

**THE UNITED NATIONS AND THE AFRICAN UNION  
IN THE PREVENTION OF  
WAR CRIMES, CRIMES AGAINST HUMANITY AND  
GENOCIDE IN AFRICA: LESSONS FROM  
RWANDA**

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**By**

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## DECLARATION

I, Yonas Debesai Gebreselassie, declare that this dissertation is my own original work. It has not been submitted to any other University or institution. The sources I have used or quoted have been indicated and acknowledged by complete reference. It is hereby presented in partial fulfilment of the requirements for the award of the LL.M Degree in Human Rights and Democratisation in Africa.

Signature:.....

Date:.....

Supervisor: Professor Lovell Fernandez

Signature.....

Date.....

## **DEDICATION**

I dedicate this work to my late uncle, Kidane Gebreselassie, my late brother-in-law, Nebayi Kidane, and all Eritreans who have become victims of deportation from Ethiopia.

May the protection of human rights reign in Africa to the fullest.

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## TABLE OF CONTENTS

### TITLE PAGE

DECLARATION ii

DEDICATION iii

ACKNOWLEDGEMENT iv

TABLE OF CONTENTS v

LIST OF ABBREVIATIONS vii

### CHAPTER ONE: INTRODUCTION

1.1. Introductory remarks	1
1.2. Statement of the problem	2
1.3. Objectives of the study	3
1.4. Relevance of the study	3
1.5. Hypothesis	3
1.6. Literature survey	4
1.7. Methodology proposed	5
1.8. Limitation and scope of the study	5
1.9. Proposed structure	5

### CHAPTER TWO: MANDATES OF THE UNITED NATIONS AND ORGANIZATION OF AFRICAN UNITY (OAU)/AFRICAN UNION (AU) WITH REGARD TO GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY

2.1. Origin, historical background and scope	6
2.1.1. Genocide	6
2.1.2. War Crimes	8
2.1.3. Crimes against humanity	9
2.2. The mandates of the UN and the OAU	10
2.2.1. United Nations (UN)	10
2.2.1.1. Primary Prevention	12
2.2.1.2. Secondary Prevention	13
2.2.1.2.1. Former Yugoslavia	14
2.2.1.2.2. Cambodia	15

2.2.1.2.3. Sudan: Darfur	16
2.2.1.2.4. Sierra Leone	17
2.2.1.2.5. Rwanda	18
2.2.1.3. Tertiary Prevention	18
2.2.2. Organization of the African Unity (OAU) / African Union (AU)	18
2.3. Conclusion	21

### **CHAPTER THREE: ANALYSIS OF THE MANDATE AND ROLE OF THE UN AND OAU / AU IN THE RWANDAN 1994 GENOCIDE**

3.1. United Nations	22
3.1.1. Primary prevention	22
3.1.1.1. Charter-based prevention	24
3.1.1.2. Treaty based prevention	28
3.1.2. Secondary Prevention	30
3.1.3. Tertiary Prevention	33
3.2. Organization of African Unity (African Union)	36
3.2.1. Primary prevention	36
3.2.2. Secondary Prevention	37
3.2.3. Tertiary Prevention	37
3.3. Conclusion	38

### **CHAPTER FOUR: OVERVIEW OF CURRENT POSITIONS OF THE UN AND AU TO CRIMES AGAINST HUMANITY, WAR CRIMES AND GENOCIDE**

4.1. Introduction	40
4.2. United Nations	41
4.2.1. Burundi	41
4.2.2. Democratic Republic of Congo	42
4.2.3. Ethiopia and Eritrea	43
4.2.4. Sudan	44
4.3. African Union	45
4.4. Conclusion	47

### **CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS**

5.1. Conclusions	48
5.1.1 United Nations	48
5.1.2. Organization of the African Unity / African Union	49
5.2. Recommendations	50

<b>BIBLIOGRAPHY</b>	<b>52</b>
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## LIST OF ABBREVIATIONS

AFRC	Armed Forces Revolutionary Council
AU	African Union
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CDF	Civil Defense Forces
CEDAW	Convention on the Elimination of All forms of Discrimination against Women
CERD	Convention on the Elimination of All forms of Racial Discrimination
CMW	Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
CRC	Convention on the Rights of the Child
DRC	Democratic Republic of Congo
GC	Geneva Conventions of 12 August 1949
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
IHL	International Humanitarian Law
NATO	North Atlantic Treaty Organization
OAU	Organization of African Unity
RUF	Revolutionary United Front
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commission for Refugees
UNMIBH	United Nations Mission in Bosnia and Herzegovina
UNPAs	United Nations Protection Areas
UNPROFOR	United Nations Protection Force

## CHAPTER ONE: INTRODUCTION

### 1.1. Background of the Study

Against the tremendous growth of international concern about human rights violations, first among them being international crimes, the prevention of their commission or omission remains a distinct reality. As quoted by Schabas, Hitler's famous comment, 'who remembers the Armenians?', is often cited in this regard.<sup>1</sup> Yet, according to Schabas, the Nazis were among the most recent to rely confidently on the reasonable presumption that an international culture of impunity would effectively shelter the most heinous perpetrators of Crimes Against Humanity.<sup>2</sup> The explanation for this is straightforward: genocide was generally, although perhaps not exclusively, committed under the direction or, at the very least, with the tacit complicity of the state where it took place,<sup>3</sup> and been exercised for so long.

Although the history of Genocide documents very gruesome German, Yugoslavian, East Timorian, Cambodian, and Sierra Leonean atrocities, Rwanda's 1994 Genocide has been described by many as the most barbaric<sup>4</sup>. Right now, although the prevention of War Crimes, Crimes Against Humanity and Genocide has become a major priority at the international level, this did nothing to rescue Rwanda from repeated odious scourges of international crimes, the last being the 1994 Genocide.<sup>5</sup> Instead, to the dismay of Rwandans and peoples of the world, the situation seems to have been oversimplified by the United Nations (hereinafter the UN) and the Organization of African Unity (hereinafter the OAU), the predecessor of the African Union (hereinafter the AU). At that time their role was controversial. Subsequently, however, the failures of these two organizations to stop the commission and continuation of the 1994 Genocide has been recognized and admitted afterwards. In fact, this failure has attracted the most vocal criticism of the UN and OAU / AU. However, the issue as to the manner through which it could have been achieved is still debatable. Besides, the current handling of the Rwandan situation and the mechanism of attempting to bring a lasting solution, either by means prosecution and / or reconciliation, has been controversial.

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<sup>1</sup> WA Schabas *Genocide in International Law* (2000) 1.

<sup>2</sup> As above.

<sup>3</sup> As above.

<sup>4</sup> See RM Press *The New Africa: Dispatches from a challenging Continent* (1999) 222.

<sup>5</sup> D Hawkins Explaining War Crimes Enforcement: From the Geneva Conventions to the International Criminal Court available at <<http://www.isanet.org/noarchive/hawkins.html>> (accessed on 10 May 2004) and C Achebe Genocide: The Global Human Rights Challenge "Never Again?" available at <<http://www.nigeriavillagesquare1.com/Articles/CCAchebe/2004/10/genocide-global-human-rights-challenge.html>> (accessed 20 October 2004).



Even after the 1994 Rwandan Genocide, the situation remains unsettled. Having regard to the number of awaiting-trial prisoners (i.e. those accused of committing War Crimes, Crimes Against Humanity and Crimes of Genocide), the pace at which the domestic courts of Rwanda and the International Criminal Tribunal for Rwanda (hereinafter ICTR) are dealing with the Genocide cases, as well as the way the matter of Genocide is being handled in Rwanda generally, a lasting solution on how to deal effectively and speedily with international crimes is still a long way off. And if corrective measures are not implemented soon, this might even nurture future atrocities. Redress has not been availed to the victims and thousands of suspects are still behind bars awaiting trial. This extensively drawn out pre-trial custody infringes the principle of the presumption of innocence, which is a cornerstone of a fair trial.

## **1.2. Statement of the Problem**

Although the concept of human rights is not new, it has never attracted more attention than today. However, contrary to the tremendous growth of concern for the international protection of human rights, Rwanda was visited by three main deplorable waves of War Crimes, Crimes Against Humanity and Genocide. Therefore, while the study is based on the premise that the primary duty of preventing these international crimes lies with the state, it will be argued that the secondary duty lies with international organisations like the UN and the AU. Both organisations could have averted or minimised the atrocities that occurred in Rwanda.

Accordingly the study aims to address four issues. First, it attempts to review the weaknesses of the UN and OAU in their human rights monitoring and promotional function derived from international human rights instruments. Second, it seeks to investigate the shortcomings of the failures of these two organisations in intervening to stop the Rwandan genocide. Third, it attempts to examine the UN's and AU's current handling of the cases of genocide as a preventive mechanism against gross human rights violations in Rwanda. Finally, the study will attempt to see if the failures seen in Rwanda are reflected in the current responses of the UN and the AU.

The study presupposes that the 1994 Rwandan genocide, although not altogether inevitable, would not have been so comprehensive had the UN and the OAU / AU not developed a culture of impunity in the genocide of 1963 and 1973. One way assume, too, that the suffering could even have been minimized had there been active measures taken by these two organisations. This thesis proceeds on the premise of a problem that the vacuum that still exists under the Rwandan situation both pre and post-1994 genocide as well as the weakness of the response from the UN and AU, is also abetting the current genocide in Sudan and countries with a volatile situation, like the Democratic Republic of Congo (hereinafter DRC) and Burundi.

### **1.3. Objectives of the Study**

Briefly the study proposes:

- (i) to explore the responses of the UN and the OAU / AU in dealing with violations of human rights and, particularly, War Crimes, Crimes Against Humanity and Genocide in Rwanda;
- (ii) to explore the status of dealing with the above crimes under the UN and AU human rights system;
- (iii) to examine whether the current positions of the UN and AU reflect the lesson learnt from Rwanda and whether this lies in deterrent measures being put in place; from which deterrence could be achieved from the commission of crimes of the above sort;
- (iv) To attempt to propose additional or alternative steps that should be taken to fully remedy the Rwandan situation and the current and future incidence of the above-mentioned grievous human rights violations.

### **1.4. Relevance of the Study**

As compared to the two pre 1994 Genocide incidents of Rwanda the 1994 Genocide received much more attention from the international community and, in particular, from the UN and OAU / AU. Despite the relatively better response and recognition of the failures, however, the Rwandan situation does not appear to be settled. Besides, as mentioned in part 1.2. of this chapter, incidents of the above mentioned international crimes are being witnessed in Africa. The volatility of the situations in countries like Burundi and incidents of Genocide in Sudan threatens an outburst of those crimes. The significance of this study is that it seeks to explore and outlines how the mandates of the UN and OAU / AU, if properly implemented, could remedy the existing Rwandan situation and help to prevent future human rights atrocities. This work can thus be used as a potential inspiration upon which measures of the UN and AU could be based, if the need arises. Finally, the research is intended to have relevance to future further studies in related areas.

### **1.5. Hypothesis**

This research is based on the hypothesis that the UN and AU have a great role to play in preventing the commission of War Crimes, Crimes Against Humanity and Genocide. This could happen through human rights monitoring mechanisms by way of political and diplomatic manoeuvre, economic, political and military sanction and military intervention as a means of protecting victims; after the commission of the crimes, by way of the combination of prosecution, reconciliation and other related mechanisms. The study hypothesises that, in the face of the cognisance of the failures of the UN and OAU / AU in the Rwandan genocide case, the current practice and response of these two organizations seems to be not meeting the demands of the

required role that should be played by both in seeing to it the Rwandan society is remedied and that those atrocities will not happen again.

## 1.6. Literature Survey

Since the formulation and recognition of standards of human rights during the 20<sup>th</sup> Century, much progress has been made to alleviate the pain of suffering that used to result from their violation. International Organizations have been established, treaties signed and enforcement mechanisms developed. But are these institutions and mechanisms meeting today's demands, particularly for countries like Rwanda and other vulnerable ones fairly and effectively?

According Iulia Motoc, the UN Special Rapporteur on human rights in the DRC, Genocide, Crimes Against Humanity and War Crimes serve to "create a frightening picture of one of the most serious human rights situations in the world".<sup>6</sup> In the discussion about the 1994 Rwandan Genocide writers like Reyntjens consider the Rwandan situation impacting on the Great Lakes problem and vice versa.<sup>7</sup> From the historical background there are many views to the solution for the Rwandan crises.<sup>8</sup> In relation to this case writers like Press, Schabas, Codere, Pottier, Lemarchand, Minow, Suarez-Orozco, and Robben have provided contentious and divergent views. Among the views, political intervention, military humanitarian intervention, judicial process, and aid assistance have been proposed.<sup>9</sup>

Joshi and the then commander of the United Nations Assistance Mission for Rwanda (UNAMIR) LGen. Romeo Dallaire also wrote on Rwanda and on the role of the UN and OAU.<sup>10</sup> Both writers believe that military measures could have averted the 1994 Rwandan Genocide. Given the severity of genocide and the other international crimes<sup>11</sup>. Kenneth Roth also argues for military intervention

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<sup>6</sup> DRC: MONUC to develop new deployment strategy available at <<http://www.cidi.org/humanitarian/irin/ceafrica/03b/ixl19.html> > (accessed on 01 May 2004).

<sup>7</sup> See F Reyntjens (2001) *Again at the Cross Roads-Rwanda and Burundi 2000-2001* 23.

<sup>8</sup> See R Joshi 'Genocide in Rwanda: The Root Causes' (1996) 51-91 *East African Journal of Peace and Human Rights* Vol. 3 No 1.

<sup>9</sup> See Schabas (n 1 above) 1-21 and 447-501; Press (n 4 above) 220-249 and 262-273; J Pottier (2002) *Re-Imagining Rwanda* 30-52; R Lemarchand (1970) *Rwanda and Burundi* 470-480; H Codere (1973) *The Biography of an African Society, Rwanda 1990-1960*; M Minow (1998) *Between Vengeance and Forgiveness* IX-XIII, 8-19, 25-27, 40-49 and 122-129; AC.G.M. Robben and MM Suarez-Orozco (2000) *Cultures Under Siege: Collective Violence and Trauma*.

<sup>10</sup> Joshi (n 8 above) and R Dallaire *Shake Hand With the Devil: The Failure of Humanity in Rwanda* (2003) 229, 232 and 260.

<sup>11</sup> H Hey *Gross Human Rights Violations: A Search for Causes* (1995) 9.

when it is the last feasible option to stop Genocide or comparable mass slaughter.<sup>12</sup> On the other hand others like Lemarchand argue that, given the historical background of the country, a solid and hard rule like the above cannot solve the Rwandan case.<sup>13</sup> However, all the above writers do not make a specific categorical mention of the broad mandate of the UN and OAU / AU by which the Genocide could have been prevented and the situation afterwards could be handled to prevent future atrocities. Thus, this study attempts to investigate how the human rights monitoring and promotion mechanisms of these two organisations could have been used as a means of preventing the atrocities from happening, how they could have been stopped and dealt with after their commission to prevent their re-occurrence elsewhere.

### **1.7. Methodology Proposed**

The study analyzes international law and practice adopted by the UN and AU. It is based on primary and secondary sources, internet sources, international instruments and case reports.

### **1.8. Limitations of Proposed Study**

Much has been said and written about War Crimes, Crimes Against Humanity and Genocide. Thus, given the wealth of literature available it would be hard to condense this study into just a few pages. Therefore, the study does not confine itself to dealing with War Crimes, Crimes Against Humanity as such; rather, it focuses on the response of the UN and AU to the Rwandan Genocide and the lessons that could be learned from it. Although reference will be made to the German holocaust, DRC, Sierra Leon, Burundi and Sudan cases the main focus of the study shall be the Rwandan experience since 1994.

### **1.9. Proposed Structure**

Chapter One addresses the introduction and gives the background of the research paper and, it has already been discussed. Chapter Two highlights the mandates of the UN and OAU / AU with regard to Genocide, War Crimes and Crimes Against Humanity. Chapter Three analyzes the mandate and role of the UN and OAU / AU in the 1994 Rwandan Genocide. Chapter Four deals with an overview of the existing position of the UN and AU with regard to similar violations. Last part concludes with recommendations.

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<sup>12</sup> K Roth Human Rights in Times of Conflict: Humanitarian Intervention-The Choices for the International Human Rights Movement available at < <http://www.cceia.org/viewMedia.php/prmTemplateID/8/prmID/887>> (accessed on 10 May 2004).

<sup>13</sup> Lemarchand (n 9 above) 479.

## CHAPTER TWO: MANDATES OF THE UNITED NATIONS AND ORGANIZATION OF AFRICAN UNION (OAU)/AFRICAN UNION (AU) WITH REGARD TO GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY

### 2.1. Origin, historical background and scope

#### 2.1.1. Genocide

De Than and Shorts stated that in the hierarchy of International Humanitarian Crimes, Genocide is widely perceived as being the most barbaric, heinous and abominable of all the inhuman acts man is capable of committing against a fellow man<sup>14</sup>. And in terms of its cruelty, Crimes Against Humanity and War Crimes follow Genocide. However, even though the law pertaining to it is recent, Genocide is as old as humanity.<sup>15</sup> And recently, despite well-documented genocidal atrocities occurring throughout history, the twentieth century was particularly horrific in the number of people from many denominations who suffered and ultimately died at the hands of various despots and rogue governments.<sup>16</sup>

The word Genocide (taken from the Greek “*genos*” meaning a race or tribe, and the Latin “*cide*” meaning kill) is relatively modern and was first penned in 1944 by the renowned jurist Raphael Lemkin in his book entitled “*Axis Rule in Occupied Europe*”.<sup>17</sup> According to the differentiating analysis that was made by de Than and Shorts, what distinguishes Genocide from other international crimes is that with this particular crime the emphasis is placed on the treatment of individuals because they form part of a group as opposed to individuals, *per se*<sup>18</sup>. In strengthening this view, quoting Lemkin’s sight, de Than and Shorts stated that Genocide is directed against the national group as an entity and the actions involved are directed against the individuals not in their own capacity but as members of the national group.<sup>19</sup>

Genocide was first legally grafted in Count Three of the indictments at Nuremberg against the accused where it was alleged that “they conducted deliberate and systematic Genocide viz, the extermination of racial and national groups, against the civilian population of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious

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<sup>14</sup> C de Than and Edwin Shorts *International Criminal Law and Human Rights* (2003) 65.

<sup>15</sup> Schabas (n 9 above) 1.

<sup>16</sup> De Than and Shorts (n 14 above).

<sup>17</sup> As above.

<sup>18</sup> DeThan and Shorts (n 17 above) 65-66.

<sup>19</sup> As above.

groups, particularly Jews, Poles, the Gypsies and others".<sup>20</sup> The word was again used in subsequent military tribunals in the prosecution of German war criminals at that time. In the aftermath of these trials, genocide gained recognition as an international crime but without a precise definition being attached to it. In the 1946 General Assembly unanimously adopted resolution 96(I), which states:

Genocide is a denial of the right of existence of an entire human group, as homicide is the denial of the right to life of an individual human being; such denial of the right of existence shocks the conscience of mankind, results in great losses of humanity in the form of cultural and other contribution represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations. Many instances of such Crimes of Genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part. The punishment of the Crime of Genocide is a matter of international concern."<sup>21</sup>

The Convention on the Prevention Punishment of the Crime of Genocide (hereinafter the Convention) and the Rome Statute of the International Court of Justice (hereinafter the Rome Statute) also provide similar elements for the Crime of Genocide as a definition.<sup>22</sup>

Before First World War, there was not an organised universal response to international crimes that occurred before it. However, with the establishment of the UN in 1945, the gravity of the atrocities committed during the Second World War triggered the development of special mechanisms in addition to those existing to deal with Genocide, War Crimes and Crimes Against Humanity.

Thus, according to the special mechanisms that were developed to deal with genocide, the UN human rights monitoring bodies have been given to conduct monitoring and promotion of human rights as a way to prevent sever violations of human rights law. Accordingly, therefore, even though perpetrators could be brought and prosecuted by international tribunals, the best mechanism would be to follow up the implementation of compliance to charter and treaty based

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<sup>20</sup> As above.

<sup>21</sup> As above 66.

<sup>22</sup> Art II of the Genocide Convention reads as follows:

In the Present Convention, genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily 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.

● Art 6 of the Rome Statute also provides the same definition of the Crime of genocide as Art II of the Genocide Convention.

obligations through human rights promotion and monitoring mechanisms that have been encapsulated under the different instruments. complaints Before the commission of the Crime of Genocide, the UN human rights monitoring bodies have a big role to play. Even though complaints could be brought and handled by the UN human rights bodies, the best mechanism would be to follow up the implementation of treaty obligations through human rights monitoring mechanisms. Before dealing with the consequence of the violations, therefore, human rights enforcement and future preventive mechanisms of the crimes mentioned have become of great relevance. For that matter, international and regional prevention mechanisms were developed, organs set up and mandates given.

### 2.1.2. War Crimes

War Crimes are defined as “grave” and “serious” violations of the rules of war – or, as it is now more commonly called, of International Humanitarian Law (IHL) – for which individuals can be held individually responsible.<sup>23</sup> Article 8 of the Rome Statute provides a detailed definition of war crimes. Under to this article, grave breaches of the Geneva Conventions of 12 August 1949 and other serious violations of the laws and customs applicable in international armed conflict, within the framework of international law, fall within the definition of war crimes.

It is true that War Crimes used to be and continue to be committed. As quoted by Yves Beigbeder, in Europe, the oldest known condemnation of War Crimes occurred in the 14<sup>th</sup> Century: Ambrose, bishop of Milan, solemnly condemned Emperor Theodosius I for the killing by his armies of some 7000 inhabitants of the town of Thessalonica in 390.<sup>24</sup> The atrocities committed in the conduct of war and conflicts in the Twentieth Century, however, manifested a barbaric tragedy. In this regard the war crimes committed in Cambodia between April 1975 and January 1979, in Rwanda in 1994, in Bosnia and Croatia in the early 1990s, in East Timor, ending in 1999, and in Sierra Leone between 1991 and 2002, are glaring examples.<sup>25</sup>

War crimes are serious violations of customary or, whenever applicable, treaty rules belonging to the body of the international humanitarian law of armed conflict. That is why, as the Appeals Chamber of the International Criminal Tribunal for former Yugoslavia (hereinafter ICTY) stated in the *Tadic case*<sup>26</sup> (Interlocutory Appeal):

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<sup>23</sup> DeThan and Shorts (n 21 above) 117.

<sup>24</sup> Y Beigbeder *Judging War Criminals: The Politics of International Justice* (1999) 4.

<sup>25</sup> See Coalition For international Justice available at <<http://www.cij.org/index.cfm?fuseaction=viewOverview&tribunalID>> (accessed on 23 September 2004). See also Dudmundur Alfredsson and Others *International Human Rights Monitoring Mechanisms* (2001) 396.

<sup>26</sup> *The Prosecutor v. Dusko Tadic* - Case No. IT-94-1-R (ICTY).

(i) War Crimes must consist of serious infringement of an international rule, that is to say 'must constitute a breach of a rule protecting important values, and the breach of a rule protecting important values, and the breach must involve grave consequences for the victim'; (ii) the rule violated must either belong to the corpus of customary law or be part of an applicable treaty; (iii) 'the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule' (§94); in other words, the conduct constituting a serious breach of international law must be criminalized.<sup>27</sup>

As opposed to Genocide there is no separate convention governing War Crimes. They are governed by international humanitarian law. Nevertheless, War Crimes fall under the jurisdiction of the International Criminal Court (hereinafter ICC) established under the Rome Statute of 1998.<sup>28</sup>

### **2.1.3. Crimes Against humanity**

Article 7 of the Rome Statute defines War Crimes and Crimes Against Humanity as any acts of murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty, torture, sexual abuse or violence, persecution against any identifiable group, enforced disappearance of persons, the crime of apartheid, and other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health pursuant to or in furtherance of a state or organizational policy to commit such attacks. This definition, though, seems to leave a gap to related crimes committed by individuals or groups without any furtherance of a state or organizational policy to commit such attacks. Indeed it may not seem to be practical. But as it may lead to manipulation, it needs to have been included.

Outlining the historical context of Crimes against humanity *de Than* and *Shorts* state as follows:

Crimes against humanity have been perpetrated against civilian groups since the dawn of time. Indeed empires were built on the subjugation, enslavement, massacres, and general overall treatment of conquered peoples. Yet these horrific and inhuman acts meted out against innocent civilians have only in the last hundred years or so been recognized by the international community as morally unacceptable and reprehensible, and only less than [SIC] sixty years ago became legally unsustainable.<sup>29</sup>

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<sup>27</sup> A Cassese *International Criminal Law* (2003) 47.

<sup>28</sup> See Art 5 and 8 of the Rome Statute.

<sup>29</sup> De Than and Shorts (n 10 above) 87.



Historically, some headway was made internationally for the introduction of laws against inhuman acts at the beginning of the last century via the Hague Convention IV of 1907 concerning the Laws and Customs of War on Land.<sup>30</sup> However, even after their universal legal recognition, crimes against humanity have been committed throughout the world. The deportation and massacres of Armenians by Turkish government in 1915<sup>31</sup>, the atrocities committed against Jews during Second World War<sup>32</sup>, the crimes committed in Rwanda in 1994, the Bosnia and Croatia of the 1990s, the killings and related violence committed in East Timor in 1999, and lately the deportation committed during the Ethiopian-Eritrean conflict from 1997-2000<sup>33</sup> are among War Crimes committed in the last century.

## **2.2. The Mandates of the UN and the OAU**

### **2.2.1. United Nations (UN)**

In the area of human rights, the mandates of the UN derive from its charter and the international covenants and treaties so far signed. Accordingly, the UN bodies are categorized into two groups: the Charter-based and Treaty-based bodies. The Charter-based human rights bodies are the UN Commission on Human Rights (hereinafter the UN Commission) and the Sub commission on the Promotion and Protection of Human Rights (hereinafter the Sub-commission). The Treaty-based human rights bodies are the Committee against Torture, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination against Women, the Committee on the Elimination of Racial Discrimination, the Committee on the Rights of the Child, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, and Human Rights Committee. The above treaty-based bodies have been mandated to monitor compliance of state party obligations in areas respective to the scope of their power. And the treaties establishing these bodies are the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter CAT), the International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR), the Convention on the Elimination of All forms of Discrimination against Women (hereinafter CEDAW), the Convention on the Elimination of All forms of Racial Discrimination (hereinafter CERD), the Convention on the Rights of the Child (hereinafter CRC), the Convention on the Protection of the Rights of All Migrant Workers and

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<sup>30</sup> As above.

<sup>31</sup> As above.

<sup>32</sup> As above 88. See also D Bloxham *Genocide on Trial: war Crimes Trials and the Formation of Holocaust History and Memory* (2001) 43 and 204.

<sup>33</sup> AfriFocus Forum For African Affairs: Surprising Turn Of Events available at <<http://www.denden.com/Conflict/media/afri-focus-022999.htm>> (accessed on 28 July 2004).

Members of their Families (hereinafter CMW), and , the International Covenant on Civil and Political Rights (hereinafter ICCPR) respectively.<sup>34</sup>

De Than and Shorts identify different background reasons for commissions of Crimes of Genocide, for which international remedies are sought and from which international human rights organisations could draw inspiration for solutions to the same crime, War Crimes and Crimes Against Humanity. De Than and Shorts state:

What makes a particular state embark upon such an extreme policy as attempting to wipe-out an entire specific group or groups, usually comprising of its own citizens? Past reasons have included: (i) a state attempting to purify its own society, as in the case of massacre and deportation of between one and two million Armenians by the then Turkish government from 1915-1918; (ii) a group being considered inferior and eventually used as a scapegoat for the perceived troubles of a particular state, as in the case of the “Final Solution of the Jewish Question” in Nazi Germany during the Second World War; (iii) a state attempting to change the overall structure and ideology of a society be it economic, social or political, as in the case of Cambodia between 1975 and 1979; (iv) a state preventing the right of self-determination of a particular group, as in the case of East Timor in the 1990; (v) a state promoting a specific culture within a state, as in the case of Kosovo in 1994; (vi) eliminating groups which are perceived as a threat to the existing rulers, as in the case of Rwanda in the 1990s; or (vii) a combination of the above. Whatever the motives are the international community has long recognized that Genocide can never be a justifiable answer to any problem.<sup>35</sup>

Prevention of Genocide, War Crimes and Crimes Against Humanity, as parts of International crimes, may be pursued through numerous and complementary approaches such as fact finding<sup>36</sup>, early warning and human rights promotion mechanisms, intervention, prosecution or in other similar ways. Moreover, these crimes involve, as witnessed in Rwanda, violations of different components of rights that are legally enforceable such as the rights to liberty, dignity, life, etc.

Thus, the preventive response expected of the UN depends on the prevailing situation in the country. James M Smith cites the following three distinct phases in which differing forms of preventative process are necessary:

**Primary Prevention** deals with root causes. It promotes healthy societies through structural means such as promoting democracy, influencing ideology, developing culture, education, media, equality

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<sup>34</sup> See Art 17 of CAT; UN Economic and Social Council Resolution 1985/17; Art 17 of the CEDAW, Art 8 of the CERD, Art 43 of the CRC, Art of the CMW, and, Art 28 of the ICCPR.

<sup>35</sup> De Than and Shorts (n 31 above) 65.

<sup>36</sup> AF. Bayefsky *The UN Human Rights System in the 21<sup>st</sup> Century* (2000) 97.

of opportunity and other stabilizing factors. **Secondary Prevention** intervenes diplomatically, economically or militarily, to prevent or avert an imminent Genocide. **Tertiary Prevention** recognises that there are on-going consequences of the Genocide long after the killing has stopped. It describes rehabilitation of the victims and society.<sup>37</sup>

### 2.2.1.1. Primary prevention

During the Rwandan Genocide, the rights to dignity, liberty, security of the person, life, health, equality, privacy, presumption of innocence, and other equally enforceable rights recognized under many of the international instruments were violated.<sup>38</sup> Thus, as the root causes of Genocide vary, the monitoring mechanisms briefly mentioned in the preceding paragraphs have roles to play by way of avoiding or minimizing the complexities that lead to the commission of the crime. This involves recommendations in situations of violations, and diplomatic interventions for violations of separate components of rights. In the Rwandan case, for example, it is argued by many that the imbalance of socio-economic power and neglect has contributed towards bringing the repeatedly committed crimes.<sup>39</sup> Before colonization, for example, The Tutsis were powerful in terms of their social status and economic power. In all those years the condition of the Hutus did not get any attention from neither the Colonizers nor Tutsis. The implication of the provisions of non-discrimination and equality under the Socio-economic Rights and Civil and Political Rights instruments is that the covenants recognize the differences in entitlements available to different ethnicities and groups. Continued denial of those entitlements and the absence of protective mechanisms would lead, as happened in Rwanda before 1994, and Sudan at present, to helplessness triggering struggle, revolt and resentment on the one hand and retaliation on the other hand.<sup>40</sup>

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<sup>37</sup> JM Smith *Breaking the Cycle of Hatred and Violence* available at <[http://www.aegis.tv/index.php?option=content &task=view&id=91&Itemid=122](http://www.aegis.tv/index.php?option=content&task=view&id=91&Itemid=122)> (accessed on 28 September 2004).

<sup>38</sup> See the Preamble, Arts 1- 3, 5-10, 12, 13, 15-19, 21, 25 and 28 of the UDHR, the Preamble, Arts 1-4, 6, 7, 9, 10, 12, 16, 17, 23, 24, 26, 41(a) and 42 of the ICCPR, Art 12 of the ICESCR, the Preamble and Arts 1, 2, 4- 9 and 11 of the CERD, the Preamble, Arts 1-3, 5, 7, 13, 17 and 24 of the CEDAW, the Preamble and Arts 1-5 of the Declaration of the Elimination of Violence against Women, the Preamble, Arts 1-4, 6, 8, 16, 18, 19, 37, 38 and 45 of the CRC, the Preamble, Arts 1-4 and 6 of the Convention concerning Indigenous and Tribal Peoples in Independent Countries and Framework Convention for the Protection of National Minorities.

<sup>39</sup> As discussed in Chapter One, the first genocide was the result of, among other things, the inferiority complex developed by the Hutu ethnic group as a result of the dominance and ill treatment by the Tutsi ethnic group, the latter's economic dominance, and the special treatment of the Tutsi ethnic group by colonial powers. While the latter two genocides were committed as a response to the beginning of the struggle of the Tutsi ethnic group which in turn was a result of ill treatment and denial of the by the former ethnic group who were in power.

<sup>40</sup> J Kimonyo 'The Rwandan Experience', in C Villa-Vicencio and T Savage (ed) *Rwanda and South Africa in Dialogue* (2001) 30

Other international crimes have similar causes. Because, no one would think of and act with tolerance and forgiveness in the presence of blind denial of rights discriminately based on ones belongingness. Thus, as part of their monitoring function, the UN human rights monitoring bodies established under the relevant instruments could play an influential role in paving the way for corrective measures and curing psychologically created wounds.

### **2.2.1.2. Secondary Prevention**

As regards committing the crime of Genocide, War Crimes and Crimes Against Humanity, the mandate of the UN derives from the power given to the UN Commission under Resolution of the Economic and Social Council of 16 February 1946 (Document E/20 of 15 February 1946) on the establishment of the UN Commission<sup>41</sup>. Thus, in the performance of its duties, the UN Commission can conduct studies, either through Special Rapporteurs, visit to the country concerned or any other means and make its recommendation to the Economic and Social Council, which in turn can make its recommendation to the General Assembly and to the Security Council under article 62 of the UN Charter for appropriate measure.

Most interestingly, however, in relation to international crimes the Security Council should first examine the situations under recommendations if there is a threat to peace, breach of the peace, or acts of aggression before it takes a positive step.<sup>42</sup> And after making a determination to that effect, if it finds it to that effect, the Security Council shall take steps to maintain and restore peace or prevent an aggravation of the situation.<sup>43</sup> Here, as article 41 mandates, to give effect to its finding and decision, the Security Council can take measures not involving force. However, should the Security Council consider the above measures inadequate or have proved to be inadequate, it may take measures to intervene militarily.<sup>44</sup> This mandate given to the UN Commission, however, does not prevent the Security Council from taking its own initiative or making determinations and act accordingly.

By the same token the power of the Security Council is not with out any limit. The first limit to the Security Council's discretion under Chapter VII of the UN Charter flows from the proportionality

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<sup>41</sup> As per the resolution, the work of the Commission shall be directed towards submitting proposals, recommendations and reports to the Council regarding international bills of rights, international declarations or conventions on civil liberties, the protection of minorities, and the prevention of discrimination on grounds of race, sex, language or religion. Besides, the Commission is mandated to conduct studies and make recommendations, and provide information and other services at the request of the Economic and Social Council. The UN is also mandated to act through one of its organs, the Security Council, as per Arts 24, 25 and Chapter VII of the UN Charter and Art VIII of the Genocide Convention.

<sup>42</sup> See Art 24 of the UN Charter in relation to Art 39 of the UN Charter.

<sup>43</sup> As above, Art 40.

<sup>44</sup> As above, Art 42.

principle, according to which the Security Council's action must be appropriate and necessary for the achievement of its stated purposes (typically, the removal of a threat to peace) and may not affect other interests to an extent which is disproportionate to the advantage obtained or pursued.<sup>45</sup> The second constitutional limit on the Security Council's power stems from article 24 of the UN Charter. Under this same article, the Security Council is required to act in accordance with the Purposes and Principles of the United Nations that are mentioned under the Preamble and Chapter VII of the UN Charter as being to save the peoples of the world from war and reaffirm faith in fundamental human rights.<sup>46</sup> This latter limitation on the Security Council's discretion is a framework against which this organ must test its function.

#### 2.2.1.2.1. Former Yugoslavia

Speaking about the situation in the former Yugoslavia, Schweigman stated that the imposition of the sanctions, the establishment of the ICTY and the declaration of United Nations Protection Areas (hereinafter UNPAs) and safe areas must be seen as being based on articles 41 and 29 of the UN Charter.<sup>47</sup> The deployment of United Nations Protection Force (hereinafter UNPROFOR) against the will of the states concerned, however, raises the issue as to the legal basis of UNPROFOR's continued presence in Yugoslavia.<sup>48</sup>

In May 1993, while the war in Bosnia and Croatia was still ongoing, the U.N. Security Council created the first International War Crimes Tribunal, ICTY, and charged it with responsibility for investigating and prosecuting individuals suspected of committing War Crimes, Genocide, Crimes Against Humanity and grave breaches of the Geneva Convention on the territory of the former Yugoslavia since 1991.<sup>49</sup> The UN Security Council created the International Criminal Tribunal for Rwanda (ICTR) in November 1994 to bring to justice perpetrators of War Crimes committed in Rwanda that year.<sup>50</sup> The United Nations Security Council, acting under its Chapter VII authority, intervened to restore peace and stability in Indonesia by dispatching a peacekeeping force and

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<sup>45</sup> N Angelet 'International Law Limits to the Security Council' in V Gowlland-Debas (ed) *United Nations Sanctions and International Law* (2001) 72.

<sup>46</sup> As above 74.

<sup>47</sup> D Schweigman *The authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* (2001) 111.

<sup>48</sup> As above.

<sup>49</sup> Coalition for International Justice: Former Yugoslavia available at <<http://cij.org/index.cfm?fuseaction=viewOverview&tribunalID=1>> (accessed on 23 September 2004).

<sup>50</sup> Coalition for International Justice: Rwanda available at <<http://www.cij.org/index.cfm?fuseaction=viewOverview&tribunalID=2>> (accessed on 23 September 2004).

establishing the UN Transitional Administration in East Timor in 2000.<sup>51</sup> In August 2000, the UN Security Council authorized a Special Court for Sierra Leone to try those most responsible for War Crimes committed after November 30, 1996.<sup>52</sup> The Court is a joint endeavor of the UN and the Sierra Leone government.<sup>53</sup>

#### 2.2.1.2.2. Cambodia

Up to two million people-- nearly one-third of the population of Cambodia... died between April 1975 and January 1979 during the rule of Khmer Rouge (the Communist Party of Kampuchea).<sup>54</sup> Surprisingly, however, the Security Council did not take any similar measures to the ones taken in Rwanda or Yugoslavia in relation to the Cambodian atrocity. Despite extensive documentation of the Khmer Rouge's calculated policies of mass execution, torture and starvation, none of the officials suspected of orchestrating these crimes against the citizens of Cambodia has been held accountable.<sup>55</sup> There have been no credible trials and most major suspects continue to travel more or less freely within Cambodia and abroad.<sup>56</sup>

In 1993 the UN Security Council's adoption of Resolution 836 opened the door for more intensive involvement of the North Atlantic Treaty Organization (hereinafter NATO),<sup>57</sup> which led great controversy. Beyond that, the UN had authorized the use of force in Yugoslavia under the agreements collectively known as UNMIBH (United Nations Mission in Bosnia and Herzegovina), which includes UN resolution 1035 and the Dayton Agreement signed by Serbia on 14 December 1995.<sup>58</sup> As many argue, NATO's military intervention was beyond the authorization given to it. It is important because the disregard for the UN shows a tendency in NATO to act with no accountability and supervision whatsoever.<sup>59</sup> Above all article 42 of the UN Charter limits

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<sup>51</sup> Coalition for International Justice: East Timor available at <<http://www.cij.org/index.cfm?fuseaction=viewOverview&tribunalID=3>> (accessed on 23 September 2004).

<sup>52</sup> Coalition for International Justice: Sierra Leone available at <<http://www.cij.org/index.cfm?fuseaction=viewOverview&tribunalID=5>> (accessed on 23 September 2004).

<sup>53</sup> As above.

<sup>54</sup> Coalition for International Justice: Cambodia available at <<http://www.cij.org/index.cfm?fuseaction=viewOverview&tribunalID=4>> (accessed on 23 September 2004).

<sup>55</sup> As above.

<sup>56</sup> As above.

<sup>57</sup> See GL. Schulte *NATO Review: Bringing peace to Bosnia and change to the Alliance* available at <<http://www.nato.int/docu/review/1997/9702-6.htm>> (accessed in 02 August 2004).

<sup>58</sup> See Operation Joint Endeavour (IFOR): UN Security Council 3613th Meeting Resolution S/RES/1035 available at <<http://www.nato.int/ifor/un/u951221b.htm>> (accessed on 20 August 2004).

<sup>59</sup> T Valasek *NATO: Last Resort, Not a Panacea* available at <<http://www.cdi.org/issues/Europe/ipskosov.html>> (accessed on 07 August 2004).

delegating power of the Security Council, even if it seeks to do so. Article 42 of the UN Charter is different from its preceding article in the sense that it limits the intervention power to be exercised by the Security Council. This article does not mention as to whether the Security Council can delegate NATO to take military action on its behalf. Therefore, the end of intervention could be at times just but, as it may lead to manipulation, cannot justify the means.

### **2.2.1.2.3. Sudan: Darfur**

Recently, the Secretary-General of the United Nations, Kofi Annan, has announced the appointment of the first Special UN Advisor on the Prevention of Genocide<sup>60</sup>. Having regard to the failure of the United Nations and the international community to tackle the Genocide in Rwanda in the 1990s, the creation of this special position at the world body appears to be a positive move towards preventing such humanitarian disasters from occurring on the same scale in the future. However, despite acknowledging its failures in the Rwandan Genocide, the UN is not taking any step to prevent the aggravation of the 'situation in Darfur'<sup>61</sup>. At least, as it is a threat to international peace and security, the Security Council could have taken appropriate measures under articles 24 and 39 to 42 of the UN Charter.

The situation in Darfur is an immediate test of the decision of the United Nations to act upon its pledge never again to allow Genocide, but till now there are reports of continuing attacks and violence in Darfur in breach of the ceasefire. As known Southern Sudan's struggle for the right of self-determination has for decades put the area under conflicts and strife.<sup>62</sup> In April 2003, when the world still welcomed the Sudanese government engagement in a peace process with the Sudanese People's Liberation Army (hereinafter SPLA), hoping for a resolution to the longest-running conflict in Africa, the government, under the pretext of combating two armed political groups, embarked on a ruthless counter-insurgency campaign against the civilian population in Darfur. This led to, among other things, civilian killings, mass rapes, and looting of property.<sup>63</sup>

In situations like the above, the Security Council is required to make recommendations under article 39 of the UN Charter or take enforcement measures under articles 41 and 42 of the UN

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<sup>60</sup> The UN's genocide watchdog available at <<http://www.rnw.nl/hotspots/html/un040713.html>> (accessed on 13 July 2004).

<sup>61</sup> Amnesty International 'Sudan: End the Human Rights Crises in Darfur' available at <<http://www.amnesty.org/>> (accessed in 1 August 2004).

<sup>62</sup> See D de Chand 'South Sudan Claims for Right of Self-Determination' <[http://www.sas.upenn.edu/African\\_Studies/Articles\\_Gen/de\\_chand.html](http://www.sas.upenn.edu/African_Studies/Articles_Gen/de_chand.html) > (accessed on 6 Aug 2004).

<sup>63</sup> Georgia Post 'At the Mercy of killers – Destruction of Villages in Darfur' <<http://www.georgiapost.com/p/40/3eabc39a66bcb7.html?id=WNAT9ac1d97aedb4470950f1f41a92a37fb9>> (accessed on 2 July 2004). See also Amnesty International Sudan End the Human Rights Crisis in Darfur <<http://www.amnesty.org/>> (accessed on 1 August 2004).

Charter. It has first to determine if a threat or breach of the peace or acts of aggression has occurred.<sup>64</sup> However, the UN Charter is silent as to the meanings and tests of the phrases 'threat to peace' or 'breach of peace' and 'acts of aggression'. These are mentioned in article 39 of the UN Charter as the governing permitting factors for the intervention of the Council in situations of International Crimes. After debating this issue at the Dumbarton Oaks Proposal it was decided to leave the entire decision to the Council.<sup>65</sup> Thus, even if there is a gross violation of human rights the Council is not mandated to intervene in the absence of the above factors. However, practice has shown us the adverse impact of human rights violations. Lately, though, the Rome Statute has provided a guiding theorem: "such crimes threaten the peace, security and well-being of the world"<sup>66</sup>. This leads to the conclusion that whenever such crimes are committed, then, there is a threat to peace and security of the world allowing the Security Council to act according to article 39 of the UN Charter even if breach to the peace and acts of aggression are not proved. However, most interestingly, the literal interpretation of article 39 of the UN Charter leads to the conclusion that the Council can only intervene under the same article in so far as the above threats and aggressions on the ground.

#### **2.2.1.2.4. Sierra Leone**

Mass killings, mutilations, and sex crimes characterized a series of conflicts between 1991 and 2002 in Sierra Leone.<sup>67</sup> In the scramble that resulted from the fight for resources, Sierra Leone fell into a system of absence of rule. That subsequently exacerbated the power grabs and warlord profiteering as a cause for the war crimes and crimes against humanity that were committed. According to Human Rights Watch Report the majority of killings on the civilians were perpetrated by rebels from the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC).<sup>68</sup> The report also added that However, government forces and their allies, including the Civil Defense Forces (CDF), also committed serious crimes, albeit on a smaller scale and of a different nature than those by the rebel alliance.<sup>69</sup> In August 2000, finally, the Security Council

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<sup>64</sup> See UN Charter (n 44 above) Art 39.

<sup>65</sup> Schweigman (n 48 above) 34.

<sup>66</sup> See the Preamble of the Rome Statute.

<sup>67</sup> Coalition for International Justice: Sierra Leone available at <<http://www.cij.org/index.cfm?fuseaction=viewOverview&tribunalID=5>> (accessed on 23 September 2004).

<sup>68</sup> Human Rights Watch 'Bringing Justice: the Special Court for Sierra Leone' available at <[http://www.hrw.org/reports/2004/sierraleone0904/1.htm#\\_Toc81830567](http://www.hrw.org/reports/2004/sierraleone0904/1.htm#_Toc81830567)> (Accessed on 12 September 2004).

<sup>69</sup> As above.



authorized a Special Court for Sierra Leone to try those most responsible for War Crimes committed after 30 November 1996.<sup>70</sup>

#### **2.2.1.2.5. Rwanda**

In 1994, Hutu extremists took advantage of political instability and long-standing ethnic tension and distrust in the region to commit a planned Genocide. Despite explicit warnings, the United Nations and its members states failed to intervene to prevent the Genocide.<sup>71</sup> Nevertheless, in the aftermaths of the atrocities, the ICTR was established by the Security Council as a means of dealing with the atrocities to bring to justice those suspected of committing Genocide, War Crimes and Crimes Against Humanity and, thereby, prevent their commission in the future. The Court was set up based up on the request made by the government of Rwanda. The background of the conflict and the contribution of UN to its preventive role will be discussed in detail in Chapter Three.

#### **2.2.1.3. Tertiary Prevention**

The last mandate of the UN lies in the Tertiary Prevention. This mechanism recognizes that there are on-going consequences of the Genocide long after the killing has stopped. It involves and describes the involvement of trials of perpetrators (by way of defeating impunity) and rehabilitation of the victims and society. Thus it draws the powers of the UN as mandated under Chapter I and VII of the UN Charter. In this case the International Tribunals so far established could serve as examples. However, the role of the UN has not yet become practically visible with regard to rehabilitation of the victims and society. In the Rwandan case, the input of the UN in the truth, reconciliation and rehabilitation process has been minimal. Although it could have contributed in the reconciliation and rehabilitation process, the focus of the UN lies in the function of the ICTR. Given the possibility of acquittal for lack of evidence, the slowness of the trials in the ICTR is defeating the presumption of innocence, which is an element for a fair trial. Secondly, victims may lose faith in pursuit of remedies. And, finally, all this factors can adversely affect reconciliation and rehabilitation as future preventive mechanisms.

#### **2.2.2. Organization of the African Unity (OAU) / African Union (AU)**

Quoting Amoo, Joshi says that both academics and policy-makers appear to have written off the OAU as an effective instrument of conflict management and maintenance of peace and stability in

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<sup>70</sup> Coalition for International Justice (n 67 above).

<sup>71</sup> Coalition for International Justice: Rwanda available at <http://www.cij.org/index.cfm?fuseaction=viewOverview&tribunalID=2> (accessed on 23 September 2004).

the African region<sup>72</sup>. The OAU has been perceived as a more or less virtually ineffective regional organization when it comes to resolving internal conflicts.<sup>73</sup> As wars and conflicts are the causes of the international crimes committed in Africa, protection of human rights had been ineffective till the establishment of the African Commission on Human and People's Rights (hereinafter the African Commission) in 1987<sup>74</sup>. But this does not mean that the African Commission has provided effective human rights protection mechanisms. Since its establishment, though not for Genocide, War Crimes and Crimes Against Humanity, the situation of human rights has shown progress.<sup>75</sup> However, even then, the guiding principles of respect for sovereignty, non-interference and independence of members states that ruled the OAU for so long has limited the effectiveness of the African Commission in particular and OAU in general in the sphere of human rights.

True that the Charter of the Organization of the African Unity (hereinafter the OAU Charter), in its preamble, states the adherence to human rights and pursuance to the UN's Charter as guiding principles of the organization. Nevertheless, it was based on strict respect for state sovereignty, non-interference, territorial integrity and independence of member states. This limited the possibility of external involvement to intervene when human rights were violated.<sup>76</sup> As mentioned above, there is scant information available on the OAU's historical practical role in situations of human rights violations. Its initiative in Rwanda, however, is mentioned as a positive effort in the Rwandan 1994 Genocide. In 1992, the OAU put its conflict resolution mandate to test in Rwanda by sending the Neutral Military Observer Group (hereinafter NMOG).<sup>77</sup> It played a critical role in the negotiation process that yielded a series of agreements from N'sele in March 1991 to Arusha in August 1993.<sup>78</sup> As it had managed to get an agreement of cease-fire from both parties, encouraged by this success in Rwanda, in June 1993, the OAU Assembly adopted a declaration on a proposed mechanism for prevention and peace-keeping with the financial, logistical and military support of the UN.<sup>79</sup> Though not implemented effectively due to the death of Habyarimana, the Rwandan president, and the outbreak of the 1994 Genocide the initiative mentioned above was a promising step. Thus, had it not been for the death of the president and the sudden outbreak of

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<sup>72</sup> Joshi (n 10 above) 77.

<sup>73</sup> As above.

<sup>74</sup> M Fleshman 'Human Rights move up on Africa's agenda' (2004) 18 (2). *Africa Renewal* 10.

<sup>75</sup> For reference, the impact of the communications brought against Nigeria (SERAC's and other cases) on the domestic sphere of human rights could be cited as examples. SERAC's case- Communication 155/96 *The Social and Economic Rights Action Center v. Federal Republic of Nigeria* 30<sup>th</sup> Ordinary Session 13<sup>th</sup>-27<sup>th</sup> October 2001.

<sup>76</sup> Arts II and III of the Charter of the OAU.

<sup>77</sup> Joshi (n 72 above).

<sup>78</sup> As above.

<sup>79</sup> As above.

the Genocide afterwards the OAU's attempt to bring together the RPF and the Government of Rwanda to an agreement of cease-fire and secession of hostilities was with a positive move that would have helped to minimize the atrocities.

Similar to the UN system, the African Charter on Human and People's Rights (hereinafter the African Charter) provides for a human rights monitoring mechanism. And the body responsible for the protection and promotion of human rights is the African Commission.<sup>80</sup> Thus, for cases of international crimes, the Commission can send Special Rapporteurs to the country concerned to report and recommend to the Assembly of Heads of States necessary measures needed to be undertaken.<sup>81</sup> However, as decisions of the Commission are recommendatory in their nature, and as there is no effective co-ordinated enforcement mechanism, the work of the African Commission under the OAU could not bear a fruit until now. Besides, as Evans and Murray noted, the rapporteurs are members of the African Commission and that has undermined the whole purpose of the investigation process.<sup>82</sup> First, as they are ambassadors and officials of governments and members of the African Commission, their role becomes questionable for lack of independence.<sup>83</sup> Secondly, as they lack enough financial support and a clear mandate, they have not been able to conduct their visit and carryout their activity as required.<sup>84</sup>

In the process of reporting, the African Commission has assumed the power of receiving reports. But article 62 of the African Charter does not mention as to *who* shall receive reports. In the performance of its duties, however, the African Commission has not developed uniform guidelines of reporting and a means of ensuring reporting.<sup>85</sup> Instead, the African Commission views the reporting mechanism as developing a constructive dialogue rather than as a means of ensuring compliance to obligations.<sup>86</sup> For that reason states follow different formalities and styles, and fail to report. Above all its resolutions are merely calls for reports.<sup>87</sup>

The enactment of the AU Constitutive Act (hereinafter the Constitutive Act) to a full enforcement, human rights will be getting a better protection. According to article 4(h) of the Constitutive Act, the

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<sup>80</sup> See Art 30 and 31 of the African Charter.

<sup>81</sup> See Art 45 and 58 of the African Charter.

<sup>82</sup> See M Evans and R Murray 'The Special Rapporteurs in the African System', (ed) M Evans and R Murray *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (2002) 299.

<sup>83</sup> As above 302.

<sup>84</sup> As above.

<sup>85</sup> As above (Malcolm Evans *et al* 'The Reporting Mechanism of the African Charter on Human and Peoples' Rights') 45.

<sup>86</sup> As above 43.

<sup>87</sup> As above 41.

Union can intervene in situations of War Crimes, Genocide and Crimes Against Humanity. Therefore, with the establishment of the African court and the coming in to effect of the Constitutive Act in the future, the enforcement mechanism, which was lacking before in the OAU human rights protection mandate, is contemplated to bring a better accountability through intervention (similar to the Security Council's power under article 42 of the UN Charter) and the African court. This is the only mention that can be made about the mandate of the OAU / AU relating to human rights. Beyond this, there is no express and precise tertiary preventive mechanisms available, especially, under the OAU system. But now, the AU can take part similar to tertiary prevention mechanisms applicable to the OAU.

### **2.3. Conclusion**

The mandate of the UN and OAU in preventing War Crimes, Crimes Against Humanity and Genocide falls into three levels. These are: before the commission, while under commission and after the commission of the crimes. Thus, albeit with shortcomings, both organizations have human rights monitoring organs and mechanisms. Through these organs and mechanisms, both the UN and OAU / AU can prevent the commission of atrocities by requiring states to comply with their duties under international instruments. With regard to the second level of mandate, the UN is mandated to intervene only when there is a threat to peace and security. However, except the one recently given under the Rome Statute there was not a clear definition of the phrase threat to peace and security. Under the OAU, however, there was no such kind of mechanism. However, under the Constitutive Act it has been solved, though with a minor weakness. In relation to the last mandate, the UN, through the mandate of the Security Council, can involve itself to see to it that perpetrators are brought to justice and the society is rehabilitated. Under the OAU there did not exist that kind of mechanism. However, now, the Constitutive Act of the AU provides a similar mechanism to that of the UN, and that is hoped to strengthen the International prevention of the above atrocities. The next Chapter, thus, examines if the UN and OAU / AU have acted and are acting as mandated.

## CHAPTER THREE: ANALYSIS OF THE MANDATE AND ROLE OF THE UN AND OAU / AU IN THE RWANDAN 1994 GENOCIDE

### 3.1. United Nations

As discussed in Chapter Two, with respect to Genocide, War Crimes and Crimes Against Humanity, the power of the United Nations (UN) flows from three mandated levels of phases: Primary Prevention, Secondary Prevention and Tertiary Prevention. This study deals with the preventive mechanisms in line with these three distinct phases of preventive processes illustrated by James M Smith.<sup>88</sup>

#### 3.1.1. Primary prevention

Being a mechanism dealing with the root causes of international crimes, the essence of Primary Prevention lies in the conviction that the UN should strive to promote a healthy society by supporting democracy, influencing ideology, developing culture, education, media, equality of opportunity and other stabilizing factors. On their face diversified, these values might look independent, philosophical and attributable to protections from domestic mechanisms. However, even though human rights are not always interpreted similarly across the continent, these norms and values of human beings nonetheless form a common human rights language in which the claims of various cultures can be articulated universally.

Given their universal nature, human rights norms impose certain requirements on governments. This, in turn, legitimizes the complaints of individuals in those cases where fundamental rights and freedoms are not respected. For that reason, the widespread ratification of international human rights agreements could be taken as evidence that these are widely shared values and also a manifestation of a recognition that states are repeatedly failing to protect and respect human rights. Such norms, thus, constitute a standard for the conduct of government and conditions necessary for the promotion of progress of all dimensions. Regrettably, however, the absence of effective human rights protection mechanisms have, over time, resulted in the commission of the most heinous crimes human beings have ever perpetrated. To aggravate the situation, these crimes are rooted in the historical deprivation of fundamental freedoms and violations of human rights by governments.

In Rwanda, although different views exist as to the roots causes of the international crimes so far committed, the two main ones are worth mentioning. For Mamdani, “at the core of the ideology of Hutu Power was the conviction that the Tutsi were a *race* alien to Rwanda, and not an indigenous

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<sup>88</sup>

Smith (n 37 above).

*ethnic group...*<sup>89</sup> That the Tutsi were a race not indigenous to Rwanda was both central to colonial ideology and a key idea that had propelled forward the 1959 Revolution.<sup>90</sup> Yet, in defining the Tutsi as a foreign race, even if without knowing it, they were reaffirming the colonial legacy and construing themselves the same way that Belgian colonialism had construed them prior to independence.<sup>91</sup> This view, therefore, holds that all the atrocities were results of hatred and revenge for an undue aristocratic and tyrannical rule by those considered outsiders. In this case it was the Tutsis.<sup>92</sup>

The second widely held view, subscribed to by the author, is that the atrocities result from feelings of the hatred and revenge that developed over time due to aristocratic and tyrannical rule, which historically happened to be committed by the majority of one ethnic group, the Tutsis. Because, had the case been like the view expressed in the above paragraph, obviously, South Africa would have suffered from a similar incidence. For Waller and the other writers, given the history of migration that existed from the last century, especially in Africa, “the differences between the Hutu and Tutsi ethnic groups were results of social differentiation and political competition”<sup>93</sup>. In reiterating this view, Joshi states that the seeds of division in the Rwandan society were sown by the colonizers along ethnic, racial and political lines.<sup>94</sup> The Tutsis were dominating the Hutus in a semi-feudal hierarchy of a master and serf<sup>95</sup>, not as outsiders, but as an ethnic group dominating the others. Besides, in addition to their aristocratic rule, the Tutsis were also receiving preferential treatment from the colonizers.<sup>96</sup> They even went to the extent of denying the Hutus what we today call their ‘civil, political and socio-economic rights’.<sup>97</sup> Therefore, Primary Prevention deals, in the first place, with the mechanisms for the protection of civil, political and socio-economic rights in general.

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<sup>89</sup> M Mamdani *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (2001) 190.

<sup>90</sup> As above.

<sup>91</sup> As above.

<sup>92</sup> See David Waller *Rwanda: Which way now?* (1996) 5. See also Joshi (n 79 above) 54-57.

<sup>93</sup> As above (Waller). See also Arthur Jay Klinghoffer *The International Dimension of Genocide in Rwanda* (1998) 6.

<sup>94</sup> Joshi (n 92 above) 55.

<sup>95</sup> As above 6.

<sup>96</sup> As above 56 and 57.

<sup>97</sup> As above. And as Waller points out, with the coming of Belgians to Rwanda, the Hutus were removed from all positions of authority within society and had very limited civil, economic and societal freedoms. Joshi also writes similarly about the socio-economic and political life of the Hutus. See also LR. Melvern *A People Betrayed: The Role of the West in Rwanda's Genocide* (2000) 8-11.

According to Melvern, the UN's Primary Prevention role dates from its inception.<sup>98</sup> In recalling this role Melvin states:

The United Nations was involved in the affairs of Rwanda from its creation in 1945, when the UN Charter – in many ways similar to the Covenant of the League of Nations – promised the colonized peoples of the world freedom, justice and protection. A special council was created, the Trusteeship Council, which was to oversee the transition to independence of the world's colonized peoples. Rwanda was transferred from its League of Nations mandate and became a UN trusteeship territory...(Accordingly), in mid-July 1948 a group of four ambassadors visited Rwanda and Burundi, officially known as Ruanda-Urundi, and Tanganyika, which was under British rule. In the same visit the ambassadors noted the strange feudal system. In their report, they criticized Britain and Belgium for their policies...The UN Trusteeship Council in New York also sent five visiting Missions to Rwanda between 1948 and 1962, and each report was more critical than the last.<sup>99</sup>

Despite all the above visits, however, apart from just urging the Belgian administration to give serious attention to the political education of the people, for which nothing concrete was done, the Mission could not do any thing more. And the UN, in response to the mission's report, took no tangible measures. On the contrary, the worsening of the prevailing situation led to the 1959 uprising of the Hutus, and finally, the violent overthrow of the traditional system followed by the first anti-Tutsi attack and violence.<sup>100</sup>

At this juncture it would be worthwhile to discuss the two channels of Primary Prevention mechanisms available under the UN human rights system: one flowing from the Charter-based bodies mandate and the other flowing from the mandate of the Treaty based bodies.

### **3.1.1.1. Charter-based prevention**

As defined in Chapter Two of this study, primary prevention deals with mechanisms by which cases or situations leading to human rights violations, in our case, War Crimes, Crimes Against Humanity and Genocide, are dealt with to avoid or prevent the commission of those crimes. But how? As history tells and even the UN Charter testifies, it was driven by the atrocities committed during the two world wars that leaders of the world brought the idea and finally made the establishment of the United Nations a reality. Accordingly, though incomplete and weak, the UN Charter did establish early preventive mechanisms.

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<sup>98</sup> As above (Melvern) 11.

<sup>99</sup> As above 11-13.

<sup>100</sup> See Joshi (n 96 above) 60 and 71. See also Waller (n 5 above) 6, and Gérard Prunier *The Rwanda Crises: History of a Genocide* (1995) 48-49.

Ever since the establishment of the UN issues of peace and security have been priorities of its statutory mandate. However, human rights issues were also recognized as having a direct correlation. To begin with, the Preamble of the UN Charter states that the determination of the peoples of the world is, among other things, to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women. The second paragraph equally testifies, by way of declaration of determination, the intensity and breadth of the failures of commitment committed in protecting and respecting fundamental human rights. Accordingly, ECOSOC was charged with the responsibility of promoting respect and observance of human rights and fundamental freedoms.<sup>101</sup>

Though the other organs of the UN also do take part, Chapter X of the UN Charter puts human rights issues under the wide mandate of ECOSOC. ECOSOC, therefore, initiates or conducts studies and submits reports and takes appropriate measures for the purpose of promoting respect for and observance of human rights and fundamental freedoms for all.<sup>102</sup> Thus, in line with its mandate under article 68, the Council established the United Nations Human Rights Commission (hereinafter the UN Commission) and the Sub-commission on the Promotion and Protection of Human Rights to conduct studies and submit proposals, recommendations and reports to the ECOSOC regarding international bills of rights, international declarations or conventions.<sup>103</sup>

Guided by the principles embodied in the UN Charter, other international and relevant regional instruments<sup>104</sup> and its responsibility to promote and encourage respect for human rights and fundamental freedoms for all, therefore, the UN Commission is supposed to conduct studies and make recommendations to ECOSOC to implement the necessary measures. ECOSOC, in turn, can make its recommendations to the General Assembly and the Security Council with respect to matters for the promotion of human rights and fundamental freedoms. However, the Security Council acts under Chapter VII of the UN Charter and enforces the recommendations brought to its attention by the General Assembly or ECOSOC only if there is a threat to the peace, breach of the

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<sup>101</sup> See Art 62 of the UN Charter.

<sup>102</sup> As above Art 62 and 68-72.

<sup>103</sup> ECOSOC Resolution 5 (I) of 16 February 1946 (document E/20 of February 1946) and ECOSOC Resolution 9 (II) of 21 June 1946. The Sub-commission was originally known as the Subcommission on Prevention of Discrimination and Protection of Minorities, but it was changed by ECOSOC decision 1999/256 of 27 July 1999.

<sup>104</sup> For the purpose of its work, the UN Commission can make use of the UN Charter, the Universal Declaration of Human Rights, the International Covenants on Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Prevention and the Punishment of the Crime of Genocide, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, the Convention on the Rights of the Child, international humanitarian law, including the Geneva Conventions of 12 August 1949 for the protection of war victims and the Additional Protocols thereto of 1977, the African Charter of Human and Peoples' Rights, and other relevant international human rights instruments.



peace and, or act of aggression. If these elements are met, then, the Security Council may use political maneuvers, economic sanctions, military sanctions or military intervention depending up on the circumstances of the case as a means of enforcing the resolutions.<sup>105</sup>

As noted previously, though with out any effective result, the UN was involved in the affairs of Rwanda from its creation in 1945.<sup>106</sup> However, since then not much exemplary commitment has been seen towards promoting the human rights situation in Rwanda. Granted, the then Trusteeship Council in New York (hereinafter the Trusteeship Council) sent five visiting missions to Rwanda. And on its visits, noting the absence of respect for human rights and fundamental freedoms one mission wrote a report to the other government members of the Trusteeship Council and, in 1954, urged the Trusteeship authority -the Belgium administration-to give serious attention to the situation.<sup>107</sup> Apart from being vague and broad, the report did not recommend any concrete measure. Nothing changed. And even though the UN Commission was already established and could have acted in accordance with its mandate, it undertook nothing.

The UN Commission, in the performance of its functions, is mandated to conduct studies of human rights violations. This involves paying visits (or sending Special Rapporteurs) to the country in issue to deal with the case according to the findings of the Rapporteurs. Thus, in the Rwandan case, even if the report of the mission sent by the Trusteeship Council of the Trusteeship Council proved to be insufficient. The Trusteeship Council could have conducted an independent study and passed its recommendations for an effective response from the General Assembly and the Security Council. Had this procedure been strictly followed, it could have helped to avoid confrontation for power or power sharing in the late 1950s, which was a transitional period for Rwanda.<sup>108</sup> The UN Commission could have, from its establishment, monitored the human rights situations in Rwanda and found means to address the human rights concerns. However, in practice, little was done. In fact, there is no concrete evidence of any visit of Special Rapporteurs

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<sup>105</sup> See UN Charter (n 14 above) Arts 10, 11(3), 13, 14, and 39-42.

<sup>106</sup> Melvern (n 99 above).

<sup>107</sup> As above 13.

<sup>108</sup> In 1959, the worsening of aristocracy and tyrannical rule of the Tutsi dominated rule and intensification of conflict led to attacks on Tutsis and a Hutu uprising and, finally, the overthrow of the king who was from the Tutsi ethnic group. Again, driven by the holding of power by force, many Tutsis fled their country to the neighbouring countries and organized themselves for an attack. This situation, in turn provoked a revenge of indiscriminate attacks on Tutsis. See Melvern (n 107 above) 14; Mamdani (n 91 above) 123; P.J. Magnarella *Justice in Africa: Rwanda's Genocide, its Courts, and the UN Criminal Tribunal* (2000) 12-13; Joshi (n 100 above) 60-61; Pottier (n 9 above) 15; International Panel of Eminent Personalities *Rwanda: The Preventable Genocide* available at <<http://www.visiontv.ca/RememberRwanda/Report.pdf>> (accessed on 21 August 2004); and Natiomaster.com Encyclopedia: History of Rwanda available at <<http://www.nationmaster.com/encyclopedia/History-of-Rwanda>> (accessed on 18 September 2004).

from the UN Commission to monitor human rights violations in Rwanda before 1994 and, especially, in the early years of its establishment.<sup>109</sup>

Indeed, an international fact-finding mission visited Rwanda in 1993 and categorically stated that the responsibility for the political assassinations and human rights abuse lies with the Habyarimana regime.<sup>110</sup> The UN Commission on Human Rights also sent a mission to Rwanda. It was headed by the Senegalese lawyer Bacre waly N'Diaye who warned the international community about the impending threat of ethnic killings in Rwanda in an August 1993.<sup>111</sup> He repeated his warnings in March 1994.<sup>112</sup> The UN only appointed a Special Rapporteur for Rwanda on 25 May 2004.<sup>113</sup> Subsequently, there has been no visible concrete work done by the UN Commission. At least it could have recommended for the establishment of the ICTR. However, it took no part. ICTR was established upon the initiation of the Rwandan government and request and resolution of the Security Council.<sup>114</sup>

The UN Commission, ECOSOC and the Secretariat have conducted studies and passed resolutions and decisions, but without implementing them. Most of the studies, resolutions and decisions have not been enforced. Besides, most of the studies, resolutions and decisions lack description of cross-cutting rights, which for years have been the fundamental causes for the atrocities.<sup>115</sup> By cross-cutting rights we mean those rights which straddle, underlie or facilitate the exercise of both civil and political rights and socio-economic rights. These rights include the prohibition against discrimination, as well as the rights to equality before the law, life and human dignity.<sup>116</sup> Thus, for the purpose of our discussion it comes in relation to group rights and rights based on ethnicity. To the contrary, the Rwandan government persuaded the UN Commission on Human Rights to end the mandate of the special rapporteur on Rwanda, replacing him with a

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<sup>109</sup> For detail see the UN Charter-based bodies database available at <<http://www.unhchr.ch/huridocda/huridoca.nsf/Documents?OpenFrameset>> (accessed on 10 October 2004).

<sup>110</sup> Joshi (n 108 above) 71.

<sup>111</sup> As above.

<sup>112</sup> As above.

<sup>113</sup> As above.

<sup>114</sup> See UN Security Council Resolutions 935 of 1 July 1994 and 955 of 8 November 1994.

<sup>115</sup> See Reports of the Special Representative of the UN Commission A/55/269 (2000), E/CN.4/2000/41 and A/53/402; Summary Record of the UN Commission E/CN.4/2000/SR.19; ECOSOC Decision E/DEC/1996/281; UN Security Council Resolutions S/RES/1449 (2002) and S/RES/1482 (2003); Communications examined by the Special Rapporteur of the UN Commission E/CN.4/2002/97/Add.1; Examination of statement submitted by Human Rights Watch the UN Commission Session E/CN.4/2001/NGO/30; Reports of the Special Rapporteur of the UN Commission A/49/508/Add.1, S/1994/1157/Add.1, E/CN.4/1997/61 and E/CN.4/1998/38/Add.1. General Assembly resolution A/RES/49/206 (1994); and UN Commission resolution E/CN.4/RES/1997/66.

<sup>116</sup> CA Odinkalu 'Implementing Economic, Social and Cultural Rights Under the African Charter on Human and Peoples' Rights', Evans and Murray (n 87 above) 188-189.

"special representative" who lacked the authority to report on alleged abuses and was limited to advising on how to improve the human rights situation.<sup>117</sup>

### 3.1.1.2. Treaty based prevention

In the years before revolution, the Hutu ethnic group were being ruled by the so-called aristocratic and tyrannical rule the Tutsi ethnic group.<sup>118</sup> As a result, after the former took power repeated atrocities were committed till 1994. And nothing prevented the severity except for the revolution that overthrew the same rule.<sup>119</sup> Due to complex socio-economic, historical and political context and background of the revolution, the first Genocide could not be averted.<sup>120</sup> And then, "for decades, the Hutu-dominated government had practiced persistent discrimination against Tutsis, the people who would be targeted during the Genocide"<sup>121</sup>. The post-independence government categorized citizens by ethnicity and, continuing a practice of the Belgian colonial regime, required all adults to carry documents identifying their ethnic group.<sup>122</sup> These identity documents were used to identify the Tutsis who were to be killed in the Genocide.<sup>123</sup> Instead, in the years that followed a number of massacres were perpetrated in Rwanda, specifically in 1959, 1963, 1966, 1973, 1990, 1991, 1992, 1993, and finally, in 1994.<sup>124</sup> In the same way as the Charter-based bodies of the UN, it is submitted that the Treaty-based bodies could provide a prevention mechanism against War Crimes, Crimes Against Humanity, and Genocide by way of promoting human rights and fundamental freedoms which have become, for years, the background reasons for hatred and resentment leading to those atrocities.

Unlike other human rights instruments, the Convention specifically is meant to avoid and punish the Crime of Genocide, but it lacks a trigger mechanism, which results in firm, appropriate action that prevents such atrocities ever being perpetrated by mankind again.<sup>125</sup> At present the

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<sup>117</sup> Human Rights Watch World 'RWANDA: Human Rights Developments' available at <<http://hrw.org/worldreport/Africa-10.htm>> (accessed on 10 October 2004).

<sup>118</sup> Joshi (n 113 above) 56.

<sup>119</sup> As above 81.

<sup>120</sup> Apart from the socio-economic situation that prevailed at that time and the focus of attention in Europe due to the Cold War has adversely affected the Rwandan situation in the 1950s and 1960s.

<sup>121</sup> Human Rights Watch 'Rwanda: Lessons Learned: Ten Years After the Genocide' available at <<http://hrw.org/english/docs/2004/03/29/rwanda8308.htm>> (accessed on 05 October 2004).

<sup>122</sup> As above.

<sup>123</sup> As above.

<sup>124</sup> Preliminary Report of the Independent Commission of Experts established in accordance with Security Council Resolution 935 (1994), "Rwanda: Accountability for War Crimes and Genocide" available at <<http://www.usip.org/pubs/specialreports/early/rwanda3.html>> (accessed on 10 October 2004).

<sup>125</sup> International Panel of Eminent Personalities (n 102 above).

Convention is almost purely reactive.<sup>126</sup> In effect it only provides for action after the crime has been committed, by which time it is too late for the victims and, indeed, for humanity in general.<sup>127</sup> Thus, its enforcement lies after effect. The convention, though, the power of interpretation to the international Court of Justice.<sup>128</sup> In this respect, however, the monitoring mechanism provided under the other international instruments could provide effective catering promotional mechanism for the international crimes mentioned above.

Rwanda has ratified the International Covenant on Economic and Cultural Rights (1975), the International Covenant on Civil and Political Rights (1975), the Convention on the Elimination of All Forms of Racial Discrimination against Women (1980), International Convention on the Elimination of All Forms of Racial Discrimination (1975), the Convention on the Rights of the Child (1990), the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict(2002), the Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitute and child pornography(2002). It has not, however, signed the other instruments dealing with socio-economic, civil and political rights.

In any case, all the treaties mentioned above provide a legal and administrative framework for the promotion of human rights. And the bodies created under those instruments are aimed at promoting the respect of respective human rights values and entitlements by way of their monitoring function. The instruments provide communication<sup>129</sup>, reporting<sup>130</sup> and investigation<sup>131</sup> mechanisms for human rights violations and situations.

Till now, as under the Charter-based system, little has been achieved with regard to Rwanda, especially before the 1994 Rwandan Genocide. Despite Rwanda's weak reporting status, almost all the committees did not take measures to get the report of the government and the promotion of human rights verified. In fact, the Committee on the Rights of the Child and the Committee on the Elimination of All Forms of Racial Discrimination have done much work with in the scope of their power. The Committee on the Elimination of All Forms of Racial Discrimination has passed

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<sup>126</sup> As above.

<sup>127</sup> As above.

<sup>128</sup> See Art IX of the Convention on the Prevention and Punishment of the Crime of Genocide.

<sup>129</sup> See, for example, Arts 21 and 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Arts 11 and 14 of the Convention on the Elimination of All Forms of Racial Discrimination, Arts 1 and 2 of the Optional Protocol to the Convention on the Elimination of All Forms of Racial Discrimination against Women, Art 41 of the International Covenant on Civil and Political Rights, Art 1 of the Optional Protocol to the International Covenant on Civil and Political Rights optional civil.

<sup>130</sup> See, for example, Arts 19 of CAT, 16 & 17 of ICESCRs, 9 of CERD, 18 and 21 of CEDAW and 40 of ICCPRs.

<sup>131</sup> See, for example, Arts 20 of CAT, 19 of the ICE SCRs and 22 of CEDAW.

impressive decisions and resolutions.<sup>132</sup> In its decisions and resolutions this Committee was able to deal with important issues relating to the flow of arms in the Great Lakes region<sup>133</sup>, the under-representation of ethnic Hutus<sup>134</sup>, ethnic tolerance<sup>135</sup>, and other related issues<sup>136</sup>. However, as in the endeavors of the Charter-based bodies, the treaty-based decisions and resolutions thus far lack, with the exceptions of the ones already mentioned, a critical examination and follow-up of cross cutting human rights. Besides, nothing much has been done to oversee the implementation of the decisions. To this effect, during the author's short study visit to Rwanda in April 2004, almost all of the public officials whom he met were Tutsis. Apart from this, most of the students whom the author met in the University of Butare, Rwanda, were Tutsis, too. Given their percentage make-up the proportion of the population,<sup>137</sup> this situation is indicative of a need for a critical examination and promotion of human rights in Rwanda.

Till now, Rwanda has submitted only two reports.<sup>138</sup> Even these two reports relate only to the rights of the child.<sup>139</sup> On 16 April 1975, Rwanda acceded to the Convention, which specifically obliges the Rwandese government to bring to justice all those suspected of committing acts of Genocide. The same also applies in stopping the Commission of the crime. The Convention on the Non-Applicability of Statutory Limitations to War Crimes Against Humanity could have provided in dealing with the Crimes of Genocide, War Crimes and Crimes Against Humanity retrospectively to prevent future atrocities, but the international community did not live up to that commitment.

### 3.1.2. Secondary Prevention

As Joshi pointed out, there is little doubt that the UN was plunged in to utter confusion by the events in Rwanda following the April 6 plane crash that claimed the life of the Rwandan President and other top officials.<sup>140</sup> This was partly due to the age-old practice of simply viewing every crisis in Africa as "tribal conflict or war" or "uncontrollable tribal anarchy" and partly on account of a lack

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<sup>132</sup> Committee on the CERD Decisions 7 (46) A/50/18,para.25(7) and 1 (45) 03/08/94. A/49/18,AnnexIII.

<sup>133</sup> As above, Decision 3 (54) A/54/18,para.21(3).

<sup>134</sup> As above, Decision 5 (53) A/53/18,para.IIB5.

<sup>135</sup> As above, Declaration A/51/18,para.30(3).

<sup>136</sup> As above, Decisions 7 (46) A/50/18,para.25(7) and Decision 1 (45) A/49/18,AnnexIII.

<sup>137</sup> In Rwanda the Hutu 84%, while the Tutsis and Twas represent 15% and 1% of the population. See CIA the World Fact Book: Rwanda available at <<http://www.cia.gov/cia/publications/factbook/geos/rw.html>> (accessed on 15 October 2004).

<sup>138</sup> See UN's reporting status of Treaty Bodies Database available at <<http://www.unhchr.ch/tbs/doc.nsf>> (accessed on 10 October 2004).

<sup>139</sup> As above.

<sup>140</sup> Joshi (note 119 above) 75.

of moral courage.<sup>141</sup> The confusion, ignorance and uncertainty finally led to the intensification of the atrocity and worsening of the crisis. And most importantly, the crimes committed were planned and systematically executed. And as evidence later disclosed, the government was responsible in planning the crime and inciting the population to commit the crimes.<sup>142</sup>

When the killing started on 29 April 1994 the International Committee of the Red Cross (ICRC) issued a strongly-worded statement that: "whole families are exterminated...and the cruelty knows no limit"<sup>143</sup>. However, the position in the UN was unclear as to what was happening in Rwanda and what measures to take. Melvern mentions the Secretary General's prompt letter to the president of the Security Council demanding a forceful action a first positive response. Nevertheless, the ambassadors in the Security Council maintained a stunning silence. Contrary to this view Barnett stated:

The Secretary General possessed information that illuminated the nature of the crimes. He had an obligation to transmit that information to the Security Council but failed to do so. Had he presented that information in a compelling way, he might have convinced the Security Council to authorize an intervention.<sup>144</sup>

Besides, as a result of the uncertainty as to what was happening, the head of the UN peacekeeping force in Rwanda, General Romeo Dallaire, and the representative of the UN Secretary-General, Jacques-Roger Booh-Booh, sent very different descriptions of events to the Secretariat in New York.<sup>145</sup> And in preparing briefings for the Security Council, the Secretariat favoured Booh-Booh's interpretation, which gave no sense of the systematic and ethnically based nature of the killing.<sup>146</sup> Dallaire's estimation of the situation that prevailed was that 4500 soldiers were needed to avert the atrocity.<sup>147</sup> The Security Council agreed to send 2,500.<sup>148</sup> However, leaving aside the need to deploy more soldiers, UNAMIR did not even have the necessary infrastructure to fulfil its limited mandate. There were more peacekeepers in former Yugoslavia than anywhere else in the world<sup>149</sup>, but Rwandans, as African, could not get that attention.

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<sup>141</sup> As above.

<sup>142</sup> L *Rwanda* 'Seven Years after the Genocide A People Betrayed: The Role of the West in Rwanda's Genocide' available at <<http://www.africacentre.org.uk/archiverwanda.htm>> (accessed on 08 October 2004).

<sup>143</sup> L Melvern *Conspiracy to Murder: the Rwandan Genocide* (2004) 222.

<sup>144</sup> Michael Barnett *Eyewitness to a Genocide: The United Nations and Rwanda* (2002) 20.

<sup>145</sup> See Human Rights Watch (note 27 above).

<sup>146</sup> As above.

<sup>147</sup> See Joshi (note 140 above).

<sup>148</sup> As above.

<sup>149</sup> As above.

As Melvern pointed out, to prevent, stop or punish Crimes of Genocide, War Crimes and Crime Against Humanity, the Convention relies on the UN, on its procedures and institutions<sup>150</sup>. In such situations the Security Council of the UN is central to this purpose. Evidently, it was too late for diplomatic intervention. The atrocities had already been planned and executed. Besides, they were committed very quickly. However, apart from mere promises of getting protection<sup>151</sup>, nothing was done to stop the commission of the crimes. Even though the Security Council could have used its mandate under Chapter VII of the UN Charter, it did not take any effective measure to stop the Genocide. UNAMIR was a UN operation mission deployed to oversee the Arusha Peace Agreement signed between the then government of Rwanda and the opposition party, RPF. To re-iterate this view Melvern noted that “by the time the UN peacekeepers arrived in December 1993 it was probably too late for peacekeeping”<sup>152</sup>. On the face of it, their assignment was ambiguous.<sup>153</sup> In the beginning it did not have any contemplated mandate with regard to the atrocities. And even if it was given an additional mandate to protect civilians, it had no final say and confirmation power. Its staff were told to protect civilians but without the use of any force, this amidst the shootings of firearms and use of machetes. Besides, UNAMIR lacked a co-ordinated command system to harmonize its mission.

Recalling the atrocities and the UN’s failure, UNAMIR’s Commander Dallaire noted:

I cannot bear to think of how many Rwandans were told that help was forthcoming that day and were then slaughtered. In just a few hours the Presidential Guard had conducted an obviously well organized and well-executed plan- by noon on April 7 the moderate political leadership of Rwanda was dead or hiding, the potential for a future moderate government utterly lost.<sup>154</sup>

Although the militia and soldiers were using firearms and grenades many killers used machetes or homemade weapons. Thus, given the nature of the atrocities, the political situation and the urgency of the matter, the Security Council could have effectively used its mandate under article 42 of the UN Charter to save thousands of lives. Regrettably this did not happen. Had an intervention occurred, it is possible that the genocidaires would have called off their master

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<sup>150</sup> As above.

<sup>151</sup> Dallaire (n 10 above) 232.

<sup>152</sup> As above.

<sup>153</sup> As above.

<sup>154</sup> Dallaire (n 151 above) 232.

plan.<sup>155</sup> The UN delayed for too long to stop the atrocities. With the overtaking of power by the RPF, however, the crises stopped.

### 3.1.3. Tertiary Prevention

Tertiary prevention recognizes the existence of on-going consequences of the Genocide, War Crimes and Crimes Against Humanity long after the killing has stopped. It deals with rehabilitation of the victims and society, prosecution of perpetrators, and reconciliation processes. Even though it may touch up on the other international treaties, the mandate of the UN relating to tertiary prevention mechanism originates from the power given to the Security Council under Chapter VII of the Charter. Under Chapter VII, and especially article 41 of the Charter, the Security Council is empowered to take measures not involving the use of armed force. Even though the UN Commission could have recommended this, it failed to live up to its mandate. Instead, the UN Security Council created the International Criminal Tribunal for Rwanda (“ICTR”) in November 1994 to prosecute perpetrators of War Crimes committed in Rwanda that year, as requested by the Rwandan government.<sup>156</sup>

By establishing the Tribunal, the Security Council thus created a step forward, which is a particular significant precedent in avoiding the culture of impunity, which, for years, has encouraged perpetrators to commit international crimes in Rwanda. This is indeed a positive step in preventing future atrocities in the sense that, on the one hand, it teaches the lesson that authors of sordid human rights trespassers will not escape the wrath of the law. On the other hand, by prosecuting perpetrators it paves the way for rehabilitation and reconciliation.

As bringing perpetrators to justice would undoubtedly serve the aim of defeating impunity and availing psychological redress to the victims, amnesties and reduction of penalties would serve the objective of softening the heart of perpetrators towards reconciliation. However, due to the nature of the atrocities committed for decades, a clear cut solution of bringing perpetrators to justice and deal with their punishment, strictly according to the law nor granting amnesties or reduction of the ordeal of perpetrators outright would not serve any lasting solution guaranteeing prevention of future atrocities. The disaster may not be that through amnesties, perpetrators would escape the reach of the law. What distresses victims is that they might be completely forgotten. The possibility of their seeking redress could be expunged by the granting of amnesty against civil action. In effect victims have been subjected to further abuse.

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<sup>155</sup> Melvern (note 143 above).

<sup>156</sup> European Journal of International Law *The International Criminal Tribunal For Rwanda: II. The Establishment of the Rwanda Tribunal* available at < <http://www.ejil.org/journal/Vol7/No4/art3-01.html>> (accessed on 03 October 2004).



Indeed, though not due to amnesty, victims tend to be forgotten in practice by domestic courts and by the ICTR when dealing with the prosecution of the suspects. Even suspects of the atrocities facing prosecution wait infinitely long for trials. As Minow stated:

It should be recognized that in a perfect society victims are entitled to full justice, namely trial of the perpetrator and, if found guilty, adequate punishment. That ideal is not possible in the aftermaths of massive violence. There are simply too many victims and too many perpetrators. Even the most sophisticated criminal system would be completely overwhelmed.<sup>157</sup>

And in fact that is what is happening in Rwanda. The courts, especially the Gacaca courts, are overwhelmed with cases relating to Genocide, War Crimes and Crimes Against Humanity.<sup>158</sup> The same also applies with the ICTR, which is expected to deal with tens of thousands of cases. So far the ICTR has only disposed of 23 cases.<sup>159</sup> The sluggish pace at which the tribunal is processing cases undermines the objective of tertiary prevention. Justice delayed is justice denied. The fact of the matter is that delays cause witnesses or potential witnesses to forget the details of events, thus, undermining their credibility. The accused, too, are plagued by the endless uncertainty as to the outcome of their cases.

Among the 23 cases so far dealt with by the ICTR, three suspects were acquitted after prolonged detention and one died after two years awaiting the start of his trial.<sup>160</sup> This means that 17.4 % of the accused persons had no speedy trial. If the number of detained persons now awaiting trial is added to it, the figure could obviously go up. And again, seven suspects were brought before the tribunal after almost six years of detention. On this issue the appeal chamber of the ICTY, held that “an aspect of the fair trial requirement is the right of an accused to have his or her case treated ... in the interests of certainty and predictability”<sup>161</sup>. However, as the above-mentioned factors have the impact of adversely affecting reconciliation, future prevention of the atrocities cannot be guaranteed.

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<sup>157</sup> Minow (n 9 above) IX-X.

<sup>158</sup> Human Rights Watch World Report 2003 Rwanda: Human Rights Developments <<http://www.hrw.org/wr2k3/africa9.html>> (accessed on 10 October 2004).

<sup>159</sup> International Criminal Tribunal for Rwanda Status of Detainees on 20 September 2004 available at <<http://www.ict.rw/default.htm>> (accessed on 15 October 2004).

<sup>160</sup> The Prosecutor of The Tribunal v Ignace Bagilishema CASE NO: ICTR-95-IA-I Decision 03-07-2002; Bernard Ntuyahaga V. The Prosecutor Case No.: ICTR-98-40-A Decision 03-06-1999; and The Prosecutor v. Leonidas Rusatira ICTR-2002-80-I Decision 14-08-2002

<sup>161</sup> The Prosecutor v. Dusko Tadic - Case No. IT-94-1-R (ICTY Appeals Chamber), March 24, 2000, para. 104-110.

The objectives of preventing future atrocities, therefore, lies with the prosecution of perpetrators, speedy trial, reconciliation and other related factors. Related to it is the ability of the tribunal to prosecute perpetrators from both sides<sup>162</sup> and its contribution to ensure speedy fair trials in the domestic courts of Rwanda is also equally important. It can provide a human right monitoring role on the function of the domestic courts and attempt to give assistance of any kind to the domestic courts as a means of upgrading their efficiency. The tribunal's attempt to see to it that the rehabilitation and reconciliation process is impartial would also help to provide a solid ground for the prevention of Genocide, War Crimes and Crimes Against Humanity.

Besides, some claim that the ICTR proceedings in Arusha, Tanzania, raise serious doubts whether it will contribute "to the process of national reconciliation and to the restoration and maintenance of peace."<sup>163</sup> Critics argue that the overall direction of the ICTR proceedings is completely one-sided, and that important international aspects of the conflict (the historical political and socio-economic reasons), which led to the catastrophe, are excluded from the deliberations of the courts.<sup>164</sup> Delays in trial and the seriousness of the sentences so far passed might lead one to assume the above conclusion. Therefore, the UN needs to tackle this challenge by adding trial chambers to minimize the burden on the already existing chambers to speed up the trial processes of the tribunal.

Apart from the above factors, the UN should take steps to monitor the whole process of rehabilitation process as a means to protect future atrocities. Media, government policies and related issues need to get attention. In the Tenth Genocide Commemoration held in Burgers Park, South Africa, the author was able to follow the speech of Mr Josef Karewera, the Rwandan Ambassador to South Africa. In his speech, the Ambassador was noticed making general statements of blameworthiness and cruelty targeting one ethnic group, Hutus.<sup>165</sup> Not only that, the authors was able to witness exhibitions and genocide cites full of dead bodies of the victims of the Rwandan genocide in his study-visit to Rwanda from 08 April 2004 - 17 April 2004. Thus, as all the above factors could have an adverse effect and undermine the reconciliation process the UN needs to address all these issues.

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<sup>162</sup> Some the atrocities that the United Nations Human Rights Field Operation for Rwanda ("UNHRFOR") investigated were reportedly carried out by Rwandese government forces. See 'Amnesty international Rwanda UN Human Rights Field Operation must keep investigative role available at <<http://web.amnesty.org/library/Index/ENGAFR470281998?open&of=ENG-RWA>> (accessed on 01 October 2004).

<sup>163</sup> Executive Intelligence Review 'UN's Rwanda Tribunal Tainted by Expediency' available at <[http://www.larouchepub.com/other/2002/2928arusha\\_trib.html](http://www.larouchepub.com/other/2002/2928arusha_trib.html)> (accessed on 29 September 2004).

<sup>164</sup> As above.

<sup>165</sup> Speech of the Rwandan Ambassador to South Africa. Burgers Park Hotel, South Africa 07 April 2004.

## 3.2. Organization of African Unity (African Union)

Although it does not have its own effective prevention mechanisms against Genocide, War Crimes and Crimes Against Humanity, OAU's role in achieving the objective of preventing them in the Rwandan case will be discussed in the same way as the UN's role. Thus, for the purpose of the discussion, this part deals with issues of primary prevention, management of the atrocities and handling of the cases after their commission.

### 3.2.1. Primary prevention

Since its establishment in 1963, the OAU did not have its own legal and institutional preventive mechanism against War Crimes, Crimes Against Humanity and Genocide. The only instrument dealing with human rights in detail, the African Charter on Human and Peoples' Rights (hereinafter the African Charter) provides generally for the protection and promotion of human rights. It also provides for an investigative and monitoring organ and mechanism.<sup>166</sup> It allows the responsible organ, the Commission deal with human rights issues by drawing inspiration from international human rights law and instruments.<sup>167</sup> It was hoped that this would redress the deficiencies of the African Charter.<sup>168</sup> However, due to the absence of an enforcement mechanism and the African Charter's "excessive emphasis on the security and sovereignty of states as well as the principle of non-interference in the internal affairs of member states"<sup>169</sup>, even OAU's successor the AU is unable to use its mandate to the fullest limit of the African Charter. The enforcement organs, like the African Court on Human and Peoples' Rights (hereinafter the Court) and mechanisms like the legal framework that has been developed to fit with the AU's function have not fully come in to force

The African Charter provides for a reporting and investigation mechanism so as to enable the Commission to do its human rights work. But here, although Rwanda acceded to the African Charter in 1983 it only submitted two reports about the human rights situation in the country.<sup>170</sup> On the top of that, however, the Reporting system and the work of the Special Rapporteur of the African Charter could not provide Rwanda an effective primary prevention mechanism due to the shortcomings of the work of the Special Rapporteur And reporting system discussed in Chapter

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<sup>166</sup> See Arts 30, 45, 46, 47, 55, and 62 of the African Charter.

<sup>167</sup> Art 60 of the African Charter.

<sup>168</sup> As above, Art 60.

<sup>169</sup> See Art III of the Charter of the OAU.

<sup>170</sup> Rwanda submitted its First Report in August 1990. It submitted the combination of all its overdue reports in its Second Report Of March 2000. See Status on Submission of State Periodic Reports to the African Commission on Human & Peoples' Rights(As of May, 2003): Rwanda available at <[http://www.achpr.org/english/\\_info/status\\_submission\\_en.html](http://www.achpr.org/english/_info/status_submission_en.html)> (accessed on 10 October 2004).

Two. Therefore, the Commission did not take any effective step to demand that the government to improve on its reporting. Given Rwanda's historical background, the Commission should have, at least, sent rapporteurs and a more active part played in promoting respect for of human rights in Rwanda. However, due to financial, logistical constraints, lack of uniform guidelines, absence of country similarly Rapporteurs and lack of enforcement mechanisms and other constraints the Commission could not, till now, put a concrete input in providing cure to prevent future atrocities in Rwanda.

### **3.2.2. Secondary Prevention**

In the area of Secondary Prevention the AU does not have a mechanism as provided for under articles 39 to 42 of the UN Charter. However, the Commission could draw inspiration and take part in stopping the atrocities and prevent future atrocities. Unfortunately even the AU did not have an enforcement mechanism and organ. Besides, it did not provide for organ to deal with situations under articles 39-42 of the Charter.

Indeed the OAU had put its conflict resolution mandate to the test in Rwanda by deploying NMOG, which failed to get the Government of Rwanda and the RPF to agree to a cease-fire. Despite its financial, logistical and other constraints as opposed to the compared strong influence of France in Francophone Africa, the OAU played an active role in Rwanda.<sup>171</sup> As mentioned in Chapter Two, even though it could not bring a lasting solution due to many factors, with prominent African countries such as Tanzania and Ghana the OAU contributed a lot in the negotiation process that yielded a series of agreements on cease-fire and political from N'sele in March 1991 to Arusha in August 1993<sup>172</sup>.

However, even though it has not yet been well seen in practice, the Constitutive Act of AU gives the AU the mandate "to intervene in a member state pursuant to a decision of the assembly, and of heads of state and government in respect of grave circumstances, namely War Crimes, Genocide and Crimes Against Humanity"<sup>173</sup>. Therefore, the realization across the continent that the mandate and institutional orientation of the Organisation of African Unity needed to be transformed to the AU in the light of challenges already faced and objectives contemplated to be achieved from the enforcement of the Constitutive Act.

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<sup>171</sup> Joshi, note 150 above.

<sup>172</sup> As above.

<sup>173</sup> Art 4(h) of the Constitutive Act of the African Union.

### 3.2.3. Tertiary Prevention

The 1994 Genocide in one small country ultimately triggered a conflict in the heart of Africa that has directly or indirectly touched at least one-third of all the nations on the continent.<sup>174</sup> Directly or indirectly many African countries have been affected by the Great Lakes conflict, which according to some writers as the situation in Rwanda is mentioned as a cause. It is equally true that throughout the past century external forces have helped shape Rwanda's destiny and that of its neighbours.<sup>175</sup> However, the OAU did nothing in the past to deal with atrocities. Evidently, the role of AU in the prosecution the Crime of Genocide, Crimes Against Humanity and War Crimes, and in the reconciliation process is also currently not fully clear. The AU could draw inspirations from other international and regional human rights instruments. However, it does not have an enforcement mechanism. Though not implemented till now, the Court will provide an enforcement mechanism in the stage of tertiary prevention. Therefore, it is imperative at this point that the realisation across the continent that the mandate and institutional orientation of the organization be strengthened.

### 3.3. Conclusion

Under the UN human rights system, the bodies dealing with the monitoring and promotion of human rights are those originating from the mandate of the Charter-based bodies and those from the Treaty-based bodies. Thus, the UN Commission and Sub-commission do conduct a human rights monitoring and promotional role under the Charter, while the Committees under the ICESCR, ICCPR, CAT, CEDAW, CERD, CMW and CRC perform their human rights monitoring and promotional role under the respective treaties. In this regard, in both categories there has not been no concrete human rights monitoring and promotion work with regard to Rwanda. The Committee on CERD, in particular, has been able to pass declarations observations and decisions. However, all have never been effectively enforced. The UN's role during the commission of the atrocities is not disputed. The UN could have acted under Charter VII of the UN Charter and stopped it militarily. It did not, however, take that measure. In the aftermath of the genocide, except for the establishment of the ICTR there is no clear evidence as to the role of the UN in the Rwandan rehabilitation and reconciliation. There is, therefore, a need for the UN to reconsider its stance on this issue.

The OAU's role in the past history of conflict and repeated genocide is not that much appreciated. The only visible role played by the OAU is its attempt in brokering cease-fire and the conflict resolution mechanism. The organ responsible to deal with human rights, the African Commission,

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<sup>174</sup> International Panel of Eminent Personalities (note 119 above).

<sup>175</sup> As above.

has also not taken any active part in both pre and post 1994 Genocide. Due to the shortcomings of its reporting procedure, defective system of relating to Special Rapporteurs, and the principle of non interference the African Commission has been, till recently been unable to provide effective mechanisms for monitoring human rights violations. However, with the establishment of the AU and the Peace and its Security Council, the coming in to force of the Constitutive Act, and the establishment of the new Court in the future the foundation has now been laid for providing more effective control mechanisms, which was lacking before. In the next chapter, if the mistakes that were committed by both organizations have been rectified.

## CHAPTER FOUR: OVERVIEW OF CURRENT POSITIONS OF THE UN AND AU TO CRIMES AGAINST HUMANITY, WAR CRIMES AND GENOCIDE

### 4.1. Introduction

In discussing developments in international human rights law and norms Shelton states:

Currently there are close to one hundred human rights treaties adopted globally and regionally. Nearly all states are parties to some of them and several human rights norms have become part of customary international law. Yet, like all law, human rights law is violated. It has not ended governmental oppression and by itself cannot prevent or remedy all human rights abuses. Many violations are linked to long-standing political, economic, and social problems that require more than law alone can repair. Education and other broad social efforts are required to combat the causes of human rights abuse: prejudice, ignorance, disease, poverty, greed, and corruption.<sup>176</sup>

Beyond the mere ratification of instruments, the decades that have passed by since the end of the Second World War have witnessed positive developments in the fight to prevent international crimes like Genocide, War Crimes and Crimes Against Humanity. Accordingly, the setting up of the Military Tribunals in Nuremberg and Tokyo, the establishment of the two ad-hoc International War Crimes Tribunals for the former Yugoslavia and Rwanda respectively (ICTY / ICTR), and the signing of the Rome Statute for the launching of the International Criminal Court (ICC) have become increasingly relevant concepts and milestones in human rights law, and especially in the area of international criminal law.

In addition to the establishment of the above-mentioned tribunals over the past decade, a gradual emerging system of international law has become an increasingly viable option. It promises a measure of comfort to the conscience of the human kind and raises awareness that international crimes cannot remain unpunished. As discussed in the preceding chapters, the UN's and the contemplated AU's prevention mechanisms have sought to provide an effective safeguard against the commission of these crimes and, where this is unsuccessful, to provide for the prosecution of the offenders. Despite all these attempts, Africa continues to experience indictments of Genocide, War Crimes and Crimes Against Humanity. This chapter, therefore, briefly examines the current responses of the UN and AU to the commission of international crimes in Africa and it looks to see if the lessons learned have contributed in making their responses fit their respective mandates.

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Dinah Shelton *Remedies in International law* (1999) 14.

## 4.2. United Nations

Corinne Dufka has noted that “over the last 10 years, at least eighteen countries in Africa have been consumed by war, usually internal”<sup>177</sup>. At present, apart from what happened in the past experiences of Rwanda, there are several active conflicts in Africa, namely in Cote d'Ivoire, the Darfur region of Sudan, Northern Uganda, Burundi, and the DRC.<sup>178</sup> As a result, be it due to the conflicts or other complex reasons, it has become a common course of life in Africa to pass through the agonies of War Crimes, Crimes Against Humanity and Genocide.

True that the establishment of international tribunals like the ICTR, ICTY and Special Court for Sierra Leone is a positive step in addressing the prevention of international crimes. But, this objective of addressing prevention is at stake because of the fact that these crimes are still being committed. Crimes under international law have been committed with impunity in Burundi and Liberia,<sup>179</sup> The conflict between the northern Ugandan rebel group, the Lord's Resistance Army (LRA), and the Ugandan government has significantly escalated with resulting serious human rights abuses against civilians in northern Uganda.<sup>180</sup> Also over three million civilians have died and a vast humanitarian catastrophe has erupted over the last five years of conflict in the DRC<sup>181</sup>. In this respect, the management of the conflicts and international crimes demands the application of the mandates covering the Secondary and Tertiary international crimes prevention mechanisms of the UN. For the same purpose, this study attempts to briefly discuss about UN's role in Burundi, the DRC, Ethiopia and Eritrea, and Sudan.

### 4.2.1. Burundi

The establishment of the ICTR has provides a positive buffer against the culture of impunity that developed for years in Rwanda. In a broader sense, it conveys a message of intolerance of the international community to the commission of atrocities similar to the ones committed in Rwanda. Beyond this, it also signals an intention to deter future killings of this sort not only in Rwanda, but

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<sup>177</sup> C Dufka *Combating War Crimes in Africa: Testimony of Corinne Dufka before the U.S. House International Relations Committee, Africa Subcommittee* available at <<http://www.hrw.org/english/docs/2004/06/25/africa8990.htm>> (12 October 2004).

<sup>178</sup> *As above.*

<sup>179</sup> Amnesty International *International Criminal Court: Burundi and Liberia - Ratification is an important commitment towards ending impunity* available at <<http://web.amnesty.org/library/Index/ENGIOR510102004>> (accessed on 13 October 2004).

<sup>180</sup> Human Rights Watch *LRA Conflict in Northern Uganda and Southern Sudan, 2002* available at <<http://www.hrw.org/press/2002/10/uganda1029-bck.htm>> (accessed on 11 October 2004). See also Human Rights Watch *Abducted and Abused: Renewed Conflict in Northern Uganda* available at <<http://www.hrw.org/reports/2003/uganda0703/>> (accessed on 13 October 2004).

<sup>181</sup> Amnesty International *Democratic Republic of Congo Human Rights Concerns* available at <[http://www.amnestyusa.org/countries/dr\\_congo/index.do](http://www.amnestyusa.org/countries/dr_congo/index.do)> (accessed on 12 October 2004).



also worldwide. In this respect, the Genocides committed in Burundi in the early 1970s demands attention.<sup>182</sup> As Porteous notes, "certainly in Burundi there has been much killing (mostly of civilians) in the past couple of years"<sup>183</sup>. Recently, as conflict goes on, more than 150 civilians were slaughtered at Gatumba refugee camp in Burundi.<sup>184</sup> This is now raising tension in Burundi in particular and the Grate Lakes region in general.<sup>185</sup> Therefore, unless a speedy and decisive measure of investigation of the matter is taken and conflict resolution is attempted, the crises could lead to more heinous scenes of international crimes. Although the UN's silence was accompanied by expressions of its concern it did nothing to the stop the conflicts, which have been the causes for the atrocities.<sup>186</sup>

Indeed, currently, the UN was able to form a coalition with South Africa, the African Union, Tanzania, Botswana, the EU, the US and others to bring some progress in driving the peace process ahead in the main conflicts of the region, namely in Burundi and in the DRC.<sup>187</sup> In this respect, even though the attempts so far made in resolving conflicts have an indisputable role in avoiding international crimes, more action is required to deal with the recent committed Genocides. Given the similarity of ethnicity and history of Rwanda and Burundi, in addition to the attempts so far made, the universal application of the Rwandan Tertiary Prevention Mechanism needs to some extent be proved in Burundi. Otherwise, the attempts that have been made in Rwanda will, in the long run, be conceived as territorially limited attempts.

#### 4.2.2. Democratic Republic of Congo

Precipitated by the 1994 Genocide in Rwanda and the fall of the West's client kleptocrat, President Mobutu, and his rotten state, the war in DRC was dubbed Africa's First World War.<sup>188</sup> Porteous

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<sup>182</sup> In Burundi between 100,000 to 200,000 Hutu were killed in 1972. See Join the Campaign The Campaign to End Genocide Hutu in Burundi available at <<http://www.endgenocide.org/genocide/hutu.htm>> (accessed on 12 October 2004). See also OnWar.Com *Burundi 1800-1999: Tutsi Genocide of Hutu in Burundi 1972* available at <<http://www.onwar.com/aced/nation/bat/burundi/fburundi1972.htm>> (accessed on 12 October 2004).

<sup>183</sup> T Porteous *Resolving African Conflicts* available at <[http://www.crimesofwar.org/africamag/afr\\_03\\_mills.html](http://www.crimesofwar.org/africamag/afr_03_mills.html)> (accessed on 13 October 2004).

<sup>184</sup> See Human Rights Watch *Burundi: Hold Rebels Responsible for Attack*, available at <<http://hrw.org/english/docs/2004/09/07/burund9312.htm>> (accessed on 25 September 2004).

<sup>185</sup> See E Leopold UN *Report Seeks Further Probe of Burundi Massacre* available at <<http://www.rwanda.net/english/News/2004/news102004/news10252004.htm>> (accessed on 25 October 2004).

<sup>186</sup> See Security Council Resolutions 1375 (2001) and 1545 (2004) of 29 October 2001 and 21 May 2004 respectively.

<sup>187</sup> Porteous ( n 183 above).

<sup>188</sup> As above.

also argues that the war, which drew in factions and rebel groups from other African wars, the remnant armies of defunct neighbouring regimes, and the usual crowd of international profiteers, may directly and indirectly have caused the deaths of over 4 million people in DRC since 1996.<sup>189</sup> The conflict and lack of stability in the DRC was not only a cause for the commission of War Crimes and Crimes Against Humanity, but also an extension to the Rwandan Genocide. After the termination of the massacre in Rwanda, many Rwandans were slaughtered in the refugee camps in the DRC, both by the RPF and Interhamwe militias.<sup>190</sup> One way or the other the conflict in the Grate Lakes region has caused or exacerbated the humanitarian crises in the region. The killings of Hutu refugees in the DRC in 1996-97, the current ethnic tensions in the Kivu provinces of the DRC, and the ethnic killings in Burundi, are all interlinked.<sup>191</sup>

Although the Security Council could have used its mandate under Chapter VII and protected civilians from atrocities, the UN had only limited effect. Recently, however, the decision of the chief prosecutor of the International Criminal Court (hereinafter ICC) to investigate War Crimes in the DRC<sup>192</sup> systematically recalls the mandate of the UN at the level of Tertiary Prevention Mechanism. Thus, even though, the secondary prevention mechanism role of the UN had not been seen to be effective, its Tertiary Prevention Mechanism by way of the prosecution of the atrocities by the International Criminal Tribunal could provide effective prevention from the future atrocities.

#### 4.2.3. Ethiopia and Eritrea

In the unfortunate conflict that broke out between Ethiopia and Eritrea, civilians have been victims of War Crimes and Crimes Against Humanity. While the deportation continued for more than one year, the UN was not able to take any effective measure to stop it or protect civilians in any way. Apart from just deportation, a reactionary response to the conflict at the border, civilians had been incarcerated, private properties foreclosed and individual bank accounts frozen by the Ethiopian government.<sup>193</sup> During the expulsion, apart from expressing its concern and call for its end, the UN

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<sup>189</sup> As above.

<sup>190</sup> S LOONG *Rwandan president: hero to hard-fisted* available at <<http://thelink.concordia.ca/article.pl?sid=04/09/21/031201>> (accessed on 30 September 2004).

<sup>191</sup> African Unification Front *How to Reform the International Criminal Tribunal: Promote accountability in Africa* available at <<http://www.africanfront.com/ICTR.php>> (accessed on 16 October 2004).

<sup>192</sup> Human Rights Watch *Democratic Republic of the Congo: Confronting Impunity* available at <<http://www.hrw.org/english/docs/2004/02/02/congo7230.htm>> (accessed on 02 September 2004). See also International Criminal Court The Office of the Prosecutor of the International Criminal Court opens its first investigation available at <<http://www.icc-cpi.int/newspoint/pressreleases/26.html>> (accessed on 01 October 2004).

<sup>193</sup> See AfriFocus *Forum For African Affairs: Surprising Turn of Events* <<http://www.denden.com/Conflict/media/afri-focus-022999.htm>> (accessed on 30 September 2004). See also Hugh Byrne *Eritrea & Ethiopia: Large-Scale Expulsions of Population Groups and Other Human Rights Violations in Connection With the Ethiopian-Eritrean Conflict* available at <<http://www.ilw.com/lawyers/articles/2004,0510-eritrea3.pdf>> (accessed on 10 September 2004).

did not do any thing.<sup>194</sup>

#### 4.2.4. Sudan

As mentioned in the preceding chapters and the above paragraphs, ten years after Rwanda, Genocide is again being committed in Sudan while the world watches and refuses act.<sup>195</sup> Although the situation requires urgent and strong response from the UN, till now, however, nothing effective has been done. Due to the witnessed failures, up to now at least 50,000 people have died, and a million are on the run.<sup>196</sup> Beyond a covert cognizance of the violations, the Security Council's has not taken immediate measure to stop the ongoing commission of Genocide, War Crimes and Crimes Against Humanity. In its resolutions, the Security Council condemned the human rights and international humanitarian law violations and other atrocities committed in Darfur, Sudan, and demanded that the Sudan government punish those responsible.<sup>197</sup> This is all the Security Council did. There is also no concrete evidence suggesting effective positive measures being undertaken by the government of Sudan. Till now, there are incidents of atrocities and reports of evidence of probable War Crimes.<sup>198</sup> Surprisingly, however, there has been no specific mention of the words Genocide, War Crimes or Crimes Against Humanity in the resolutions. Even though, the UN recently created a post of special advisor on the prevention of Genocide<sup>199</sup> to report on Crimes of Genocide, mass murder and large-scale human rights violations, the non-mentioning of these words in the resolutions indicates that no work has been done by the office of the special advisor. Even if it is to work, its set-up under the Secretary General's office will probably hinder its timely effective contribution due to the bureaucratic channels that its report has to go through.<sup>200</sup>

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<sup>194</sup> Byrne (As above).

<sup>195</sup> See S Booker & AL Colgan 'Genocide in Darfur' available at <<http://www.genocidewatch.org/SudanAfricaActiononDarfur5august2004.htm>> (accessed on 30 August 2004).

<sup>196</sup> S Pelley 'Witnessing Genocide In Sudan' available at <<http://www.cbsnews.com/stories/2004/10/08/60minutes/main648277.shtml>> (Accessed on 17 October 2004).

<sup>197</sup> See Security Council Resolutions 1547 (2004), 1556 (2004) and 1564 (2004) of 11 June 2004, 30 July 2004 and 18 September 2004 respectively.

<sup>198</sup> News.Designerz.com 'UN mission says "war crimes" likely in Darfur' available at <<http://international.news.designerz.com/un-mission-says-war-crimes-likely-in-darfur.html>> (accessed on 16 October 2004). See also AllAfrica.com 'Ongoing Crimes in Darfur' available at <<http://news.google.com/news?q=International+Crimes+in+Darfur&hl=en&lr=&sa=N&tab=nn&oi=news>> accessed on 30 September 2004), S Mansur *Darfur* 'Exposes Trait of Arab Politics' available at <<http://www.denden.com/Conflict/media/afri-focus-022999.htm>> (accessed on 30 September 2004) and International Crises Group 'Darfur Deadline: A New International Action Plan' available at <<http://www.crisisweb.org/home/index.cfm?id=2920&l=1>> (accessed on 25 September 2004).

<sup>199</sup> E Harsch 'UN Seeking to Avert a New Rwanda' *Africa Renewal* Vol. 18 No. 2 (2004) 15. See also UN secretary general appoints advisor on genocide <[http://www.aegistrust.org/index2.php?option=content&do\\_pdf=1&id=125](http://www.aegistrust.org/index2.php?option=content&do_pdf=1&id=125)> (accessed on 17 October 2004)

<sup>200</sup> According the function given to the special advisor on the prevention of genocide, its report to the Security Council has to pass through the office of the Secretary General. See Harsch (note 10 above).

At this juncture, the Security Council could urgently use its power under Chapter VII to investigate the matter and act as per article 42 to protect the commission of atrocities, if there appears to be a continued massacre. Granted, the UN's mandate is not to retaliate for the crimes committed. However, for situations of continued violence like that of Darfur, given the efforts so far made and the results witnessed, an opportune time to intervene militarily and protect civilians and apply the tertiary mechanism mandates of the Security council instead of continuing negotiations and waiting for results of recommendations while people are suffering. Such attempts, however, have not been made so far by the Security Council.

### 4.3. African Union

In discussing OAU's position of addressing Africa's gross human rights violations Wech, Jr states:

Those African leaders who broke the conspiracy of silence about flagrant, widespread human rights abuses in member States had little positive impact at least initially. "See no evil, hear no evil, speak no evil" typified the views of OAU summiteers to a point. Politically sanctioned repression and murders in Uganda, the Central African "Empire," and Equatorial Guinea, and the election of Idi Amin as Chair despite his horrendous record, besmirched the organization's reputation and overall credibility of African States in criticizing human rights abuses in other countries.<sup>201</sup>

Apart from the inter-state conflicts that occurred, internal conflicts and gross human rights violations affecting neighbouring countries posed the greatest challenges to the OAU. For that matter, as noted in the paragraph above and in Chapter Three, due to its weak organizational structure and limited resources, it could not address the above concerns effectively. The exception to its failure, however, is its positive contribution of applying its Conflict Prevention, Management and Resolution mechanism to end Apartheid and decolonisation of African States.<sup>202</sup> On the other hand, OAU's failure in involving itself in the long-lasting conflict in Sudan, is an example to the contrary.

According to Jonah, African leaders were conscious that most of the southern part of Sudan is populated by black Africans, who are at war with the northern part, which is mainly Arab.<sup>203</sup> He

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<sup>201</sup> CE. Wech, Jr. 'The OAU and Human Rights: Regional Promotion of Human Rights,' in *The Organization of African Unity after Thirty Years* Y El-Ayouty(ed) (1994) 55.

<sup>202</sup> Other Regional Organizations available at <[http://www.aph.gov.au/house/committee/jfadt/africa/Afrch\\_3.pdf](http://www.aph.gov.au/house/committee/jfadt/africa/Afrch_3.pdf)> (accessed on 20 October 2004)

<sup>203</sup> See JO.C. Jonah 'The OAU: Peace Keeping and Conflict Resolution' in (ed) Y El-Ayouty *the Organization of African Unity after Thirty Years* (1994) 11.

adds that the majority of the OAU members, “who are from south of the Sahara, were mostly reluctant to get involved in situations where their objectivity may be questioned”<sup>204</sup>. This, however, is not the sole reason. As could be recalled from the past experiences of the OAU and as outlined above, its structural and legal framework and resource constraints had limited its effectiveness in addressing the human rights violations that occurred in Africa since its establishment in 1963. Besides, an organisation chaired by leaders such as Idi Amin most unlikely to challenge the measures of Sudanese leaders.

The succession of the African Union, however, seems to be heralding a new era of concern for human rights Africa. The Constitutive Act of the AU provides, in principle, for the anticipation and prevention of conflicts as its objective and the right of intervention in the case of War Crimes, Crimes Against Humanity and Genocide.<sup>205</sup> In addition, the Act provides the mechanisms and organs to achieve these ends.<sup>206</sup> One drawback is the mechanism through which the decision for intervention is mandated. As provided under articles 4(h) of the Act and 4(2)(j) of the Protocol, if the Peace and Security Council is to intervene for reasons of War Crimes, Crimes Against Humanity and Genocide, the decision of the Assembly of the Heads of States has to be secured. But as the General Assembly shall be composed of Heads of States, given the reluctant responses of heads of states during the history of OAU, its effectiveness is doubtful. Besides, even though inspiration could be drawn from the Charter, it is doubtful whether AU could intervene if regional peace and security is threatened. Here, it should be noted, both courts, the African Court of Justice and the African Court on Human and Peoples Rights, have not yet come in to force. Otherwise, on its face, the legal and structural framework provided seems to provide a better mechanism to deal with conflict and human rights violations.

Recently, the initiative taken by Rwanda and Nigeria to deploy troops for the protection of civilians in Darfur has shown the first strong commitment to stop Crimes Against Humanity in Africa.<sup>207</sup> And now, though it has not been implemented, after more than 18 months of killing, rape, looting and starvation in the Darfur region of Sudan, Africa’s main intergovernmental body, the African Union (AU), has agreed to boost its military presence there.<sup>208</sup> Therefore, given the failure of the parties in

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<sup>204</sup> As above.

<sup>205</sup> See Art 3(f), 4(2)(h), 5(2) and 18 of the Act, Art 2, 3(b), 4(2)(j) and 6-9 of the Protocol on the establishment of the Peace and Security Council of the African Union, and Art 3-8 of the Protocol for the Establishment of the African Court on Human and Peoples Rights.

<sup>206</sup> As above.

<sup>207</sup> See P Chatterjee ‘Darfur Diplomacy: Enter the Contractors’ available at <<http://www.corpwatch.org/article.php?id=11598>> (accessed on 23 October 2004).

<sup>208</sup> The Economist Global Agenda ‘Can the African Union bring peace to Darfur?’ available at <<http://news.asmarino.com/>> (accessed on 25 October 2004).

the disarmament of the Janjaweed militias<sup>209</sup>, the African Union, through its Peace and Security Council, needs to take a swift and decisive action in implementing the deployment of the forces.

In the DRC, the recent fighting in Bukavu is the latest event in a pattern of deteriorating security and massive violations of international human rights and humanitarian law.<sup>210</sup> There are reports of massacres.<sup>211</sup> The transitional government has, however, been unable to meet these challenges and has failed to stop the violence.<sup>212</sup> Unlike the steps that it is attempting to take in Darfur, the AU has thus far not acted similarly. Accordingly, similar to the Darfur's case the Union needs to promote and rely on the commitment of African States in attempting to strengthen the already existing United Nations peace keeping mission in the DRC, Mission de l' Organisation des Nations Unies en RD Congo ("MONUC").

#### 4.4. Conclusion

As a response to the atrocities committed in Rwanda, the UN pledged to commit itself for "never again". The AU also came in to force as a successor to the OAU, with a better mandate for the promotion of human rights and conflict resolution mechanisms. However, some organs of the AU have not started their function. Besides, its intervention mechanism seems to have a complex bureaucratic procedure. Although the enforcing organ is the Peace and Security Council of the African Union, the right to intervention in respect of international crimes cannot be made without the decision of the General Assembly of the AU, which should be composed of Heads of States. This, given the shortcomings the OAU, could limit the effectiveness of the AU in that regard, in addition to its slowness in taking speedy measures. It took more than ten months for the Union to agree on intervening in Darfur, Sudan.

Contrary to its promises, the UN also is not without a lack of responses. To fill the gap of reporting of Genocide, the UN Secretary General created a new post of special advisor to alert on incidents of Genocide. However, the office seems dormant. Although, the establishment of international tribunals like the ICTR was believed to have brought a positive lesson, after the 1994 Rwandan Genocide crimes under international law have been committed with impunity in Burundi and Liberia and serious humanitarian crises have occurred in Uganda and in the DRC. This is, among other things, due to lack of commitment, and the speedy and decisive measures, as well as specific monitoring body.

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<sup>209</sup> African Union Peace and Security Council 17<sup>th</sup> Meeting, 20 October 2004 Available at <<http://www.africa-union.org/home/Welcome.htm>> (accessed on 23 October 2004).

<sup>210</sup> Human Rights Watch *African Union: Stem Conflicts by Ensuring Rights Protection* available at <<http://hrw.org/english/docs/2004/07/03/africa9002.htm>> (Accessed on 28 September 2004).

<sup>211</sup> Human Rights Watch *D.R. Congo: Executions, Torture by Armed Groups in Ituri* available at <<http://hrw.org/english/docs/2004/10/22/congo9555.htm>> (accessed on 23 October 2004).

<sup>212</sup> As above

## **CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS**

### **5.1. Conclusions**

The 1994 Rwandan Genocide is a result of civil, political and socio-economic factors, which, over years had developed due to a culture of impunity. Thus, although not altogether inevitable, had there been effective precautionary measures to avoid all those triggering factors, the genocide in Rwanda would not have been comprehensive as it became. Accordingly, these measures could have been accomplished through the human right monitoring and promotion mechanisms available under the UN Charter, the African Charter and the various international human rights instruments.

#### **5.1.1 United Nations**

Under the UN human rights system, the human rights monitoring and promotion mechanisms fall under two categories: those originating from the mandate of the Charter-based bodies and those from the Treaty-based bodies. Thus, the UN Commission and Sub-commission do conduct a human rights monitoring and promotional role under the Charter, while the Committees under the ICESCR, ICCPR, CAT, CEDAW, CERD, Convention on Migrant Workers and CRC perform their human rights monitoring and promotional role under the respective treaties.

Despite its involvement in the affairs of Rwanda from its creation in 1945, the UN did not do much through the UN Commission. The UN Commission was mandated to conduct studies and make recommendations to the ECOSOC. However, there is no concrete evidence showing its effective human rights monitoring and promotional role prior to 1994. Notwithstanding the fact that Rwanda was hit by repeated incidents of genocide and despite reports of the imminence of the genocide just before the 1994 killings, the UN Commission failed to devote attention to the situation and make urgent recommendations. Even though it conducted many studies and passed resolutions after the 1994 Genocide, the studies lack description of a critical examination of cross-cutting rights and make up provision for an agenda of implementation of the rights. The UN continues to demonstrate a lack of will and an absence of a co-ordinated functional plan to deal with emergencies.

The same also applies the Treaty-based bodies, as much had not been done before 1994. Even though the Committees can monitor the compliance of the Rwandan government with its human rights obligations, and even though Rwanda submitted only two reports under only one treaty, the CRC, all the committees did not attempt to conduct studies or secure reports from the government. After 1994, however, the Committees to CRC and CERD made some observations, passed resolutions and issued records. The CERD, especially, has done commendable work, even though it has not followed this up with implementation and enforcement.

The failure of the UN, during the commission of the 1994 Rwandan Genocide, is undisputable. Despite all the reports of UNAMIR and other sources, the UN did not take decisive and swift measures to determine the situation and act under the mandate given to the Security Council under Chapter VII of the Charter. In addition to that, the absence of an alerting organ responsible solely for the purpose of the Convention could have paved the way for responsibility and concrete action.

The UN is dealing with the 1994 Rwandan genocide through the ICTR. However, due to its slowness in prosecution hundreds of thousands of suspects are still awaiting trial at present, and there is no realistic hope that the tribunal will finish its work by the end of its term, which is 2008.<sup>213</sup> This, coupled with sluggish Gacaca court proceedings and the fragile socio-political peace in the country undermines the rehabilitation and reconciliation process.

### **5.1.2. Organization of the African Unity / African Union**

Unlike the UN, the OAU did not have many bodies for the monitoring of human rights situation. The only human right body, the African Commission came into being in 1986, with the coming in to force of the African Charter. But, even then, it has not done much. Due to the absence of uniform guidelines, coupled with the nature of the recommendations of the African Commission, the absence of an empowering and enforceable mandate, and the lack of the state commitment, the reporting mechanism has not been effective. Similarly, the Commission could not use Special Rapporteurs as a means of studying the human rights situations and investigate violations. Due to financial constraints, the absence of clear mandate and an adequate number of Rapporteurs, the position of the Rapporteurs as members of the African Commission and officials of governments, limits the effectiveness of the work of Special Rapporteur.

The OAU could also have used its conflict resolution mechanism to minimize the tension as a means of avoiding the 1994 Genocide. Although it was tried in 1991-1993, it could not bear fruit because of the absence of due to absence of emergency peace enforcement measures and the reluctance of some states and failures of the UN. In the aftermath of the Genocide the role is not clearly visible in Rwanda. In fact, for War Crimes, Crimes Against Humanity and Genocide, the Constitutive Act gives the African Union the right to intervene, though only with the authority of the Assembly of Heads of States. In any case, the AU is not playing any apparent role in the aftermath of the 1994 Rwandan Genocide. Although it has not come in to force yet, it is worthwhile to mention that the African Court on Human and Peoples Rights and the establishment of the Peace and Security Council of the African Union promises to a measure of credibility to the protection of

<sup>213</sup>

Fondation Hironnelle 'Interview with Judge Erk Mose (ICTR)' available at <http://www.hironnelle.org/hironnelle.nsf/0/964926e7e128814dc1256e29007bc374?OpenDocument> (accessed on 26 October 2004).



human rights in Africa. Besides, the AU does not provide for an organ responsible for monitoring human rights situations in relation to War Crimes, Crimes Against Humanity and Genocide.

Despite the set up of International Tribunals like ICTY and ICTR, War Crimes, Crimes Against Humanity and Genocide have been committed in Darfur, DRC, Burundi, Sierra Leon and in other African countries. However, the response of the UN has not been encouraging. Some African countries like Rwanda and Nigeria have shown a primary commitment by sending troops to Darfur; but their input on the situation cannot be effectively assessed as yet.

## **5.2. Recommendation**

The past decade saw the establishment of two ad-hoc International Tribunals for the former Yugoslavia and Rwanda (ICTY / ICTR) and the signing of the Rome Statute for the establishment of a permanent International Criminal Court (ICC). The universality of the jurisdiction of international crimes is becoming more and more relevant it is therefore essential that the UN should undertake the followings:

It should strive to strengthen the work of its human rights bodies and ensure the effective implementation of the human rights monitoring and promotion mechanisms. In the same way it should also build its capacity and strengthen its conflict resolution functions;

Given the purpose of human rights monitoring and promotion, the UN and its human rights bodies should develop a practice of passing strong recommendations and taking decisive and enforceable action should be developed;

The UN needs to develop quick-acting emergency mechanisms for addressing international crimes. Besides, it should set up a separate and independent body responsible for monitoring and investigation of human rights violations in relation to War Crimes, Crimes Against Humanity and genocide;

Given the slowness of ICTR procedure and the huge case backlog, the UN needs to take steps to increase the number Chambers and judges. In addition, as part of the rehabilitation and reconciliation process, the UN needs to become active in following up the process and raising financial or other support to institutions and parties involved in the process.

The African Union, on the other hand:

Should take steps to minimize bureaucracy and develop decisive and effective instruments for addressing gross human rights violations.

The AU needs to devise means to tackle with the guiding principles of non-interference and respect for sovereignty from the realm human rights which, for years have limited the OAU's effectiveness in protecting human rights.

For effective use of the Constitutive Act, the Peace and Security Council of the African Union should be given the power to decide on intervention.

The AU needs to take part in the Rwandan rehabilitation and reconciliation process in order to help sensitise the people, alert international donors for their financial aid to enable victims redressed and the world and the international donor community to attend to the material needs of the victims.

In addition, the AU needs to develop its conflict resolution mandates.

On the other hand, the government of Rwanda should develop a culture of equality, tolerance and transparency. Besides, it needs to commit itself to comply with its obligations through reporting and allowing investigations

Given the number of suspects, their financial capacity, impossibility of redressing victims, donors should contribute to the compensation fund for the victims of genocide. As it could be unpractical to ensure compensation from those found guilty of the Crime of Genocide the UN, AU and the Government of Rwanda should strive to raise compensation fund for the victims of genocide.<sup>214</sup>

Human rights organizations should renew their commitment to report incidents of international crimes and to bring these to the attention of international human rights monitoring bodies, such as the African Union and its organs

Word Count 18, 000 (with out footnote).

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