PROSECUTION OF GENOCIDE AT INTERNATIONAL AND NATIONAL COURTS

A COMPARATIVE ANALYSIS OF APPROACHES BY ICTY/ICTR AND ETHIOPIA/ RWANDA

BY

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CERTIFICATION

I ---------- hereby certify that this work is the result of original research carried out by Debebe Hailegebriel under my supervision at the Faculty of Law, University of Makerere

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DEDICATION

This dissertation is dedicated to my family and, most especially, my beloved parents, Mr. Hailegebriel Wendimgezahu and Mrs. Mamit Belda, whose inspiration, encouragement, prayers, support and above all, love, made me reach this level of education.

MAY GOD BLESS YOU EXCEEDINGLY AND ABUNDANTLY

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Abbreviations

EPC	Ethiopian Penal Code
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
RPE	Rules of Procedures and Evidence

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Synopsis

This paper deals with the prosecution of a crime of crimes, genocide, at international and national levels. The international community has shown interest in penalizing perpetrators of gross human rights violations since the Nuremberg trial, and then the adoption of the 1948 UN Genocide Convention. After these times, significant numbers of international tribunals, although at an ad hoc levels, have been established to punish gross violations of human rights including the crime of genocide. Along with these tribunals quite a number of national courts have engaged in the prosecution of genocide. Nevertheless, due to legal and practical problems the two legal systems are adopting different approaches to handle the matter, although the crime is one and the same. Therefore, the objective of this paper is to assess critically where the difference lies, the cause and impact of the disparity on the rights of the accused to fair trial. Moreover, the study will posit some recommendations that might assist to ameliorate this intermittent situation.

CHAPTER ONE

INTRODUCTION

1.1 Background of the study

As international concern for the promotion and protection of human rights around the world has increased, different strategies have been developed to ensure compliance with international norms. Courts are the most basic of all these strategies. When human rights violations occur the first places to look for redress are courts. In short, courts are the highest forums where human rights are enforced, be it at the national or international level.

Article IV of the Convention for the Prevention and Punishment of the Crime of Genocide[1](the Genocide Convention) provides for the prosecution of the crime of genocide before

> a competent tribunal of the state in the territory of which the act was committed or by such interested international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction.

Though the Convention presupposes for the establishment of a permanent international penal tribunal, this postulation was not realized until July 1998 when the Rome Statute has established the International Criminal Court.[2]

However, the absence of a permanent international penal tribunal did not prevent the international community to prosecute the crime of genocide at the international level. It suffices to mention the establishment, at an ad hoc level, of ICTY and ICTR by the United Nations Security Council to prosecute persons responsible for genocide and other serious violation of international humanitarian laws.[3] Along with these tribunals, there have been a significant number of national courts prosecuting genocide committed with in their territory or in other

[1] Geneva Convention for the Prevention and Punishment of the Crime of Genocide, adopted by the UN General Assembly on 8 December 1948.
[2] The Rome Statute of the International Criminal Court, UN DOC. A/CONF 183/9
[3] UN Security Council 3217th meeting Resolution S/RES/ 827, May 25, 19993 and UN Security Council 3453rd meeting Resolution S/RES/955, November 8, 1994 for the establishment of International Criminal Tribunals for the Former Yugoslavia and Rwanda, respectively.

territories.[4] Nevertheless, in administering the issue, these two legal systems are adopting different approaches and capacities. They differ, for instance, in rules of procedures, imposition of sentences, expertise, logistics and so on. In addition, as Kindiki points out, '[s]ome states have resorted to granting amnesty to the perpetrators, while others have opted to prosecute[5]', despite the offence being an international crime and states are under duty to prosecute perpetrators of gross human rights violations.[6]

1.2 Statement of the problem

The quality of a judgment, among other things, may be determined by its certainty and predictability.[7] Even if not all courts are expected to give absolutely the same kind of decisions with regard to a given law, the difference, however, should not be inflated. In the process of prosecution, the central principle of rule of law necessitates, among others, the application of general, preexisting norms.[8] If the standards employed by courts cannot be predicted based on the existing laws, parties undoubtedly face the difficulties of framing their cases.

These two courts also have differences in determining sentences against convicted accused. Their difference is not only in the modality of determining sentence but also in the degree and type of the sentence they are empowered to impose. The statutes that have established both ICTY and ICTR, for instance, do not entail capital punishment while such as the penal codes of Ethiopia[9] and Rwanda[10] do. As a result, the political leaders of the Rwandan genocide who are brought before the ICTR face at worst a life in jail while their fellows, who were

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[4] A. Schabas 'National Courts finally begin to prosecute Genocide 'the Crimes of Crime' (2003) 1 *Journal of International Criminal Justice* 1. He mentioned countries like Bolivia, Ethiopia, Rwanda, France, Israel, Canada and Romania as cases in point.

[5] K. Kindiki 'Prosecuting the perpetrators of the 1994 genocide in Rwanda: Its basis in international law and the implications for the protection of human rights in Africa' (2001) 1 *African Human Rights Law Journal* 64

[6] M. Minow *Between Vengeance and Forgiveness* (1998) 28

[7] G.W. Mugwanya 'The International Criminal Tribunal for Rwanda: Law, Practice and Institutions: Challenges and Accomplishments'in C. Heyns(ed) *Human Rights Law in Africa* (forth coming) 9

[8] M. Minow (n. 6 above) 25

[9] See Article 281 of the Penal Code of the Empire of Ethiopia of 1957, Proclamation No.158 of 1957

[10]: N. A. Comb 'Copping a Plea to Genocide: The Plea Bargaining of International Crimes' (2002) 151 *University of Pennsylvania Law Review* 7

executing their command but brought before the national court, face death penalty.[11]

Adopting new procedural rules may seem less significant in connection with the principle of retroactivity. Nevertheless, there are instances where by they entail a greater or equal damage that might have been resulted by substantive laws.[12] National courts employ preexisting procedural laws while ad hoc international criminal tribunals adopt their rules of procedures post facto. This situation will lead, as stated by Minow,

> the tribunal's decisions inevitably [to] have the character of applying norms to people who did not know at the time of the conduct in question the content of the norms by which they could be judged.13

Even in substantive laws, there is a difference in what genocide is under the international criminal law and the Ethiopian Penal Law. In its definition of genocide Article 281 of the Ethiopian Penal Code (EPC) has included political groups while all the Genocide Convention, the ICTY and ICTR statutes do not include this group. Therefore, what is genocide under the Ethiopian law may not be genocide under international law.[14]

Any criminal justice system is complex as compared to other cases.[15]However, the complexity of prosecuting the crime of genocide is not comparable with the others. Unlike other offences, genocide is mostly committed by a large number of people, with different kind and degree of participations. It involves the contribution of countless individuals and innumerable events that have developed through a long time.[16] It is not simply a sporadic or random event. Rather it encompasses a systematic effort over time to destroy a national population.[17]

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[11] M. H. Morris 'The trials of Concurrent Jurisdiction: The case of Rwanda' (1997) 7 *Duke J. of Comp. & Int'l L.* 357
[12] M. Minow (n. 6 above) 35
[13] As above
[14] D.Haile 'Accountability for the Crimes of the Past and the Challenges of Criminal Prosecution; The case of Ethiopia' (2000) *Leuven Law Series* 42
[15] P.Kessing et al ' Improving the Criminal Justice System in Nepal' in H. Stokke and A. Tostenser (eds)(Year Book 1999/2000) *Human Rights In Development* 243
[16] R. May & M. Wierda 'Evidence before the ICTY' in R. May et al(eds)(2001) *Essays on ICTY Procedure and Evidence* 250
[17] I. L. Horowithz *Genocide, State Power and Mass Murder* (1976) 16-18

In terms of number, if we take the case of Rwanda, it is estimated that over 100,000 people were considered as suspects participating in the commission of genocide that had destroyed more than half a million people in 1994.[18] Though the number of victims is not exactly known, in the Ethiopian genocide trial initially there were about three thousands suspects waiting trial.[19]This adds further difficulty in the endeavor to prosecute genocide.

The offence of genocide is planned and organized secretly and systematically so that no evidence is made available. It is conducted mostly with the approval of, if not direct intervention, the state apparatus.[20]As a result, in court proceeding direct evidence may not be available, especially against top officials who are deemed to be the masterminds of the atrocity. Due to this and other problems in relation to evidence, the international tribunals seem to swerve from the traditional way of proving criminal cases and adopt liberal approach unlike national courts.[21]

We have discussed that one of the contributing factors for the disparities is lack of permanent international criminal court that is working on the basis of preexisting laws and rules. Due to these and other reasons the international community now become successful in establishing this court.[22] It appears that the adoption of the Rome Statute will moderate the disparities that have existed for long and contributed for the disparity in the prosecution of genocide and other international crimes. This Statute has established permanent International Criminal Court and addressed issues dealing with admissibility, investigation, prosecution, arrest, rules of procedures and evidence, which were remaining the major causes for disparities.[23]

1.3 Objectives of the study

[18] O. Dubis Rwanda's National Criminal Courts and the International Tribunal' www.icrc. Org/web/org, (Accessed 26/05/2003)
[19] M. Redae 'The Ethiopian Genocide Trial' (2002) 1 *Ethiopian Law Review* 2. D Haile (n 14 above) 1, puts this number to be 5000
[20] I. L. Horowithz (n. 17 above) 18
[21] May and Wierda (n.16 above) 251. See also N. A. Comb (n.10 above) 74-78
[22] See the Rome Statute (n. 2 above)
[23] As above

The general aim of this work is to analyze comparatively and critically the approaches adopted by international and national courts to prosecute the crime of genocide, in view of revealing the differences that exist, their impact on the rights of the accused and their causes and finally to give recommendations. Having these in mind the work

A. Examines the different legal and practical approaches adopted by the international and national courts
B. Reveals the fundamental rights of the accused that are threatened by the approaches adopted by the two types of courts
C. Assesses the position of the Rome Statute of International Criminal Court in protecting the rights of the person accused genocide.
D. Present possible solutions that would help protect the rights of the accused.

1.4 Research questions

The research will query:

A. Is there a significant difference in the prosecution of the crime of genocide between international and national courts?
B. What are the sources of these discrepancies?
C. What impacts do they have on the rights of the accused?
D. What roles the Rome Statute of the International Criminal Court will play in ameliorating these problems?

1.5 Significance of the study

As discussed in the literature review, the works done so far are dealing with the issue of the prosecution of genocide from different perspectives. The importance of this work is its attempt to show the problems that exist in having two different courts prosecuting the same offence. It views the problems from both sides and reveals the discrepancies with their causes and possible suggestions. Unlike its predecessors, this contribution will assess the complementary relationship that should exist between national and international courts in the process of genocide prosecution. By doing so the work will assist both the national and international community to identify the areas that need due consideration in the prosecution of genocide to protect the rights of the accused.

1.6 Literature survey

On the prosecution of genocide in Ethiopia, Mehari Redae wrote about the process of the trial, the problems the trial has faced and the alternative measures to wholesale prosecution. By showing the inefficiency of the justice system, the author suggests for the Ethiopian government to limit its prosecution to few and selective individuals and release the rest but subject to disclosure of truth procedure.24 However, this work is limited in scope, and it focuses only on the Ethiopian trial saying few or nothing about the international aspect of the crime.

Dadimos Haile is the second scholar to write on the Ethiopian genocide trial.25 His work focuses on the principal challenges and limitations faced in the over all process of accountability for crimes of the past. In doing so he also raises some of the contentious legal issues involved in the prosecution process and the applicability of international law and standards. The author concludes that wholesale prosecution process will lead to prolonged and protracted proceedings and hence the Ethiopian genocide trial should be selective.

William A. Schabas has discussed the prosecution of genocide at the national level emphasizing the case of Rwanda.26 In this work, the historical development of the Genocide Convention, the problem of prosecuting the crime of genocide, the Rwandan national courts and genocide have been discussed. Nevertheless, the impact of having these two institutions to prosecute the same offences but employing their own system of rules of procedures and evidence has not been assessed.

The relationship between the Rwanda's national criminal court and the International Criminal Tribunal for Rwanda, though limited in scope, has been conversed by O. Dubois27. He has dealt with the issues of investigation, evidence, co-operation between the Tribunal and, the Rwandan national Courts and Office of the Public Prosecutor, and the approach employed by the Rwandan government to bring to justice suspects of the crime of genocide. However, the

[24] M. Redae (n 19 above 1-26
[25] D. Haile (n 14 above)
[26] W.A. Schabas (n.4 above) 1
[27] O.Dubois 'Rwanda's national criminal courts and the International Tribunal' (1997) *International Review of the Red Cross* no 321, p.717-731

issues that need to be addressed when we discussed about the relationship between international tribunal and national courts in prosecuting genocide, go beyond what has been dealt by Dubois.

K. Kindiki has also researched the need for the prosecution of genocide perpetrators in Rwanda and assessed its implication on the protection of human rights in Africa.28 However, it was not the objective of this work to examine the correlation between the Rwandan national court and the ICTR. The writer has critically examined the lesson that could be drawn from genocide trial in Rwanda and the importance of punishing genocide perpetrators for the protection of human rights in Africa as a whole.

The other worth mentioning author in the area is Nancy A. Combs. In her work, 'Copping a Plea to Genocide: The Plea Bargaining of International Crimes' she thoroughly discussed how the practice of ICTR and ICTY differs from national courts in addressing the question of plea bargaining.29 She has revealed the fallacy of the practice of the ICTR and its Rules of procedure. However, as the topic itself suggests, this work focuses only on one issue leaving the others untouched. But as discussed elsewhere the discrepancies that exist between the international and national courts go beyond this.

1.7 Methodology

As the topic itself suggests, comparative approach is employed and it is largely a library work using case laws and literatures.

1.8 Limitations of the Study

The maximum space allocated to the study was the first challenge. Secondly, getting of decided cases, especially from the Rwandan national courts was the other problem. The two national courts are using their own national languages, which is not English

1.9 Scope of the study

[28] K. Kindiki (n 5 above) 64-77
[29] N. A. Comb (n.10 above) 1-107

It is not the aim of this study to analyze the whole theoretical aspects revolving around the prosecution of genocide. Though a brief discussion is anticipated, the focus is to show how the international and national courts are approaching the issues of prosecuting genocide, and the impact of these approaches on the right of the accused.

1.10 Chapterization

This work consists five chapters. Chapter one is addressing the general introduction of the work, and it has already been discussed. Chapter two deals with the crime of genocide and its criminal responsibility as indicated under different national and international laws. The third chapter is devoted to focus on the right to fair trial in the prosecution of genocide and specifically addresses the issues of the right to legal assistance, speedy trial, obtain and examine evidence, and sentencing. In chapter four the Role of the Rome Statute in protecting the rights of the accused, its impact on national laws, the complementarities of the International Criminal Court and national courts will be discussed. Finally, the work will come to an end by giving concluding remarks and recommendations under the fifth chapter.

CHAPTER TWO
GENOCIDE AND CRIMINAL RESPONSIBILITY

2.1 Meaning of genocide

2.1.1 Literal meaning

It has been argued that the term *genocide* is a hybrid between the Greek word *genos* (race or tribe) and the Latin suffix *cide* (killing)[30] This term was first used by the jurist Raphael Lemkin in 1944 during World War II to describe the systematic plan of the Nazi's to destroy the Jews and Gypsies.[31] According to him, the word genocide connotes

> the destruction of a nation or of an ethnic group' and implies the existence of a coordinated plan, aimed at total extermination, to be put into effect against individuals chosen as victims purely, simply and exclusively because they are members of the target group.[32]

Lemkin's definition of genocide is broad and it includes attacks on political and social institutions, culture, language, national feelings, religion, and the economic existence of the group as such.[33]

Next to Lemkin different writers have attempted to define genocide but from different perspectives. Chalk and Jonassohn defined this term as:

> a form of one-sided mass killing in which a state or other authority intends to destroy a group, as that group and membership in it are defined by the perpetrator.[34]

According to this definition, genocide is committed against a group, which is defenceless and has no plan of reciprocity, and all members of the group are labelled as victims. It also allows the inclusion of different kinds of groups and left the definition of group for the perpetrator rather than listing them out in advance.

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[30] DD. Nsereko 'Genocide: A Crime Against Mankind' in G. K. McDonald & O. Swank-Goldman (eds.) (2000) *Substantive and Procedural Aspects of International Criminal Law* (Vol. 1) 117
[31] R. Dixon et al (eds.) (2003) *International Criminal Courts Practice, Procedure and Evidence* Para. 13-6
[32] A. Destexhe 'Rwanda and Genocide in the twentieth centuries' www.pbs.org/wgbh/pages/frontline. (Accessed 12 August 2003)
[33] F. Chalk & K. Jonassohn *The History and Sociology of Genocide; Analysis and case studies* (1990) 9
[34] As above, 23

With regard to the perpetrator, it is restricted to state or those who hold sate authority.[35]

To add more, Rummel has also defined genocide as 'the government murder of people because of their indelible group membership.'[36] Unlike the definition of Chalk and Jonasshon, the extent of the group in this definition is limited to those groups in which membership is ineffaceable or involuntary. Similarly, this definition also restricts the perpetrator to be government, and makes no reference the possibility of the crime being committed by other ordinary individuals.

2.1.2 Legal Definitions

So far we have seen the literal meanings of genocide given by different writers. Following will be the discussion on the legal definitions of this concept as given by different national and international legal instruments. Since the definitions provided for in the UN Convention on Genocide, the Statute of ICTY, ICTR and ICC do not have any difference[37], there would not be separate discussions and we will take the definition of the UN Convention on Genocide. At the national level, we will see the definition of the EPC that takes a different approach than the stated international instruments.

The practice of genocide is condemned both by customary and conventional international laws.[38] In its resolution, the General Assembly of UN declared that[39]

> [G]enocide is the denial of the right of existence of entire group, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the concise of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these groups, and is contrary to moral law and to the sprit and aims of the United Nations.

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[35] As above, 23-27
[36] J. Rummel 'Democide versus Genocide: Which is What' www.hawaii.edu/powerkills/GENOCIDE.HTM (Accessed 12 August 2003)
[37] See Articles 4, 2 and 6 of the Statutes of ICTY, ICTR and ICC, respectively which all of them take verbatim the definition of the UN Convention on Genocide.
[38] F. Chalk & K. Johassohn (n 33 above) 9
[39] UN General Assembly Resolution (UNGAR) 96/1 UN Doc.A/Add.1 at 189

The International Court of Justice (ICJ) also affirmed that 'the principles contained in the Genocide Convention have been recognized by civilized nations as binding on states, even without any conventional obligation'[40]. Therefore, even in the absence of, or not being a party to the Genocide Convention or the Statute of ICC, the crime of genocide is punishable under customary international law.

Article II of the UN Genocide Convention defines the term genocide as

> 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.

2.1.2.1 Acts constituting genocide

This definition clearly states the acts that constitute or establish the crime of genocide and the type of groups that fall with in the scope of the protection. From this definition we can infer that genocide is made up of two main elements; (1) the *actus reus* consisting of a serious of acts having the effect of destroying a particular group; and (2) the *mens rea* consisting of the specific intent to destroy, in whole or in part, that particular group.[41]Therefore, acts enumerated in the definition from (a) to (e) constitute the actus reus elements.[42]

Depending on the proof of the effects of the acts, they can be categorized in to two groups; those acts mentioned under (a), (b) and (e) require proof of result while the rest two acts (c) and (d) do not demand such proof,

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[40] Reservations to Genocide Convention, 1951 ICJ 15. See also Prosecutor v. Jean-Paul Akayesu ICTR Judgement Case No ICTR - 96- 4 – T, Par. 495 and H. J. Steiner & P. Aliston *International Human Rights in Context; Law, Politics, Morals* (1996) 141

[41] R. Kolb 'The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on their Jurisdiction and on International Crimes' (2000) *The British Year Book of International Law* 286

[42] As above, 286-287

'but require an intent of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part or imposing measures intended to prevent births with in the group'.[43]

2.1.2.2 Intention

On the other hand, the *mens rea* (the mental element) of the crime of genocide as indicated in the definition has three fundamental components;[44]

1. Intention to destroy a group;
2. The intention to destroy that group in whole or in part:
3. Intention to destroy a group that is identifiable by;
    (a) nationality
    (b) race;
    (c) ethnicity; or
    (d) religion

These three components need further discussion and we will see each of them in detail.

One of the distinct features of genocide is the fact that it presupposes a 'special intent' for the commission of the crime. In the Akayesu case, the Tribunal defines 'special intent' as 'the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged'[45]. Hence in the case of genocide, as the Tribunal argued, 'the special intent lies in the intent to destroy, in whole or in part, national, ethnical, racial or religious group as such'.[46]

The purpose of the action or omission of the perpetrator must always be to destroy the identified group as a distinct entity. The act is directed against the victim not because of his or her individual reason but because he or she is a member of the persecuted group.[47] Therefore, the prosecution is expected to

[43] R. Dixon et al (n 31 above) Para. 13-8a
[44] As above
[45] Akayesu case (n 40 above) Par. 498.
[46] As above
[47] R. Kolb (n 41 above) 287

prove the existence of this specific intent going beyond the mere destruction of the group.[48]

2.1.2.3 Who are protected?

As clearly stated under Article II of the Genocide Convention, four groups expressly mentioned fall under the scope of the protection by the Convention. These are national, ethnical, racial and religious groups. By some scholars[49]and tribunal[50] these groups have been ascribed the following common features;

1. Membership is involuntary; members do not chose to be a member, rather it is determined by birth, and hence inevitable;
2. Members of the group are easily identifiable and constitute distinct and clearly determinable communities;
3. They are constituted in a permanent and stable fashion.

However, it is highly arguable to conclude that all the four protected groups manifest the aforesaid features. It is beyond doubt and confusion to ascribe these features to ethnical and racial groups, which are acquired by birth and also considered as identical group.[51] Nevertheless, the rest two, especially religious group, are controversial and subject to criticism. It is hardly possible to argue that these groups are protected because membership is involuntary, stable and distinct.

Freedom of religion is one of the basic rights, which have been guaranteed by significant number of international and national laws. This right includes, inter alia, the right to hold or to adopt a religion of ones own choice.[52] As Nsereko argues, '[R] eligion, like political beliefs, is a matter of will or choice. It can be embraced or abandon[53]'. Legally, therefore, it is unwarrantable to argue that membership in religion is involuntary and by birth. It amounts to denial of the fundamental right to freedom of religion.

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[48] As above
[49] DD. Nsereko (n 30 above) 130 and R. Kolb (n 41 above) 288
[50] Akayesu's case (n 40 above) Para.511
[51] DD. Nsereko (n 30 above) 131
[52] See Articles 18 of the International Covenant on Civil and Political Rights and the Ethiopian Constitution,Proclamation No.1/1995 respectively
[53] DD.Nsereko (n 30 above) 130

UN Resolution 96/1, which is considered to be the basis for the adoption of the Genocide Convention, echoed vehemently the need for the protection of political group equally with religious group. It reads '[M]any instances of such crimes of genocide have occurred, when racial, religious, political and other groups have been destroyed, entirely or in part'[54]. As it is vivid from the Resolution, the scope of protection is so broad and embraces not only political groups but also any other groups as long as the intention to destroy that group in whole or in part exists,

Next to religious group, the protection of national groups on the stated grounds also requests further discussion. Nationality is a social status that one can acquire it in different forms depending on the national law of a given country. Generally, it may be acquired by law or by birth.[55]In this regard Hudson, as rapporteur for the International Law Commission, stated the following opinion;[56]

> Under the law of some states nationality is conferred automatically by operation of law, as the effect of certain changes in civil status: adoption, legitimation, recognition by affiliation, marriage. Appointment as teacher at a university also involves conferment of nationality under some national laws.

Like religion and political groups, nationality at times becomes a matter of choice either to have it or not. Article 15(2) of the Universal Declaration of human rights (UDHR) declares, 'No one shall be deprived of his nationality *nor denied the right to change his nationality*.'(Emphasis added). Consequently, the assumption that membership in nationality is involuntary is not legally founded and it is against the right of the individual to choose and change his nationality unless it is interpreted narrowly and only to include nationality that is acquired by birth.

2.2 The Ethiopian Penal Code

Part II, Title II of the EPC deals with offences against the law of nations. The crime of genocide is considered as one of these offences, and Article 281 of the

[54] UNGAR (n 39 above)
[55] See Article 33 0f the Ethiopian Constitution (n 52 above)
[56] Yrbk. ILC (1952), ii-8. The rubric employed is 'Conferment of nationality by operation of law', as cited in I. Brownlie *Principle of Public International Law* (1999) 394

Code defines it, though not in verbatim form, similarly to the Genocide convention. This provision reads as follows:[57]

> Art. 281. ---Genocide; Crimes against Humanity
> Whosoever, with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, organizes, orders or engages in, be it in time of war or in time of peace:
>
> > (a) killings, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever; or
> > (b) measures to prevent the propagation or continued survival of its members or their progeny; or
> > (c) the compulsory movement or dispersion of peoples or children, or their placing under living conditions calculated to result in their death or disappearance,
>
> is punishable with rigorous imprisonment from five years to life, or, in cases of exceptional gravity, with death.

Apparently it appears that Article 281 of the EPC treats both genocide and crimes against humanity as single offence.[58]Nevertheless, when we look at the elements constituting the offence, they are more or less similar to the definition given by the UN Genocide Convention.[59]As result of the naming of the offence as 'Genocide; Crimes against Humanity', two kinds of interpretations come out. One is to apply this provision only to crimes of genocide and the other is to apply the provision both to genocide and crimes against humanity.

Dadimos is contending the first interpretation on the ground that the scope of protection is extended also to include political group, which makes it incompatible with the UN Genocide Convention.[60] In other words, according to his argument, what is considered as genocidal act under Article 281 of the EPC is not considered as such by other international instruments dealing with genocide, and

[57] EPC (n 9 above)
[58] Haile (n 14 above) 40
[59] As above
[60] As above

hence it makes it impossible to be regarded as international crime. Consequently, Mehari also argues, '[E]thiopia doesn't seem to owe the duty to prosecute the present accused [those who have been charged of committing genocide] on the basis of the Genocide Convention.'[61]

In the case between Special Prosecutor and Mengistu Hailemariam et al, the Federal High Court of Ethiopia ruled that

> Article 281 of the Ethiopian Penal Code, which was enacted to give a wider human rights protection, should not be viewed as if it is in contradiction with the Genocide Convention. As long as Ethiopia does not enact a law that minimizes the protection of rights afforded by the Convention, the mere fact that Ethiopia is a party to the convention does not prohibit the government from enacting a law, which provides a wider range of protection than the Convention. Usually international instruments provide only minimum standards and it is the duty of the Ethiopian Government to enact laws that assist their implementation.[62]

Consequently, the court rejected the objections of the accused and further affirmed that the crime of genocide as indicated under the EPC to be considered as international crime.[63]

The other unique feature of Article 281 of the EPC, unlike Article II (e) of the Genocide Convention, is its inclusion of 'peoples' under the act of forcible transfer. Under Article II (e) of the Genocide Convention only children are protected from forcible transfer while under Article 281(c) of the EPC both children and peoples are included in the protection. However it should also be noted that in the drafting process of the genocide Convention there was a proposal for the inclusion of forcible transfer of peoples, although the sixth Committee rejected it.[64]

In the opinion of this writer, the inclusion of the two social groups ('political' and 'peoples') unlike the Genocide Convention do not render the crime of genocide under the EPC not to be considered as international crime. As ruled by the

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[61] Mehari (n 19 above) 21
[62] Special Prosecutor v. Mengistu Hailemariam et al, Ruling on preliminary objections, 10 October 1996, File No. 1/87, Federal high court of Ethiopia
[63] As above
[64] See UN GAOR 6th Committee, 3rd session, 82nd meetings, 184_186 as quoted by Haile (n 14 above) 41

Federal high Court above, international instruments may set out rules of minimum standards below which state parties may not be allowed to go. Therefore, state parties to a given treaty are at liberty to extend the obligation they assume and enact a law that provides a wider protection of human rights. As discussed above it was not logical for the UN Genocide Convention and the other mentioned international instruments to exclude political group that have the same character with religious group.

In this regard it is worth mentioning the argument held by the ICTR in the Akayesu case. The Tribunal, before arriving at a conclusion as to the scope of protection of the Statute, raised the following basic questions;[65]

> whether the groups protected by the Genocide Convention, echoed in Article 2 of the Statute, should be limited to only the four groups expressly mentioned and whether they should not also include any group which is stable and permanent like the said four groups….

After raising these questions the Tribunal concluded;[66]

> [I]n the opinion of the Chamber, it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux préparatories*, was patently to ensure the protection of any stable and permanent group.

This ruling clearly proves the possibility of expanding the scope of protection provided by the Statute (which is a proto type replica of the Genocide Convention) to any other groups as long as that group qualifies having the features of the protected groups. Many scholars have written on the reasons behind the exclusion of political groups, which also have the same character as religious group, from the scope of protection of the Genocide Convention. For these writers, the rationales for the exclusion of political groups were more of political than legal.[67] It was the East-West or the Cold War politics that made it impossible for political groups to be included as the representative of the Soviet Union in UN firmly objected the inclusion.

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[65] Akayesu case (n 40 above) Para.516
[66] As above
[67] S. Bassiouni 'The Normative frame work of International Humanitarian Law; Overlaps, Groups and ambiguities' (1998) 8 *Transnational Law and Contemporary Problems* 47

2.3 Genocide and/or crimes against humanity?

As we have seen above one of the contentious features of Article 281 of the EPC is the naming of the offence, which reads 'Genocide; Crimes against Humanity'. Consequently, some writers argue that the provision was intended to govern both genocide and crimes against humanity, which are, of course, distinct offences.[68]Under this section, therefore, an attempt will be made to address this problem.

Genocide and crimes against humanity have both common and distinct features. There are so many authors who are equating genocide as a subset or one type of crimes against humanity.[69] In The case between the Kayishema case the Trial chamber of ICTR held that

> [t]he definition of the crime of genocide was based upon that of crimes against humanity, that is, a combination of "extermination and persecutions on political, racial or religious grounds" and it was intended to cover *"the intentional destruction of groups in whole or in substantial part"* (emphasis added). The crime of genocide is a type of crime against humanity.[70]

As Peter also argued, '[I]nternational law recognizes genocide as one of the crimes against humanity'[71]. Therefore, it is a common practice to view the act of genocide as an act of crimes against humanity.

Nevertheless, the two concepts have their own application under international law. Genocide is restricted to the destruction of specific and defined group while crimes against humanity is targeted against any civilians regardless of the group they belong.[72] Genocide is said to be committed only when there is a specific intent to destroy in whole or in part a narrowly defined group.[73] In the Akayesu case the Court held that ' crimes against humanity differs from genocide in that for the commission of genocide special intent is required while this special intent

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[68] Haile (n 14 above) 43
[69] A. Byrnes 'Torture and Other offences involving the violence of the physical or mental integrity of the Human Person' in G. K. McDonald (n 30 above) 226. See also R. Kolb (n 41 above) 285.
[70] Prosecutor v. Kayishema ICTR Judgment Case No. ICTR-95-1-T, Para 89
[71] C .M. Peter *Human Rights in Africa; A Comparative study of the African Human and Peoples' Rights Charter and the New Tanzanian Bill of rights* (1990) 60
[72] Kayishema case (n 70 above)
[73] M .C. Bassiouni *Crimes against Humanity in International Criminal Law* (1999) 569

is not required for crimes against humanity'[74]. As defined in Article 6(c) of the London Charter, crimes against humanity is committed in connection with war unlike the definition of genocide, which penalises the offence weather it is committed in times of war or peace.[75]However, it should be noted that in the ICTR and Rome Statute this situation have been changed and hence if crimes against humanity are committed either in times of war or in times of peace, they are punishable.[76]

In conclusion, crimes against humanity and genocide are international offences that have some common as well as distinct features of their own. The word 'genocide' some times is defined or expressed as crimes against humanity. Having these in mind we will asses the nature of Article 281 of the EPC. As discussed elsewhere all the elements listed in this provision are the constituting elements of the crime of genocide as stipulated under Article II of the Genocide Convention (of course with the exception of the inclusion of political groups). It requires special intent, the scope of protection is limited to defined groups, and the material acts (modes of committing the offence) are also restricted in the same manner as the Genocide Convention.

As stated above the definition of crimes against humanity transcends the definition of genocide in terms of the scope of protection and the material acts constituting the crime. It protects any civilian population and includes such acts like murder, extermination, enslavement, deportation and other inhuman acts.[77]Therefore, in the opinion of this writer the attempt to interpret Article 281 of the EPC as also including crimes against humanity will entail the following legal problems.

1. It will narrow down the definition of crimes against humanity only to include groups and acts listed in the provision;
2. The attempt to include groups and acts other than mentioned in the provision by way of reference to other international instruments is not in line with the principle of legality. The attempt will go beyond interpreting

[74] Akayesu (n 40 above) para.568
[75] Steiner &Alston (n 40 above) 1028 and see also Article 5 of the Statutes of ICTY
[76] Articles 3 and 7 of the Statutes of ICTR and ICC, respectively
[77] M. C. Bassiouni (n. 73 above) 203

existing elements. But it leads to an act of adding other elements and thereby creating an offence not intended by the legislature.

Article 281 of the EPC should be interpreted narrowly and apply only to the crime of genocide. We should not be misled by the naming of the provision so as to include crimes against humanity. If the intention of the legislature were also to penalize crimes against humanity, the wordings of the title would appear as 'Genocide and Crimes against Humanity'. The separation of the two words with out any conjunction but by semicolon is rather an indication that the offence is one, which is genocide, and the phrase 'Crimes against Humanity' was used as explanatory to the crime of genocide.

2.4 Criminal Responsibility

2.4.1 Command (Superior) responsibility

This principle has its basis both in customary and conventional international law.[78]Articles 7 and 6 of the Statutes of ICTY and ICTR respectively, stipulate two kinds of criminal responsibilities; direct and indirect responsibilities. Direct individual criminal responsibility flows from the following acts; planning, instigating, ordering, committing or aiding and abetting for the commission of genocide.[79] On the other hand, indirect individual criminal responsibility arises from command responsibility whereby superiors criminally held liable for acts committed or omitted by their subordinates.[80]Under this section we will discus the second type of individual criminal responsibility for it is one of the major point of differences between international and national courts.

2.4.1.1 Statutes of ICTY and ICTR

Command criminal responsibility appears to be an exception to the general criminal law that a person is responsible only for his criminal acts or omissions.[81] In criminal law, there is no vicarious or imputed criminal responsibility like civil case. According to the principle of command criminal responsibility, however,

[78] R. Kolb (n.41 above) 309
[79] Articles 7(1) and 6(1) of the Statutes of ICTY and ICTR, respectively.
[80] As above, Articles 7(3) and 6(3)
[81] A. Obote-Odora 'The Statute of the International Criminal Tribunal for Rwanda: Article 6 Responsibilities' (2002) *Kluwer Law international* 344

superior who knows or had reason to know that the subordinate was about to commit an offence or had done so, and fails to prevent, suppress, or punish the subordinate will criminally be held liable.[82]

For the superior to be held liable the following elements must be satisfied[83]. First, there should be an effective superior and subordinate relationship, which may be *de jure* or *de facto.* Secondly, the superior must have known or had reason to know about the commission of the crimes by the subordinate. Thirdly, the superior must have failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[84]

2.4.1.2 The Ethiopian Penal Code

Neither the special nor the general part of the EPC expressly deals with situation of command or superior responsibility. The Code governs only those acts mentioned above as direct individual criminal responsibilities under the Statutes of ICTY and ICTR. As stipulated under Article 69 of the Code, superiors will criminally be held liable only for acts committed or omitted with their express order and so far as the subordinate's act did not exceed the order given.

According to the doctrine of command responsibility under international law, failure of the superior to submit the matter to the concerned authorities or punish the perpetrator who is under his effective supervision is a dereliction of duty, which entails criminal responsibility. Article 11 of the Criminal Procedure Code of Ethiopia deals with accusation in general and provides for rights and duties, depending on the type of the offence, to give information about the commission of certain offences. Individuals are not all the time under criminal responsibilities to report to the concerned authorities the commission of any offence.[85]

However, Article 11(2) of the Criminal Procedure Code imposes a duty to report only for the commission of offences provided in Articles 267, 344 and 438 of the

[82] Articles 7(3) and 6(3) of the Statutes of ICTY and ICTR, respectively.
[83] As above
[84] Prosecutor v. Aleksovski, Case No. IT-95-14/1-AR73, Delalic et al Case No. IT-96-21-A, Kayishema Case (n70 above), Akayesu Case (40 above), Prosecutor V. Kambanda ICTR-97-23-T, Ruggiu ICTR-97-32-T
[85] Article 11(2) of Criminal Procedure Code of Ethiopia, Proclamation No.185 of 1961

Penal Code. Apart from these offences the Procedure does not make reference to the crime of genocide or other offences considered as offences against the law of nation. Even in these cases, the responsibility of the accused is not imputed to the main offence as indicated in Articles 7(3) and 6(3) of the Statutes of ICTY and ICTR. The failure of the individual to report these offences is taken as a separate offence and entails a lesser penalty.

Consequently, if one, regardless of his official capacity or is under a duty by law or by rules of his profession, fails with out good cause to report the perpetrator of, or of the commission of a crime of genocide to the concerned authority, will be punished with fine not exceeding five hundred Ethiopian dollars or with simple imprisonment not exceeding three months.[86] Since the crime of genocide is punishable with rigorous imprisonment from 5 years up to life, or in grave circumstances with death,[87]failure to report it will entail individual criminal responsibility.

To sum up though the doctrine of command responsibility is recognized both by the Statutes of ICTY and ICTR, the EPC failed to incorporate this essential principle. Under the Ethiopian criminal law, therefore, it is impossible to held criminally liable superiors unless there is a proof of direct participation in the commission of the offence, either as a principal or co-offender. Consequently, in the Ethiopian genocide trial it is becoming common to see when superiors are let free while their subordinates who are supposed to execute the policy or order of them are sentenced.

[86] See Article 438(1) of the EPC
[87] As above Article 281

CHAPTER THREE
THE RIGHT TO FAIR TRIAL

3.1 Introduction

The principles of 'due process' and 'rule of law' are elemental to the protection of human rights.[88] For the full realization and protection of human rights citizen should have recourse to courts, which are independent, impartial and competent in the administration of their judicial functions.[89] Consequently, the right to a fair trial can be said the central basis for the proper implementation of all other rights. This right, however, depends up on the proper administration of the justice system.[90]

Different international and national laws guarantee the right to fair trial.[91] The concept of fair trial, as enshrined in these instruments, encompasses the following major components.

1 Equality of arms
2 Right to legal aid
3 Right to be presented in person at the trial
4 Public character of the hearing
5 Trial within a reasonable time
6 Independent, competent and impartial tribunal established by law
7 Presumption of innocence and protection against self-incrimination
8 Prompt and adequate information on the accusation
9 Adequate time and facilities for the preparation of the defense
10 Free assistance of an interpreter
11 Right of appeal
12 Right to compensation
13 *Ne bis in idem*

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[88] R. Clayton & H. Tomlinson *The Law of Human Rights* (vol. I) (2000) 550
[89] As bove
[90] R. B. Lillich 'Civil Rights' in T. Meron (ed)(1992) *Human Rights in International Law; Legal and policy issues* 140
[91] Articles 10,14, 7, 6 and 20 of Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, African Charter on Human and Peoples' Rights, European Convention on Human Rights and The Ethiopian Constitution (n52 above), respectively.

The discussion of each elements constituting fair trial would undoubtedly require a book-length study. Therefore, under this chapter we are going to discuss only some of the elements, which are very crucial and have bearings on the justice system in the prosecution of genocide at the national and international level. Therefore, the right to legal assistance, speedy trial, causes of delays in genocide prosecution and access to evidence will be the main focuses. In connection to this we will also discuss sentencing procedures adopted by the two courts.

3.2 The right to legal assistance

This right is one of the basic elements constituting the right to fair trial, which presupposes, *inter alia*, ensuring equal opportunity for contending parties both in accusation and defence.[92] The core reason behind the concept of providing legal assistance for indigent accused is to ensure that the accused is in an equal position to his or her counter party, the prosecutor.[93] To put it differently, should it be necessary to ensure equality of arms in the litigation process, there should be a system of legal assistance for indigent accused, which is well equipped with professionals and material resources as the prosecutor office.

As Ackerman comments,

> [A] decision in a criminal court can have no legitimacy, if there is even the suggestion that it came about due to the weakness of the judiciary, the prosecutor or the defence. To be accepted all three components must be competent.[94]

The availability and quality of legal assistance is equally important as the judiciary and the prosecutor for proper administration of criminal justice. Due to this reason, the Statutes of both ICTY and ICTR provide for this fundamental right and the accused is entitled not only to such prominent lawyers but also to have lawyer of his or her own choice. Their counsels are paid the same gross income as their counter part in the prosecution.[95]

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[92] M. Minow(n. 6 above) 25
[93] J. E. Ackerman 'Assignment of defence Counsel at the ICTY' in R. May & Wierda (n 16 above) 169
[94] As above
[95] R. Dixon et al (n. 31 above) Para.20-92

The right to legal assistance is not limited only to having counsel. The indigent accused should be given equal opportunity to present and examine evidences as the prosecutor. The principle of equality of arms entitles the accused to find and examine witness on their behalf under the same conditions as prosecution office.'[96]To this end, the tribunals cover any expense incurred for the preparation of defence.

As the ICTR Detainees Status of 13 August 2003 indicates a total of 66 suspects have been detained and, out of this number, 31 awaiting trial, 19 pending trial, 4 pending appeal, 8 serving sentence, 3 released and 1 died.[97] The Status chart also provides the names of 55 detainees' defence counsels whose total number is 87.[98]Out of the 55 detainees, 33 have been represented by two defence counsels. To put it differently, 50% of the total accused have been represented by two counsels before the trial.

The professional quality of defence counsels is an essential factor equally or more than their number. Assigned lawyers should have sufficient knowledge and experience in the area so that they can defend the accused properly from the challenge of the prosecutor.[99]Lack of qualification of the defence would disturb the balance of the judicial system and its credibility, and severely affect the rights of the accused to fair trial.[100] Consequently, Article 13 of the ICTR Directive on the Assignment of Defence Counsel provides, inter alia, for any person to be assigned as defence counsel 'he should be admitted to practice law in a State, or is professor of law at a university or similar academic institutions and has at least 10 years' relevant experience'.

Article 20(5) of the new Ethiopian Constitution provides for the right to legal assistance for indigent accused. At the federal level, pursuant to Proclamation No.25/1996 an office of defence counsel have been established on a

[96] As above
[97] 'ICTR Detainees Status on 20 August 2003' www.ictr.org/default.htm. (Accessed 20 August 2003)
[98] As above
[99] J. E. Ackerman (n.93 above)
[100] R. Dixon (n. 31 above) Para. 20-36

departmental level under the Federal Supreme Court. [101]The office is composed of 7 counsels, only one with law degree, and the rest with no qualification except basic legal knowledge and practice.[102] Most of them are pensioned from other institution for their age is beyond 55, and hence the court hired them on temporary basis with a salary of less than 50 USD per month.[103]

The office provides service only for accused charged with criminal offence entailing penalty greater than 15 years imprisonments. In the year 2003 the office has 403 cases including the genocide cases. On average, each counsel is assigned for more than 150 accused in the genocide trial. Here it should be noted that the court did not follow the same approach for the trial of the top officials who were members of the Ethiopian Provisional Military Council.[104] In this case for thirty-six accused, the court assigned 31 private lawyers, the majority of whom are prominent lawyers in the country.[105]

The genocide trial is strange in its nature to the Ethiopian judicial system. Though the act is condemned by the Penal Code, there was no single case tried before this time. The complexity of the concept coupled with the number of accused and evidence presented in a single file were annoyance to the system. To prove this assertion it is worth mentioning the cases of Special Prosecutor and Kassayie Aragaw et al in which more than 200 defendants were charged together, and the case of Debela Dinsa et al which consists 60 defendants, 225 counts and a list of 1471 witnesses.[106]

It is under this situation that the need for qualified and competent defence counsel is becoming so vital in the Ethiopian genocide trial where defendants are charged with serious offences that entails capital punishment. The writer, as a judge of the Federal High Court of Ethiopia and trying the majority of these

[101] Article16(2)(j) of Proclamation for the Establishment of Federal Courts, Proclamation No.25/1996-
[102] Federal Supreme Court of Ethiopia Job Structure, Personnel Department
[103] As above
[104]Their total number is 75and, out of this, 28 are being tried in absentia including the former President. See Mengistu Hailemariam et al case (n.62 above)
[105] As above
[106] Special Prosecutor V. Kasayie Aragaw et al, File No.923/89 and Special Prosecutor V. Debela Dinsa et al, File No. 912/89, Ethiopia Federal High Court

cases, witnesses that it is hardly possible to say that the indigent defendants charged with genocide crime, except the top officials of course, are provided with proper legal assistance. The defence counsel office both in terms of quality and quantity is not in a position to carry out this sombre responsibility.

As stated above, one defence counsel is assigned for a large number of accused and this results in him not knowing that some defendants are assigned to him. To put it differently, let alone to understand each case and prepare for the proceeding, the counsel may not even know properly the defendants themselves. There is no any possibility for the counsel to conduct defence investigation and collect relevant evidence to the case. The counsel comes to know defence witnesses only on the date of their hearing, equally with the court and the prosecutor. As a result, the counsel does not know what the defence witness is going to testify. There are instances where by the defence witness turns out to be prosecution witness and testify against the accused.

The inefficiency of the defence counsels is expressed even to the extent of failing to know how to conduct cross-examination. It is common to see questions raised that rather support the case of the prosecution rather than in the defence of the accused. As a result, the accused have on several occasions sought permission of the court to conduct the examination by themselves and have even by withdrawn the counsels.

3.3 The right to obtain and examine evidence

The principle of equality of arms presupposes, among others, the right of the accused to find and examine witnesses on his behalf under the same condition as prosecution witnesses. The Statutes of both ICTY and ICTR have guaranteed this right, and hence the tribunals even cover costs necessary for the attendance of the defendant's evidence.[107] Like wise, the 1995 Ethiopian Constitution has guaranteed this right under Article 20(4), which reads partly

> '[A]ccused persons have the right to ... have evidence produced in their own defence, and to obtain the attendance of and examination of witnesses on their behalf before the court'.

[107] Articles 20 and 21(4)(d) ICTR and ICTY Statutes, respectively

Nevertheless, the reality is far from what has been stated in the Constitution. Regretfully, the government, through the court's budget, is paying only expenses of prosecution witnesses.[108]The court does not pay any thing for the indigent accused to find and examine his or her evidence even if a government counsel represents him or her.[109]As a result of the stated problem, it is common to hear from accused pleading that though he/she has defence evidence, but due to financial incapacity to bring, prefers to be convicted only by the prosecution evidence.

3.4 The right to speedy trial

This right is one of the cardinal elements of the right to fair trial. Generally, it relates to the time by which a trial should commence, end and judgment be rendered.[110]At all these stages the accused is entitled to be tried with out undue delay. In the administration of criminal proceedings, this right, as argued by Lahiouel, serves three essential interests.[111]

1. Protects the accused from any unduly long period remaining in a state of uncertainty about his fate or serious disabilities normally associated with criminal proceedings.
2. Safeguards the right of the accused to mount an effective defence; the passage of time may result in loss of exculpatory evidence.
3. Enhances public confidence in the criminal justice system.

It should be noted that it is impossible to have a universally accepted time set to measure the delay of a given case. It is determined on a case-by-case basis taking two factors into account. The length of the proceedings, and the cause

[108] See the Budget Schedules of the Federal Supreme and High Courts of Ethiopia. Note that the SPO has also its own budget for its witnesses.
[109] Special Prosecutor v Begashaw Atalay et al, File No. 924/89 Federal High Court of Ethiopia.
[110] A. Zayas 'The Examination of Individual Complaints by the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights' in G. Alfredsson et al (eds)(2001) *International Human Rights Monitoring Mechanisms* 108
[111] H. Lahiouel 'The Right of the Accused to an Expeditious Trial' in R. May & Wiedra (n 16 above) 198

and justification of the delay must be assessed together.[112] Therefore, what is essential for the determination of undue delay is not only the length of the time but also the justification given for that length of time. The delay may be considered undue when there is no legal justification for its causes. With this general background we will proceed to see some of the basic causes attributable for delays in genocide prosecution and the legality of these causes.

In its nine years activity, the ICTR has so far concluded nine cases, out of which three pleaded guilty,[113] and one released in acquittal.[114]Four cases pending appeal[115]while 19 are on trial and 31 are waiting trial. Half of the detainees awaiting trial have been arrested since 1998 while the rest are from 2001and following. Out of 19 detainees who are on trial, two detainees score the maximum time (from 1995), which is almost 9 years,[116]5 detainees since 1996, 7 detainees since 1997, 3 detainees since1998 and two detainees since 1999 and 2001are still on trial stage.

Under the Ethiopian genocide trial, the majority of the defendants have been detained since 1991,[117]and the first charge was brought in 1994 against 74 former members of the Provisional Military Administrative Council (*Derg*).[118] The majority of the rest charges have been brought in the year 1997. The first genocide case to be decided in 1999 was the case of Dr. Geremew Debele.[119]

3.5 Causes of delays in genocide prosecution

So far we have seen how the prosecution of genocide cases are time taking and next will be the causes for the delays. Several causes may be attributed for delays in criminal proceedings in general and genocide in particular. Generally, three factors have been identified; the complexity of the case, the conduct of the

[112] As above 199
[113] Kambanda Case (n 84 above), Prosecutor *v.* Ruggiu ICTR-97-32-T and Serushago ICTR-98-39-T
[114] Prosecutor V. Bagilishema ICTR-95-1-T
[115] Prosecutor V. Ntakirutimana, Elizaphan ICTR-96-10-I and ICTR-96-17-I, Ntakirutimana, Gérard ICTR-96-10-T and ICTR-96-17-T, Semanza ICTR-97-20-T and Niyitegeka, ICTR-96-14-I. The first three cases took seven years and the last one, four years from date of arrest to the final conviction.
[116] Prosecuto *v.* Ndayambaje ICTR-96-8-I and Kanyabashi ICTR-96-15-I
[117] N. Roht-Arriza 'Case Studies: Africa and Asia, Overview' in N. Roht-Arriaza(ed)(1995) *Impunity and Human Rights in International Law and Practice* 224
[118] Mengistu Hailemariam et al case (n.62 above)
[119] Special Prosecutor *v*. Dr. Geremew Debele, Fedreral high Court of Ethiopia File No. 952/89.

accused and the conduct of the relevant authorities.[120] However, as the scope of this paper is limited in space to address all these causes, we will restrict the discussion only to some of the basic factors that are also unique for genocide prosecution.

3.5.1 Joinder of cases and accused

Rule 48 of the RPE of ICTR reads ' person accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried'. Article 48 of the same provides for joinder of crimes, and states ' two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction and the said crimes were committed by the same accused'. Similarly, Arts 116 and 117 of the Ethiopian Criminal Procedure Code provide for joinder of charges and accused.

This principle is essential in criminal proceedings for the following reasons;[121]

1. It saves time and costs
2. Assists to accord the same verdict and treatment for persons accused of crimes committed in the same transaction
3. Enables for a more and consistent and detailed presentation of evidence and
4. Saves witnesses and victims from making several journeys and repeating their testimony, which have both physical and mental impact.

Nevertheless, these interests should be weighed against the interests of the accused. According to Rule 82 of the RPE of ICTR, if there is conflict of interests that may cause serious prejudice to the accused or to the interests of justice, the court may order separate trial. For instance, if joinder of accused would cause undue delay to the trials of others, the court should not permit joinder and if any it should order for separate trial.

In the ICTR current proceeding, out of the 19 detainees who are on trial, 16 are joinders being divided into four groups; "Butare" group 6 accused, media leaders

[120] Huber *v.* Austria, Report 2D& R11, 8 Feb 1973 as cited in R. May (n 16 above) 202
[121] Mengistu Hailemariam case (n62 above)

3 accused, “Military I” 4 accused and 3 accused who are military and government administrators.[122] The majority of these accused have been detained since the years 1996 and 1997and, 2 accused since 1995 and other 2 accused since 1998. As the statistic indicates, though these files are the oldest files in the ICTR, their trials are still pending even after 8 years. As to how joinder of accused is problematic and causes delays in the ICTR trial, have been appreciated by the Tribunal itself in its 2000 annual report to the UN Security Council.[123] This situation begs the question that whether ICTR will accomplish the remaining cases with in the time limit set for it, which is 2008[124], while still holding 50 detainees (almost 76% of the total detainees).

In the case of Ethiopia, the Special Prosecutor has brought cases joining several accused and counts together. In some files more than 200 accused charged with more than 200 counts.[125]This coupled with the number of evidence called by the prosecutor, severely have challenged the right to expeditious trial of some of the accused who have been charged jointly with those accused who have large number of counts. To mention one among several cases, in the case between the Special Prosecutor and Debela Dinsa et al, there were 60 accused, 225 counts and a list of 1471 witnesses.[126] When we look at the distribution of the counts to each accused the difference between the maximum and the minimum counts was one count to 195 counts. To put it differently, there was one accused charged with only one count while another accused in the same file was charged with 195 counts.

In the stated file, those accused who have been charged with a lesser counts were making an objection for separate trial alleging that their right to expeditious trial would be affected if they are tried jointly with other accused who have large number of counts. Initially, the court rejected the objection but with out giving any reason. However, after two years trial, as a result of the persistence objection of

[122] ICTR Detainees Status (n 101 above)
[123] Annexes II and III of 5th Annual Report of ICTR to United Nations General Assembly Security Council fifty-fifth Session, 2 October 2000, A/55/435-S/2000/927
[124] G. W. Mugwanya (n.7 above) 9
[125] Special Prosecutor v. Gesgis Gebremeskel et al, File No.939/89 and Kasayie Aragaw case (n 106 above)
[126] Debela Dinsa case (n 106 above)

the accused, the court looked to the matter again and ordered a separate trial after realizing that the joinder was to the detriment of the right of some of the accused charged with lesser counts. [127]After separation, the court was able to give decision with in one month for 10 accused charged with less than 5 counts while the rest are still pending for hearing of witnesses.

The other problem of joinder of cases is also associated with hearing of witnesses. It is impossible to hear a witness if one of the accused for various reasons fail to appear on the date of hearing. Because that accused has the right to be tried in his presence and to cross-examine witnesses called on his case. This situation will lead to adjournment of the case and thereby causing delays for the rest of the accused. The proceeding of joinder become more detrimental when there is a defendant whose case is being tried in his absence.[128] In this condition the detained accused are obliged to wait until the other accused appear or, if the case continued in absentia, until all the evidences are concluded including those evidence adduced only against the absent accused.

3.5.2 Number and kind of evidence

Proof of international crimes is not as simple as other ordinary offence. Usually, international crimes are the culmination of a number of years conflict and may involve many locations and incidents.[129] In an attempt to prove or rebut the existence or none existence of all these multifarious facts litigants may present different kinds of evidence and in a larger quantity, which makes the trials long and complex. For instance, in the case between Special Prosecutor and Mengistu Hailemariam et al, the prosecutor presented 825 witnesses, which took 6 years for the court to hear despite the fact that the court allocated every Tuesday only for this file.[130]

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[127]As above. Out of the listed 1471 witnesses at the time when the court gave this ruling for a separate trial, it was only 60 witnesses that had been heard and according to the calculation of the court, to hear the rest witnesses a minimum of 15 years were expected.

[128] See Article 161(2) (a) of the Criminal Procedure Code of Ethiopia (n 89 above), for conditions of trial in absentia.

[129] R. May & M. Wierda (n. 16 above) 249

[130] In this file the prosecutor listed to call more than 2000 witnesses. See also the hearing of Teshome Gebremariam, the third witness of the prosecutor, which took three days.

In administering issues of evidence, rules of evidence play great role either by facilitating or hindering the proceeding. These rules are expected to be as flexible as possible so as to ensure expeditious and fair trial. As argued by Mugwanya, 'rigid rules of procedure and evidence may impede rather than facilitating substantive justice'.[131] In the case between the Prosecutor and Aleksovski, the Appeal Tribunal of ICTY also commented that the purpose of rules governing evidence is ' to promote a fair and expeditious trial and the Trial Chambers must have the flexibility to achieve this goal'.[132]

Consequently, both the Statutes of ICTY and ICTR provide for liberal approach that is not hindered by technical rules found in national law systems.[133] Giving the power of adopting rules of procedure and evidence to the judges themselves will undoubtedly assist them to make this rule simple and expedite proceedings. When judges face practical problems not addressed by the rules, they will be at liberty to amend that rules with out looking for some body to do it for them.[134] More so, Rules 89 of the RPE of both ICTY and ICTR provide that ' in case not otherwise provided for, a Chamber shall apply rules of evidence which will best favor a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principle of law'. As a result, as commented by Lahiouel, judges in the ICTY

> had started to play more active role in trials by questioning counsel and witnesses, cutting off irrelevant or repetitive testimony and excluding witnesses whose testimony is cumulative or of no material assistance with respect to disputed issues. The result has been expeditious of the proceeding.[135]

As argued above, national laws are rigid and leave little or no room for the judges to play active roles in controlling evidence before trials. Usually, these rules are enacted by parliament and not by the courts unlike the two ad hoc tribunals. Ethiopia has a criminal procedure code that was enacted in 1961 after having a resolution by the Senate and Chamber of Deputies, and been approved by the

[131] G. W. Mugwanya (n.7 above) 9
[132] Aleksovski Case (n 84 above) Par. 19
[133] See R. May & M. Wierda (n. 16 above) 251, for the ICTY and G. W. Mugwanya (n.7 above) 9, for the ICTR. See also Articles 15 and 14 of the Statutes of ICTY and ICTR, respectively that provide a wider discretion for the judges of the Tribunals to adopt rules of procedure and evidence.
[134] The RPE of ICTY has been amended 30 times until 17 July 2003 while that of ICTR 10 times until 27 May 2003. http://www.un.org/icty/legaldoc/index/htm and http://www.ictr.org/legaldoc/htm
[135] H. Lahiouel (n 111 above)

Emperor.[136] However, unlike the two ad hoc International Tribunals, the Ethiopian courts do not have the power to adopt or amend the rules of procedure and evidence; this power is reserved to the legislature.

Regrettably, Ethiopia does not have evidence law, which is very essential in particular in the administration of criminal justice. Due to this lacuna, judges are obliged to look for some scattered provisions in other laws dealing with evidence, especially the Criminal Procedure Code. The law of evidence governs, inter alia, issue of admissibility and relevancy of evidence. In the absence of this law, however, it is hardly possible for the court to determine what evidence before it is admissible and relevant, and exclude those whose probative value is substantially outweighed by the need to ensure a fair trial.[137] In other words, the role of judges in controlling the kind and amount of evidence presented before them would be restrained and rather it depends upon the wishes of parties. This is one of the chronic problems that the Ethiopian criminal justice system in general, and the genocide trial in particular are facing.

In the Ethiopian genocide trial, the prosecution usually lists and presents several witnesses and exhibits in a single count. At times it seems that as long as the witness is willing to appear before the court, there is no prior selection by the prosecution as to their relevance and probative value. To prove the death of one person, the prosecution may call all of his parents, relatives, friends or any one who is interested as long as he can mention the name of the victim. This situation led the trial to become long and hamper the right of the accused to expeditious trial. As stated above, there is no clear legal provision that mandates the court to control these situations except than accepting what has been proposed by the prosecution. In other words, the Ethiopian judges, like the International Tribunals, do not have the power to cut off irrelevant or repetitive testimony and exclude witnesses whose testimony is cumulative or of no material assistance to resolve the issue at hand. Hence the result has been delays of the proceedings and lengthening of the detention of most of the accused for more than 10 years.

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[136] The Criminal Procedure Code of Ethiopia (n 85 above)
[137] G. Boas 'Admissibility of Evidence under the Rules of Procedure and Evidence of the ICTY: Development of the ' Flexibility Principle" in R. May & M. Wiedra (n 16 above) 265.

3.5.3 Other Causes of delays for the Ethiopian genocide trial

Apart from what have been discussed so far there are other factors attributed to the delays of the Ethiopian genocide trial. First there was a delay by the government to decide how to handle the matter. The government made its decision to take the matter to the legal machinery after having arrested the former government officials for more than one year.[138] When the Special Prosecutors Office was established in August 1992 some ex-officials had been jailed for 18 months with out charges.[139] This office was entrusted with the power to investigate and prosecute 'any person having committed or responsible for the commission of an offence by abusing his position in the party, the government or mass organizations under the Dergue-WPE regime'.[140] It took almost five years for the prosecution finally to come up with a charge of genocide against the majority of the defendants.[141]There are also some charges that have been brought to the court after 10 years in 2001.[142]

After the opening of the case before the court still there were some problems associated with the prosecution. The failure of the prosecutor to present evidence on time was the major problem. Though the prosecutor gathered the necessary exhibits and they are found in its control, it is common to see the prosecutor asking the court for additional adjournment to present them. Failure of prosecution witnesses to appear for various reasons is also another challenge for the delay.

Although the prosecution is mandated to carry out investigations and to arrest suspects, the court is insisting giving order for the Federal Police to hunt or provide letter of proof for accused not found by the prosecutor. Until the police do so, it will be impossible for the court to proceed the case to the next step. This procedure results in delaying the case of those accused that are appearing.

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[138] D. Haile (n 14 above) 28
[139] N. Roht-Arriza (n 117 above)
[140] Article 6 of the Proclamation for the Establishment of the Special Prosecutors Office, Proclamation No.22/1992
[141] See all the genocide files in the Federal High Court.
[142] Special prosecutor v. Legesse Asfaw et al, File No1264/93.The hearing of this case was commenced in 2001.

Translation of language is also the other factor contributing for delays of some cases instituted against accused or witnesses coming from areas where the official language of the court is different.[143] First, the court did not have its own translator and had to look for some one whenever the question arises. There were instances where the court may not be able to get such person and witnesses obliged to go back without being heard. Second, hearing of one witness through translator undoubtedly takes much more time than other witnesses. Third, the quality of the translation to relay on it to give a fair judgment may also be questionable.

In relation with the court, the major problem was lack of sufficient judges. When the prosecution brought the genocide case, the court had already been under chronic problem of backlog with other cases due to the dismissal of significant number of judges without a replace.[144] At that time the court was no more functioning except than giving adjournments, which were longer than a year. There were also instances where cases have been adjourned for lack of quorum of judges. It was only in the year 2000 after the appointment of additional judges for the High Court that it became possible to establish a special chamber for the genocide trial. Though this chamber it self was not sufficient to handle the whole genocide cases, it was, however, successful to bring tremendous change in the situation of the genocide trial either for good or bad. Because it was after the establishment of this chamber that court has started giving judgments.[145]

3.6 Sentencing

Sentencing is the other major point of difference that exists in the prosecution of genocide between international and national criminal courts. In this regard, they differ in the kind of penalties they impose, factors available to determine penalties, stipulating the limits of penalties and the like. Therefore, this section addresses these issues and their implication on the right of the accused.

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[143] Gesgis Gebremeskel et al (n 129 above), and Abera Aga et al File No. 937/89. The accused in these files are from western Shoa province where either Guragigna or Oromigna is the local language.
[144] Mehari (n 19 above) 6
[145] Before this Chamber there was only one judgment; Geremew Debele case (n 123 above)

3.6.1 Type of penalties and the issue of capital punishment

The penalty imposed both by ICTY and ICTR is restricted only to imprisonment.[146] Rules 101(a) of the RPE of the ICTY and ICTR provide that the maximum available sentence is life imprisonment. These Tribunals can not impose penalties like capital punishment, fine, forced labor, deprivation of certain rights and so on. Both the Statutes of ICTY and ICTR do not provide for death penalty for the obvious reason that the trend of the international community is towards the abolition of this punishment.[147]Therefore, accused appearing before ICTY and ICTR face at worst life imprisonment, as it is the highest penalty imposed by the Statutes. By contrast, both the Ethiopian and Rwandan Penal Codes provide for different kinds of punishments including death penalty.[148]This disparity is against the principle of equality before the law for it creates discriminatory treatment among accused of the same crime, and even among co-offenders.

In the Rwandan genocide trial, those accused appear before the ICTR will face atmost life imprisonment whatever role they may have in the commission of the genocide while their subordinates who executed their plans are condemned to death by the Rwandan national courts. It is a legal paradox to see that masterminds are being penalized a lesser penalty than their subordinates.[149] Until the year 2002, the Rwandan national courts that are entrusted to try the genocide case sentenced 682 accused to death, and out of these 23 were executed.[150]

Likewise, in the Ethiopian genocide trial until 22 September 2003, the Federal High Court has rendered capital punishment against 16 accused.[151] Unlike the Rwandan case, in Ethiopia so far there has been no execution, and most of the sentences were given against those accused whose cases were tried in

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[146] Articles 24 and 23 of ICTY and ICTR Statutes, respectively.
[147] Second Optional Protocol to ICCPR, adopted and proclaimed by the UN General Assembly Resolution 44/128 of 15 December 1989
[148] For different kinds of punishment under the EPC (n 9 above) see Articles 88 (fine), 102 (compulsory labour), 105 and 107 (simple and rigorous imprisonment), and 116 capital punishments. See also Articles 14 to 18 of the Rwandan Organic Law, No. 08/96 of 30 August 1996, which provide for capital punishment, imprisonment and secondary punishments.
[149] H. Morris (n11 above) 357
[150] Amnesty International *Gacaca: A question of justice* (2002), AI Index: AFR47/007/2002 at 17
[151]President Office of Federal High Court of Ethiopia

absentia. Among individuals appearing before the Court, only 5 were sentenced to death and their cases are pending appeal.[152]Therefore, as compare to Rwanda, the number of accused sentenced to death in the Federal High Court of Ethiopia is much lower.

In addition to death penalty, the Statutes of both ICTY and ICTR do not provide for secondary punishments. By contrast, both the Organic Law of Rwanda and the EPC entail this penalty in addition to the main one. Article 123(2) of the EPC reads, 'a sentence of death or rigorous imprisonment carries with it the deprivation of all civil rights'. This provision further states that in the case of death penalty and life imprisonment the deprivation shall be permanent, subject to the prerogative of mercy. Similarly, Article 17 of the Organic Law of Rwanda provides for the withdrawal of civil rights of those person found guilty of genocide. According to this provision, for persons whose acts place them under category 1, the deprivation of their civil rights would be for life.

3.6.2 Sentence calculation

The Statutes of both ICTY and ICTR do not stipulate any limit as to the amount of the imprisonment that judges of the Tribunals shall pass. As stated above, according to Rule 101(a) of the RPE of the ICTY and ICTR the maximum imprisonment the Tribunals can impose is given as life imprisonment. However, neither the Statutes nor RPE of both Tribunals do provide for the minimum period of imprisonment below which the Tribunals may not go.

Both the Ethiopian and the Rwandan Penal Codes, by contrast, specify the minimum and maximum limit of imprisonment that the courts can impose. Under Article 281 of the EPC genocide is punishable with a minimum of five years rigorous imprisonment, which could be extended up to life imprisonment, and only in cases of exceptional gravity the court may impose death penalty. Note that under the EPC if the imprisonment is for a defined duration, the maximum time is 25 years.[153]

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[152] Special Prosecutor v. Zenebe Ayele et al File No.641/89 and Tesfayie Woldesilassie et al File No.206/93

[153] Article 107(1) of the EPC (n 9 above)

Similarly, Article 14 of the Rwandan Organic Law specifies the following scales; persons whose acts place them in category 1 are liable to death penalty, category 2 life imprisonment but if plea guilty, from 7 to 11 years, and person whose acts place them in category 3 if plea guilty, one-third of the penalty the court would normally imposed.[154]

3.6.3 Factors of sentencing

According to Articles 24(1) and 23(1) of the Statutes of ICTY and ICTR, respectively, the Tribunals shall have recourse to the general practices regarding sentences in the courts of the former Yugoslavia and Rwanda in determining terms of imprisonment. In addition to that the Tribunals are require to take into account the gravity of the offence and the individual circumstances of the accused. Nevertheless, as also argued by Combs, the Tribunals' Statutes and Rules do not set down the specific aggravating circumstances and provide for only one mitigating circumstance i.e. 'substantial cooperation with the prosecutor'. [155] Further, the Statutes do not stipulate 'which individual circumstances might be relevant to sentencing or how they might be relevant'.[156]

Although the statutes of both Tribunals instruct the judges to make recourse to the sentencing practice of national courts, the practice of the Tribunals, however, prove the tendency of not to be bound by such practices. Rather the Tribunals prefer to rely on their unfettered discretion. In Prosecutor *v.* Delalic et al., the Appeals Chamber of ICTY held that:

> whilst a trial chamber should have recourse to and should take into account the general practice regarding prison sentences in the courts of the former Yugoslavia, Trial Chambers were not obliged to conform to that practice.[157]

Similarly, in the case between Prosecutor and Kamabanda, the ICTR also held that the recourse to the practice of sentence to national court is to use them as 'guidance, but is not binding' and hence the Tribunal shall

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[154] See Article 2 of the Organic Law of Rwanda (n 148 above) for the different categories of offenders together with their respective penalties.
[155] A. Combs (n 10 above) 79
[156] As above
[157] Delalic et al. Case (n 84 above), Judgment, Par. 813

> lean more on its unfettered discretion each time that it has to pass sentence on persons found guilty of crimes falling with in its jurisdiction, taking into account the circumstances of the case and the standing of the accused person.[158]

From these practices one may infer that the judges of the Tribunals may not appreciate the sentence practice of the national courts in determining sentence, and rather they may rely on other factors, which they deem them relevant. As result, they may impose sentence indicated otherwise, or going below or above the limits prescribed in the national laws. On the other hand, national laws usually provide for sentence guidelines that their courts have to take into account in determining sentences. The EPC provides for both factors that may aggravate or extenuate sentences.[159]

3.6.4 Pardon or commutation of sentences

Rules 123 and 124 of the RPE of ICTY and ICTR, respectively state that:

> if, according to the law of the State of imprisonment, a convicted person is eligible for pardon or commutation of sentence, the State shall, in accordance with Article 28 of the Statute, notify the Tribunal of such eligibility.

After receiving the notification, the President of the Tribunal in consultation with the permanent judges determine the appropriateness of the question taking into account[160]

> the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner's demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the prosecutor.

At this juncture we may raise the following questions in relation to the above rules. First what would be the case if the law of the State of imprisonment does not provided for pardon or commutation or that State fails to notify the Tribunals? Second, what procedural safeguards are available for the convicted person to exercise these rights? After what specific minimum time that the convicted

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[158] Kambanda Case (n 84 above) Judgment, Par. 23-25

[159] See Articles 79, 81 and 86 of the EPC (n 9 above), for the specific factors serving as mitigating and extenuating sentences.

[160] Rules124, 125 and 126 of RPE of ICTY and ICTR, respectively. Unlike Rule 124 of the ICTY, Rule 125 of ICTR RPE requires the President of the Tribunal to make a notification to the Rwandan Government before determining pardon or commutation.

person would be entitled to claim this right? All these questions are not specifically addressed in the stated Rules of ICTY and ICTR.

Contrary to the Tribunals' Rules, crime of genocide under Ethiopian law 'may not be commuted by amnesty or pardon of the legislature or any other state organ'.[161] Nonetheless, the President of the country may commute death penalty to life imprisonment.[162]It is important to note that just like any other offences, the rule of probation is equally applicable to the crime of genocide under the EPC, and accordingly,

> where two thirds of the sentence have been served or when a sentence is for life when twenty years of such sentence have been served, the prisoner may be released on probation, if his conduct has been satisfactory and other conditions laid down by law.[163]

More over, those accused sentenced to life imprisonment are entitled to probation after 20 years imprisonment. By applying this principle, the Federal High Court of Ethiopia has released significant number of genocide convicts before they served the whole term of the imprisonment.

3.7 Conclusion

There are differences between the two international and national courts in the issue of sentencing. The Statutes of the ad hoc Tribunals provide a wider range of discretion to the judges in determining factors and limits of penalties than the Penal Codes of the two countries. On the other hand, the Statutes stipulate only imprisonment while the Penal Codes of the two countries provide for different kinds of punishment. This disparity lead to the treatment of persons accused of the same offence in different ways, which is contrary to the principle of equality before the law.

The wide discretions given to the ad hoc Tribunals may lead to arbitrariness and lack of uniformity. Different Chambers of the Tribunals appreciate different kinds of extenuating and aggravating circumstances. Factor that is taken as mitigating

[161] Article 28(1) of the Ethiopian Constitution (n 52 above).
[162] As above, sub Article 2
[163] Article 112 and 207of the EPC (n 9 above)

or aggravating a sentence in one chamber may not be taken as such in another Chamber or in another time.[164]This inconsistency has an impact not only on the quality of the sentences of the tribunals but also on the right of the accused to be treated equally.

[164] A. Combs (n 10 above) 81-84

CHAPTER FOUR

THE ROLE OF THE INTERNATIONAL CRIMINAL COURT IN THE PROSECUTION OF GENOCIDE AND PROTECTING THE RIGHTS OF THE ACCUSED

4.1 Introduction

So far we have discussed the major legal and practical problems that exist in the administration of genocide prosecution both at the international and national panorama. Among the contributing factors for this disparities, the *epso facto* nature of the ad hoc tribunals, the incompatibility of the applicable laws, availability of skilled human resources and sufficient finance to administer the justice machinery are identified. To avoid these and other possible injustices that may occur in the administration of international crimes the move towards a permanent international court had been started long ago. Therefore, under this chapter we will discuss the role of the International Criminal Court in the prosecution of genocide and protecting the rights of the accused.

The evolution of the idea of creating an international criminal court can be traced back to the days after World War I.[165] From its inception, the UN has also been cognizant of this idea as it was clearly expressed in its Resolution 260 of 9 December 1946, which was made to adopt the Genocide Convention. Accordingly, the idea of establishing a permanent international criminal tribunal for the prosecution of genocide perpetrators appeared in the Convention [166]and in the same Resolution the General Assembly urged the International Law Commission 'to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide . . .[167],

After the Commission submitted its study, which was in favor of the establishment of the court, the General Assembly established a committee to prepare proposals relating to the establishment of such court. Although the committee prepared the draft statute, it was becoming difficult for the General

[165] 'International Criminal Court' (ICC) ICC http://www.pict-pcti.org/courts/ICC.html
[166] Article IV of the Genocide Convention (n 1 above)
[167] UNGAR (n 39 above)

Assembly to consider the matter due to lack of consensus on the definition of aggression.[168] Following the egregious violations of human rights that had occurred in the former Yugoslavia and Rwanda, and the establishment of ICTY and ICTR, the quest for permanent international criminal court has received additional impetus.[169]These and other factors led the international community to adopt the Rome Statute, which has established the International Criminal Court (ICC) and came into force on July 2002.[170] This Court has been entrusted with the power of exercising jurisdiction over the crimes of genocide, crimes against humanity, war crimes and the crimes of aggression.[171]

4.2 ICC visa-a vis ICTY and ICTR

As compared to the ad hoc Tribunals, ICTY and ICTR, the ICC has the following peculiar features. Unlike the ICTY and ICTR it has been established to work on a permanent basis and hence there is no time limit set down for the expiry of its jurisdiction. The two ad hoc Tribunals exercise concurrent jurisdiction with national courts and have supremacy over the latter. On the other hand, the ICC is intended only to complement national courts. In other words, the ICC does not have a concurrent or supremacy jurisdiction over national courts as that of the ICTY and ICTR. It will exercise its jurisdiction only when national courts are unwilling or unable genuinely to carry out the investigation or prosecution of a person accused of the crimes defined in the Statute.[172]

Unlike the ICTY and ICTR, the ICC is not accountable to the UN Security Council although it is expected to have a close relationship with the UN. Like any other State Party to the Statute, the UN may participate in the funding of the ICC and make a referral of cases to the court. Since ICC is created by a treaty, its accountability will be to the Assembly of the State Parties. Therefore, the ICC has a greater degree of independence than ICTY and ICTR. Finally, victims of crimes or their families can access the ICC directly and claim reparation for the violation of their rights.

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[168] 'Rome Statute of the International criminal Court: Overview' http://www.un.org/law/icc/general/overview.htm (Accessed 6 October 2003)
[169] ICC (n 165 above)
[170] The Rome Statute (n 2 above)
[171] As above, Article 5
[172] ICC (n 165 above)

Generally, as argued by Steiner and Alston, ad hoc tribunals have the following legal and practical problems.[173]

1. Organizing new tribunal is expensive and time consuming.
2. The risk of associating tribunals with the particular conflict they are assigned to resolve.
3. Their role as conflict resolving body will be outshined by their role as punishing the wrongdoers.
4. They have limited jurisdiction *ratione temporis* and *ratione loci*. They are created to address conflicts arising in specific time and place.
5. The creation of Ad hoc tribunals by executive resolution, the resolution of the Security Council, is highly arguable. It is out of the normal way of creating judicial institutions, which should be ether by legislation, if it is at the national level, or by a treaty, if it is at the international level.
6. Ad hoc tribunals are susceptible to avoidance by their creator at any time. In addition, they have to negotiate for financial and personnel resources. However, the principle of legality requires, inter alia, that the criminal courts be established on a secure constitutional base; that the law to be applied be sufficiently defined in advance; that the court personnel, the judges especially, have security of tenure, and carry out their activities independently.
7. It is a political body that decides the kind of crimes, the territory, the time period covered and the nationality of the defendants for the ad hoc tribunals.
8. Their role as having a deterrent effect on potential perpetrators is minimal as compared to permanent court.
9. The problems of concurrent jurisdiction. Ad hoc tribunals may lead to discriminatory treatment among offenders of the same crimes but who appeared before national and international tribunals.
10. The statutes of ad hoc tribunals do not have the power to impact national laws and there by create homogeneity.

[173] H. J. Steiner & P. Aliston (n 40 above) 1083-1084 and see also C.K. Hall ' The Role of the Permanent International Criminal Court in Prosecuting Genocide, Other crimes Against humanity and Serious Violations of Humanitarian Law' in G. Alferdsson (n 114 above) 460-461. See also R. Dixon et al (n 31 above) 600

4.3 Complimentarity: ICC visa-a-vis national courts

As stated above the power of the ICC is limited to complement national courts in the investigation and prosecution of international crimes. It is only when the national justice system fails to carry out these tasks that the ICC will step in. In other words, the ICC is not intended to displace the national judicial system that is functioning effectively and willing to prosecute perpetrators of international crimes.[174] Paragraph 10, Articles 1 and 17 of the Rome Statute of the ICC clearly pronounce the principle of complimentarity that should exist between the ICC and national courts. In short, the first priority always goes to national courts and it is only when there is unwillingness or inability on the part of the state that the ICC will interfere.

Consequently, if proceedings were made or being undertaken or after the case being investigated a decision was made not to prosecute by the state which has jurisdiction over it, the ICC will not accept the case for prosecution unless it has been proved that the acts of the national state concerned was done for purpose of shielding the accused. In these situations, unwillingness of the state is presumed and the ICC will prosecute the matter.[175]There might be several instances whereby governments are becoming unwilling to prosecute perpetrators for various reasons. 'There may be governments that condone or participate in an atrocity themselves, or officials may be reluctant to prosecute someone in a position of great power and authority.'[176]

In the cases of Ethiopia and Rwanda, the genocides were committed with the full intention and participation of the governments. In these situations it was absolutely impossible to bring to justice the perpetrators who were, of course, government officials. The only option that was available was to wait until that

[174] H. J. Steiner & P. Aliston (n 40 above) 1081-1082
[175] Article 17(2)(a-c) of the Rome Statute (n 2 above)
[176] 'International Criminal Court to be Established' http://www.un.dk/Temp/ICC_11_april.htm (Accessed 8 October 2003)

governments would have been overthrown either by ballot or bullet. However, now this situation is changed by the Statute of ICC for it mandates the Court to investigate and prosecute atrocities that may occur in violations of the rights protected by the Statutes regardless of the persons who commits them.

The second condition that empowers the ICC to have jurisdiction is the situation where the state is unable to investigate and prosecute such crimes due to the disappearance of the accused, the necessary evidence and testimony or due to other reasons. The state may face these problems as a result of a total or substantial collapse or unavailability of its national judicial system.[177] It is important to note the situation that happened in Rwanda right after the 1994 genocide. Like any governmental institutions, the judiciary of Rwanda in the aftermath of the genocide was largely destroyed. The personnel required to run the judiciary had been killed or fled the country. There were no even material resources like books, vehicles papers.[178] Generally, the judiciary was in a state of collapse to handle the matter and serve justice even if the government was willing to do so.

Although there was a variation in the degree of the problems, the Ethiopian judicial system was also in a similar challenge. The justice system in Ethiopia suffers from shortage of experienced and qualified personnel. In discussing the Ethiopian forth-coming genocide trial, Roht-Arriza had commented that,

> [w]hen and if trials do occur, many of the attorneys will be inexperienced, some fresh out of law schools, as will be many judges. They will be called on to apply difficult concepts of international as well as domestic law.[179]

4.4 The impact of the Rome Statute on National laws

As discussed above one of the advantages of the Statutes of ICC as compared to that of ICTY and ICTR is its influence on national laws. Paragraph four of the Statute of ICC affirms that the effective prosecution of the most serious crimes of concern to the international community is ensured by taking measures at the

[177] Article 17(3) of the Rome Statute (n 2 above)
[178] United Nations High Commissioner for Human Rights Field Operation in Rwanda, The Administration of Justice in Post-Genocide Rwanda, at 3, Para 11. as quoted by M .H. Morris (n 11 above) 353
[179] N. Roht-Arriza (n 117above) 225

national level and by enhancing international cooperation. Paragraph 10 of the same also recalls 'that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes'. Article 88 of the Statute of ICC also reads '[s]tate Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this part.'[180]

Consequently, State Parties are required to review their criminal laws and procedures whether they are in conformity with the Statute in the process of investigation, prosecution and defenses available for the accused. States would not be able to fulfill their obligations under the complementarity principle if their national laws fail to prohibit those acts considered as offences by the Rome Statute or provide procedures for cooperation with the ICC.[181] Therefore, this system of complementarity gives governments an incentive to modify their national laws to allow their own courts to prosecute the same range of crimes and individuals on which the ICC exercises jurisdiction. This process of amendment will assist national laws in representing a great advance in the rule of law, eroding impunity, promoting public order, and preventing and reducing the commission of these crimes.[182]

In the previous chapter we have seen some of the basic legal and practical defects prevailing in the prosecution of the crime of genocide. Following is brief discussion how the Statute of ICC addresses these issues. To begin with the definition, the Statute takes verbatim the definition of the UN Genocide Convention.[183] It does not cover social and political groups under its scope of protection. Under criminal responsibility, like the Statutes of ICTY and ICTR, the Statute of ICC includes command responsibility.[184]

The Statute of ICC provides much emphasis than the Statutes of ICTY and ICTR on the issue of sentencing and penalties. With regard to types of punishment, in

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[180] That part of the Statute deals with international cooperation and judicial assistance.
[181] 'Rome Statute ratification' http://www.justiceinitiative.org/activities/ij/ratification Accessed 3 October 2003
[182] National Law Enforcement and the International Criminal Court' http://www.iccnow.org. (Accessed 4 October 2003)
[183] Article 6 of Rome Statute (n 2 above)
[184] As above, Article 28

addition to imprisonment, the ICC is empowered to impose fine and forfeiture of proceeds, property and assets derived directly or indirectly from the crime.[185] The Statute of ICC stipulates, though not the minimum, the maximum term of imprisonment to be 30 years when the court does not impose life imprisonment.[186]The statute of ICC also does not provide for capital punishment. Before imposing a sentence, in addition to the evidence and submission made during the trial, the Court is required to hear any additional evidence or submission relevant to the sentence.[187]Rule 145(11)(c) of the ICC RPE enumerates the additional factors that the court shall take in the assessment of the appropriate sentence. Unlike the Statutes of ICTY and ICTR, the power of commutation or reduction of penalty is reserved only to the ICC and the State of enforcement or the national state of the individual do not have any say on it.[188]Furthermore, the ICC statute specifies the time limit and the factors that the Court should take into account in reviewing the sentence to determine its reduction.[189]

One of the great achievements by the Statute of ICC concerning the rights of the accused is that of the obligation imposed on the prosecutor to scrutinize not only incriminating evidence but also exonerating evidence so that such evidence can be made available to the accused as well.[190]The other point of interest in the ICC statute is the manner it regulates the issue of plea guilty. In such a case, before giving conviction the court has to look for the following conditions; the plea is made in a voluntary manner after realizing the nature and possible consequences of such declaration and consulting with the defense counsel, and the guilt is supported by the charges, the materials and evidence presented by the prosecutor or the accused.[191]Further more, the Pre-Trial Chamber plays decisive role in safeguarding the rights of the accused by controlling the prosecutor's power of investigation.[192]Finally, in relation to standards of proof, for the first time in an international instrument, Article 66 (3) of the ICC Statute

[185] As above, Article 77
[186] As above
[187] As above, Article 76
[188] As above Article 110(1) and (2)
[189] As above Article 110(3) and (4)
[190] As above, Article 54(1)(a)
[191] As above, Article 65
[192] As above Articles 57 and 58

expressly provides that in order to convict the Court must be convinced beyond reasonable doubt that the accused is guilty.[193]

[193] International Criminal Court: Fact Sheet 3
http://www.amnesty.org.au/whatshappening/icc/icc3.html (Accessed 7 October 2003)

CHAPTER FIVE
CONCLUSIONS AND RECOMENDATIONS

5.1 Conclusions

Genocide is the crime of crimes that affects not only individual person or national state but the international community as a whole. As an international crime it is condemned both by customary and conventional international laws, and therefore, all states are under obligation to bring those responsible to justice either in their own courts or extradite them to another state able and willing to do so. Despite this fact, the twentieth century has witnessed the destruction of millions of people on political, religious, ethnic or other grounds and the perpetrators left untouched.[194]

The existing international justice system has largely failed to prosecute the crime of genocide, and it relies almost exclusively on national courts. The international community so far has established only two international ad hoc tribunals to prosecute this crime. Although many factors are attributed to this failure, the inability of the international community for almost fifty years to establish permanent penal tribunal as envisaged in the Genocide Convention is the major one.

Along with the ad hoc international tribunals, national courts also have engaged in the prosecution of genocide. However, having two different courts for one and the same offence has its own limitations. One of these limitations is the disparity that exists between the ad hoc international tribunals and national courts in the process of prosecuting the crime of genocide. Under these work, attempts have been made to show these disparities, their causes and impact on the rights of the accused.

What is genocide under the EPC is not considered as such by all international instruments criminalizing the act of genocide. Whether the EPC criminalizes the acts of genocide and/or crimes against humanity it is highly arguable. Further more, while both the ICTY and ICTR Statutes criminalize the failure of the

[194] C.K. Hall (n 173 above) 457

superior to control his/her subordinate committing genocide, there is no this kind of liability under the EPC. Therefore, what is an offence under the Statutes of the two ad hoc tribunals is not an offence under the Ethiopian penal law.

Both the Ethiopian and Rwandan Penal Codes provide for capital punishment while there is no such penalty under the ICTY and ICTR Statutes. As a result, persons accused of the same genocide offence, may be co-offenders, face different kinds of sentences for the mere fact that they appear before different courts. In addition, it is the judges and not the Statutes of the ad hoc Tribunals who determine what kind of factors to be taken in to account in imposing penalty. This situation creates inconsistency even among the different Chambers of the Tribunals. Under the Statutes of ICTY and ICTR, commutation of sentence is subjected also to extra-judicial bodies; the state of enforcing the sentence and the national government of the accused. Moreover, there is no provision providing for the specific time limit when the reduction can be claimed and whether the accused can plead for this right.

Practically, the two national courts face problems of skilled human power and infrastructure to handle this complex case and equally guarantee the rights of the accused to a fair trial. The genocide that occurred in the two countries, especially the Rwandan genocide involved a number of accused and evidence that are beyond the carrying capacity of their justice system. These recurrent situations highly affected, among others, the rights of the accused to legal assistance, expeditious trial and equality of arms.

Generally, in the ICC Statute the rights of the accused are protected to a greater extent than other international instruments.[195] The Statute is trying to strike a balance between the rights of the accused and the victim. Therefore, the ratification of this Statute undoubtedly plays a monumental role in influencing national laws and providing a better protection for the rights of the accused.

[195]International Criminal Court (n 193 above)

5.2 RECOMMENDATIONS

1. At the national level, states must make sure that their laws are inconformity with international laws that criminalize the crime of genocide. In this regard Ethiopia is expected to do more in the following areas.

   First, the definition given to genocide by the Penal Code should be reviewed in line with the Genocide Convention, and the Rome Statutes, if Ethiopia is becoming party to it. The inclusion of political and social groups in the scope of protection of the provision of genocide by the Penal Code should not be point of confusion as it is also possible to give protection for these groups by a provision dealing with crimes against humanity.

   Second, since there is no specific provision penalizing crimes against humanity, there should be a specific provision criminalizing this act rather than merging it in the definition of genocide.

   Third, command responsibility should be included in the Penal Code as it is in the Statutes of ICTY, ICTR and ICC for it is essential for the full protection of the rights of the victims.

2. The Rules of Procedure and Evidence of ICTY and ICTR should be amended so that they incorporate factors that the Chambers should take in to account either to extenuate or aggravate penalties. This amendment will bring consistency in determining sentence and protect the right of the accused and the victim.

3. The Tribunals alone should have the power to decide reduction of sentence. The practice of seeking opinion from states of enforcement and

national of the accused would affect the rights of the accused. There should also be a specific provision indicating the time limit when reduction by the accused, and not by other bodies, can be claimed.

4. The international community should assist national courts in their effort to prosecute the crime of genocide in particular and international crimes in general.

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