of a widespread or systematic attack against a civilian population’. The ICC defined this element as ‘multiple commission’ of one or more of the underlying offences against ‘any civilian population pursuant to or in furtherance of State or Organizational policy to

⁶⁰⁴ In case of the latter ones, Professor Schabas said that only the deliberate infliction of measures and their calculation that such measures will result in the destruction of the group in whole or in part needs to be proved. It is not necessary that the destruction, if any, be a result of the measures. This is also true in case of imposition of measures intended to prevent births. The simple imposition of the measure with the intention to prevent births only needs to be proved. See *ibid*, pp. 155-178

⁶⁰⁵ See ICC Elements of Crimes, Art 6(a)-(e)

⁶⁰⁶ Schabas, *Genocide under International Law*, p.222

⁶⁰⁷ Diane Marie Amman, “Prosecutor vs. Akayesu. Case ICTR-96-4-T”, *American Journal of International Law* 93:195 (1999):195-199, at 197.

⁶⁰⁸ ICC Elements of Crimes, Art 6(a)-(e)

⁶⁰⁹ *Ibid*, Art.6 (Introduction)

commit such attack.’⁶¹⁰ In addition, under the ICC law, the attacks against the civilian population should not necessarily be a military one but should be the result of the active promotion or encouragement including by omission of the attacks on civilian population by a state or an organization.⁶¹¹ The Prosecutor, in addition to proving this, is also expected to ascertain that the perpetrator has committed the attacks with the ‘knowledge of the attack.’⁶¹² Under Art.30 of the ICC Statute, ‘knowledge’ means, ‘awareness that a circumstance exists or a consequence will occur in the ordinary course of events.’⁶¹³ Hence, the Prosecutor is expected to prove that the defendant was aware of either the existence of the attack or its consequence. Particularly, he needs to prove that the defendant ‘knew the conduct was part of or intended to be part of a widespread and systematic attack directed against a civilian population.’⁶¹⁴ The ICTR Statute requires that the widespread and systematic attacks directed against a civilian population must be on the national, ethnic, racial, political, and religious grounds.⁶¹⁵ Hence, an ICTR Prosecutor is expected to prove that the attacks are directed on a civilian population defined by either of the grounds cited above. This means that under the ICTR, attacks committed on a civilian population, who could not be identified as national, racial, ethnic, political or religious group are not be considered as Crimes against Humanity. Meanwhile, in other instruments such as the ICC statute, the Special Court of Sierra Leone where crimes against humanity are defined as widespread and systematic attacks on any civilian population or as simply attacks on civilian population, the proof of the existence of widespread or systematic attack on such population, with the perpetrator’s knowledge, is enough to say crimes against humanity is committed. In other words, the prosecutor needs to show that the victim is civilian and he is targeted as part of the systematic and widespread attack on a civilian population.⁶¹⁶

In addition to all these requirements of proof emanating from the legal requirements, there is also the context in which these crimes occur. Usually they occur within the context of massive scale conflicts either of an intra or inter-state nature. Often their Prosecution involves the indictment of

⁶¹⁰ ICC Statute, Art. 7(2)

⁶¹¹ ICC Element of the Crimes, Art.7 Introduction, Paragraph 3

⁶¹² ICC Statute, Art.7(1)

⁶¹³ Ibid, Art. 30(3)

⁶¹⁴ See ICC elements of Crimes Art.7(1)(a)-(k)

⁶¹⁵ ICTR Statute, Art.3

⁶¹⁶ Guenael Mettraux, “Crimes against humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda”, *Harvard International Law Journal* 43:237 (2002):237-316, at 256.

many individuals. These factors coupled with the requirements of the proving the elements of the crimes pose a great challenge to a prosecutor. For example, in case of Genocide, the prosecutor needs to provide witnesses from different places of the country where such crimes are committed to show that intent to destroy a particular group exists by reason of speeches made by the group of perpetrators, the consistent targeting of a group believed to be a victim of the atrocities, the existence of the overall plan for the destruction of such group, the method employed in one area also is similar or identical with that used in other areas. To show all these facts before the Courts, the Prosecutor needs to call lots of witnesses, and needs to produce other evidences that are deemed to prove his case. This requires the prosecutor to dedicate his various resources and efforts in to each case. This fact also has its bearing on the speediness of the trial as more and more of witnesses are called to testify and more and more of time is taken hearing other evidence, then the trial might take long time to complete with a negative impact on the right of the accused to a speedy trial. This could be illustrated more when one sees the fact that during its sixteen years of its existence, the ICTR dispatched only 36 cases, while 8 cases are on appeal, 8 accused were acquitted, and another 22 still in progress⁶¹⁷, a small drop in the ocean if one compares it to the domestic prosecutions where close to a million people were prosecuted.⁶¹⁸ The Special Court, on the other hand, had received thirteen indictments in 2003 in four cases and has completed the three cases based in Sierra Leone and while the trial of the former Liberian leader is narrowing to a close as the last witness in the case has completed his testimony⁶¹⁹ while two other cases were dropped because of the death of the accused.⁶²⁰ In the ICC, there is no completed trial in the five situations, so far, but the proceedings started in three of them.⁶²¹ The Domestic Prosecutions are no exceptions. In fact, they epitomize the argument that trying to produce too much evidence results in delay of trials, as the Ethiopian and Rwandan domestic prosecutions demonstrate.⁶²² The

⁶¹⁷ See <http://www.unicttr.org/Cases/tabid/204/Default.aspx> accessed on 26 November, 2010.

⁶¹⁸ William Schabas, "Rwandan Courts and the Quest for Accountability: Genocide Trials and Gacaca Courts," *Journal of International Criminal Justice* 3:879 (2005): 879-95 at 882.

⁶¹⁹ Mike Corder, "Last witness Completes Testimony in the Taylor Trial," *AP News*, 9 November, 2010 available at <http://www.thefreelibrary.com/Last+witness+completes+testimony+in+Taylor+trial-a01612371546> Accessed on 22 November, 2010

⁶²⁰ See <http://www.sc-sl.org/ABOUT/tabid/70/Default.aspx> accessed on 26 November, 2010.

⁶²¹ See <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/> accessed on 26 November 2010.

⁶²² In the Ethiopian case, the fact that the Special prosecutor has a mandate of recording the atrocities for posterity also played a major role in the protracted trial. See Frode Elgesem & Girmachew Alemu Aneme, "The Rights of the Accused" at 38. For Rwanda see Oliver Dubois, "Rwanda's National Criminal Courts and the International Tribun-

Prosecutors and the Courts of both international and domestic face a challenge in trying to balance the need to produce evidence against the accused and the right of the accused for a fair trial.

4.2 Victor's Justice?

This is a challenge that faces the establishment of *ad hoc* International Tribunals. These *ad hoc* tribunals are so far established after the conclusion of bloody conflicts and atrocities in which crimes against the norms of International humanitarian laws, namely crimes against humanity, genocide and war crimes were committed. The Nuremberg Tribunal, the Tokyo Tribunal, the ICTY, the ICTR and the Special Court for Sierra Leone are such ad-hoc international tribunals. The Nuremberg and the Tokyo tribunals were established by the victorious powers while ICTY and ICTR were established by the UNSC under its Chapter VII mandate. The Special court for Sierra Leone, however, is established by the joint agreement of the GoSL and the UNSG. As it can be understood from the experience of the establishment of these tribunals, they have come in to existence as a result of the wave of condemnation of the atrocities committed by one group from human rights groups, governments, winners of the war, the UNSC and the international community as a whole. The Nuremberg Tribunal, as seen in the second Chapter, was also established as a result of the winners of the war such as USA, UK, France and USSR all condemned the atrocities committed by the Nazis against the Jews and called for justice⁶²³, while in the case of ICTY; the UNSC repeatedly stated its concern about the conflict that was going on in the territory of the former Yugoslavia⁶²⁴ before establishing the Tribunal.⁶²⁵ The establishment of the ICTR by the UNSC⁶²⁶, on the other hand, was seen as an effort to make up for its earlier ignorance of the situation in that country.⁶²⁷ Such influences on the establishment of an international ad hoc tribunal would persist, the Writer believes, in case a future conflict of the same nature materialized and the option of establishing an ad hoc tribunal is chosen, this would make the tribunals more tilted to prosecuting the defeated side, since they are created as a response to the

al,” International Review of the Red Cross, 321, (1997) available at <http://www.icrc.org/eng/resources/documents/misc/57jnza.htm> accessed on 30 November, 2010.

⁶²³ Schwelb, “Crimes against Humanity,” at 183

⁶²⁴ See UNSC Resolutions 769(1992),770(1992),771(1992),780(1992),808(1993),816(1993)

⁶²⁵ See UNSC Res 827(1993)

⁶²⁶ See UNSC Res-955(1994)

⁶²⁷ Allison Corey & Sandra F. Joireman, “Retributive Justice: The *Gacaca* Courts in Rwanda,” African Affairs 103:410,73-89, at 80 available at <http://etn.sagepub.com/content/8/1/5.full.pdf> accessed on 12 November, 2010.

atrocities committed by one side⁶²⁸, and by one organ which might create the possibility of interference.⁶²⁹ The most criticized International Tribunal for conducting one sided prosecutions is the ICTR. It is believed that all the accused with the exception of the Belgian-Italian defendant Georges Ruggiu are Hutus.⁶³⁰ Trying to avoid the perception of such a bias would present a massive challenge to any future International *Ad hoc* Tribunal. This being said the Special Court for Sierra Leone has shown that this challenge could be overcome by prosecuting leaders of the Civilian Defense Forces (CDF) - a pro-government militia group established to counter the RUF (Revolutionary United Forces) which is the main rebel group responsible for majority of the atrocities in the country.⁶³¹ However, it still remains a challenge for international ad hoc tribunals.

4.3. Lack of Uniform Legal Regime

The countries that the writer selected for this study do not have exactly the same definition of the crimes. It is also discussed that in the case of the Ethiopian Criminal code, Crimes against Humanity are not recognized as a crime and the definition of Genocide is expanded to the intent to destroy a political group. It is also discussed in the case of ICTR Crimes against Humanity occur when the widespread and systematic attacks are directed on a civilian population on national, ethnic, racial, political and religious grounds. Moreover, there is also a difference with respect to the underlying offences included under the definition of crimes against humanity. All these highlight the piece meal approach to the understanding of the crimes. This kind of definitions undermines the conception of the crimes and the integrity of the international criminal justice system. It creates different understanding of what constitutes Crimes against Humanity or Genocide, and what does not, its eventual consequence being politically motivated prosecutions. This is so because governments could prosecute their opponents, either in their territories or outside it, by including some elements in the definition of either crimes against humanity or genocide just to set-

⁶²⁸ Andreas O'Shea, "Ad hoc Tribunals in Africa: a Wealth of Experience but a Scarcity of Funds," *African Security Review*, 12:4, 17-24, (2003) at 21

⁶²⁹ Geert-Jan Alexander Kooops, "International and Internationalized Criminal Courts: the New Face of International Peace and Security?" *International Criminal Law Review* 4:527, 527-547(2004) at 533.

⁶³⁰ Luc Reydam, "The ICTR Ten Years on: Back to the Nuremberg Paradigm?" *Journal of International Criminal Justice* 3:977(2005):977- 988, at 985.

⁶³¹ 'Sierra Leone War 'Hero' On Trial', *BBC World News*, posted on 10 June, 2004, available on <http://news.bbc.co.uk/1/hi/world/africa/3793727.stm> accessed on 12 November, 2010.

the political score. This is also another challenge for prosecuting crimes against humanity and genocide in Africa.

4.4. Challenges Related to Assumption of Jurisdiction

In the Previous Chapter, it has been discussed that the ICTR assumed jurisdiction on Rwandans upon those alleged to have committed acts of Genocide, Crimes against Humanity and War Crimes (Personal Jurisdiction) during the period between 1 January to 31 December, 1994 (Temporal jurisdiction) while the Special Court assumed jurisdiction on persons who are alleged to have played a great role in the commission of crimes against humanity and war crimes (Personal Jurisdiction) starting from 30 November, 1996 (Temporal jurisdiction).⁶³² The determination of temporal jurisdiction, according to the writer, presents a challenge to ad hoc tribunals as the court will not have the power to entertain violations which started before the stated period or violations more grave than those within the jurisdiction of the court.⁶³³ This damages the tribunal's ability in delivering justice to the victims who might be frustrated in finding that their assailant may be loose and out of the reach of justice. In addition, limited temporal jurisdiction might hamper the tribunal's effort in addressing all the outstanding issues of the conflict and hence its effort to contribute to the reconciliation process.⁶³⁴ Moreover, during the initial phase, the conflicting parties may suggest different temporal jurisdictions to go in line with their own interests.⁶³⁵ Accommodating these interests with the purposes of the tribunal to be established is a challenge facing future *Ad hoc* Tribunals.

It has been discussed in the previous Chapter that the ICC works according to the Complementarity principle which give the first chance of prosecuting alleged cases of Crimes against Humanity and Genocide before it entertains the case with the exception of the cases of countries deemed to be 'unable' or 'unwilling' to prosecute. In determining whether a state is 'unwilling'

⁶³² Note here that the Term 'Personal Jurisdiction' is referred under this paper as a jurisdiction used by Courts on Persons, while 'Temporal Jurisdiction' refers to the Jurisdiction limited time. It can be inferred from the Statutes of the Special Court and ICTR.

⁶³³ Richard Vokes, "The Arusha Tribunal: Whose Justice?" *Anthropology Today*, 18:5, 1-2, (2002), at 2.

⁶³⁴ The Rwandan Representative to the UNSC argued this way during a debate on ICTR establishment when opposing the proposal on the Temporal Jurisdiction eventually adopted (1 January-31 December, 1994) was discussed. See Madeline H. Morris, "The Trials of Concurrent Jurisdiction: The Case of Rwanda," *Duke Journal of Comparative and International Law* 7:349, 349-374, (1996-97) at 354.

⁶³⁵ See *Ibid*

to prosecute, the Court considers factors like whether the prosecutions that have taken place are sinister attempts at shielding the alleged person from prosecutions in the ICC, ‘unjustified delays’ which do not show the intent to bring the person to trial and impartiality and lack of independence in the trial already held. The Challenge the ICC faces in this regard is making the criteria of admissibility (i.e. ‘unwilling’ or ‘unable’) objective. The requirements that are listed as to show the unwillingness of a country to prosecute sound a bit like most of the justice systems of Africa where most of them are poor countries with weak judiciary vulnerable for corruption and political interference and characterized by delays. If the ICC were to apply those criteria strictly to all cases, most African nations will be judged to be ‘unwilling’ or ‘unable’. In addition, the Countries fearing being adjudged as such might interfere in the judiciary to speed things up in the otherwise slow justice system leading to impartiality and violation of the rights of the accused. The ICC faces a challenge in performing a balancing act and formulating objective criteria in determining the admissibility of cases before it.

As seen in the previous chapter, Senegal assumed jurisdiction on the case of Hissene Habre on the ground of Universal jurisdiction. The Use of this principle to assume jurisdiction on cases of Crimes against Humanity and Genocide presents another challenge. This is because, firstly, as seen above African countries do not have uniform laws and in particular uniform definition of the crimes making one incident a crime in one jurisdiction while excluding it in the other. This makes the effort of securing cooperation among states difficult. Secondly, Universal Jurisdiction violates the principle of sovereignty which is the fundamental or the bed rock principle upon which international law and international relationships stand.⁶³⁶ It does so because it is not based on any treaty law which specifically elaborates the concept and authorize such use and nor does it have any basis on customary international law.⁶³⁷ The use of it by a country amounts to deriding the power of another state through the use of its judiciary. Since one means of exercising sovereignty of a country is through its judiciary, prosecuting a person with no connection to ones’ country is violating the power of the other judiciary to try its citizen or the crime committed

⁶³⁶ Chandra Lekha Sriram, “Revolutions in Accountability: New Approaches to Past Abuses, American University International Law Review 19:301, 301-430, (2003-2004) at 306.

⁶³⁷ See *ibid*

within its territory.⁶³⁸ Thirdly and most importantly, Universal jurisdiction can be a basis for politically motivated prosecutions.⁶³⁹ It can serve as a weapon of foreign policy for one country which is aggrieved by the political decision of the other country-which the former believes is vital to its national interests. It could serve one country as a way of creating bad image for the regime or its foe or designed to create pressure on members of the government of certain country to change their stance on a certain policy issue. Ironically, the AU which decided that Senegal prosecute Hissene Habre, has also been vocal in its opposition of the use of the principle of Universal Jurisdiction and even went as far as to organize panel of eminent personalities to study the issue of abuse of universal jurisdiction.⁶⁴⁰ Making sure that prosecutions genuinely intended to bring accountability to a certain atrocity are clear of the vices and ulterior motives mentioned above is a challenge.

4.5. A Prosecutor for the Broad Prosecutorial Powers

As discussed in the previous chapter, International Tribunals are composed of separate Prosecution Offices mandated to investigate and indict those thought to be responsible for the commission of serious violations of International Humanitarian Law including Crimes against Humanity and Genocide. To carry out this mandate such offices have been given powers ranging from initiating investigation *proprio motu* to deciding not to prosecute or not to investigate and deciding to withdraw charges. The writer of this paper believes that the exercising of such broad powers requires a prosecutor of exceptional personality. A Prosecutor must be one who is courageous, who does not fear anyone, who can indict any one he wants regardless of how powerful they are. He must also be one with diplomatic skills that enables to get cooperation from states and one with excellent negotiation skills. The states need to consider such factors, in addition to the ones

⁶³⁸ Henry Kissinger, "The Pitfalls of Universal Jurisdiction," *Foreign Affairs*, 80:4, 86-96(2001) at 92.

⁶³⁹ See *Ibid.* See also Aaron Solomon, "The Politics of Prosecutions Under the Convention against Torture," *Chicago Journal of International Law* 2:309, 309-314,(2001)

⁶⁴⁰ See AU Decisions Assembly/AU/Dec.213(XII) Addis Abeba, Feb 2009, Assembly/AU/Dec.199(XI) Sharm El-Sheik(2008), Assembly/AU/Dec.243(XIII) Sirte (2009).

under their respective statutes. Finding a person with required qualification and experience and these above mentioned traits is also a challenge for the tribunals.⁶⁴¹

4.6 Sentencing and the needs of Retribution

It had been discussed earlier that under the ICC Statute other than grave cases which entail life imprisonment, the sentence of imprisonment will not exceed 30 years. It has also been pointed out that under the ICTR, the Special Court for Sierra Leone and Senegalese legal system that sentences of imprisonment are for a number of years or life, while under the Ethiopian legal System the maximum sentence for the crimes is the Death Penalty. These contradictions create a stumbling block for the achievement of the main purpose of their establishment which is Retribution. This is particularly the case for the *ad hoc* Tribunals where they have primacy over cases. This primacy jurisdiction allows such tribunals to entertain the cases of those persons accused of being the masterminds of Genocide and Crimes against Humanity while the domestic courts get their foot soldiers. The lighter sentence at the ad hoc tribunals will be imposed on the former and the higher sentence will be imposed on the latter. This does not create the sense of retribution and justice on the victims needed for reconciliation and might even create the feeling among them that the perpetrators got away with it. This is also another challenge the International Tribunals face, since losing the faith of the victims will annul its very existence which is thought to contribute to reconciliation and justice.

4.7 The Challenge of Providing Adequate Funding for the Trials

As mentioned earlier, the ICTR gets its funding from the UN's regular budget, while the Special Court gets its funding entirely from voluntary contributions of the international community and the ICC from the regular assessed contribution from member states and other voluntary contributions by the international community. The domestic tribunals, on the other hand, are funded mostly by their own governments from the regular budget of the governments. In practical terms, however, these funds are not available for use or if they are, they are often inadequate for the ac-

⁶⁴¹ The current Chief Prosecutor Mr. Ocampo is one who has most of the skills needed for the job. For the Profile of the Current Chief Prosecutor see Benjamin N. Schiff, *Building the International Criminal Court*, (New York: NY, Cambridge University Press, 2008) at 109

tivities to be carried out.⁶⁴² For example, in case of the ICTR, the UN often cannot meet the required budget and for the Special Court, since the contribution is voluntary it is always difficult to get the contribution needed.⁶⁴³ There might also be donor fatigue which makes states and international organizations alike to be reluctant. This problem could be even worse in the domestic trials as the domestic trials are marred by delays and violation of the Fair Trial Guarantees from which the international community tends to shy away rather than being associated with, let alone fund such trials. When the international community abandons them, the Countries being poor, the trials suffer a lot and the violations of the rights of fair trials also get worse as there will not be state appointed defense counsels, there will be fewer prosecutors and investigators, and no experts participating in the investigation, thus causing delays in the investigation and the subsequent trial. This is what has happened in Rwandan and Ethiopian cases.⁶⁴⁴ There is also the case of Hissene Habre, entertained by Senegal, in light if its agreemen to prosecute Hissene Habre on behalf of Africa as per the decision of the AU Assembly of Heads of States and Governments with the assumption that the funding for the Trial will come from the voluntary contribution of member states and the international community especially the EU and AU member states. However, neither the EU nor the member states contributed to the budget of the trial which led the AU to pass its decision to call a donor conference. This also did not materialize which led the Senegalese President to threaten to ‘hand Habre over to the AU’ signaling his frustration with the process.⁶⁴⁵ Securing a regular and adequate funding is also another challenge to the success of prosecutions of crimes against Humanity and Genocide.

⁶⁴² Lana Ljuboja, “Justice in an Uncooperative World: ICTY and ICTR foreshadow ICC ineffectiveness,” *Houston Journal of International Law* 32:767(2009-10):767-804, at 782.

⁶⁴³ O’Shea, “*Ad hoc* Tribunals in Africa,” at 19

⁶⁴⁴ For details of delays in the Ethiopian Red Terror Trials SEE in general Yacob Hailemariam, “The Quest for Justice and Reconciliation: the International Criminal Tribunal for Rwanda and the Ethiopian High Court,” *Hastings International & Comparative Law Review* 22:667(1998-1999):667-746. See Elgesem & Aneme, “The Rights of the Accused” 33-50 For Rwanda see Schabas, “Rwandan Courts and the Quest for Accountability,”

⁶⁴⁵ Senegal Threatens to Hand Chad Dictator to AU, AFP Global Edition posted on 3 February, 2009 available on <http://www.thefreelibrary.com/Senegal+threatens+to+hand+Chad+dictator+to+AU-a01611785320> accessed on 15 November, 2010.

4.8 Challenges of legitimacy for the ICC

The ICC was established as the first permanent international criminal tribunal charged with entertaining cases of the commission of Crimes against Humanity, Genocide, and War Crimes in the territory of the members or by their nationals. However, it faces a huge challenge of legitimacy resulting from the referral of the Darfur case via the UNSC and its subsequent indictment of the President of Sudan, Omar Hassen Al-Beshir.⁶⁴⁶ It managed to do this, through Art.13 (b) of the Rome statute which allows the UNSC to refer a case to the court under its Chapter VII mandate.⁶⁴⁷ After many efforts to take action following the conflict that has raged over the western Sudan territory of Darfur⁶⁴⁸, the UNSC decided to set up a Commission of Inquiry on Darfur on 18 September, 2004.⁶⁴⁹ In January 2005, the Commission came up with its report, which found that crimes were being committed in Darfur with the government involvement but there was ‘no evidence’ to suggest that it was Genocide.⁶⁵⁰ The Commission also suggested that the Khartoum government was ‘unlikely’ to bring the perpetrators before justice, so the UNSC should refer it to the International Criminal Court (ICC).⁶⁵¹ The Commission emphasized that the ICC is the best option to prosecute the perpetrators⁶⁵² and annexed evidence as well as a sealed list of persons accused of committing crimes and the reasons for them to be regarded as such.⁶⁵³ After considering the recommendation, the UNSC decided to refer the case to the ICC on 31

⁶⁴⁶ See Paragraph 11 of the Eighth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593(2005) available on <http://www.icc-cpi.int/NR/rdonlyres/BBA77B57-C81C-4152-988C-D8D953471453/279075/8thUNSCreportsenttoUNENGI.pdf> accessed on 15 November,2010.

⁶⁴⁷ ICC Statute, Art. 13(b)

⁶⁴⁸ The conflict in Darfur started in 2003, when two rebel groups, the Sudanese Liberation movement /Army (SLM/A) of the largely Masalit and fur tribes and the Justice and Equality movement (JEM) of the Zaghwa tribes in the North, took up arms against the government of Sudan protesting about marginalization injustice of the Majority of Darfur population. For further explanation of the war, See Julie Flint & Alex De Waal, *Darfur: A Short History of A Long War*, (London: UK, Zed Books, 2005),1-17. Also See Gerard Prunier, *Darfur: The Ambiguous Genocide*, 2nd edition, (Ithaca: NY, Cornell University Press, 2007), 1-20

⁶⁴⁹ United Nations Security Council Resolution on the report of the Secretary General on the situation in Sudan, S/Res/1564 (2004), adopted on the 5040th meeting 18 September,2004, Para. 12

⁶⁵⁰ The Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Geneva, 25 January, 2005 available on http://www.un.org/News/dh/sudan/com_inq_darfur.pdf accessed on 26 November,2010, Para. 518

⁶⁵¹ Ibid, Para.589

⁶⁵² Ibid,Para.648

⁶⁵³ Ibid. para.525

March, 2005 by adopting Resolution N^o 1593, and which also called on the cooperation of all member states of the UN in the work of the court, by a vote of 11-4 with the rest abstaining.⁶⁵⁴

The ICC Prosecutor, Luis Moreno Ocampo acting under this Mandate, on 27 Feb, 2007, applied for a warrant to be issued on Ahmed Muhammed Harun, a former Minister of State for the Interior of the Government of Sudan and Currently Minister for Humanitarian Affairs, and Ali Muhammed Ali Abdel-Rahman (Also known as Ali Kushayb) an alleged Militia leader.⁶⁵⁵ The ICC issued warrant on 2 May, 2007 for these two individuals.⁶⁵⁶ The Sudanese government refused to cooperate with the Court and even refuse to recognize the court.⁶⁵⁷ Up on the application of the Prosecutor, ICC issued warrant against the President Omar Hassan Al-Basher in March, 2009.⁶⁵⁸ In addition to the government officials, the Prosecutor also charged a JEM military commander, named Abu Garda for War crimes and crimes against humanity.⁶⁵⁹ Mr. Abu Garda was summoned to appear before the court, which he accepted and made a first appearance before the court.⁶⁶⁰ However, Pre-trial Chamber refused to confirm the charge on him.⁶⁶¹

The ICC's attempts to go for the "bigger fish" in issuing a warrant against the President of Sudan, has met opposition among the leaders of Africa. The leaders through the AU Assembly of Heads of States and Governments expressed their "deep concern" at the application of the Prosecutor for the warrant of arrest of President Beshir⁶⁶² and after the warrant is issued expressed their "grave concern" on the impact the indictment might ensue difficulties on the peace process in various regions.⁶⁶³ They subsequently decided to suspend all cooperation with the court by citing Art.98 of the ICC statute.⁶⁶⁴ In another case, while Israeli Defense Forces (IDF) repeatedly bombed the Gaza Strip in December, 2009 as many as 1400 civilians including women and

⁶⁵⁴ Robert Cryer, "Sudan, Resolution 1593, and International Criminal Justice," *Leiden Journal of International Law*, 19:195, 195-222, (2006) at 203 available at http://eprints.bham.ac.uk/167/1/Leiden_06_R_Cryer.pdf accessed on 17 November, 2010.

⁶⁵⁵ See <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/> accessed on 26 November 2010.

⁶⁵⁶ Ibid

⁶⁵⁷ Ibid

⁶⁵⁸ ibid

⁶⁵⁹ Ibid

⁶⁶⁰ Ibid

⁶⁶¹ Ibid

⁶⁶² AU decision on the case of Hissene Habre, Feb 2009, para. 1

⁶⁶³ AU decision on the case of Hissene Habre, Sirte July 2009, para. 3

⁶⁶⁴ Ibid, para.10

children perished.⁶⁶⁵ A UN report later found that war crimes were committed during these bombing campaigns.⁶⁶⁶ The UNSC so far did nothing to present accountability to these crimes, and no effort was made particularly on its part to refer the case to the ICC based on Art.13(b).⁶⁶⁷ The writer believes that the Gaza bombing campaigns and the subsequent reaction of the UNSC is an indicator that the UNSC referral system is a liability rather than an asset for the court and it will only undermine its credibility with respect to bringing impunity to an end regarding Genocide, Crimes against Humanity and War crimes. Under the UN charter, the UNSC has been given not only the power to act on those situations that are deemed to be threats to the international Peace and Security but also the power to determine what constitutes a threat to international peace and security.⁶⁶⁸ As a political organ, it makes these decisions based on political considerations. A political organ is not expected to decide on legal issues purely on legal considerations; the political considerations outweigh, if not dominate it entirely. Moreover, the fact that out of the fifteen members of the Council Five of them has veto power (the so called P-5) also indicates that their interests are always respected. They can protect their allies and move to punish those who do not serve their interests. Hence, the existence of such a system as one of its trigger mechanisms presents a massive challenge of legitimacy of the court as it could easily be considered as a tool of the P-5s rather than an independent international judicial body. This in turn presents a massive challenge of securing cooperation with states in arresting perpetrators wanted by the court and subsequent detention after sentencing.

⁶⁶⁵ US House rejects Goldstone Report, www.aljazeera.net, posted on 4 November, 2009 available on <http://www.thefreelibrary.com/US+House+rejects+Goldstone+report.-a0211130330> accessed on 26 November 2010.

⁶⁶⁶ Report of the United Nations Fact Finding Mission on the Gaza Conflict (Goldstone Report) available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf> accessed on 24 November, 2010.

⁶⁶⁷ As Israel is not a party to the ICC so the only way the Court could exercise jurisdiction is through the UNSC referral.

⁶⁶⁸ UN Charter, Art.39

4.9 The Capacity to Entertain Many Cases at a Time

Unlike the *ad hoc* Tribunals, the ICC, which currently is composed of 114 member states⁶⁶⁹, is required to initiate proceedings if either Crimes against Humanity, Genocide or War crimes or two or all of them occur within these 114 member states' territories or if these crimes are committed by their national(s) as per Art.12 of its Statute. It might happen that cases within the jurisdiction of the court could occur in many countries at a time. This creates a personnel, financial as well as logistical challenges for the work of the Court. Currently, the Court has 18 judges in three divisions with the Pre-trial division composing of two chambers of three judges each, the Trial chamber composing of eight judges and the appeals chamber consisting of the president of the court with four other judges.⁶⁷⁰ The Office of the Prosecutor where it is made up of three divisions; the prosecutions, investigations and the jurisdiction, complementarity and cooperation divisions, headed by the deputy prosecutor and two other staff members.⁶⁷¹ If there were to be many more cases, these personnel as well as other resources of the court may well be stretched. This will in turn impact the court's mission of ending impunity as it might be forced to cut back on some cases and forced to choose the high profile cases over 'the less important' ones(as the high profile cases would give it high publicity and create the perception that it is performing).

4.10 The USA and the ICC

The United States of America, being the most powerful nation, has been actively participating in matters of international criminal justice since the days of Nuremberg and Tokyo Trials. However, starting from the negotiation for the establishment of the Court it has been its most vocal opponent.⁶⁷² It is one of the seven countries which voted against at the UN conference for the estab-

⁶⁶⁹ See <http://www.icc-cpi.int/menus/icc/about%20the%20court/icc%20at%20a%20glance/icc%20at%20a%20glance?lan=en-GB> and also see <http://www.icc-cpi.int/Menus/ASP/states+parties/> for the list of state parties to the court. Both Sites accessed on 26 November, 2010.

⁶⁷⁰ See <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court> accessed on 26 November 2010.

⁶⁷¹ See <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor> accessed on 26 November 2010.

⁶⁷² The US and the International Criminal Court, Human Rights Watch available on <http://www.hrw.org/campaigns/icc/us.htm> accessed on 26 November 2010.

lishment of the court.⁶⁷³ The USA opposes primarily the Court's assumption of jurisdiction based on territoriality principle, the power of the prosecutor to initiate proceedings by its own motion or (*proprio motu*) powers and the court's power to decide on whether a state is unable or unwilling to prosecute.⁶⁷⁴ The US believes that such powers will result in a politically motivated prosecutions against its armed forces stationed in other countries which are members of the court.⁶⁷⁵ The US later removed its signature of the court that it signed during the last days of the Clinton Administration on 6 May, 2002⁶⁷⁶ and started to seek immunity agreements (later became known as BIAs or Bilateral Immunity Agreements⁶⁷⁷) with countries which are members or non-members of the court protecting its citizens from prosecutions that might arise in the territory of these countries.⁶⁷⁸ By 2006, the US had secured more than 100 of such BIAs out of which 46 were state parties to the ICC.⁶⁷⁹ In Africa alone it has managed to secure the agreement of 38 states out of 53 countries in total, out of which 24 are state parties.⁶⁸⁰ As per the American Service members' protection Act (ASPA), Countries who refuse to sign any such agreement will lose their military aid and other economic assistance.⁶⁸¹ These measures suggest that the ICC has the USA as its most powerful enemy. This is a huge challenge for the court when it investigates cases in which there are serious crimes committed by Americans. Not prosecuting them would

⁶⁷³ The other countries were China, Iraq, Libya, Yemen, Qatar and Israel. See New International Criminal Court Set Up available on <http://www.telegraph.co.uk/news/uknews/1390655/New-international-criminal-court-set-up.html> accessed on 26 November 2010.

⁶⁷⁴ Gerhard Hafner, "An Attempt to Explain the Position of the USA towards the ICC", *Journal of International Criminal Justice* 3:323 (2005):323-332, at 325.

⁶⁷⁵ Paul W. Kahn, "Why the United States is So Opposed; The International Criminal Court: An End to Impunity?" (the Magazine), Published in December, 2003 available on http://www.crimesofwar.org/icc_magazine/icc-kahn.html accessed on 26 November 2010.

⁶⁷⁶ David Rennie, "US Reneges on Deal for War crimes World court," the Daily Telegraph posted on 07 May, 2002 available on <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/1393439/US-reneges-on-deal-for-war-crimes-world-court.html> accessed on 26 November, 2010.

⁶⁷⁷ These agreements are also Known as Article 98 Agreements named after Art.98of the ICC Statute which exempts states from cooperation with the court if any such cooperation will be inconsistent with any of its international obligations including bilateral treaties. See Schiff, *Building the International Court*, at 174

⁶⁷⁸ US Opposition to the International Criminal Court, Global Policy Forum available at <http://globalpolicy.org/empire/us-un-and-international-law-8-24/us-opposition-to-the-icc-8-29.html> accessed on 26 November, 2010.

⁶⁷⁹ Status of U.S. Bilateral Immunity Agreements by Region available on <http://www.iccnw.org/documents/CICCFSBIAstatuscurrent.pdf> accessed on 26 November 2010.

⁶⁸⁰ Ibid

⁶⁸¹ Raj Purohit, "Article 98/Bilateral Immunity Agreements," posted on 3 June, 2008 See <http://humanrights.foreignpolicyblogs.com/2008/06/03/article-98-bilateral-immunity-agreements/> accessed on 26 November , 2010

seriously jeopardize its legitimacy as a judicial organ and it could not proceed to prosecute them because the states would refuse to detain and transfer the persons wanted by the Court. This will seriously undermine its work.

CONCLUSION AND RECOMMENDATION

CONCLUSION

Based on the above study, the writer had found that;

- The International Criminal Court has a strong institutional setup. It has judges and prosecutors who are independent as understood from the way they are elected through a secret ballot by the vote of two-thirds and by absolute majority vote of the member states, respectively. This ensures that the political appointment of the judges is not possible. The writer also has found out that, besides independent officials, the ICC enjoys strong rules of evidence which incorporates the traditions of the common law and civil law legal system with sufficient discretion for both the judges and the prosecutors in order to be able to perform their activities effectively and efficiently. The Pre-trial Chamber is there to ensure that the prosecutor does not abuse his wide powers. It, inter alia, checks whether the cases the Prosecutor started to investigate are admissible, issues warrants and other orders. It also has a detailed definition of the crimes with the 'element of crimes' document to back it up. As to the right of the accused, it also incorporates rights the accused enjoys from investigation to trial period before the Court, besides the already recognized rights under the ICCPR and other instruments. Moreover, the ICC has the most diverse funding system of the Courts studied under this paper. This enables it to be adequately funded for any trial and also make it independent of any political interference on its affairs.
- Although the ICC has such strong points, the writer is of the opinion that it also faces some challenges which it needs to overcome in order to achieve its goal of fighting impunity around the world. From among many challenges, there is the challenge of legitimacy caused by its UNSC referral System stands out as the greatest. This is because the system opens the door for political maneuvering of its affairs and thereby, making it the forum for politically motivated prosecutions and non-prosecutions. This, in turn, creates a legitimacy problem in its efforts to end impunity around the world resulting in the states' refusal to cooperate with the Court ulti-

mately impairing its work. The Court also faces other challenges such as the USA's opposition to it and its aggressive campaign of signing BIAs with the court's members not to cooperate with the court. Other challenges include the light sentence imposed in the not so grave cases, the high burden of proof, finding a personality to fit the position of the prosecutor who is capable of exercising the broad powers of the prosecutor.

- As to the *Ad hoc* Tribunals, the writer pointed out that they have a good guarantee of the right of the accused and good rules of evidence incorporating the traditions of the major legal systems: the Common law and the Civil Law Traditions. On the other hand, the Judges and the Prosecutors of the courts are appointed by the UNGA after the nomination of by the UNSC (in the case of the ICTR) and by the UNSG and Government of Sierra Leone (for the Special Court). In addition he has also hinted out that, they do not have a diverse source of funding. The funding comes from the regular budget of the UN (in case of the ICTR) and from voluntary contribution of the international community (in case of the Special Court). This indicates that they can be influenced by outside pressure. The writer also has found out that these *ad hoc* Tribunals as their nature indicates are established after a certain conflict and this creates the challenge of being one-sided in their prosecutions of serious violations of International Humanitarian Law and might lead to victor's justice. This is so because they are usually the results of public outcry to a certain group's atrocities.
- As to the domestic courts of Rwanda and Ethiopia, the writer has indicated that though they have adequate guarantees of the rights of the accused, whether through their own legislation or through the ratification of international treaties, in actuality the rights are not respected because of the lack of funds for them which results in the lack of state appointed attorneys for the accused, sub-standard accommodation in prisons, delay of investigations and hence trials and lack of experts to aid in the investigation. When these situations are added to the high burden of proof the crimes require, prosecutions become ineffective. However, the writer had found that these domestic trials impose a harsher penalty than that of the ICC with the sentence reaching as high as death penalty. The writer has also shown that in case of the Ethiopian trials the definition of Genocide was wider than the other definitions as it gives protection to 'political groups' and groups of 'color.'

- As to the Senegalese trial of Hissene Habre, the writer had found that Senegal has fair trial guarantees and other rights due to an accused or arrested person, by its domestic legislations and by the international instruments it ratified like the ICCPR and the ACHPR. The writer has shown that the funding of the trial that was to be provided for by the members of the AU and the EU but so far such funds could not be furnished. Besides this, the writer had hinted that while the use of universal jurisdiction is highly political and violates sovereignty of states, but at the same time was needed in the circumstances to bring accountability in the absence of any other method.

RECOMMENDATION

After reaching the above conclusions, the writer recommends that;

- If African leaders are serious about fighting impunity, they should actively seek accession to the Rome Statute of the ICC (for those who are not yet members of the ICC) and cooperate fully with the court in its current and subsequent works. Becoming a state party to the ICC brings many advantages. First or foremost, States would no longer have to establish a tribunal to try the perpetrators of a certain atrocity, they would no longer have to be asked to contribute to the fund of a trial whenever there exists one. It will bring stability, certainty and predictability into the way Crimes against Humanity and Genocide are prosecuted in Africa. It will also create uniformity in the definition of the crimes to that of the International Criminal Justice system. In addition, it will abolish all the vices of universal jurisdiction and hence be the perfect solution for the effort the AU started in tackling the Abuse of universal jurisdiction. This is all possible because the ICC has a strong institutional setup with independent Judges, independent Prosecutor with discretionary power exercised with the supervision by the Chambers. It accords broad guarantees of the right to the accused. It has diverse funding sources, democratic participation of states in the Assembly of State Parties. In addition to all the advantages mentioned above, it has the long term benefit of the respect and promotion of human rights in the continent as the leaders, knowing there is an independent Court which will not shy away from prosecuting them if they engage in mass violation, refrain from engaging in mass violation of human rights which can be characterized as Crimes against Humanity and Genocide.

- The ICC, on the other hand, needs to formulate ways of strengthening the domestic jurisdiction of its member states that do not have an efficient judicial system as that of the more developed countries. It can do this through training and financial assistance to the judiciary of those countries in order to raise their capacity to entertain cases of Crimes against Humanity and Genocide. This measure will be important since the ICC could not entertain each and every case before it. Hence, by building the capacity of the Judiciary of the states and making them enable to entertain cases, it will unload significant burden from its shoulders making it an efficient court capable of providing justice to the victims without delay. Such measure is also important in strengthening the relationship between the court and the states which later facilitates for cooperation in apprehending suspects and execution of sentences. Moreover, it can also be used as an incentive to join for those who are not yet its members.
- In addition to improving the capacity of domestic criminal justice system, the ICC should also come up with clear and objective criteria of determining unwillingness of countries to prosecute the perpetrator before their courts. This is important in that it counters the arguments that the prosecutions are aimed at the poor and ensures that the court is a well meaning body.
- The ICC needs to amend Arts.13 (b) and 16 of its Statute in order to remove the power of the UNSC to refer and defer cases to the ICC. This is important because it closes the door on prosecutions and non-prosecutions based on political calculations which is the case now. Since the UNSC is a political organ its decision to refer or not to refer are the reflections of its members' political position especially the permanent members (P-5s). Removing this power from the ICC will remove any political interference from the system, thereby aiding the Courts legitimacy as independent, permanent, international Tribunals capable of holding fair trial in cases of Crimes against Humanity and Genocide.
- In order to counter the opposition of the USA, supporters of the Court with considerable influence over the world political scene like the United Kingdom, France, and Germany, either through the European Union or individually, need to take a leading role by encouraging countries who are threatened by the USA to join the ICC and to refuse to sign the BIAs. They can do that by offering an alternative financial assistance to that of the USA's.

- The ICC needs to also amend its Statute to lift the requirement imposed on the Court to sentence a guilty person with not more than a maximum of 30 years of prison sentence (excluding grave cases). This is because since the persons charged before the Chambers are mostly masterminds of a certain atrocities, 30 years sentence is a light sentence. The ICC needs to give the Judges the discretion to impose sentences case by case basis and impose penalties of more than 30 years if they deem appropriate. This could put the ICC in a special place in the hearts of the victims as they could see it as one which could bring justice to them.
- To reduce the risk of delay to be brought by the heavy burden of proof naturally associated with the crimes, the ICC or any other tribunal/court, need to establish separate chambers dedicated for one case. This will speed the process of examining the witnesses, even if many, as the designated chamber will fully dedicate its time and resources on the hearing and avoid delays that could have occurred had the chamber entertained two or more cases at a time. Also important is the increment of the number of prosecutors and investigators within the Office of the Prosecutor to handle the investigations more efficiently and without delay.
- The UN and the AU need to encourage their member states to join the ICC so that if atrocities in the future occur and there is a need to prosecute the perpetrators of such atrocities, they need not establish an *Ad hoc* Tribunal. Since the advantages to be gained by being part of the ICC outweighs that of the ad hoc tribunals, they should move for full involvement within the court. This move would free the trials of the tendency to be one sided as a result of their being a response as it has been observed by the *Ad hoc* courts so far, will guarantee the funds to be available for the trial as opposed to the irregular, benevolent funding seen so far in the *Ad hoc* Tribunals and will give emphasis to the respect of the rights of the accused.

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Plagiarism Declaration

I, FEKADE ALEMAYHU, do hereby declare that the thesis 'Prosecution of Crimes against Humanity and Genocide in Africa: A Comparative Analysis' is my original work and that it has not been submitted for any degree or examination in any other university. Whenever other sources are used or quoted, they have been duly acknowledged.

Fekade Alemayhu
