THE POSSIBLITIES OF INTERNATIONAL PROSECUTION AGAINST THE FORMER SOMALI MILITRY REGIME FOR HUMAN RIGHTS ABUSES IN SOMALILAND FROM 1981 TO 1991: ESTABLISHING INDIVIDUAL CRIMINAL AND CIVIL RESPONSIBILITY UNDER INTERNATIONAL LAW

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by

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DECLARATION

I, Mohamed Farah Hersi, declare that the work presented in this dissertation is original. It has never been presented to any other university or institution. Where other people's work has been used, references have been provided, and direct quotations have been acknowledged. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LL.M Degree in Human Rights and Democratisation in Africa.

Signed…….

Date…….

Supervisor: Prof. Frans Viljoen

Signature…….

Date……..

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List of abbreviations

ACHPR	**African Charter on Human and Peoples' Rights**
ACHR	**American Convention on Human Rights**
ATC	**Alien Tort Claim Act**
BDK	**Badhka Site**
CAT	**Convention against Torture**
FSIA	**Foreign Sovereign Immunity Act**
ICC	**International Criminal Court**
ICTR	**International Criminal Tribunal for Rwanda**
ICTY	**International Criminal Tribunal for former Yugoslavia**
ILC	**International Law Commission**
ICCPR	**International Covenant on Civil and Political Rights**
IMC	**International Military Tribunal**
MKD	**Malko Durduro Elementary School Site**
OAU	**Organization for African Unity**
PHR	**Physicians for Human Rights**
SC	**Security Council**
SNA	**Somali National Army**
SNM	**Somali National Movement**
SSDF	**Somali Salvation Democratic Front**

SWC	**Somaliland War Committee**
TFG	**Transitional Federal Government**
TVPA	**Torture Victim Protection Act**
US	**United State of America**
UN	**United Nation**
WWII	**World War Two**

Chapter one: Introduction

1.1 Background to the study

Due to the colonization of Africa, the Somali territory was divided into five areas, all subjected to colonial rule, but ruled by different imperialist powers.

The northern part of the Somali territory was colonized by the British government, which named it the "Somaliland Protectorate". The United Kingdom ruled the Somaliland Protectorate from 1884 to 1960.[1] During the African nationalist movements, which gathered momentum in the mid 1950s, Somaliland became part of the political movement against imperialistic domination. As a consequence, the chiefs and the political leaders in Somaliland agreed to demand their independence from the British government. On 26 June 1960, the people of Somaliland were given their independence.[2] The other four parts where Somali's were living (Southern Somalia, Djibouti, the northern Province of Kenya, and parts of Ethiopia (the Ogaden region)), were colonized by Italy, France, and Britain, and occupied by Ethiopia, respectively. During the nationalistic movement, Somali's in these regions had been struggling to gain their independence from the colonial rulers.[3] At that time, Somaliland was the only independent Somali state, and as a result it started a political movement towards the unification of all Somalis in the colonized territories into a single state. This movement had a pertinent impact on the situation in Italian-colonized South Somalia, which was still under the colonial rule. As a result of these campaigns, South Somalia gained its own independence on 1 July 1960. The people of Somaliland decided to unite with those in South Somalia, in order to preserve the unity of Somali people as one nation. The strength of the prevailing sentiment of Somali unity is apparent from the fact that Somaliland decided to go this route even though it had already been recognized as an independent state by more than 30 countries across the world. Consequently, the Somaliland government decided to unite with South Somali unconditionally and voluntarily.[4] On 1 July in 1960, Somaliland and Somalia united together under one nation, the "Democratic Republic of Somalia".

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[1] www.somalilandtimes.net (accessed 13August 2008)
[2] www.somalilandpatriot.com (accessed 2 September 2008)
[3] www.somalilandpatriot.com(accessed 2 September 2008)
[4] www.somaliland.org (accessed 24 August 2008)

After nine years of civilian rule, in 1969, the Democratic Republic of Somalia witnessed its first military rule. A coup d'état, led by General Mohamed Siyad Barre, overthrew the civilian government led by Cabdrashid Ali Sharmake. During this military regime in Somalia, a political movement developed in the northern regions of Somalia (Somaliland) against the Barre's regime. As result of that movement, Barre started to dismantle and ban all political parties in the country. In addition, he suspended the multi-party system and the Constitution of the Republic of Somalia. Accordingly, in 1981, members of the Somaliland elite launched the Somali National Movement (SNM) in London. As a result, the northern regions of Somalia (Somaliland), where the Isaac clan dominated, become increasingly hostile to and better organised in its campaigns against the military regime in Somalia. The government of Somalia consequently imposed certain harsh security measures. Politicians belonging to the Isaac group were either killed or arrested. This does not mean that the Isaac was similar to either Tutsi in Rwanda or Bosnian Muslims in Serbia in terms of holding high ranks of governmental positions. Accurately, they used to have ministers and other high positions including but not limited to military personnel.

In early 1988, a fully fledged civil war had broken out in Somalia formerly northern regions of Somalia. As a result of that hostile approach towards the military rule in the country, Barre's regime destroyed Somaliland's capital of Hargeisa, using a combination of artillery, South African mercenaries and bomber aircraft. These aircraft even took off from the airport and outskirts of the city of Hargeisa. Several UN agencies reported these atrocities.[5] The SNM defeated Barre's forces in the northern regions and as result it gained the authority to rule the former northern regions of Somalia (Somaliland). In 1991, the civil war came to an end.

After the fall of Barre's regime in Somaliland, an inter-clan conference was held in Buroa. On 18 May 1993, the Republic of Somaliland was declared unilaterally as an independent and sovereign state. The territory of Somaliland, as proclaimed, is bordered by Ethiopia in the south and west, by Djibouti in the northwest, by the Gulf of Aden in the north, and by Somalia in the southeast.[6]

The extent of the atrocities remained largely hidden away. In 1997, a heavy rain exposed bones, ropes, broken skulls and torn pieces of clothing in shallow graves in Hargeisa, capital city of

[5] UN Doc/ Gen/ E/ cn.4/1999/o3/Commission of Human Rights, fifty-fifth session, item 19 agenda, the human rights situation in Somalia
[6] See article 2 of the constitution of the Republic of Somaliland

Somaliland.[7] Then President Mohamed Hajji Ibrahim Igal set up a technical office on the investigation of alleged international crimes committed in Somaliland during the military rule in Somalia. The Somaliland War Committee Investigation was also formally established.[8] Purposively, this Committee was aimed at documenting any evidential materials relating to alleged international crimes committed in Somaliland. The Committee was tasked to investigate genocide, crimes against humanity, and war crimes, committed by the Barre regime against the people of Somaliland.[9] According to the list made by the Committee, which is still highly classified, the following persons committed international crimes during that time: Mohamed Ali Samater, Mohamed Hersi Morgan, Abdi Ali Yusuf (also known as Tokeh) and others. Mohamed Ali Samater was the Ministry of Defence and then Prime Ministry of Somalia, Mohamed Hersi Morgan was the Army Commander in the northern regions of Somalia (Somaliland), and Tokeh was the Army Commander of Fifth Battalion of Somali National Army. Civil claims were instituted against Samater and Tokeh before US District Court of Virginia by victims of the human rights violations.[10]

The War Crimes Committee requested the UN to carry out a forensic investigation on the mass graves found in the vicinity of Hargeisa.[11] An independent human rights expert of the UN Commission on Human Rights requested the UN to send a forensic expert to Somaliland in 1997.[12] After preliminary investigation, the forensic experts discovered more than 100 mass graves and reported that some of the mass graves indeed exhibited the characteristics of gross human rights abuses.[13] It recommended that the sites be preserved, and an international team of forensic experts be authorized by UN to carry out further investigation.[14] Regrettably, this recommendation has never been implemented by the UN.

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[7] IRIN, Web Special: a decent brutal-Somalis yearn for justice: http://www.irinnews.org.webspecails/somaliajustice/default.asp(accessed 13 August 2008)
[8] Maurica N'dri, LLM alumni student at the Centre for Human Rights, University of Pretoria, field trip report in Somaliland
[9] N'dri (n 8 above)
[10] *Bashe Abdi Yusuf, Aziz Mohamed Dena, John Doe, Jane Doe, and John Doe II v. Mohamed Ali Samater*
[11] E-mail from Hussein A. Aided on 27 July 2008
[12] UN Doc/ Gen/ E/ cn.4/1999/o3/Commission of Human Rights, fifty-fifth session, item 19 agenda, the human rights situation in Somalia
[13] UN Doc/ Gen/ E/ cn.4/1999/03/, Commission of Human Rights, Fifty-fifth session, item 19 agenda, the human rights situation in Somalia
[14] UN Doc/ Gen/ E/ cn.4/19999/03/, Commission of Human Rights, Fifty-fifth session, item 19 agenda, the human rights situation in Somalia

1.2 Research question

This study will, firstly, examine whether alleged international crimes, namely genocide, crimes against humanity, and war crimes had been committed by the military regime in the former northern regions of Somalia (Somaliland) during the period 1981 to 1991. Secondly, the study will analyse whether such crimes constitute internationally recognized crimes as provided for by the international conventional definitions, including those in the Statute of the International Criminal Court, and the jurisprudence of ad hoc tribunals. Thirdly, the study will examine the international criminal responsibility of the warring parties. Fourthly, this study will analyse whether there is an international legal case to be made against those who bear the greatest criminal responsibility for the crimes committed. In addition, the possibility of civil redress will be investigated.

1.3 Significance of the study

There is no academic work or study that had been conducted on this subject. I therefore intend to initiate a debate about this past event. Through this study, it is anticipated that victims will be equipped with knowledge about the possibility to prosecute those who have committed such crimes. In addition, the study will provide a source to educate the survivors and their relatives about the norms and mechanisms of the international justice system.

1. 4 Objective to the study

Since the aftermath of the brutal civil war in Somaliland, no one has systematically considered the human rights atrocities committed by one of the most brutal regimes in sub-Saharan Africa. Somaliland is a victim of international crimes, arguably including genocide, crimes against humanity and war crimes. The international community has failed to set up an international tribunal for the trial of those who bear the greatest criminal responsibility for the crimes committed in Somaliland. Therefore, it is the objective of this study, firstly, to throw light on the international rules which govern those crimes committed in Somaliland during the military regime. Secondly, the study will apply those rules to the case of Somaliland, based on the available evidence. Thirdly, the study will establish a case for the international prosecution of those who bear the greatest responsibilities for the human rights atrocities that occurred in Somaliland. Fourthly, this study will investigate which international mechanism provides the best chance of serving as an adequate

prosecutorial mechanism. Finally, the study will analyse the role of individual criminal responsibility under international criminal law.

1.5 Literature review

Much has been written on the ever-increasing area of international criminal justice. One of the leading academic in this field is Lyal S. Sunga, who discusses the role of international criminal law in the international criminal justice system.[15] His works elaborates the different stages that international criminal law went through in relation to its codification. The author also explains the complexity of this newly emerging discipline. The author highlights the significant role played by the International Law Commission during the codification of this emerging discipline. The author further discusses the historical international trials, such as the Tokyo and Nuremburg trials, and also their significant contribution to international criminal law. Dinah Shelton,[16] in *International Crimes, Peace and Human Rights,* has highlighted the experience of Nuremberg trials, and the contribution of international criminal tribunals for Rwanda and former Yugoslavia towards reconciliation. The author also discussed the merger of international criminal law, international humanitarian law and international human rights law towards unified approach on international human rights crimes.

Mark Lattimer,[17] in his book, *Genocide and Human Rights,* establishes the conceptual framework of 'genocide'. He provides the definition of genocide from the text of the Genocide Convention and also the jurisprudential definition provided by the ad hoc international tribunals. In addition to that, he frames a full understandable concept on genocide and mass violation of human rights. In view of this, he provides a formula for genocide and also set up a preventive genocide mechanism. Finally, he emphasizes punitive punishment and the significance of reconciliation of post-genocide events, and speaks out on individual accountability, human rights atrocities and the limits of international justice. The study perceives that there are limited studies which explore the specific issue of the potential application of the international criminal justice to the situation in Somaliland.

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15 Lyal S. Sunga *The Emerging System of International Criminal law, Development in Codification and Implementation* (1997) 345.

[16]Dinal Shelton *International Crimes, Peace and Human Rights: The Role of International Criminal Courts* (2000)

[17] Mark Lattimer *Genocide and Human Rights* (2007)

Many of the works related to the subject can best be described as newspaper articles, published by the media. Therefore, these contributions cannot be regarded as academic work. Consequently, one may conclude that the subject has not yet evoked much academic literature.

The most exceptional book entitled *A Government at War with its Own People*, has been written by a human rights activist Raqiya Omar.[18] She exposed those crimes against humanity and war crimes that were committed by the Barre regime during the northern crises. The book does not deal with the applicability of international persecution against those who were alleged to have committed such international crimes. Furthermore, the book does not utilise the role of individual accountability under international law and universal jurisdiction, which can be used to prosecute those who bear the greatest criminal responsibilities for the international human rights abuses that occurred in Somaliland during the Barre regime. Also, the study does not deal with analysing the applicability and the possibility of international justice system. It does not also deal with the role of the African human rights system for such human rights atrocities. Apart from that book, there is no other academic literature that directly reflects those international crimes. However, there is a field report entitled, *Dealing with the aftermath of the brutal war: war crimes, investigation in Somaliland, issues and challenge*s.[19] The author argues that there were war crimes and crimes against humanity, but he argues that there was no genocide committed during the civil war in Somalia. Hence, I conclude that the topic under investigation has not yet been explored extensively in academic forums, as it is difficult to find relevant in-depth academic materials on this subject.

1.6 Limitation of the study

It would be impossible for every study to encapsulate the full problems that goes with this issue. This study is not a comparative model, yet where required the study will adopt comparative modalities. This study will not address the issue of evidence in relation to the examination of the mass graves and forensic evidence in order to support this international legal case against the perpetrators. Thus, the study will not address the issue of evidence and also their determination whether that evidence constitutes to testify that there was genocide, crimes against humanity and

[18] http:/www.somalilandinside.com (accessed 3 August 2008)
[19] N'dri (n 8 above) 13

war crimes in Somaliland. Therefore, the study will only draw on the factual and available evidence.

1.7 Methodology

This study will be analytical. It will consist on an analysis on both primary and secondary sources. The primary data source does not apply to the face-face approach interview, yet the study has conducted interview through phone conversation and distributed questionnaire, then the information that have been received will be analysed and incorporated in to this analytical study. Secondary documentary sources will be used in order to cover the historical background of the study.

1.8 Overview of chapters

Chapter one will provide a brief background of the study and will include a brief statement of the research problem, objectives, research methodology, and consolidated review of existing literature. Chapter two will explore to define the international crimes such as genocide, crimes against humanity and war crimes. It will apply these internationally recognized conventional definitions to the facts and collected evidence such as forensic anthropology evidence to the allegedly international crimes, which occurred in Somaliland during Bare regime. In addition, it will analyse these facts within conventional definition and, finally it will evaluate whether such crimes constitute international crimes. Chapter three will examine the responsibility of warring parties. Chapter four will explore the possibility of whether an international legal case can be made against the responsible parties. Accordingly, the study will look at the possibility of prosecuting those who bear the greatest responsibility through the various mechanisms for international criminal accountability such as the National Tribunals, National Courts of another State, International Criminal Court of Justice, Ad Hoc Tribunals, and African Commission. Finally the study will examine the applicability of non-prosecutorial options. Chapter five will compose of a summary of the presentation and the conclusion drawn from the entire study.

Chapter two: The application of substantive international criminal law and the jurisprudence of ad hoc international criminal tribunals to the alleged international crimes in Somaliland during the Barre regime

2.1 Introduction

The emergence of international crimes such as genocide, war crimes and crimes against humanity has established an international legal principle aimed to protect and prevent the worst forms of human rights atrocities and to prosecute those who committed such atrocities. This chapter will provide the conventional and jurisprudential definitions of genocide, war crimes and crimes against humanity. The chapter will also rely on the jurisprudence of the ad hoc tribunals such as the International Criminal Tribunal for Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR). Furthermore, and will make reference to the Statute of the International Criminal Court. The chapter will provide the facts and evidence for the allegedly international crimes committed in Somaliland during Barre regime, and then it will apply those facts and evidence to the internationally provided definitions and scholarly written jurisprudence of international courts. Finally, the chapter will determine whether such acts constitute international crimes.

2.2 Has genocide been committed in Somaliland during Barre regime?

A multifaceted approach is required to determine whether genocidal acts were committed in Somaliland during the military regime. The following part of the study will explore the conventional definition of genocide and the jurisprudential interpretation provided by international criminal courts.

2.2.1 The conventional definition of genocide

Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (Genocide Convention) declares genocide to be a crime under international law, whether

committed in time of peace or war, thus genocide may occur in peace time or during war.[20] Articles II and III defines genocide and enumerates the acts that are made punishable by the Genocide Convention, namely genocide, conspiracy to commit genocide, direct and public incitement of it, and complicity in it.[21]

Article II of the Genocide Convention defines genocide as follows:

> Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily 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 to another group.

The conventional definition of genocide has various elements which need to be fit well to those allegedly genocidal acts committed in Somaliland. The main requirements are the intention to destroy in whole or in party, a national, racial, religious and ethnic group. Thus, in order to argue that genocide was committed, firstly the alleged actions should fit the required elements that have been mentioned above. The Convention has two main parts, which is (1) the group requirement; and (2) the mental requirement. The Convention does not define exhaustively what these two main requirements are, but the ad hoc international criminal courts have further exposed the jurisprudential interpretations of these two key elements.

2.2.2 The jurisprudential interpretation of the elements of the genocide

The international criminal tribunals have explored and defined what constitutes genocide. Since the establishment of the international criminal tribunals began at Nuremberg and Tokyo,

[20] David Hirsh *Law against Genocide: Cosmopolitan Trails* (2003) 28- 29
[21] Draft Convention on the Crime of Genocide, June 26, 1947, UN Doc. E/447 (Secretary General Report)

allegations of genocide were rare. The ICTR was the first international criminal tribunal that dealt with a genocide case and also convicted an individual for this crime.[22] Examining and also exploring the case law of the ICTR has a major significance of the determination whether genocide has been committed in Somaliland. Following the wording of Genocide Convention, the ICTR Statute formulates the first criminal element, namely 'intent to destroy', as follows: 'the intent to destroy, in whole or in part, a national, ethnic, racial or religious, as such.' The ICTR identifies that genocide has two main core components.[23] The Court formulates these two elements as the mental requirement and the group requirement. The mental element explains the phrase of 'intent to destroy' while the group requirement refers to the 'the destruction of a national, ethical, religious, and racial' group. In setting a typical clarification, the International Law Commission (ILC) has stated, "a general intent to commit the enumerated acts combined with general awareness of probable consequence of such an act is not sufficient for the crime of genocide".[24] Conversely, the ILC also argued that a lesser perpetrator did not need to know every detail of genocide plan, but that he should have a "degree of knowledge of the ultimate objective of the criminal conduct".[25]

Applying these sentiments to a particular case, the Trial Chamber of the ICTR defined the intent requirement as *dolus specialis* or special intent.[26] The Chamber held that the specific intent of genocide required that the "perpetrator clearly sought to produce the act charged", but also referred the formulation of the definition of genocide. The Trial Chamber in the Judgment of *Rutananda* specified that a perpetrator must act with the individual desire to achieve the destruction of the group which the individual victim of the act concerned is member.[27]

The ICTR examined different approaches to the group element, using objective and subjective criteria respectively as identification tools.[28] In the ICTR's first judgment in the case of *Akayesu*, the Trial Chamber defined each group in objective terms. A national group was defined as a

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[22] *Prosecutor v. Akayesu* ICTR (2 September 1998) ICTR Reports
[23] *Prosecutor v. Akayesu* ICTR (2 September 1998) ICTR Reports
[24] UN Doc.A/51/10.6 May to 26 July 1996, pp. 87-88, UN Doc.A/51/10.6 May to 26 July 1996, pp. 89-90
[25] UN Doc.A/51/10.6 May to 26 July 1996, pp. 87-88, UN Doc.A/51/10.6 May to 26 July 1996, pp. 89-90
[26] The *Prosecutor v. Akayuse* ICTR (2 September 1998) Para. 121; the *Prosecutor v. Kambanda* (4 September 1998) para 16; the *Prosecutor v. Kayishema and Runzinda* (21 May 1999) para. 91. In his book, Schabas (2001a:129) explained the term "dolus specialis" as special intent or specific intent were used interchangeably by the Tribunals, although they derived from different families of law and had a different meaning. See more, *Jelisic* case, the ICTY Appeals Chamber
[27] T*he Prosecutor v. Rutaganda* (6 December 1999) ICTR Reports
[28] *Prosecutor v. Kambanda* (4 September 1998) ICTR Reports para.40, resp.(1) and (2), and (3)

"collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of the rights and duties".[29] An ethnic group was defined as "a group whose members share a common language or culture",[30] and a racial group was defined as a group share "hereditary physical traits often identified with geographical region, irrespective of linguistic, culture, national or religious factories."[31] And finally, the members of religion group shared the "same religion, denomination or mode of worship".[32]

According to the definitions provided above, the Tutsi people could not be identified as an ethnic group nor any other protected group mentioned in the Trial Chamber's definitions on the group elements. But the Trial Chamber asserted that 1948 Genocide Convention was intended to protect any stable and permanent group.[33] The ICTY also defined the group requirement as the ICTR defined. The two international criminal tribunals thus adopted the same definitions on the protected group.

The other sections of this study will focus on the application of mental elements and group element to the facts of the allegedly genocidal acts committed in Somaliland by the Barre regime.

2.2.3 the application of conventional definitions and jurisprudential interpretation to the allegedly genocidal acts committed in Somaliland

To make their actions qualify as genocidal act, the main question should be whether the Barre regime intended to destroy or annihilate the Isaac in whole or in part. While many people in Somaliland argue that genocide was committed, researchers argue that, strictly speaking, genocide was not committed in Somaliland.[34] This has left an open dilemma to many Somalilanders as well as academics. Thus, it is significant to examine whether such allegedly genocidal act fit into the Genocide Convention and the judicial interpretation of the ad hoc international criminal tribunals. An international criminal act requires a degree of mental and physical elements, which have to be based on the evidence of whether genocide is committed.

It is one of the basic elements of criminal definitions to identify the mental element. The major principle underlining the mental element is to examine the mental status of the defendant. It is

[29] *Prosecutor v. Akayesu* (2 September 1998) ICTR Reports para. 512
[30] *Prosecutor v. Akayesu* ICTR (2 September 1998) ICTR Reports para .513
[31] *Prosecutor v. Akayesu* ICTR (2 September 1998) ICTR Reports para. 514
[32] *Prosecutor v. Akayesu* ICTR (2 September 1998) ICTR Reports para. 515
[33] *Prosecutor v. Akayesu* ICRT (2 September 1998) ICTR Reports , para. 516 to 701
[34] N'dri, (on file with author) (n 19 above) 13

worthy that the mental element does not relate to the motive or the reasons why someone has done a wrongful criminal act. So, the mental element refers the intention of the defendant, while the motive refers the reason and the objective behind his act.

In relation to the mental element required for genocide, the ICTR Statute has formulated the mental element as follows: "the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such."[35] The ICTR has explained the content of the concept of mental element. It stipulates that there are four questions arise from the formulation "the intent to destroy, in whole or in part, national, ethical, racial or religious groups".[36] Firstly, the Convention does not fully explain what kind of mental element is required. Secondly, should there be a specific intention in all cases of genocide, or would knowledge be sufficient under certain circumstances. Thirdly, how can a certain state of mind be proved: what level of evidence is needed with regard to this element to sustain a charge of genocide?

2.2.3.1 Required level of mental element

In relation to the case of Somaliland, no one has ever made a full academic analysis of the question whether genocide was committed in Somaliland during the Barre regime. Therefore, I will try to apply the jurisprudence of ICTR to answer the question whether Somaliland's claim can fit the definition provided by the Trial Chamber of the ICTR. As it may be clear from the *Rutanada* case, the Trial Chamber held that there should be a **specific intention** on the part of perpetrator to destroy any of the protected groups mentioned in the Convention.

Applying the mental requirement of specific intention to the situation that prevailed in Somaliland, it should be pointed out that there are no evidential indications of the specific intent to destroy the Isaac group, wholly or partly, on the part of the military regime in Somalia. The only reason why the Isaac was targeted was not their tribal origin, but rather their supportive assistance to the resistance movement, in Somaliland, generally, and the SNM, specifically. In addition, there was no outcry about the destruction of the Isaac as a tribal group. The available evidence does not reveal that the government had any extermination policy towards them.

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[35] L J Van den Herik *The Contribution of the Rwanda Tribunal to the development of International Law* (2000) 105
[36] Van den Herik (n 35 above) 105

The mental requirement has further not been met, because there was no coordinated plan for the destruction of the Isaac as a group as well as there was no proven desire from other people of the Barre regime for the destruction of the Isaac. The military regime of Somalia was at war with SNM. As this armed struggle movement was initiated by some politicians of the Isaac clan, the only rational reason why the Isaac was targeted was not their tribal origin, but it was their affiliation with the SNM. Killing and inhuman acts are skills of all military regimes in Africa, and this also applied to the case of Somaliland. It is evident that the Isaac was not the only group that was hostile to the military socialist regime in Somalia, and was not the only group targeted by the Barre regime.

From 1978 to 1981, there was a human rights atrocity which happened in the North East of Somalia specifically Hiiran and Mudug regions, which the Majertan clan dominates. Although there was no published international human rights report which can back up my argument, some Somali human rights defenders has written articles on this issue.[37] As it is clear from the text of that written script that those atrocious acts, which the military regime committed against that clan, were only due to the financial and military support that they gave to the Somali Salvation Democratic Front (SSDF) Therefore, it is my argument that the genocidal acts which allegedly occurred in Somaliland do not fit the group and mental elements required under article 2 of the Genocide Convention and also the jurisprudence made by the ICTR and ICTY.

2.2.3.2 Does the Isaac constitute a protected group under the Convention?

The Convention provides that ethnic and racial groups are one of the protected groups under the Genocide Convention. But the Convention does not extensively and comprehensively stipulate and define what ethnicity means under the Convention. Because the Genocide Convention does not fully explain the major elements under article II of the Convention, it has been left open to the international courts to explore and set jurisprudential interpretations based on the objective definitions on those elements. Thus, the ICTR, which was the first international court to deal with the matter of genocide, grappled the problem of the Genocide Convention's protected groups. In its first genocide case, *Prosecutor v Akayesu*,[38] the ICTR had to address whether and how the Tutsi

[37] Raqiya Omaar *Somalia: A Government at war with its own People , testimonies about the killing and the conflict of North (*Africa Watch 1990) 23
[38] *Prosecutor v. Akayesu* ICTR (2 September 1998) ICTR Reports

victim met the Genocide Convention's requirements. The Court began by establishing the generic definition of both racial and ethical and it defined ethnic as "a group whose members share a common language or culture." Racial group, it explained, is "As "a group based on the hereditary with a geographical region".[39] Comparatively, the ICTY has defined the protected groups as follows:[40]

> "A national group is collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties. An ethnic group is a group whose members share common language or culture racial group is a grouping based on hereditary and physical traits often identified with a geographical region, irrespective of linguistic, cultural national or religious factors. A religious group is one in which the members share the same religion, denomination or mode of worship".

The question is then, which group does the Isaac fit into: an ethnic, national, racial, or religious group? The ICTR and ICTY defined an ethnic group as a group whose members share a common language and culture.[41] The question that needs to be addressed here is whether the Isaac constitutes an ethnic group in this sense. The Isaac does not belong to any culture different from the other clans of Somalia, nor does it have a specific language different from the other clans. Somalia is homogenous society and Somali's mostly speak the same language. Therefore, Isaac could not be regarded as an ethnic group as in the case of Tutsi in Rwanda and Bosnian Muslims in the Former Yugoslavia.

The Isaac also does not constitute a national group, as they are not a collection of people who are perceived to share a legal bond based on common citizenship. They belong to the Somali nation, and as result they do not qualify as a national group.[42] Moreover, the Isaac does not constitute a religious group. A religious group has been defined as "a group shared the same religion, denomination or mode of worship".[43] Thus, the Isaac does not qualify as a religious group as its members do not have a specific religion which is different from the other parties of Somalia. Somalia has only one religion which is Islam, and the Isaac belongs to that religion, consequently

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[39] Lisson, David *Defining "national group" in Genocide Convention: a case study of Timor* (2008) 252
[40] John E.Ackerman & Eugene O'Sullivan *Practice and Procedure of the International Criminal Tribunal for the Former Yugoslavia* (2002) 132
[41] *Prosecutor v. Gatete,* indictment ICTR (14 December 1999)ICTR Reports; the *Prosecutor v E. and G Ntakirutimana and Sikubwabo* ICTR (20 October 2000); *the Prosecutor v. Sikirica* ICTY (30 August 1999) ICTY Reports
[42] *Prosecutor v. Akayesu* (2 September 1998) ICTR Reports Para. 512
[43] *Prosecutor v. Akayesu* ICTR (2 September 1998) ICTR Reports

the Isaac cannot be regarded as a religious group provided under the Genocide Convention. In relation to the racial group, the ICTR defined this group as "a group who was based on hereditary physical traits often identified with geographical region, irrespective of linguistic, culture, national or religious factories".[44] With respect to this group, the major requirement is that the group should be based on the same hereditary physical traits which must be different from the other peoples of the country. Although it may be argued that this group is more close to the argument that the Isaac belongs to one of the protected groups in Genocide Convention, it does not fully qualify to be regarded as that groups because the Isaac do not have a specific physical hereditary trait different from the other parties of Somalia. Thus, Isaac does not constitute as racial group under the requirements of genocide.

Therefore, it is my argument that they are not the protected groups mentioned in the Convention and the same time they are not fit the jurisprudential definitions provided by the two ad hoc international criminal tribunals.

2.2.4 Further conflicting standpoints

Apart from the reasons elaborated above, it may also be pointed out that the former Somaliland President stated in an interview that genocide was not committed, but rather "attempted" by the military regime.[45] Although the War Committee in Somaliland argues that there was genocide, there are a dismissal from the government of Somaliland that genocide was not committed in Somaliland.

In addition, human rights expert Gerda Linder argues that the crime committed in Somaliland was "quasi-genocide":[46]

> "The dictator unleashed the military against the Isaac population with quasi-genocidal results. Isaacs were potential suspects everywhere, in the south they lost their jobs, they were detained, some executed, and subsequently their main cities fell pray to bloody destruction. Hargeisa, capital of the North (Somaliland), was bombed and destroyed in 1988. These atrocities are being labeled

[44] *Prosecutor v. Akayesu* ICTR (2 September 1998) ICTR Reports Para. 514
[45] Web Special: a decent brutal-Somalis yearn for justice: http://www.irinnews.org.webspecails/somaliajustice/default.asp(date of access 13 August 2008)
[46] N'dri (n 19 above) 10

> ‘quasi-genocide’, since Isaac was systematically exterminated. This is different to the Rwanda, where even, ‘half –blood’ was potentially targets for extermination. Until the end there were Isaacs in the cabinet, something would not have been thinkable in Rwanda.”

2.2.5 Conclusion

Every genocidal act should meet the two main requirements of genocide: the group requirement and the mental element. It is a major element that the alleged genocide must have been committed with specific intent to destroy; and that this intention should have been directed at the extermination of a targeted group belonging to one of the protected groups mentioned under article 2 of the Genocide Convention. In Somaliland, the Barre regime did not intend to exterminate the Isaac wholly or partly. The only reason that they were targeted was their financial support to the SNM, which created a hostile approach from the Barre’s regime. The other requirement is that the targeted group should belong to one of the protected groups enumerated under article 2 of the Genocide Convention. The groups mentioned under the Genocide Convention are ethnic, national, racial or religious. The Isaac cannot be regarded as an ethnic, national, racial or religious group. Therefore, the allegedly genocidal acts committed in Somaliland cannot be regarded as genocide, as these acts do not satisfy the requirements provided for under article 2 of the Genocide Convention and the jurisprudential interpretations of the international ad hoc tribunals.

2.3 Have crimes against humanity been committed in Somaliland during the Barre regime?

In this subdivision of the study, I will investigate whether crimes against humanity were committed in Somaliland. The study will, first, provide the conventional definitions of the crimes against humanity and, secondly, it will utilize the jurisprudential interpretations of international criminal ad hoc tribunals, and thirdly, it will apply these conventional and jurisprudential definitions to the facts and available evidence of the allegedly crimes against humanity committed in Somaliland during the Barre regime.

2.3.1 The definition of crimes against humanity

Crimes against humanity are mentioned in the IMT Charter,[47] and also other international declaration issued by some of European countries during the genocide of Armenia. This initial concept of crimes against humanity was later codified in statutes of criminal tribunals set up after WWII. After the prosecution of war criminals of WWII, there was a tendency that international criminal law should be enlarged and sustained in order to preserve the maintenance of international peace and the protection of international justice. This has led the establishment of International Criminal Court in 1998, by way of the Rome Statute. During the intervening period, there were crimes against humanity which occurred in Eastern Europe and central Africa. With the commitment of the international community to prosecute and punish international criminals, the UN Security Council established ad hoc criminal tribunals. These tribunals were the ICTR and ICTY. All these tribunals included crimes against humanity in their Statutes.

Thus, the international community has codified those acts which are regarded as an international crimes specifically crimes against humanity. At this point I shall enumerate the different acts which constitute these crimes. The Rome Statute has defined and enumerated a number of acts which can be regarded as crimes against humanity.[48] Article 7 of Rome Statute defines crimes against humanity including their component as follows:

a) Murder
b) Extermination
c) Enslavement
d) Deportation or forcibly transfer
e) Imprisonment

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[47] Article 6 of the Charter of the IMT provides the enlisted international crimes such as war crimes, crimes against the peace and crimes against humanity. The charter specifically article 6 which

> "Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or prosecutions on political, racial or religious grounds in the 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 count where the perpetrated"

[48] the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: see article 7 of the Rome Statute it enlist the crimes against humanity

f) Torture
g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and other forms of sexual violation
h) Persecution of any identified group
i) Enforced disappearance
j) The crime of apartheid
k) Other inhuman acts

The crimes listed in article 7 of the Rome Statute are those crimes which constitute crimes against humanity. Similarly, the ad hoc international criminal tribunals have also included in their statutes those crimes enlisted under article 7 of Rome Statute. For instance, article 3 of the ICTR Statute provides the similar crimes enlisted under article 7 of the Rome Statute. In addition, the ICTY Statute provides similar crimes mentioned under article 3 of ICTR Statute.[49] Therefore, I will apply these enumerated crimes to the facts and evidence that relates to the crimes against humanity committed in Somaliland.

2.3.2 The application of conventional definitions to the allegedly crimes against humanity that occurred in Somaliland during the Bare regime

I have discussed the conventional definitions of the crimes against humanity and I have also mentioned the historical context of the crimes against humanity. I will now be focusing on applying the conventional requirements of the crimes against humanity to the facts gathered from the allegedly crimes committed in Somaliland during the military regime of Barre.

2.3.2.1 Murder, extermination and imprisonment

According to the findings of the War Committee in Somaliland and international forensic teams, there were mass killings in Somaliland. The murders were committed in many parts of the country, but specifically Buroa, Hargeisa, Berbera, Gebilay and other major cities. According to the

[49] See more article 5 of the Statute of ICTY

findings of the Committee there was widespread killing against the people of Somaliland. In May 2003, the Committee mapped and identified 200 mass graves in Hargeisa, 12 in Berbera, and 8 in Buroa.[50] At the request of an Independent Expert, a preliminary assessment of mass graves in the vicinity of Hargeisa was undertaken. Thereafter, a mission was sent to Somaliland in order to investigate all these mass graves. Thus, that mission was carried out by Physicians for Human Rights (PHR) under the auspices of the Office of the United Nations High Commissioner for Human Rights in accordance with Commission on Human Rights resolution 1997/47 of 11 April 1997.[51] The aim of the mission was to conduct an on-site assessment of alleged mass graves in the vicinity of Hargeisa. These assessments were consequently carried out at the request of the independent expert of the Commission on Human Rights on the situation of human rights in Somalia, Ms. Mona Rishmawi. Between 17 and 21 December 1997, the forensic team observed and examined a minimum of 92, and possibly as many as 116 alleged graves in three areas on the southern and south-western outskirts of Hargeisa.[52]

The forensic expert found one young adult male and one adult male individual, both completely skeletonised. The clothed adult male has indications of cranial trauma, in particular on the left side of the cranial vault. No evidence of trauma is seen on the unclothed young adult male.[53] Remnants of preserved hair and fingernails are found with these individuals.[54] Loops of cotton-like material associated with the individuals may be discarded ligatures. Patterned impressions on the floor of the grave are consistent with the grave having been dug by an earth moving machine, as stated by a witness to the Government's Technical Committee for the Investigation of War Crimes of the Barre regime (the Technical Committee). The context of these discoveries lead the forensic team to conclude that many of the other mound features at BDK and nearby sites are likely to contain human remains. Recent superficial disturbance by children of a suspected grave at the Malko Durduro Elementary School site (MKD) had partially exposed human skeletal remains and a possible rope ligature.

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[50] N'dri, (n 34 above) 7-8
[51] IRIN, Web Special: a decent brutal-Somalis yearn for justice: http://www.irinnews.org.webspecails/somaliajustice/default.asp (accessed 13 August 2008)
[52] UN Doc/ Gen/ E/ cn.4/19999/03/, Commission of Human Rights, Fifty-fifth session, item 19 agenda, the human rights situation in Somalia
[53] UN Doc/ Gen/ E/ cn.4/19999/03/, Commission of Human Rights, Fifty-fifth session, item 19 agenda, the human rights situation in Somalia
[54] UN Doc/ Gen/ E/ cn.4/19999/03/, Commission of Human Rights, Fifty-fifth session, item 19 agenda, the human rights situation in Somalia

The authors, having observed a large number of suspected and known mass grave sites in the vicinity of Hargeisa, Somalia, and having conducted an assessment examination of two graves containing a minimum of six individuals exhibiting evidence of per-mortem injury, binding, and haphazard burial, conclude that human rights violations have been committed against these individuals.[55]

In relation to the element of imprisonment, there was widespread unfair imprisonment in Somaliland. One of the survivors has mentioned in her application before the US District of Virginia that, on the night of 3 October 1984, army soldiers from Fifth Battalion surrender. The soldiers burnt down the hut and killed and looted the livestock. She was taken with her husband and six others to a military base and was detained for one week." This is only a few of many acts which were contrary both domestic law of Somalia and international human rights.[56] The wide range imprisonment of members of Isaac clan was a political tool used by Barre in order to suppress the popular revolution of Somaliland. All the acts which are mentioned in Rome Statute, the ICTR Statute, the ICTY Statute, and other previous international tribunals such as Nuremberg and Tokyo, were committed by the Barre regime.

2.3.2.2 Torture and other inhuman acts

Torture was also added to CCL No.10.[57] While it is not listed in the 1954 Draft Code, it appears the statutes of ad hoc International Criminal Tribunals for Rwanda and Yugoslavia. In addition, it is also mentioned in ICC Statute as part of crimes against humanity. Like other atrocious international crimes torture is listed under the most heinous crimes. Furthermore, there are other international and regional human rights instruments which clearly prohibit and outlaw any act which relates to torture. For instance, the Convention against Torture outlaws torture and other inhuman treatment. In the regional human rights protection, there are three regional human rights systems which deal with torture. In Africa, African Charter on Human and Peoples' Rights

[55] UN Doc/ Gen/ E/ cn.4/19999/03/, Commission of Human Rights, Fifty-fifth session, item 19 agenda, the human rights situation in Somalia
[56] *Jane Doe and John Doe V. Yusuf Abdi Ali a.k.a TOKEH*, in the US District Court for the Eastern District of Virginia
[57] Hirish (n 20 above) 70

prohibits torture, degrading and inhuman treatment.[58] In Europe, European Convention on Human Rights prohibits such acts,[59] as does the American Convention on Human Rights.[60] These regional and international conventions are the reflection of international community that torture and other inhuman acts could not be tolerated.

In relation to the case of Somaliland, massive torture was committed by the Barre regime against the people of Somaliland. Torture and other inhuman treatment were the interrogative skills of the military regime in order to retrieve information that deals with the military activities that SNM engaged in northern Somalia. Although the Somali Constitution and other relevant legislation did not legitimize the use of torture in the prisons of Somalia, the Barre regime tortured people who were detained illegally and unconstitutionally. In a civil action against one of the former military commander of Somalia, the head of the Fifth Battalion of Somali National Armey, filed in the United State District for Eastern District of Virginia, Alexandria Division, it was stated by one of the survivors of human rights atrocious acts in Somaliland, that the defendant had been arrested without any legal means and due process.[61] She was then kept her in a cell which did not have toilet and bath.[62] At the time, she was pregnant. As she mentioned in her application, the commander had beaten her during the interrogation period in order to get any information on whether she concealed weapons in her farm for the SNM movement. As a result of that inhuman act, she lost her baby.[63] Thus, this denotes that there was inhuman and torture committed by the military regime against the civilian population of Somaliland for being supplying, supporting, building and reinforcing SNM.

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[58] Article 5 of the African Charter Provides 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited'

[59] Article 3 of the European Convention on Human Rights provides, 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'

[60] Article 5 of the Inter-American Convention on Human Rights provides, 'No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person'

[61] Tokeh case (n 10 above)

[63] *Jane Doe and John Doe v. Yusuf Abdi Ali a.k.a TOKEH*, in the US District Court for the Eastern District of Virginia www.centreforjusticeandaccoutablity.com (accessed 24 July 2008)

2.3.4 Conclusion

Crimes against humanity are mentioned in Rome Statute and other statutes of international ad hoc tribunals. The crimes committed in Somaliland fit the conventional definitions and the jurisprudential interpretation of ad hoc tribunals. Therefore, crimes against humanity were committed in Somaliland by the Barre regime.

2.4 Have war crimes been committed in Somaliland during the Barre regime?

After the end of WWII, the Allied Powers had agreed to build international criminal tribunals which prosecute those who bear the greatest responsibility of the crimes committed. The proposal has led the establishment of international ad hoc tribunals which were aimed at to prosecute the defeated axis. Therefore, the concept of war had been codified under the Allied Control Act No.10, Nuremberg Charter and Tokyo Charter. Although international criminal tribunals were built, there was an effort to precede the continuity of the internalization of war crimes under the conventional protection. As result, the international community had agreed to draft and adopt an international convention which deals with international and non-international armed conflict, the four Geneva Convention had came in to being. In order to perverse and monitor those provisions enshrines under the Geneva Conventions, the international community felt the need of an international judicial body which protects and enforces those rights and obligation enshrined the Geneva Conventions.[64]

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[64] Tokeh case (n 63 above)

[64] The International Criminal Court of Justice: article 1 of the Rome State provides, “An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.”

2.4.1 The applicability of Geneva Conventions to situation of non-international armed conflict

Article 8 of the Rome Statute of ICC distinguishes the international norms which govern international armed conflict and norms which regulate non-international armed conflict.[65] Article 8 of the Statute of International Criminal Court provides a list of grave breaches of the provisions derived from the Four 1949 Geneva Conventions: the Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Conflict in the Field (First Geneva Convention), the Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention) Genève Convention of Relative to the Treatment of Prisoners of War (third Geneva convention), Geneva Convention Relative to the Protection of Civilian in time of War (Fourth Geneva Convention).[66]

The major distinction of international armed conflict and non-international armed conflict is international armed conflict is a conflict between states while internal armed conflict is a conflict which does not have an international armed conflict character. For instance, the conflicts in the former Yugoslavia were held to have both international and internal aspect. The test for determining the international character of an armed conflict has been subject of much debate, within and beyond the Chambers particularly ICTY, in situation were armed forces were fighting in a *prima facie* internal armed conflict. On 15 July 1999, the Appeals Chamber in the *Tadic* case concluded that overall control by a foreign state over a military organization is sufficient for considering the armed conflict to be international. This legal standard differs from the standard of the International Court of Justice which had applied in the *Nicaragua* case in 1986.[67] The question that needs to be answered is whether those international norms which are enshrining under article 8 of the Rome Statute can only be applied to the international armed conflict and not to the internal armed conflict.[68]

As far as concerning the Statute of ICC, there is no clear definition of what constitute international armed conflict. This has made a big debate around this issue. In addition, the ICTY has maintained

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[65] See more article 8 of the Rome Statute of International Criminal Court of Justice
[66] See more the fourth Geneva Conventions
[67] *Nicaragua v. US* (merits) 1986 ICJ Reports 14
[68] Machtel Boot *Genocide crimes against humanity, war crimes :nullum crimen sine lege and the subject matter jurisdiction of International Criminal Court* (2002) 557-559

that article 2 of the statute which deals with war crimes can only be applicable to an international armed conflict. It excludes from the applicability of war crimes which does not have any international armed conflict character.[69] The longstanding issue of non-applicability of Geneva Convention to the non-international armed conflict may undermine the full realization of international justice and the individual accountability of gross human rights violation. The Trail Chamber of ICTY in the Judgment of *Delalic* states that customary law has developed the Geneva Conventions provisions to constitute an extension of the system of grave breaches to internal armed conflict.[70] Although these statutes of international criminal tribunals do not enclose which stipulates the applicability of grave breach of Geneva Convention to the internal armed conflict, international customary law stipules that any criminal act should be punished, as result, the Nuremberg Tribunal had concluded that the absence of treaty provisions on the punishment could not stop the finding of individual criminal responsibility.[71]

The Trail Chamber of the ICTR considers the issue of international criminal responsibility for war crimes committed in an internal armed conflict. The court did so in the case of *Kayishema* and *Ruzindana.*[72] The Trail Chamber qualified the discussion on the customary status of war crimes as being superfluous. In addition, in the case of *Rutaganda*, the Trial Chmaber upheld the views of both the *Akayesu* judgment and of *the Kayishema* and *Ruzindana* judgment, and concluded that violations of the norms included in article 4 of the ICTR Statute, "as a matter of custom and convention, incurred individual responsibility".[73] In the *Bagilishema* judgment, the Trail Chamber, presumably trying to summarize the previous case law, stated "jurisprudence of this Tribunal has established that common article 3 and Additional Protocol II were applicable as a matter of custom and convention in Rwanda in1994.[74]

These case laws determine that internal armed conflict can be applied to the Geneva Conventions. The jurisprudence of the court provides that internal armed conflict is subject to international conventions which govern international armed conflict. Therefore, the case of Somaliland which falls under the internal armed conflict is similar to the internal conflict which occurred in 1994 in

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[69] Boot (n 68 above) 559
[70] Appeal transcript, p. 379, cited by the Appeal Chamber in *Prosecutor v. Del*alic and Others Judgment, Appeal Chamber, and Case N0. IT-96-21, 20 February 2001, para.22.
[71] Van den Herik (n 35 above) 213.
See more, the *Prosecutor v. Kayishema* and *Ruzindana* (21 May1999) ICTR Reports 56-158
[72] the *prosecutor v. kayishema* and Ruzindana (21 May1999) ICTR Reports 156-158
[73] The *prosecutor v. Rutaganda* (6 December 1999) ICTR Reports paras. 86-90
[74] The *prosecutor v. Bagishema* (7 June 2001) ICTR Reports para 98

Rwanda because the applicability of the Geneva Conventions to the case of Somaliland resemble to the case of Rwanda. The customs of the war are under customary international law and it does not need to be proven whether the state is stat party to the Geneva Conventions. Therefore, the crimes committed in Somaliland fall under the Geneva Convention and particularly common article 3.

2.4.2 The definition of war crimes in Geneva Conventions and in the Statutes of International Criminal Court

The definition of the war crimes has been mentioned in the international conventions and the statute of international ad hoc tribunals and as well as International Criminal Court.[75] In relation to these two definitions of war crimes or those international instruments which govern and regulate international and internal armed conflict, I will split two main components which define war crimes. The first part is the conventional definitions and the second is the statutes of international courts and as well as their jurisprudential interpretations. The global instrument which safeguards the rules and regulation of international and non-international armed conflict are as follows:

- Genève Convention of Relative to the Treatment of Prisoners of War (Geneva Convention III)
- Geneva Convention Relative to the Protection of Civilian in Time of War (Geneva Convention IV)
- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol 1)
- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol II)[76]

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[75] See article 8 of Rome Statute of International Criminal Court of Justice, see also article 4 and 3 of ICTR and ICTY respectively

[76] In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place

These conventions and additional protocols are the international instruments which govern international armed conflict and non-international armed conflict. In relation to the statutes of international tribunals, I would cite the definitions provided by ICTR, ICTY and ICC. The ICTR Statute provides under article 4 for the violations of common article 3 to the Geneva Conventions and of Additional Protocol II.[77] Although ICTY deals with the crimes enlisted under article 4 of the Statute of ICTR, still the wording of article 4 and article of the Statute of ICTY is different. The ICTY does not mention in its Statute common article 3 of Geneva Conventions, yet the crimes enlisted in its Statute are more identical to the crimes mentioned under article 4 of ICTR Statute.[78] Finally, article 8 of the Rome Statute provides an enlisted war crimes which the ad hoc tribunals enumerated their Statutes. There is no difference between the enlisted war crime mentioned under article 3 of ICTY and article 4 of ICTR charters. The jurisprudence of the ICTR has extensively explored the requirement and the elements of war crimes in the *Akayesu* case.[79]

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whatsoever with respect to the above-mentioned persons: Violence to life and person. in particular murder of all kinds, mutilation, cruel treatment and torture; (b) Taking of hostages; (c) Outrages upon personal dignity, in particular humiliating and degrading treatment; (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. 2. The wounded and sick shall be collected and cared for.

[77] The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977.

[79] The Trail Chamber of the ICTR claimed that war crimes could only be committed by specific class of perpetrators, comparatively the Trail Chamber focused on the class of victims. They are therefore confined the applicability *ratione personae* to the perpetrators as well as victims. In the *Akayesu* case, the Trail Chamber stated that the class of perpetrators in the first instance comprised all individuals who were members of the armed forces and who were under military control. As mayor, Akayesu obviously did not belong to the armed forces. Secondly, using a teleological interpretation, the Trail Chamber also included all other persons with some kind of public authority who were either ordered or expected to support or fill the conduct of hostilities in the class of perpetrators. The criterion used was therefore that the perpetrators should hold a public position either *de jure* or *de facto* and that should contribute to the warfare through that position. The Trail Chamber referred the case if *Hirota*. In the case of Somaliland, the Former Prime Minister and other member of armed forces have indeed fulfilled the jurisprudential interpretation of the ICTR Trail Chambers. Morgan, Tokeh and Ali Samater can be held responsible for the war crimes that occurred in Somaliland. Morgan was at the time the Commander of Somali National Army in the northern regions of Somalia (Somaliland), he was actively and directly involved the human rights atrocities that were committed in Somaliland. Ali Samater was Ministry of Defense and Prime Minister and also he is responsible for those human rights abuses.

2.4.3 Application of conventional definitions to war crimes committed in Somaliland

As I have noted above, the war in Somalia was an internal armed conflict and all international conventions and customs are applicable to those war crimes committed in Somaliland.

Lawful international or internal combatants have the rights to kill or disable an enemy soldier.[80] As enshrined in the Geneva Conventions, it constitutes a war crime to kill a person who does not take part in the hostilities.[81] All sub-paragraphs of article 8 of the ICC Statute contain provisions concerning the killing of another human being, thus constituting a war crime in both international armed conflict and non-international armed conflict.[82] The ICTY Trial Chamber held that in the *Delalic* case that willful killing is a grave breach of under the 1949 Geneva Conventions, and the crime of "murder" a violation of common article 3.[83] The case law of ad hoc tribunals indicates that the required mental element includes the concept of recklessness. In the *Akayesu* judgment, the ICTR Trial Chamber required that "at the time of the killing the accused or a subordinate had the intention to kill or inflict bodily harm on the deceased having known that such bodily harm is likely to cause the death of the victim".[84]

The case law and the jurisprudence of international ad hoc tribunals have dealt with this issue as I mentioned above. These courts and their statutes have established the jurisprudential and conventional interpretation on willful killing as a war crime. In the case of Somaliland, the internal war caused mass killing. These killing can be attributed to both warring parties, who caused death to each other, without the knowledge of the existence of the Four Geneva Conventions, or as willful violations, in full knowledge of these Conventions. The two main warring parties, the SNM and the Barre regime, were therefore responsible of serious violations of the Geneva Conventions and also common article 3 to these Conventions.

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[80] Boot (n 68 above) 579

[81] Civilian causalities caused by an armed attack mat, however, be justified as "collateral damage" when in conformity with principle of proportionality.

[82] See article 8(2)(a)(i) of Rome Statute, " willful killing" article (8) (2) (b) (vi), " killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrender at discretion";

[83] The *Prosecutor v. Delalic* IT-96-21/ Celebri 16 (1998)

[84] *Akayesu* judgment, Trial Chamber, para,589 (on the requirement of murder as a crime against humanity)

Although there is no extensive research relating to these crimes, the Committee of War Crimes in Somaliland has collected some testimony, but only pertaining to those crimes which the Barre regime committed. However, it should be kept in mind that the Committee had no mandate to investigate the war crimes committed by SNM. Still, some studies concluded that murders, cruel, torture, extra-judicial killing and other assaults on human dignity were committed by the SNM in Somaliland in the course of warfare on the civilians and other placed *hors de combat*. Some recorded video shows the devastation of the capital city of Hargeisa. In this regard, former Minister of Foreign Affairs Adna Adan Ismail stated as follows:[85]

> "Hargeisa was completely destroyed by shellfire and bombardments. Many civilians were killed and the survivors crossed the border of Ethiopia. All the buildings and the houses are destroyed. General Morgan used to climb on the roofs of his then wartime headquarters gruesomely admired that tasks of his soldier with binoculars. If a building was still standing, he would order his army to destroy completely and to wipe it out. Hargeisa was a lifeless city."

The office of the Committee has recorded and documented serious war crimes such as the killing of civilians, destruction of the property, killing the wounded combatant and other serious violation of the laws and customs of the war.

2.4.4 Conclusion

In a nutshell, it is clear from the facts stated above, that war crimes were committed in Somaliland and as result, common article 3 to the Four Geneva Conventions of 12 August 1949 were violated. These crimes, committed in Somaliland in the 1980s and early 1990s, constitute war crimes as provided for by both the conventional definitions and the jurisprudence of international criminal courts.[86]

[85] N'dri (n 34 above) 13-14
[86] N'dri (n 34 above) 13-14

2.5 Chapter conclusion

Chapter two has exposed various hidden and unexplored crimes that had occurred in Somaliland during the Barre regime, between 1981 and 1991. After Somaliland had unified with other parties of Somalia in 1960, it started to experience and witness a wide range of human rights atrocities, which increased over the years and culminated in the unilateral secession of the Republic of Somaliland. These human rights atrocities that had occurred in Somaliland have ranged from allegedly constituting genocide, crimes against humanity and war crimes. These crimes have been recognized and categorized as international crimes which the international community felt are against the peace and the security of the community of nations. For that reason, it set up an international justice mechanism system which is aimed to preserve and protect international peace and security. In addition, it persecutes and punishes the international criminals who are responsible internationally for that human rights violation that had occurred in the relevant countries.
After the post-colonial civil war in Somalia, the withdrawal of Somaliland from the unified state of Somalia, and the declaration of the fully independent state of Somaliland, an office was set up by the Igal regime for the documentation and collection of evidential material. The aim of this process was to prepare for either domestic or international persecution against those who bear the greatest criminal responsibility for the atrocities committed during the Barre regime. As result, this office has conducted various investigations pertaining to war crimes, genocide and crimes against humanity. As a result of that investigation, it had confirmed that genocide, war crimes and crimes against humanity had been committed. This study had conducted its own research, to either concur or disagree with the finding of that Committee.

Consequently, chapter two has scrutinized those international crimes through the internationally recognized legal framework, and it concludes as follows. Firstly, genocide has not been committed as it does not fit the requirements of the conventional definitions set forth by the Genocide Convention and the jurisprudence of the ad hoc international criminal tribunals. Secondly, crimes against humanity were committed by the Barre regime as the events meet the pre-listed conventional requirement and therefore, constitute international crimes. Thirdly, war crimes were committed in Somaliland, as the atrocities committed meet the pre-listed conventional requirements set forth in the fourth Geneva Conventions and the jurisprudential interpretation of ad hoc tribunals.

Chapter three: The international criminal responsibility of Somali military regime and Somali National Movement

3.1 Introduction

Prior to the WWII there was no international legal framework which dealt with the responsibility of the warring parties. Neither international nor national laws had any potential ability to prosecute those who bear the greatest or primary criminal responsibility for gross actions. Apart from that, the international community was not well globalized in a way that could serve the victims of international crimes and also ensure the protection and preservation of international peace and security. After the end of WWII, the victorious powers felt that there should be a prosecutorial mechanism for those who were responsible for the crimes committed and prosecute their terrible actions during the war. Therefore, the international community (specifically the victorious powers) designed an international prosecutorial mechanism. Thus, the Nuremberg and Tokyo tribunals were respectively established in order to try leaders of Nazi Germany and Japanese Empire. These developments culminated in the formulation of a framework of international criminal responsibility. This framework has set up a system of unprecedented global justice regime. After the end of these two international tribunals, there were internationally recognized principles, which are 'Nuremberg principles'.[87] The UN General Assembly requested the International Law Commission to formulate internationally recognized principles on the basis of the Charter of the Nuremberg Tribunal and the judgment of the Tribunal.[88] The first principle provides as follows: 'any person who commits an act which constitute a crime under international law is responsible therefore and liable to punishment'.[89] This principle internationalizes the universality of internationally recognized crimes such as genocide, crimes against humanity and war crimes. In the aftermath of those criminal tribunals, the international community had set up other ad hoc international criminal tribunals aimed at the persecution of the genocide committed in Rwanda and the Former Yugoslavia. Thus, international criminal responsibility was codified and implemented in the ad hoc tribunals as well as International Criminal Court, legally established in 1998.

[87] These principles which are consisting of 7 principles were drafted by ILC with request of General Assembly in resolution 177. These principles were the outcome of the jurisprudence of the ad hoc criminal tribunals.
[88] See more resolution 177 (II), paragraph (a)
[89] See more on principle 1 of the Nuremberg principles.

This chapter will look at the international criminal responsibility of warring parties in Somaliland during the period 1981 and 1991. The two main warring parties were the Somali National Movement (SNM) and Somali National Army (SNA) under Barre. The chapter will analyse whether those individuals who were commanding both parties could be said to be liable for the crimes committed during the period of warfare. Although I am focusing on the responsibility of the former Somali regime, I will also try to shed light on the other party's international criminal responsibility.

3.2 The international criminal responsibility of the Somali military regime for the crimes committed in Somaliland

Traditionally, international law had no effective and efficient role to play in the regulation and in determining the role of individual criminal accountability for the crimes committed during armed conflicts. Before WWII, there was no cohensive and well developed system of international justice system, and no clarity about the criminal responsibility of states and individuals. The concept of states or individual criminal responsibility traces its origin back to the legacies of Nuremberg and Tokyo Criminal Tribunals. The Nuremberg Principles provide the punishment and the criminal accountability of specific internationally recognized crimes. Principle 1 of the Nuremburg principles provides as follows: "any person who commits an act which constitutes a crimes under international law is responsible therefore and liable for punishment". After the end of the world wars, three different possible answers towards establishing international criminality were advocated: first, exclusive responsibility of states; second, cumulative responsibility; and finally, exclusive responsibility of individuals.[90] These options will now be considered in the context of Somaliland.

3.2.1 State responsibility under international law

Although there is no binding international legal framework which guides or regulates the responsibility of states towards their wrongful acts against their fellow citizens, there are international customary laws and legal principles which make clear that states are responsible and

[90] Nina H. Jorgensen *Responsibility of states for international crimes* (2006) 2-3

will be liable to be punished for their atrocious human rights violations that they have committed against their citizens. [91]

Article 40 and 41 of the Draft Articles on State Responsibility provide that states shall cooperate to bring to an end through lawful means any serious breach of an obligation arising under peremptory norms of general international law and shall not recognize as lawful situation created by such serious breach. Although the Draft Articles do not provide the definition of the peremptory norms, such definition can be found in the commentary made by the ILC on article 40 of the Draft.[92] These peremptory norms are the prohibition on aggression, slavery, genocide, race discrimination, apartheid, and torture and the obligation to respect the right of self-discrimination.[93]

A breach of an international obligation entails the responsibility on states to fulfil the obligation. A state is responsible for the crimes being committed in its territory. It is clear from that perspective, that the Somali military regime is internationally responsible for the crimes committed in Somaliland during the civil war in Somalia. It is reasonable to argue that the states are driven by human beings, not by the state itself. Therefore, it is my argument that the Somali state is responsible for the crimes against humanity and war crimes which occurred in Somaliland. Although the Somali state was dissolved after the overthrown of Barre in 1991, it is still responsible for those crimes. It is my view that every government that comes to power in Somalia in the future should give civil damage to the survivors and the victims of such heinous and human atrocious crimes, and should undertake other steps such as prosecution of the surviving perpetrators. If the state is responsible for those crimes, the relevant individual should also be accountable for the criminal acts that they committed to their fellow citizen whom they should have protected and served.

3.2.2 Individual criminal responsibility under international law

Today, the argument that individuals may be criminally responsible for certain acts which constitute crimes under international law, regardless of the law of their state, is an accepted and

[91] See article 19, 20, and 21 of Draft on State Responsibility
[92] Yearbook of the International Law Commission, vol. II 2002
[93] John Dugard *International law: A South African perspective* (2005) 279

recognized aspect of international law.[94] However, as was mentioned before, prior to the judgment of the International Criminal Tribunal of Nuremberg, there was no clear international obligation towards the individual accountability for international crimes. The Nuremberg Principles provide that individuals are criminally responsible for the crimes committed in their countries. Principle 1 provides that "any person who commit an act which constitute a crime under international law is responsible therefore and liable to punishment". The general rule underlying in this Principle is that international law may directly impose duties on individuals. The commentary made by the ILC on the Principle is that crimes are committed by men, not by abstract entities, and only by punishing individuals, who commit such crimes, can the provision of international be enforced.[95]

In addition, Principles II of the Nuremberg Tribunal provides as follows: "The fact that a person who committed an acts which constitutes a crime under international law acted as Head of State or responsible government does not relieve from the responsibility under international law." This Principle extinguishes the international principle of immunity from criminal jurisdiction of an acting Head of State. It is in the interest of justice and the enforcement of international human rights principles that those responsible be punished and prosecuted for their gross human rights violations.

Major General Muhammad Hashi Ghanni, a Former Chief Commander of the Northern Regions of Somalia (Somaliland), during a reconciliation conference held in Djibouti argued that the military was defending the country from a guerrilla movement backed by the Ethiopian government and stated as follows:[96]

> "The human rights you are talking about [pause]. Anyone can accuse anyone of violations. But human rights - I was a soldier, I was defending a country. I was defending that country from a guerrilla movement that was backed by the Ethiopian government. I had obligations to protect the territorial integrity of Somalia, and I was defending my borders. If you are going to call that action human rights abuses, I don't know what to say. I don't believe I have committed any human rights abuses... And I want to ask you a question: Don't you think that what Europeans and Americans did in Africa are human rights abuses? If you want to talk about human rights abuses, let's talk about that".

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[94]Jorgensen (n 90 above) 3

[95] Year Book on International Law Commission, vol. II 2002

[96] http://www.irinnews.org.webspecails/somaliajustice/default.aso (accessed 13 August 2008)
IRIN, Web Special: a decent brutal-Somalis yearn for justice:

This concept or argument made by Major General Ghanni is invalid and irrelevant to the criminal responsibility of individual accused of international crimes. It undermines the full realization of the global justice regime and also precludes from victims the exercise of their natural rights. As result, Principle IV of the Nuremberg Principles provides that "the fact that a person acted pursuant to order of his government or of a superior does not relieve him from responsibility under international law provided a moral choice was in fact possible to him." International law does not accept the argument that a commander was protecting and fulfilling his national obligations. And as result, he is responsible individually for the crimes he is alleged to have committed.

3.3 The criminal responsibility of the Somali National Movement

Due to prolonged repressions, the Somali National Movement (SNM) came into being in mid 1981. It was based at London, in the United Kingdom. Later, the SNM entered into an agreement with the Socialist government of Ethiopia in order to be granted a military base in Gashamo and Hartasheikh. After a long discussion, the Ethiopian government gave permission to the SNM to establish a military station. As result, SNM launched its first military operations in the former northern regions of Somalia in 1988 against the Somali National Army based in Hargeisa and Buroa. At the end of a war that took more than two years, in 1990 SNM forces seized power in all the northern regions of Somalia, and, finally, the Barre regime collapsed in 1991.

Thus, during such turbulent times, war crimes and crimes against humanity were committed by both warring parties. There is no well documented evidence pertaining to the allegation that the SNM bears a certain level of criminal responsibility for their inhuman acts, which are inconsistent with international law, committed during the war. Under international law each party is responsible individually for the crimes committed in Somaliland during the war. As I have indicated, the Barre regime is responsible for the war crimes and crimes against humanity which occurred in Somaliland during the civil war. However, the SNM is also accountable for the heinous crimes that they committed against the Barre's military personnel. Although it is difficult to find any related evidence on the crimes committed by SNM, there are personal accounts that have been documented. Mohamed Cali Caateeye, for example, asserted during the war as follows: [97]

[97] N'dri (n 34 above) 13-14

> "The SNM forces themselves were also responsible for the lying some mines and have of course, identified their whereabouts; but there areas are small compared with the extensive mine-lying by Barre garrison during their occupation of Somaliland"

It is clear and evident that SNM also had a hand in the war crimes committed in Somaliland. Their target was not the civilians, specifically the Isaac, but rather it was SNA and other affiliated groups. Therefore, SNM may be responsible for the following human rights abuse: torture against Somali National Army, killing wilfully prisoner of wars, killing members of Darood clan and their fellow supporters such as Gadabuursi; and other inhuman acts which are contrary to the international standard of warfare.[98]

3.4 Conclusion

International criminal responsibility has become a widely accepted concept under international law after the end of WWII. After the collapse of Nazis and Fascist regimes in Europe and Asia, the victorious powers agreed to prosecute those who bear the greatest criminal responsibility of the crimes committed during the World War II. As result, they had established international military tribunals in Germany and Japan. As result, the notion of a legally enforceable international criminal responsibility came into being. This concept provides that each party to the conflict should be accountable for the crimes being committed during war or peace time. The accountability of international crimes is a major party of international justice regime. In order to preserve international peace and order, there should be a system of justice which is aimed at the prosecution of those who breach international peace and security.

The case of Somalia is not exceptional, and thus it needs to be investigated in order to be prosecuted those who were responsible for the atrocious human rights acts that happened in Somalia. In relation to the criminal responsibility of the Somali military regime, it is clear from Chapter Two that crimes against humanity and war crimes were committed by the Somali regime

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[98] Darood is one of the largest clans in Somalia, and it is the clan whom Barre traces his lineage. Gadabuursi is the clan which dominates Awdal region in the former northern regions of Somalia and now in Somaliland. They used to give support to the Barre regime. Both these clans were subject to numerous human rights abuses by the SNM forces.

during the northern conflict. As a result, the Barre regime is accountable as state and its leaders as individuals for those international crimes committed in Somaliland in the mid 1980s and early 1990s. As provided by the Nuremberg Principles, the Barre regime is responsible for the international crimes that occurred in Somaliland.[99] These principles made clear that the argument of following superior order is not legitimate under international law, and ruled that every commander is responsible for the crimes he committed even if he was following superior orders.[100]

As an armed military organization, there have been allegations against SNM that they have violated certain human rights instruments which are enshrining both international and regional human rights conventions.[101] Thus, the SNM is responsible for various human rights transgression such as torture, destroying property, killing wilfully prisoner of war, killing members of Somali clans who used to support the military operations against the Isaac. Such acts would render the SNM responsible organizationally and individually for those crimes which are directly against the international law.

Hence, both the Barre regime and the SNM are accountable individually for the international crimes committed in Somali Northern Regions of Former Somalia (Somaliland), and as a result they are punishable under international law.

[99] See more on Nuremberg Principles adopted by General Assembly of the United Nations
[100] See more Principle I, II, IV of the Nuremberg Principles
[101][101] These international instruments are Convention against Torture and the Four Geneva Conventions, which i am arguing that SNM was violated. The regional instruments such as ACHPR have also been violated by SNM.

Chapter four: Making an international as well as domestic case against the former Somali Military Regime for the crimes against humanity and war crimes committed in Somaliland from 1981 to 1991

4.1 Introduction

As explored in chapter two of this study, I have examined whether genocide, crimes against humanity and war crimes were committed in Somaliland during the Barre regime. As I have indicated in that chapter, I have determined that crimes against humanity and war crimes were committed in Somaliland by the Somali Military regime. In relation to the allegations that genocide was committed, the study has confirmed that genocide was not committed. In chapter three, I have discussed the international criminal responsibility of the conflicting parties in Somalia. I concluded that both parties in the armed conflict were responsible for various human rights abuses, and as a result accountable for those human rights violations. Therefore, in this chapter, I will examine the various international accountability mechanisms available under domestic, regional and international levels. The central theme of this chapter is whether an international case as well as domestic case can be made against the Barre regime for the international crimes committed in Somaliland from 1981 to 1991. In view of this, this chapter will try to identify the availability of the appropriate international justice fora.

This chapter will attempt, firstly, to analyse why Somaliland authorities failed to set up a national criminal tribunal for the crimes committed in their territory during the military occupation of Barre regime. Secondly, it will attempt to identify why the Security Council of the United Nations has not been willing to establish an ad hoc criminal tribunal for the human rights atrocities that occurred in Somaliland. Thirdly, it will examine the applicability of whether a case can be lodged before the International Criminal Court. Fourthly, it will attempt to apply the regional human rights protection mechanism, exploring the possible to benefit of the individual communication procedure of the African Commission on Human and Peoples' Rights. Fifthly, it will highlight the role of national courts of other states for the persecution of the perpetrators. Finally, the study will look at the civil liability of the perpetrators under international law.

4.2 Why did the Somaliland authority fail to establish a national criminal tribunal for the prosecution of members of Barre's regime?

Although the international legal process established a corpus of law providing individual criminal responsibility for the atrocities in peace and war, domestic legal systems remain the primary fora for holding individuals accountable for those acts.[102] National legal system should hold the primary responsibility of prosecuting those who have allegedly to have committed the gravest international crimes which are outlawed under international law.[103] Even though the prosecution of perpetrators before the national courts has an impact to the stability and the post-war peace building process of that country, justice should prevail in order to keep the peace in its course.

Since Somaliland has withdrawn from the union with the former collapsed Somalia, it has not considered the establishment of a national criminal tribunal for the international crimes committed in Somaliland during the military regime in Somalia. However, There is no clear reasons why the successive governments of Somaliland have been reluctant to establish a national criminal tribunal for the prosecution of Barre's regime.

It is likely that the Somaliland authorities have not been eager to establish such national tribunal for the following five reasons:

Firstly, there was an amnesty issued by the Somaliland clans. That amnesty was extended only to the members of Somaliland who participated the oppressive involvement of the Barre regime in Somaliland. The amnesty was not extended to the people from the South Somalia who are now staying and living in Somaliland.

Secondly, the former government of Somaliland led by President Igal was not interested in introducing a national policy for the prosecution of the former members of Barre regime as it is clear from a statement made by former president Igal:

> "It depends on the investigation. I don't think an investigation would pinpoint any individuals. It might reveal the dates - for example, that people in a particular mass grave

[102] Hirsh (n 20 above) 160-161.

[103] Harish (n 20 above) 161

were killed [in] approximately June 1982, or 1985... Then the inference would be whoever was in charge at that time [was responsible]. There would never really be an accusation of an individual -and we don't want to do that, anyway."[104]

Thirdly, a complicated and time-consuming process of prosecution may have financial implications, which the government of Somaliland would not be able to sponsor or cover.

Fourthly, most of the perpetrators are not staying in Somaliland, and the same time Somaliland authority would not be able to request from the interim Federal Government of Somalia to extradite such individuals. The major problems underlining in this context are the lack of full and respected relationship between the TFG and the Somaliland authorities. One may think that such deteriorated relationships trace its roots back to the armed conflicts that occurred between these two people. In addition, the TFG has not been publically acknowledged that there were crimes against humanity and war crimes that occurred in Somaliland during the civil war. Thus, it is my view that the TFG will never extradite a man like Morgan and Hassanturki to the Somaliland administration in order to be prosecuted before the national courts of Somaliland.[105]

Finally, Somaliland is an unrecognized entity which does not have any international extradition treaties to any one of the international community with exception of Ethiopia.[106] This lack of international relationship with other international communities may undermine the persecutions of the perpetrators.

4.3 Why did the Security Council of the United Nations fail to establish an ad hoc international criminal tribunal for the international crimes committed in Somaliland?

After the disclosure of the mass graves found in the vicinity of Hargeisa, the Somaliland authority requested from the UN to establish an ad hoc international criminal court for those human rights

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[104] http://www.irinnews.org.webspecails/somaliajustice/default.asp (accessed 13 August 2008)
IRIN, Web Special: a decent brutal-Somalis yearn for justice:

[105] Morgan was the Chief Military Commander of Former Northern Regions of Somalia. He was the successor of the Mohamed Hashi Ghanni. On the other hand, HassanTurki was once a military commander in former northern regions of Somalia. The Somaliland administration has categorized these war criminals as those who bear the greatest criminal responsibility for the crimes that occurred in Somaliland from 1981 to 1991

[106] There is no bilateral treaty on the extradition, but Somaliland government used to hand over members of Ogadenian National Liberation Front

abuses committed in Somaliland.[107] The UN has the competence to set up an international criminal tribunal as provided for under Chapter VII of the UN Charter.[108] This Chapter facilitates the UN Security Council to create, through a resolution, an international criminal tribunal as it did create a tribunal for the former Yugoslavia and Rwanda.[109]

The applicability of establishing an international tribunal in Somaliland is impracticable for the following three main reasons: Firstly, Somaliland is not a member of the UN and as result it would be not viable to accept the offer from the Somaliland authority. Secondly, the Somali state has collapsed and as a result, it would be difficult to request the Somali government to propose to the UN Security Council in favour of the establishment of an ad hoc tribunal. Finally, the international community does not view the human rights abuses that occurred in Somaliland as a threat against international peace and security.[110]

4.4 Can a case be instituted before the International Criminal Court for the human rights atrocities committed in Somaliland?

The International Criminal Court (ICC) is based at in The Hague, in the Netherlands. The Court has been inaugurated on 11 March 2003.[111] As an international permanent judicial organ, this Court has been tasked to entertain those cases which are of concern to the international community as a whole. These cases are genocide, crimes against humanity and war crimes.[112] As I have examined above, with the exception of genocide, these international crimes were committed in Somaliland, and as result, it is imperative to ask whether the ICC can have jurisdiction to prosecute those who bear the greatest criminal responsibility for the crimes against humanity and war crimes that occurred in Somaliland from 1981 to 1991.[113]

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[107] E-mail from Hussein A. Aided (Deputy Director of the SWC) on 23 July 2008
[108] See more on Chapter IV of the UN Charter
[109] After the genocide in Rwanda and the crimes against in Yugoslavia, the UN Security Council had set up an ad hoc international criminal tribunal for the sole prosecution of perpetrators
[110] The only major reason of establishing an ad hoc international criminal tribunal is the protection and the preservation of the international peace and security. Chapter IV of the UN Charter enables the SC to set up an international criminal tribunal if it thinks as inevitable
[111] Dugard (n 93 above) 192
[112] Dugard (n 93 above)192

[113] Article 5 provides as follows: The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to

The Statute of the Court defines one of the elements of the jurisdiction of the Court as *ratione temporis* jurisdiction.[114] The Court is limited to the crimes occurring after the entry in to force of the Statute, namely 1 July 2002.[115] Therefore, the *ratione temporis* of the Court is only applicable to events that occurred after the entry in to force of the Rome Statute, and as a result, the Court has no jurisdiction to consider the case of Somaliland. Furthermore, the Somali government is not a state party to the Rome Statute and this renders that the ICC has no jurisdiction to entertain this case.

4.5 The role of the African Commission on Human Rights and Peoples' Rights on the human rights abuses committed in Somaliland

In the post-colonial epoch, African States have congregated in Addis Ababa, Ethiopia, to adopt a charter which upholds the regional integration of the continent.[116] In May 1963, the Charter of the Organization of African Unity was adopted in Addis Ababa and entered into force in September 1963.[117] In this adoption process, Somalia was a member state of the OAU, and as a member state it had a duty to promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.[118] With regard to the protection of human rights in Africa, the AOU Charter did not extensively mention the African human rights protection. However, the 1981 African Charter on Human and Peoples' Rights was adopted by the AOU in

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the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression. 2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

[114] Article 11 of the Rome Statute limits the *ratione temporis* jurisdiction as follows: "The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute. 2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3."

[115] Dugard (n 93 above)192
[116] CH Heyns & Killander (eds) *Compendium of key human rights documents of the African Union* (2006) 2
[117] Heyns & Killander (n 116 above) 2
[118] See more article 2(1)(e) of the Charter of the Organization of African Unity in 1963

Nairobi, Kenya.[119] The adoption of this Charter has had a vital role on the realization of African regional human rights protection. The African Charter recognizes individual rights as well as peoples' rights, rights and duties, and some socio-economic rights, in addition to civil and political rights.[120]

As a member of the OAU, Somalia ratified the Charter in 1985. It therefore has a duty to protect and promote the rights being mentioned under the provisions of the Charter. In order to maintain and monitor the implementation of the Charter, a supervisory body (the African Commission on Human and Peoples' Rights) was created in the Charter. This quasi-judicial regional body is mandated to perform two main tasks, which are the protective and promotion of human rights. [121] The Commission has the duty to protect the rights mentioned in the Charter and also promote the realization of human rights protection in Africa.

In relation to the human rights abuses that occurred in Somaliland, there is a role that the African Commission could play for the restitution of the victims. It would be an unprecedented case if the African Commission were to affirm that the human rights abuses that occurred in Somaliland were against the spirit and the purpose of the African Charter on Human and Peoples' Rights. Although there was no precedent case that relates to the applicability of applying African Commission as a forum of justice for the crimes against humanity and war crimes that had occurred in Africa, it is my argument that the African Commission has the legitimacy to play a pivotal role for the prevention and the prohibition of the crimes against humanity and war crimes which have been committed in member states of the African Charter. As indicated above, one of the mechanisms of protective mandate is the submission of individual communications. Therefore, it has been authorized that the Commission must deal with the individual communications from all African states.

In the case of Somaliland, the victims of the crimes against humanity and war crimes may be able to file a petition before the African Commission in order to consider the human rights abuses that occurred in Somaliland. This communications may be filed against the members of former Somali

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[119] Heyns & Killander (n 116above) 23
[120] F Viljoen *International Human Rights law in Africa* (2007) 237
[121]F Viljoen *International Human Rights law in Africa* (2007) 318, the author categorized the protective mandate of the Commission as follows: individual communication, inter-state communication, and 'onsite' or 'fact-finding' mission

military regime such as Tokeh, Mohamed Ali Samater and Mohamed Xirsi Morgan. It is 17 years after the end of the civil war in the Former Northern Regions of Somalia (Somaliland), and there is no individual communications from the people of Somaliland that has been sent to the African Commission. The only main reason is the lack of full knowledge about the regional human rights protection and specifically the role, mandate, jurisdiction and the responsibility of the African Commission. Thus, it would not be possible for the people of Somaliland to file a communication against the perpetrators.

In addition, in the African Charter allows for the submission of inter-state communications. Somaliland cannot have the accessibility to lodge inter-state communications against Somalia, because it is not member state of the AU and African Charter. Therefore, it would not possible to lodge an inter-state communication against Somalia.

4.6 The role of prosecution of national courts of another states for the international crimes committed in Somaliland: extraterritorial application of the certain international offenses

One of the mechanisms for accountability of the human rights abuses is the prosecution before national courts of other states. Criminal trials outside the country where human rights abuse have been committed signify yet another alternative for the criminal law against human rights abuses.[122] This mechanism authorizes criminal accountability for the human rights abuses that occurred outside the territory of the prosecuting state. There are special statutes which govern international offenses and their extraterritorial applicability.[123] This is the application of universal jurisdiction principle. For instance, 1984 Torture Convention has extraterritorial application, permitting the prosecution for torture committed beyond the borders of the persecuting states. Similarly, states fulfil their duties under 1949 Geneva Convention, Protocol 1, or should have legislation necessary to criminalize grave breaches regardless of the place of commission.[124] States like United States and France have criminal statutes on genocide. Other states, like Belgium, Spain, and Sweden, have promulgated domestic laws concerning international offenses apart from those related to specific treaty obligations.[125] The Canadian law on war crimes and crimes against humanity under Imre Finta was prosecuted permits persecution of foreigners for the acts against other foreigners

[122] Hirsh (n 20 above) 179
[123] Hirsh (n 20 above) 179
[124] Hirsh (n 20 above) 179
[125] Hirsh (n 20 above) 179

committed abroad. Canada could exercise jurisdiction over the person based only on his presence in Canada, and the accused is later present in Canada.[126]

The case *Jane Doe and John Doe v. Yusuf Abdi Ali a.k.a Tokeh,*[127] dealt with the defendant Abdi Ali who departed from Somalia and eventually entered Canada in December 1990.[128] In 1992, Abdi Ali was deported from Canada for having committed gross human rights violations in Somalia.[129] As indicated above, the Canadian criminal law prosecutes international offenders if the offenders present in Canada and committed war crimes and crimes against humanity. The Canadian authority did not willingly enforce those human rights principles that are enshrining the criminal law of Canada which permits the extraterritorial prosecution. It is my argument that Canada should not have deported Abdi Ali, but should have prosecuted him before their national courts for the gross human rights abuses committed in Somalia. Canada has undermined the post-Nazi international justice development for not prosecuting Abdi Ali. This unwillingness is a threat against the realization of universal human rights protection and individual criminal accountability.

After Abdi Ali was deported from Canada he went to US. Some of the victims of war crimes and crimes against committed in Somaliland had instituted a civil claim against Abdi Ali. It was an action for compensatory and punitive damages for torts in violation of international and domestic law. This case will be further discussed in the following portions of the study.

4.7 Civil accountability for gross human rights abuses under international law

State civil responsibility for the acts constituting infringement of basic human rights is not a new theory of international law.[130] A wide-ranging theory of state accountability for grave breaches of humanitarian law by its forces during time of armed conflict can already be found in provisions of the Four Geneva Conventions of 1949.[131] In *Bosnia and Herzegovina v. Yugoslavia,*[132] the ICJ was

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[126] Hirsh (n 20 above) 179
[127] The defendant was commander- in- chief of the Fifth Battalion of the Somali National Army, he was alleged to have committed a gross human rights violation such as torture, , cruel, inhuman or degrading treatment or punishment, arbitrary detention of plaintiff Jane Doe and for the attempted extrajudicial killings
[128] Centre for Accountability in the US, *Jane Doe and John Doe v. Yusuf Abdi Ali a.k.a Tokeh*
[129] Tokeh case (n 135 above)
[130] S D Bachmann, Civil responsibility of states for human rights atrocities under international law Bachmann (ed) *Civil Responsibility for Gross Human Rights Violations* (2007) 7
[131]Bachmann (n 130 above) 7

faced for the first time with the question of state liability for the gross human rights violations. It held that Yugoslavia was liable to pay civil compensation to Bosnia and Herzegovina. in this case it is clear from the judgment of the ICJ that state are responsible of civil responsibility for the gross human rights violations that they committed against either their citizens or an aliens.

In the case of Somaliland, it is different from the illustrated case that has been indicated above, because Somaliland is not a state according to international law and the international community. For that reason, Somaliland is not able to lodge an inter-state complaint against Somalia establishing civil responsibility for the gross human rights violations that were committed in Somaliland. Thus, Somaliland does not have the possibility to benefit from inter-state complains before the ICJ. [133] If it is not possible that Somaliland can apply civil responsibility for the human rights atrocities committed in its territory, would it be possible to apply through individual civil responsibility.

4.8 Civil responsibility for human rights abuses before US courts

The United States (US) has long historical background about human rights adjudication for foreign litigants.[134] Human rights litigation before the UC courts had began in 1980 with the milestone decision of *Flartiga v. Pena-lrala*, when the Second Circuit Court found that acts of (state) torture, committed outside US territory involving only non-US citizens, both as victims and perpetrators, could institute a successful civil actions before US federal courts.[135] It had reported that for the last 25 years more than hundred civil cases for alleged serious human rights violations were brought before US federal courts under Alien Torts Claims Act (ATC).[136]

The ATC was legislated in 1789 as domestic law which allowed for the adjudication of torts committed by an alien against an alien.[137] Thus, human rights adjudication process before US courts has led to successful human rights litigation against individuals, states, non-state actors, and,

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[132] *Bosnia v. Herzegnovia* ICJ (1993) ICJ Reports 3
[133] See more on the case of *Velasquez Rodriquez v. Honduras* case in IACtHR
[134]Bachmann (n 130 above) 7
[135] Bachmann (n 130 above) 7
[136] Bachmann (n 130 above) 7
[137] Bachmann (n 130 above) 7

recently, multi-national corporations.[138] This well-developed domestic civil liability has ended the lack of extraterritorial applications for the gross human rights violations that were committed in another state. This extraterritorial human right litigation mechanism has really enhanced, developed, and promoted the realization of universal protection of human rights. One of the main objectives that drive this concept is ideal of combating immunity. Although there are many states that are not willing to join the application of extraterritorial human rights adjudication, the US has maintained to apply this human rights adjudication process in its territory.

Benefiting from the opportunity for human rights litigation in the US for the crimes committed in other state, some Somalilanders who are victims of crimes against humanity and war crimes have filed civil suit application against two members of the former Somali military regime. There are two cases which have been instituted before US courts. These two cases are against two former Somali military commanders, namely Samater and Tokeh which I shall be dealing with later on this study.

The first case is against Samater, the former Ministry of Defence and then Prime Minster of the Democratic Republic of Somalia, *Bashe Abdi Yusuf, Aziz Mohamed Dena, John Doe, Jane Doe, and John Doe II v. Mohamed Ali Samater.*[139] Some members of Isaac clan filed a civil action under the Torture Victim Protection Act of 1991 (TVPA) and the Alien Tort Claims Act (ATC). The plaintiff alleged that Samater, as official who was in charge of the Somali Armed Forces in the 1980s and 1990s, is responsible for the acts of torture, extrajudicial killings, attempted extrajudicial killings, crimes against humanity, war crimes, cruel, inhuman, and degrading treatment of punishment; and arbitrary detention of the plaintiff. [140]

It is important to shed some light the involvements of Samater for the above alleged crimes and human gross human rights violation against him. During the early 1980s, the military of Somalia committed immense gross human rights violations against the members of the Isaac for their support of SNM. The Barre regime was trying to neutralize the northern oppositional movement.

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[138] Bachmann (n 130 above) 7

[139] See more in this case against the former Ministry of Defense and then Prime Minster of former collapsed Somalia, *Bashe Abdi Yusuf, Aziz Mohamed Dena, John Doe, Jane Doe, and John Doe II v. Mohamed Ali Samater.*[139] this case has been filed before District Court of Eastern Virginia find full text on (www.cja.org)

[140] *Bashe Abdi Yusuf, Aziz Mohamed Dena, John Doe, Jane Doe, and John Doe II v. Mohamed Ali Samater*

The Security Forces, acting under the control of Samater, were together responsible for the pervasive and systematic use of torture, arbitrary detention and extrajudicial killings against Isaac population.[141] During the 1980s, when Samater was Ministry of Defence and then Prime Minster, the government modified its approach towards the Isaac and began utilizing the military forces as a campaign to annihilate Isaac clan opposition. It is clear from the facts indicated above that Samater was directly involved and therefore responsible for crimes against humanity and war crimes that occurred in Somaliland during his term as Ministry of Defence and then Prime Minster of Somalia.

Samater had challenged the subject matter of jurisdiction on the claim that he is immune from the US court's jurisdiction as he was a foreign head of state and committed the alleged offences that capacity. Samater claims that as Somalia's former Prime Minster, he is entitled to immunity from lawsuits against him. He argues that his immunity has been shielded under the US Foreign Sovereignty Immunities Act (FSIA). Therefore, if Samater's claim of immunity is protected by FSIA, then the court is obliged to dismiss the claims against him. Before the court considered this argument, the Transitional Federal Government of Somalia sent to a letter to the US Department of State, which reads as follows:

> "In previous letter, our government also expressed its concern over the persecution in US court against the former Prime Minter and head of state Mr. Mohamed Ali Samater. We request that your department initiate state of interest to request that the court dismiss the lawsuit against him as a violation of Mr Samater's immunity and as threat to the reconciliation efforts then underway in Somalia.
>
> We wish to indicate that the actions attributed to the Mr. Samater in the lawsuit in the connection with quelling of the insurgencies from 1981 to 1989 would have been taken by Mr. Samater in his official capacity and reaffirm Mr. Samater entitled sovereign immunity from the persecution for these actions."[142]

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[141] *Bashe Abdi Yusuf, Aziz Mohamed Dena, John Doe, Jane Doe, and John Doe II v. Mohamed Ali Samate*

[142] When the civil proceeding was started the TFG contacted the State Department of the US requesting to extinguish the civil suit against the Former Prime Minster of Somalia. The main argument was that he was head of state who entitles sovereign immunity from the local courts of another jurisdiction. It is clear fro the intention of the TFG that they were shielding behind the civil lawsuit against this perpetrators who criminally responsible for the gross human rights violations that had went through the former northern regions of Somalia (Somaliland) this study did not find any concern from the Somaliland authority.

In the court's final judgment, it concludes that Samater is immune from civil liability in those proceedings under the FSIA. Finally, the court ruled that Samater is entitled to sovereign immunity under the FSIA for the acts he undertook on behalf of the Somalia government. Therefore, the court ruled that it had no subject matter over the plaintiff's claim brought under the TVPA and ATC.

The reasoning of the court was that Samater is immune from the US local courts for being a former head of state. Therefore, it is important for this analytical study to look at another country that dealt with this issue. Senator (formerly General) Pinochet, head of State of Chile during a period of severe and systematic human rights violations between 1973 and 1990, came to United Kingdom to seek medical treatment in 1998.[143] On 25 November, after his arrest, a five judge penal of House of the Lords overturned the Divisional Court decision by majority of three to two, holding that a former head of State was not entitled to immunity for crimes under international law.[144] An expanded seven judges reheard the case in early 1999. The seven judges agreed that there are crimes under international law to which immunity *ratione materiae* is not applicable, and that torture is one of these crimes.[145] Although the newly developed doctrine of universal jurisdiction was applied to the case, it is was clear from the majority of judges in the House of Lords that certain crimes cannot be tolerated by the civilized nations and, therefore, immunity of a former head of state could not be regarded as a shield from international prosecution.

Similarly, it may b argued that as he had no sovereign immunity in international law, Samater would have been behind bars today for the international crimes he committed against the people of the Isaac. As I have indicated above, that case was unsuccessful of the sole reason that Samater was once a former head of State and therefore, he is immune from the jurisdiction of local courts.
The next case is the one against the former military commander Yusuf Abdi Ali, also known as Tokeh. In this case, *Jane Doe and John Doe v. Yusuf Abdi Ali, a.k.a. Tokeh,* the plaintiffs filed their civil case against this perpetrator before the US District for Eastern District of Virginia, Alexandria Division. The plaintiffs institute this civil action against Tokeh for his responsibility for torture; inhuman or degrading treatment or punishment; and arbitrary detention of the plaintiff and for attempted extrajudicial killings and also claims for war crimes and crimes against

[143]Jorgensen (n 90 above) 133
[144] Jorgensen (n 90above) 133
[145] Jorgensen n 90 above) 133

humanity against Tokeh. Plaintiffs allege that Tokeh is personally responsible for, or exercised command responsibility over or conspired with or aided and abetted subordinates in the Fifth Battalion of the Somali National Army. The plaintiffs have followed the same adjudication procedure as in the case against Samater that I have analysed above. Tokeh used to command the army unit stationed in Gebilay. From 1984 until 1989, Tokeh, a commander-in-chief of the Fifth Battalion, is alleged to have directed and contribute in a brutal counterinsurgency operation against SNM and Isaac clan. The court has not yet judged whether the defendant is liable for the alleged gross human violations. To my knowledge it has not yet been finalized.

4.9 Chapter conclusion

In this chapter, I have scrutinized the accountability mechanisms that are available in international, regional and national justice forums. Firstly, I have explored the role of national courts of Somaliland. Had Somaliland authority willed to prosecute those who bear the primary criminal responsibility, it would have set up a national criminal tribunal for the crimes committed against the people of Somaliland. Since Somaliland was announced as an independent and sovereign state, it has not tried to consider the issue of the past, including addressing the crimes that occurred in Somaliland. There is no clear and justifiable reason that explains why the Somaliland authority failed to set up such a national criminal tribunal. Cost and lack of capacity may go some distance to explain this state of affairs. Secondly, the study also examined the possibility of the UN Security Council setting up an ad hoc criminal tribunal for the crimes committed in Somaliland. Arguably, the UN SC has the legitimate authority to set up such a tribunal under Chapter VII of the UN Charter, but it never considered to initiate such tribunal. The main reasons are the firstly, Somaliland is not member of UN and secondly, the UN does not view those crimes committed Somaliland were against the international peace and security. Thirdly, I have analysed whether the ICC has a mandate or jurisdiction to hear the case of Somaliland. With regard to the case of Somaliland, I have examined the Rome Statute which under article 11 provides that the Court will have jurisdiction only the crimes committed after the entry into force of the Rome Statute namely 1 July 2002. Therefore, it would not be possible to seek an international remedy before this Court on the bases that it does not has jurisdiction to hear this case because the crimes that happened in Somaliland were committed from 1981 to 1991. Fourthly, at the regional level, the study examined the role of ACHPR. The study has found that through individual communication, the Commission would have been able to entertain the cases from Somaliland people on the crimes committed

against them during Barre regime. Fifthly, at the national level, the study examined the role of national courts of another state for the prosecution of crimes committed in Somaliland. With regard to this, the study found that it would be possible to pursue those perpetrators before the national courts of another state such as US, Spain, and Belgium. Specifically, the study examined the applicability of 1984 Convention on Torture which has extraterritorial application.

The international human rights abuses have to dimensions for accountability, firstly the criminal prosecution and secondly, the civil litigations against the perpetrators. Finally, the study examined the civil liability of the perpetrators for the gross human rights violations that occurred in Somaliland. With view of this, the study examined two pivotal cases against two former Somali military commanders. The first case is *Bashe Abdi Yusuf, Aziz Mohamed Dena, John Doe, Jane Doe, and John Doe II v. Mohamed Ali Samater,* in which the court of District in Virginia in the US ruled that Samater as former Prime Minster of Somalia is immune from domestic courts of the US as provided under FSIA and therefore, that case was dismissed. The other case is *Jane Doe and John Doe v. Yusuf Abdi Ali, a.k.a. Tokeh*, in which still the court issued a judgment on whether Tokeh is responsible for the allegation made by the plaintiffs.

Chapter five: Conclusion

During the conflict in the Northern Region of the Former Somalia (Somaliland), a wide range of human rights abuses were allegedly committed against the Isaac clan. After the unilateral declaration of the Republic of Somaliland as an independent and a sovereign state, there was an investigation of the crimes committed during the former military regime in Somalia. As a result, Igal's administration has set up a technical office for the documentation of the evidential materials of the human rights abuses that had occurred in Somaliland.

Due to the northern crisis and the establishment of SNM, the Barre regime became hostile to the Isaac clan for their massive support they used to give SNM. This hostile approach towards the Isaac clan has brought about a counterinsurgency campaign by the Somali National Army. The military presence in the Northern Region of Former Somalia (Somaliland) was increased and the security had been tightened. This increased the popularity of the Isaac clan against the government of Barre. Most members of the Isaac clan were supporters of the SNM and they offered economic assistance to the SNM. In addition, Isaac politicians were either killed or arrested without fair trial and without due process of law, and this has fuelled the hotlist approach against the Barre regime. During that time, there was mass killing, murder, torture, rape, extrajudicial killing, detention, and other various human rights abuses. Therefore, the Barre regime has been alleged to have committed crimes against humanity and war crimes.

There are a wide range of allegation that ranges from genocide, crimes against humanity and war crimes. Therefore, the study has examined these allegations and their applicability under international law. Through its research analysis, it has concluded as follows:

Firstly, genocide was alleged to have been committed by Barre regime against the Isaac people during the northern crisis in the former Somalia. Therefore, this study has explored and tried to determine whether such crimes have been committed in Somaliland. Answering this question, the study has utilized the conventional definitions as well as jurisprudential interpretations of international ad hoc tribunals such as ICTR and ICTY. Therefore, the study has concluded that genocide was not committed in Somaliland during the brutal military regime in Somalia. The Genocide Convention under article 2 stipulates the main requirements of genocidal acts, namely the mental and group elements. The mental element refers the intention to destroy, in whole or in part, a national, ethical, religious and racial group. The intent to destroy entails that the whole

group should be annihilated wholly or partly. As I have demonstrated, such intention was not part of the Barre's plans to destroy and exterminate all Isaac. The other main requirement of genocide is that the intention to destroy should be directed to these groups such as national, religious, ethical, and racial. The Isaac clan does not constitute or belong to any of these groups which the Genocide Conventions enlists. Therefore, the allegedly genocidal acts that occurred in Somaliland do not fit the conventional definitions and the jurisprudential interpretations of the ad hoc international criminal tribunals.

Secondly, crimes against humanity were allegedly committed in Somaliland. In this study, it has been determined that they fit the conventional and jurisprudential requirements, and therefore, such crimes were committed in Somaliland during the military regime in Somalia.

Thirdly, war crimes were also allegedly committed, and the study exposed that such crimes were committed against the people of Somaliland. The Four Geneva Conventions and other international humanitarian laws have been violated during the armed conflict in Somaliland by both parties. The Committee of War crimes in Somaliland has investigated this aspect of allegation, it then has determined that murder, torture, inhuman acts, killing war prisoners, wanton destruction of cities, town, villages or devastation not justified by military necessity, attack, or bombardment, of by whatever means, of undefended towns, villages, dwelling or buildings.

All these war crimes were committed in Somaliland by the Barre regime, as well as by the SNM. Internationally both parties are accountable for the crimes they committed. The international criminal responsibility is one of the developing concepts in international law, and therefore, this study has highlighted the criminal responsibility of the warring parties in Somaliland. Persecuting those who are criminally responsible for the crimes committed, the study has enlisted a various international, regional and national prosecutorial mechanisms which are accessible for the victims. Jointly, they are criminally responsible under international criminal law. Therefore, the study brought into being that crimes against humanity and war crimes were committed in Somaliland and this generates the establishment of international criminal responsibility under international law. As result, the study has established the individual criminal accountability under international law, and it believed that every criminal is individually responsible for the crimes he committed against the sufferers.

The study then detailed the various international criminal accountability mechanisms that are accessible under international law as well as under domestic laws. There is a wide rage spectrum of international accountability systems under international criminal law.

Firstly, the study has examined the failure of the governments of Somaliland for not establishing a national criminal tribunal for the gross human rights violations that occurred in Somaliland. Because the primary onus of accountability for the acts of Barre regime rests with the Somali government, domestic trials must be considered as an important potential mechanism for accountability.

Secondly, the study depicted that the Security Council of the United Nations has failed to establish an ad hoc international criminal tribunal for the crimes that occurred in Somaliland. As an unrecognized country, Somaliland does not have access to request from the SC to establish an ad hoc international criminal tribunal for the crimes that occurred in Somaliland, nor does the SC view those human rights abuses that occurred in Somaliland as a threat against international peace and security. Under Chapter VII of the UN Charter mandates the SC to establish such tribunal and in fact it established for Rwanda and Yugoslavia.

Thirdly, the study has examined the role of ICC in relation to the crimes committed in Somaliland. With regard to the jurisdictional limitation under the Rome Statute of ICC, the Court does not have any *ratione temporis* jurisdiction to entertain the crimes that occurred in Somaliland. The Court only has jurisdiction to hear the crimes that occurred after the entry in to force of the Rome Statute.

Fourthly, the study has interestingly concerning the role of African regional human rights protection. Concerning about this alternative, the study has determined that there is a position that African Commission on Human and Peoples' Rights may pay attention to the cases from the victims of the crimes against humanity and war crimes that occurred in Somaliland. The major role that the ACHPR can play is to admit the communications comes from Somaliland in order to acknowledge the human rights abuses that occurred in Somaliland.

Fifthly, the work has dealt with the role of national courts of another state for the persecution of the perpetrators. One of the important mechanisms for accountability to prosecute the perpetrators is to institute either a civil claim or criminal before national courts of another state. The persecution may be either criminal prosecution or civil claim against the perpetrators. With regard

to this, the doctrine of universal jurisdiction will be applicable to such circumstances. In addition, there are certain international conventions which have extraterritorial application such as 1984 Torture Convention. This Convention permits to prosecute those who committed torture in their countries before another state. With regard to the case of Somaliland, this extraterritorial application may be applied against the members of Somali military regime. On the other hand, civil accountability for the gross human rights violations is one the developing theoretical principles under international law. As I have indicated above, there are particular countries that enable the victims of gross human rights violations to institute a civil claim against the offenders if they are present in those countries. For instance, the US courts have the jurisdiction to hear a civil lawsuit against any accused perpetrators. In the case, *Bashe Abdi Yusuf, Aziz Mohamed Dena, John Doe, Jane Doe, and John Doe II v. Mohamed Ali Samater,* the plaintiffs had claimed a civil damage against the former Defence Ministry of Somalia and then Prime Ministry of Somalia. The plaintiff alleged that Samater, as official who was in charge of the Somali Armed Forces in the 1980s and 1990s, is responsible for the acts of torture, extrajudicial killings, attempted extrajudicial killings, crimes against humanity, war crimes, cruel, inhuman, and degrading treatment of punishment; and arbitrary detention of the plaintiff[146]. In the court's final judgment, it concludes that Samater is immune from civil liability in those proceedings under the FSIA. Finally, the court ruled that Samater is entitled to sovereign immunity under the FSIA for the acts he undertook on behalf of the Somalia government. Therefore, the court ruled that it had no subject matter over the plaintiff's claim brought under the TVPA and ATC. In another case, the other case is *Jane Doe and John Doe v. Yusuf Abdi Ali, a.k.a. Tokeh*, in which still the court issued a judgment on whether Tokeh is responsible for the allegation made by the plaintiffs.

Finally, the study is advocating for the international prosecution against the former Somali military regime for the human rights atrocities that they committed against the people of Somaliland during the military rule in Somalia. Justice will only prevail if those who bear the greatest international criminal responsibility for the crimes committed are prosecuted. The study strongly recommends, as the most immediate mechanism to attain success, that the people of Somaliland who are victims of either crimes against humanity or war crimes and staying in Western Europe or the US should institute civil claims against the former members of Barre's regime present in these countries.

Word count: 17 981

[146] *Bashe Abdi Yusuf, Aziz Mohamed Dena, John Doe, Jane Doe, and John Doe II v. Mohamed Ali Samater*

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