

THE PROSECUTION OF THE DERG CRIMINALS IN ETHIOPIA

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Abstract: *Under the Derg regime, which ruled Ethiopia from 1974 to 1991, tens of thousands of Ethiopians were killed, tortured or detained particularly during the infamous “Red Terror” purges of the late 1970s. Upon deposing the Derg regime, the Ethiopian Government became willing to accept its national and international obligations to investigate and bring to justice those involved in crimes and human rights violations during the Derg military junta, and embarked on a policy to create a more democratic future and live by the rule of law. However, accomplishing justice after a lengthy civil war and dictatorial regime is not an easy task; despite the severe difficulties and lengthy process, the Ethiopian Government managed to bring to justice those perpetrators and sentenced to some of them while in absentia. This paper discusses the prosecution of the Derg officials, particularly those involved in the Red Terror campaign, and challenges the prosecution encountered in Ethiopia.*

Key Words: *Ethiopia, Derg regime, civil war, Red Terror*

ETYOPYA’DA DERG SUÇLULARININ KOVUŞTURULMASI

Özet: *Etiyopya’da 1974 – 1991 yılları arasında süren Derg rejimi sırasında onbinlerce Etiyopyalı öldürülmüş, işkence görmüş ve tutuklanmıştır. Derg sonrası dönemde Etiyopya hükümeti Derg askerî yönetiminin işlediği suçlar ve insan hakları ihlallerini soruşturma konusunda istekli olduğunu göstermiştir. Ancak uzun süren bir iç savaştan ve diktatörlük rejiminden sonra adaleti sağlamaya çabalamak birçok sorunlar ve zorluklar içermektedir. Bu makalede Derg görevlilerinin kovuşturulması ve bu sürece yönelik zorluklar konu edilmiştir.*

Anahtar Kelimeler: *Etiyopya, Derg Rejimi, iç savaş, Kızıl Terör*

I. Recent Global Efforts against Impunity and Post-Conflict Justice: An Overview

The end of the post-Cold War saw some optimism in bringing those who nationally and internationally committed serious crimes and gross human rights abuses in the past to justice. International community demonstrated various forms of post-conflict justice efforts. International (criminal) law has undergone even dramatic changes. As a result, criminally responsible individuals – regarded as holders of a few obligations deriving from customary international law and from the breach of fundamental international values, some solely relating to armed conflicts (e.g., breaches of humanitarian law, applicable in non-international armed conflicts) and others (those on crimes against humanity, genocide, aggression, torture, terrorism) also concerning the peacetime¹ – have increasingly seen to be hold accountable and be punished for the crimes.² As such, officials and publics would learn that crime is punishable and that nobody is above the law. For individual victims, justice is only served if the proper investigation and prosecution are carried out by the State and established the appropriate sanctions to those responsible.³ An absence of justice on the part of victims means betrayal by the State and the risk of heading to the privatisation of justice (i.e., revenge, a cycle of violation). Thus, as a reaction to gross atrocities and crimes, States and international organisations, even groups (the victim community and even individuals) considerably boosted the creation of some international, mixed national/international and special national tribunals after the end of their wars. While my principal focus is to investigate Ethiopia's Derg prosecution efforts and challenges, I firstly and briefly outline the recent development in punishing responsible individuals on a global basis.

A. The New Phenomenon of International, Mixed or National Criminal Tribunals

The very reason of the existence of a State as a centralised authority is to ensure justice for persons under its jurisdiction by prosecuting and punishing

- 1 Antonio Cassese, *International Law* (Oxford/New York: Oxford University Press, 2004), pp.77-80, 85; Trial of the Major War Crimes before the International Military Tribunal, Nuremberg 14 November 1945-1 October 1946 (Nuremberg: 1947), i, at 233. Individuals have also regarded as holders of limited procedural rights in international law. See, *Ibid.* A recent case law in regard can be seen at: *Tadic* appeals jurisdiction decision (1995), para 134.
- 2 Cesare P. R. Romano, Andre Nollkaemper, and Jann K. Kleffner (eds), *Internationalised Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford: Oxford University Press, 2004); "Prosecuting Violations of International Criminal Law: Who Should Be Tried?", in *NPWJ (No Peace Without Justice) International Criminal Justice Policy Series No. 1* (November 2005).
- 3 S.H. Ardiles, "The Absence of Justice" in *Impunity: An Ethical Perspective*, ed. Charles Harper (Geneva: World Council of Churches Publication, 1996), p. 107.

serious crimes and human rights violations.⁴ While several instances of genocide have occurred since the adoption of the Genocide Convention (1948), no action was taken at either national or international level until the creation of the ad hoc tribunal of Yugoslavia and Rwanda in 1993 and 1994, respectively.⁵ In 1993, the UN Security Council, under the process of Art 41 of the 1945 UN Charter, established the International Criminal Tribunals for the former Yugoslavia (ICTY),⁶ and in 1994, it set up the International Criminal Tribunals for Rwanda (ICTR) to prosecute those responsible for atrocities during times of war and genocide.⁷ These two special tribunals gave impetus to the adoption of the International Criminal Court (ICC) with limited jurisdictions, finally established in 2003.⁸ The creation of the ICC expands the scope of the international criminal justice in accordance with its Statute, even though it does not have retroactive jurisdiction. The Nuremberg, which was established by an international agreement of the four victorious of World War II, and the two new tribunals were created by an exception to norms of customary international law. In addition, a significant reaction to callous and atrocious crimes in the world has led to an interesting development of hybrid courts: these are the Special Court for Sierra Leone,⁹ the Crime Panels of the District Court of Dili for East Timor,¹⁰ Regular 64 Panels in the Courts of Kosovo,¹¹ the Extraordinary Chambers in the Courts of Cambodia,¹² the War Crimes Chambers in Sarajevo,¹³ the hybrid Tribunal for Lebanon,¹⁴ and the Supreme Iraqi Criminal Tribunal for trying Saddam Hussein and other top Bath Party officials.¹⁵ The establishment of the Special Prosecutor's Office in

4 Danah Shelton, "Reparations for Victims of International Crimes", in *International Crimes, Peace and Human Rights: The Role of the International Court*, ed. Danah Shelton (Ardsley, N.Y.: Transnational Publishers, 2000), p. 49.

5 Ilias Bantekas and Susan Nash, *International Criminal Law* (2nd) (London: Cavendish Publishing Ltd, 2003), p. 7.

6 UN SC Res 827 (25 May 1993); UN Doc. A/54/187-S/1998/846, Sixth Annual Report of the ICTY, 25 August 1999, VIII.

7 UN SC Res 955 (8 November 1994).

8 37 ILM (1998), 999. See also, Ilias Bantekas and Susan Nash, *International Criminal*, p. 9.

9 UN Doc. S/2000 915 dated 4 October 2000, Annex 'Agreement between the United Nations and the Government of Sierra Leon on the Establishment of a Special Court of for Sierra Leon', Enclosure 'Statute of the Special Court for Sierra Leon'; See UN Secretary-General Kofi Annan's speech in Freetown in July 1999. *UN News Wire*, August 2, 1999; *Le Monde*, November 30, 1999.

10 Cesare P. R. Romano, Andre Nollkaemper and Jann. K. Kleffner (eds), *Internationalised Criminal Courts*.

11 *Ibid*.

12 UN Doc. A/51/930, S/1997/488, 24 June 1997; Yves Beigbeder, *Judging Criminal Leaders: The Slow Erosion of Impunity* (The Hague/London/New York: Martinus Nijhoff Publishers, 2002), pp. 172-179.

13 In-Depth: Justice for a Lawless World? Rights and Reconciliation in a New Era of International Law', this can be found at: <http://www.irinnews.org/InDepthMain.aspx?InDepthId=7&ReportId=59472> (accessed: 29/03/2010).

14 Cesare P. R. Romano, Andre Nollkaemper and Jann K. Kleffner (eds), *Internationalised Criminal*.

15 Susan Sachs, "Iraqi Governing Council Sets Up Its Own Court for War Crimes", *The New York Times*, December 10, 2003. See also, Iraq: Iraqi Special Tribunal-Fair Tribunals Not Guaranteed', in *Amnesty*

Ethiopia to try the Derg officials is another unique case that will be discussed separately and thoroughly below.

However, unlike the ICTY and the ICTR, which were established by resolution of the UN Security Council and constituted as subsidiary organs of the UN, and unlike national courts established by law like that of Ethiopia, the Special Court for Sierra Leone established by an agreement between the UN and the Government of Sierra Leone in 2002.¹⁶ This because the Government had neither the legal capacity nor the financial resources, after a decade of civil war, to set up a national court to try those responsible for serious violation of international humanitarian law. After difficult and lengthy negotiation between the UN and the Cambodian Government, the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea began to work in 2006 as a locally housed tribunal running under largely Cambodian local judges/laws and minor international judges.¹⁷ The Government of Cambodia insisted that, for the sake of the Cambodian people, the trial of the serious crimes committed during the Khmer Rouge regime (1975-1979) must be held in Cambodia using Cambodian staff and judges together with foreign personnel.¹⁸ The weaknesses in this case are no doubt linked with the current leaders' own participation or past support for the Khmer Rouge and their fear that the actions of their own leaders may be internationally exposed.

The UN Transitional Authority for East Timor also created, by the Security Council (Res. 1272), a mixed judicial system for East Timor and promulgated a regulation (N. 2000/11) that set up a system of District Courts of Dili for East Timor.¹⁹ However, the Indonesian Government resisted to setting up ad

International, May 13, 2005, can be found at: <http://www.globalpolicy.org/images/pdfs/0513AlIraq.pdf> (accessed: 26/03/2010); "The Law of the Supreme Iraqi Criminal Tribunal", in "Al-Waqa' I Al-Iraqiya", *Official Gazette of the Republic of Iraq*, Number(4006) Forty-Seventh Year, 14 Ramadan 1426 Hijri, October 18, 2005, can be found at: <http://www.ictj.org/static/MENA/Iraq/iraq.statute.engtrans.pdf> (accessed: 22/03/2010); Cesare P. R. Romano, Andre Nollkaemper, and Jann K. Kleffner (eds), *Internationalised Criminal*. See also <http://www.globalpolicy.org/component/content/category/163-general.html> (accessed: 26/03/2010); 'Genocide Studies Programme', can be found at: <http://www.yale.edu/gsp/index.html> (accessed: 28/03/2010); 'Yale Human Rights and Development Law', at: <http://www.law.yale.edu/academics/YHRDLJ.htm> (accessed: 28/03/2010).

16 'Security Council and Sierra Leone' at: <http://www.globalpolicy.org/component/content/category/203-sierra-leone.html> (26/03/2010). <http://www.globalpolicy.org/component/content/article/203/39438.html> (accessed: 23/03/2010).

17 <http://www.globalpolicy.org/component/content/category/163-general.html> (26/03/2010); 'An Introduction to the Khmer Rouge Trial' can be found at: http://www.cambodia.gov.kh/krt/english/introduction_eng/index.htm (accessed: 26/03/2010).

18 Yves Beigbeder, *Judging Criminal Leaders: the Slow Erosion of Impunity*, p.202.

19 For East Timor and an Ad-Hoc East Timor Court, see at: <http://www.globalpolicy.org/security-council/index-of-countries-on-the-security-council-agenda/east-timor.html> (accessed: 26/03/2010)

hoc international tribunal on its country, justifying that its national justice system is both willing and capable to judge the perpetrators of the extreme violence and atrocities in East Timor.²⁰ The Special Tribunal of Lebanon is also an international criminal tribunal for the prosecution, under Lebanese law, of criminal acts relating to the assassination of the former Lebanese Prime Minister Rafik Hariri, who was murdered, along with 22 others, on 14 February 2005.²¹ The court, which has a mixed composition of Lebanese and international judges and has its seats in Netherland, was established by an agreement between the United Nations and the Lebanese Republic.²²

Another development with efforts to combat impunity was demonstrated by the creation of the War Crimes Chamber (WCC) in Bosnia as a joint initiative of the ICTY and the Office of the High Representative.²³ Although it contains a significant international component, the WCC is essentially a domestic institution operating under national law, within the criminal division of the State Court of Bosnia.²⁴ Similarly, the UN Interim Administration Mission in Kosovo (UNMIK) issued regulations (known as “Regulation 64 Panels”) permitting international judges to serve alongside domestic judges in existing Kosovar courts, and international lawyers to join forces with domestic lawyers to prosecute, as well as defend, individual war crimes cases.²⁵ In the post-Saddam Hussein Iraq, the Supreme Iraqi Criminal Tribunal (formerly the Iraqi Special Tribunal)²⁶ was established under Iraqi national law to try Iraqi

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- 20 Evelyn Rusli, ‘Conviction Squashed for Crimes in East Timor’, in *New York Times*, August 8, 2004. http://www.humanrightsfirst.org/cah/ij/w_context/w_cont_06.aspx (accessed: 26/03/2010)
- 21 ‘Special Tribunal for Lebanon’, accessible at <http://www.un.org/apps/news/infocus/lebanon/tribunal/> (accessed: 29/03/2010).
- 22 ‘Security Council Votes to Establish Hariri Assassination Tribunal’, *UN News Centre*, 30 May 2007. Security Council resolution 1664 (2006) of 29 March 2006; Security Council Resolution 1757 (2007) of May 30 2007. <http://www.un.org/apps/news/story.asp?NewsID=22746&Cr=leban&Cr1=> (accessed: 29/03/2010). Kim Ghattas, ‘Lebanon’s Groundbreaking Tribunal’, BBC News, May 21, 2006. See at: http://news.bbc.co.uk/2/hi/middle_east/4926536.stm (accessed 07/ 12/2008); L. Maalouf, ‘Special Tribunal for Lebanon on the Back Burner’, in *International Justice Tribune/Radio Netherlands*, October 14, 2009; <http://www.stl-tsl.org/action/home> (accessed: 29/03/2010).
- 23 Presidential Statement: S/2002/PRST/21/2002. The WCC officially began operations in Sarajevo on March 9, 2005.
- 24 IRIN: ‘In-Depth: Justice for a Lawless World? Rights and Reconciliation in a New Era of International Law’, can be found at: <http://www.irinnews.org/InDepthMain.aspx?InDepthId=7&ReportId=59471> (accessed: 29/03/2010).
- 25 IRIN: ‘In-Depth: Justice for a Lawless World? Rights and Reconciliation in a New Era of International Law’, can be found at: <http://www.irinnews.org/InDepthMain.aspx?InDepthId=7&ReportId=59471> (accessed: 29/03/2010).
- 26 ‘The Law of the Supreme Iraqi Criminal Tribunal’ can be found at: Al-Waqai’ Al-Iraqiya, *Official Gazette of the Republic of Iraq*, N. (4006) Forty-Seventh Year, 14 Ramadan 1426 Hijri, October 18, 2005. See also, S. Sachs, ‘Iraqi Governing Council Sets Up Its Own Court for War Crimes’, *The New York Times*, December 10, 2003. See also, Iraq: Iraqi Special Tribunal-Fair Tribunals Not Guaranteed’, in *Amnesty International*, May 13, 2005, can be found at: <http://www.globalpolicy.org/images/pdfs/0513AIIraq.pdf> (accessed: 26/03/2010). <http://www.ictj.org/static/MENA/Iraq/iraq.statute.engtrans.pdf> (accessed: 22/03/2010).

nationals or residents accused of genocide, crimes against humanity, war crimes or other serious crimes (such as manipulating the judiciary, squandering national resources and the use of armed force against an Arab country)²⁷ committed between 1968 and 2003.²⁸ The US rejected the establishment of an UN-sponsored international or hybrid tribunal to try Saddam Hussein and other Iraqi leaders justifying that there would be some political obstacles to set such new tribunal and if so, it would cause a slow pace of the tribunal.²⁹

The creation of these different tribunals has required a strong pressure by the 'international community' or more precisely by the UN Security Council, with the support of the UN Secretariat and the spoken denunciations and proposals of the major international human rights organisations based on the strong feelings of the victimised populations. There are other alleged war crimes and wartime human rights abuses committed recently.³⁰ Yet, we have not seen meaningful prosecution of crimes that have occurred on a massive scale.

Certainly, international community should intensify the fight for the rule of law at both the national and the international levels which is a political, social and moral obligation of each State. The open question though is that, where some serious crimes of international concern have been committed, under what circumstances the permanent members of the UN Security Council find a consensus to set up new ad hoc international tribunals; and secondly, whether the UN will continue its commitment to creating or assisting such temporary quasi-national, mixed or international tribunals, which obviously such courts may benefit from more resources than those available for a national court, for instance, additional financing and research capacity, as well as ensuring that international standards of justice would be met.

27 http://www.cpa-iraq.org/human_rights/Statute.htm;
<http://www.ictj.org/static/MENA/Iraq/iraq.statute.engtrans.pdf> (accessed: 22/03/2010)

28 Iraq: Iraqi Special Tribunal-Fair Tribunals Not Guaranteed', in *Amnesty International*, May 13, 2005, can be found at: <http://www.globalpolicy.org/images/pdfs/0513AlIraq.pdf> (accessed: 26/03/2010).

29 Yves Beigbeder, *International Justice*, p.113.

30 Among others are: the Lord's Resistance Army of Uganda, the former guerrilla and the current ruling clique of Eritrea, the Government of the Sudan, the Sri Lankan military and the Tamil Tigers, and the Government of Israel and the Hamas party are amongst the main concerns where wide scale of gross human rights violation and dehumanisation are characterized by impunity when crimes against individuals, groups, and humanity go unpunished. The United Nations and others believe that the actions of these entities may amount to war crimes, crimes against humanity and grave human rights violation. For instance, "UN Mission Finds Evidence of War Crime by both Sides in Gaza Conflict", *United Nations News Centre*, 15 September 15, 2009; "UN Fears Sri Lanka 'War Crimes'", BBC News, 13 March 2009. See at: <http://news.bbc.co.uk/1/hi/7942051.stm>. (accessed: 17/01/2010).

1. The Special Prosecutor's Office and the Trial of Derg in Ethiopia

The Derg regime was overthrown in 1991 by the Ethiopian Peoples' Revolutionary Front (EPRDF).³¹ Mengistu fled to Harare, Zimbabwe, on 21 May 1991, in a plane sent by the US Government,³² where President Robert Mugabe granted him political asylum. During the Derg regime, the Red Terror in Ethiopia was the largest and best-known campaign of human rights violations.³³ Soon after the down fall of the Derg, the EPRDF Government established a Special Prosecutors' Office ("SPO") charging it to prosecute the Derg junta officials and began legal proceedings against the Derg officials charged with genocide, crimes against humanity and other severe crimes under the brutal Marxist regime of Colonel Mengistu Haile Mariam (1974-1991). The case of the Ethiopian trials is a clear-cut example of retributive justice that have received the most attention in the transitional justice discourse and a justice that emphasizes the need to hold perpetrators accountable and punished for their crimes.³⁴ The PSO trial was the first of its kind on the African continent; and it has recently been concluded. Below are a detailed description and analysis of the case.

a. Historical Background

In Ethiopia's modern history, the most severe crimes and human rights violations were in connection with the 1974 revolution. In 1974, the Imperial Government's indifference to the famine of 1972-1973, the acute economic poverty and political suppression led to mass uprisings against the rule of Ethiopia's monarchy, the Emperor Haile Selassie-I. However, during the revolution, there was no organised political leadership which was capable to respond to the country's situation. In June 1974, a group of junior officers of the Ethiopian military established their own committee know as 'Derg', the short name of the Coordinating Committee of the Armed Forces, Police, and Territorial Army.³⁵ On 12 September 1974, the military committee, under the

31 The EPRDF and by extension the TGE are dominated by the Tigray People's Liberation Front (TPLF). In 1989, the TPLF together with other ethnicity-based rebel groups form the alliance EPRDF.

32 Riccardo Orizio, *Talk of the Evil* (London: Secker & Warburg, 2003), pp. 146, 149.

33 Ts. Engelschin, "Prosecutions of War Crimes and Violations of Human Rights in Ethiopia", 8 *Yearbook of African Law* (1994), 43.

34 Scott Gates, Halga Malmin Binningsbo, and Tove Gate Lie, "Post-Conflict Justice and Sustainable Peace", *World Bank Policy Research Working Paper No. 4191* (April 1, 2007). Available at SSRN: <http://papers.ssrn.com/sol3/results.cfm> (accessed: 12/04/2010).

35 'Derg' (the term is a Ge'ez word) was a communist military junta of a committee of 120 commissioned and non-commissioned junior officers of the air force, police force and the territorial army. Girmachew Alemu Aneme, "Apology and Trials: The case of the Red Terror Trials in Ethiopia", 6 *African Human Rights Law Journal* (2006), p. 64 at p.65; Dawit Welde-Giorgis, *Red Tears: War, Famine and Revolution in Ethiopia* (Trenton, N. J.: Red See Press, 1989), 11-12.

instigation of Majors Mengistu Haile Mariam and Atnafu Abate and some others of the Derg entered Emperor Haile Selassie's Palace, and seized power. In November 1974, the Derg executed 60 officials of the former imperial government of Emperor Haile Selassie-I without court hearing. The Derg suspended the Constitution and established a military government,³⁶ and it soon established itself as a 'permanent and irrevocable self-perpetuating group', rejecting all calls for civilian rule.³⁷ The deposition of Emperor Haile Selassie marked the beginning of 17 years of State-sponsored terror and violence against the People of Ethiopia that ended in May 1991.

b. The Derg's Red Terror Campaign and the Fall of Derg

The deposition of Emperor Haile Selassie proved to be just the beginning of the revolution, for then there developed a power struggle within the Derg. It then had faced with a number of civilian groups competing for control of Ethiopia, most notably the Ethiopian People's Revolutionary Party (EPRP)³⁸ but also the All-Ethiopia Socialist Movement (MEISON).³⁹ Both the ERPR and MEISON were enthusiastic supporters of the communist revolution that toppled Emperor Haile Selassie-I; however, they were also only two of a large number of groups which competed to be the Derg's political educators.⁴⁰ Ideological and political conflict began to develop between the two groups, the EPRP and its major Marxist rival, MEISON, with MEISON aligning itself with Mengistu in 1976. In 1976, the EPRP youth committees had planned a nation-wide protest against the Derg regime on May Day. The day before the demonstrations, the Derg Campaign Department ordered the Derg Special Forces to eliminate all those who were participating in the EPRP demonstration. Hundreds of demonstrating youths were executed throughout the country. Once Mengistu Hailemariam took supreme power as chairman of the ruling Derg government, in February 1977, following the murder of Teferi, he moved to quarrel the civilian groups, the EPRP, who opposed the Derg's

36 Yacob Haile-Mariam, 'The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court', 22 *Hastings International and Comparative Law Review* (1999), p. 667 at p. 674; Edward Kissi, 'Famine and the Politics of Food Relief in United States' Relations with Ethiopia: 1950-1991' (Ph.D. Diss. Montreal, Canada: Concordia University, 1997), pp.176-177; Fred Halliday & Maxine Molyneux, *The Ethiopian Revolution* (London: New Left Books, 1981), p. 87.

37 Girmachew Alemu Anem, 'Apology and Trials', at p.65; Fred Halliday & Maxine Molyneux, *The Ethiopian Revolution*, p. 87.

38 The EPRP, which was founded in April 1972 in Germany, is also known as "Ihapa" from the acronym in Amharic (etyop'ya Hezbawi Abyotawi Party).

39 'MEISON', which was organised in early 1976, is the acronym in Amharic: *Mela Ethiopia Sosialist Niqinaqi*.

40 See in: "Ethiopia: Ethnic Federalism and its Discontents; Africa Report No. 153, 4 September 2009", *International Crisis Group*, p. 3 (accessed 16 November 2009).

idea of a revolution “imposed from above”.⁴¹ In response to the instability and his opponents, Mengistu officially implemented a campaign of Red Terror (or *Qey Shibbir*, in Amharic) (1977-1978), with the Proclamation 121 of 1977.

The Derg’s Red Terror designed first to eliminate all EPRP opposition as a political organisation. During the first stages of the Red Terror, MEISON remained closely allied with the Derg and assisted in combating suspected EPRP supporters regardless of age, race, religion, gender or ethnicity. In July 1977, the *Zemecha* or ferreting-out campaign was directed and conducted by the Derg against what it called anti-revolutionary and reactionary elements. The action resulted in the death of over 1000 people and the arbitrary detention of 1503 persons accused of belonging to one or other political party.⁴² But later in 1978, the Derg turned on MEISON, fearing its membership was more loyal to the party than it was to the government, and launched a bloody campaign against rural MEISON supporters.⁴³ Between 1977 and 1978, the Derg military junta was characterised by the most atrocious crimes and human rights violations. Tens of thousands of men and women of its opponents were executed, arbitrarily imprisoned, disappeared and tortured without trial by the Red Terror.⁴⁴ The bodies of those who were killed were left in the street as a warning to others.⁴⁵ Some families, who were fortunate enough to identify the bodies of the murdered youth, were required to pay for the bullets that were used to kill their sons and daughters before they could claim the corpses.⁴⁶

The Red Terror massacre was officially launched in November 1977 and continued until 1980.⁴⁷ The crimes committed by the Red Terror were estimated 30,000 to 50,000.⁴⁸ Amnesty International reported that the total of persons killed by the end of the Red Terror campaign alone ran as high as 150,000 to 200,000.⁴⁹ However, it was not only the Red Terror period, but the entire Derg regime was characterised by massive human rights violations and

41 Dawit Welde-Giorgis, *Red Tears*, p. 21.

42 Ts. Engelschne, “Prosecutions of War Crimes, p. 43.

43 Marina and D. Ottaway, *Ethiopia: Empire in Revolution* (New York: Africana, 1978), p. 247. See also “A Despot at War on All Fronts”, *Time*, May 23, 1977 (accessed: 14/052009).

44 Neil Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Vol II Country Studies, (Washington DC: USIP Press, 1995), p. 560

45 Dadimos Haile, *Accountability for Crimes of the Past and the Challenges of Criminal Prosecution: The Case of Ethiopia* (Leuven: Leuven University, 2005), p.15.

46 *Ibid.*, (2002), p. 15.

47 Ts. Engelschin, “Prosecutions of War Crimes and Violations, at p. 43.

48 Yaconb Haile-Mariam, “The Quest for Justice and Reconciliation, at p. 678;

49 *Ibid.*

serious crimes, including crimes against humanity and war crimes.⁵⁰ The killings of the Derg continued well beyond the Red Terror. The Derg mainly used *kebele* officials (the smallest administrative unit in urban milieus, set up by the Derg) to carry out the above violations and the degree of systematic killings was extremely high. The Africa Watch also reported: “Tens of thousands of Ethiopians were tortured, murdered or ‘disappeared’ after arrest during the period from 1974 to 1991.”⁵¹

Ethiopia experienced severe drought in the early 1980s. The Derg exacerbated the effects of the drought by channelling relief aid to military and Derg-held areas and thus “turned it into” a famine “quicker and harder”. It is estimated that 50% of the 400,000 famine victims is attributable to the Derg’s policies.⁵² Food relief for the 1984 famine in the country was prevented from reaching the victims, causing many thousands to perish.⁵³ The Derg was also carried out a forced settlement programme for military purpose as counter-insurgency strategy between 1984 and 1986.⁵⁴ Another Derg regime’s unlawful mass killing and counter-insurgency measures against various ethnicity-based rebellions in country took place in the market town of Hawzen in the province of Tigray in 1988. The aerial bombardment by MIG planes lasted a full day and left approximately 2,500 civilian market goers dead.⁵⁵

At the end of 17 years of brutal human rights violations marked by terror and violence, the Ethiopia’s oppressive military junta, the Derg, was overthrown on May 28, 1991, by the Ethiopian People’s Revolutionary Democratic Front (EPRDF), a coalition of anti-government groups organized and led by the Tigray People’s Liberation Front (TPLF). In May 1991, the EPRDF arrested and detained approximately 1900 individuals suspected of committing crimes and violating human rights during the Derg regime. The EPRDF felt its responsibility to bring those criminally responsible to justice and called for the

50 Girmachew Alemu Aneme, “Apology and Trials, at p.65.

51 Africa Watch, Ethiopia: Reckoning UN-Der the Law (1994). See also, Alexander De Waal, “Evil Days: Thirty Years of War and Famine in Ethiopia”, *Africa watch* (September 1991), 3-4; The Government of Ethiopia, Trial Observation and Information Project (2000), Consolidated Summary and Reports from observations made in 1996, 1997, 1998 and 1999, compiled and distributed by NIHR’s Project ‘Ethiopia’s Red Terror Trials: Africa’s First War Tribunal’, 1.

52 Neil Kritz, *Transitional Justice*, pp. 560-561.

53 The Government of Ethiopia, “Trial Observation and Information Project (2000), Consolidated Summary and Reports from observations made in 1996, 1997, 1998 and 1999, compiled and distributed by NIHR’s Project ‘Ethiopia’s Red Terror Trials: Africa’s First War Tribunal’”, 1; Human Rights Watch Report, December 1994, *Ethiopia – Reckoning Under the Law*, 7-8.

54 *Ibi*.

55 Human Rights Watch Report, December 1994, *Ethiopia – Reckoning Under the Law*, 7-8. The Derg regime waged both intra-state and inter-state conflict during its stay at power. Most of the war crimes were committed in the context of the Derg fighting ethnic-based insurgency in the south (against Oromo rebellion), east (Somali/Ogadeni rebellion) and north (Tigrayan and Eritrean rebellion).

establishment of a transitional government, and upon which to establish a special court that investigate and prosecute these criminal and human rights violation cases.⁵⁶

c. The Establishment of the Special Prosecutor's Office

The Derg military government that ruled Ethiopia from 1974 to 1991 was characterised by massive human rights violations, including crimes against humanity.⁵⁷ As stated above, the subsequent crimes of the Derg in the period 1974-1991 can be divided into three main categories: the Red Terror, War Crimes and Misuse of Humanitarian aid and policy. The EPRDF opted to investigate and prosecute the main perpetrators of past crimes as part of the transitional justice.

In July 1991, the EPRDF called a national conference made up of representatives of a majority of the different political and ethnic groups. That conference produced the Transitional Period Charter of Ethiopia, Charter, which acted as an interim constitution until a government was elected and a permanent constitution drafted and adopted in 1995.⁵⁸ This process presented the opportunity for the Transitional Government to demonstrate its commitment to the rule of law. In a bid to realise its duty to investigate and prosecute the crimes and gross human rights violations committed by the Derg regime, the Transitional Government of Ethiopia established the Special Prosecutor's Office (SPO) in August 1992 by law (Proclamation No. 22/1992), mandated with two fold goals: 1) "to establish for public knowledge and for posterity a historical record of the abuses of the Mengistu's regime", and 2) "to bring those criminally responsible for human rights violations and/or corruption to justice."⁵⁹ The Preamble of the Proclamations Establishing the SPO affirms a bid to deter the recurrences of similar violation of human rights by stating that the establishment of SPO is meant to be: "[I]n the interest of a just historical obligation to record for the posterity the brutal

56 Intervention by Mr Girma Wakjira, "UN Commission on Human Rights, Geneva", 17 February 1994 at 5.

57 Girmachew Alemu Aneme, "Apology and Trials, at p.65.

58 International Human Rights Law Group, *Ethiopia in Transitions: A Report on the Judiciary and the Legal Profession* (1994), 1.

59 The Government of Ethiopia, "The Special Prosecution Process of War Criminals and Human Rights Violators in Ethiopia", *Office of the Special Prosecutor, Transitional Government of Ethiopia*, Addis Ababa, February 1994, at p. 2. Intervention by Mr Girma Wakjira, "UN Commission on Human Rights, Geneva" (February 17, 1994), at 5; Luelseged Degu, "Report from Special Prosecutor's Office of Ethiopia: Half-way Transitional Justice" (February 11, 2010). See at: <http://ecadforum.com/blog/?p=3327> (accessed: 06/04/2010).

offences committed and the embezzlement of property perpetrated against the people of Ethiopia and to educate the people to make them aware of those offences in order to prevent the recurrence of such a system of government".⁶⁰

In September 1992, the Transitional Government appointed Girma Wakjera as experienced and respected prosecutor to head the SPO. However, it took the Transitional Government almost a year to perform the judiciary and establish an independent office of investigation and prosecution. This is because, in Ethiopia, the judicial independence and continuity have never been the hallmark of the legal system. The SPO created four teams, each of which focuses on gathering evidence relevant to a particular abuse committed by the Derg regime: Red Terror, forced relocation, war crimes and the manipulation of famine relief.⁶¹ There is a fifth team which has been gathering evidence on the structure of the government and the security and military forces in an attempt to see how this structure was used to carry out the human rights abuses. Two additional groups provide supports to all these areas, among others, with documentation and computer system.⁶² In February 1993, after the SPO officially began to just perform its function, it received about 1900 detainees from police commission. The head of prosecutor of the SPO, Girma Wakjera, emphasised the importance of carrying out the trials internally as part of a healing process and establishing a new era of the rule of law, and he stated: "[S]ome think a country like Ethiopia cannot afford such actions. The opposite is the fact. As a nascent democracy we cannot afford a continuation of governmental impunity, we cannot afford a lack of confidence in democratic institutions, like courts. We cannot afford old wounds to fester and infect our society for years to come".⁶³

On the part of the State of Ethiopia, the moral and legal duty to investigate and prosecute those crimes and atrocities committed by the Derg regime clearly derives from the national and international law obligations. Ethiopia was the first nation to ratify the UN Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) of 9 December 1948, on 1 July 1949.⁶⁴ Eight years after ratifying the Genocide Convention, Ethiopia

60 Transitional Government of Ethiopia, Preamble Proclamation 40/92, the Proclamation for the Establishment of the Special Prosecutor's Office, 1992.

61 Transitional Government of Ethiopia, "Proposal for Financial Assistance" (Office of the Special Prosecutor, Transitional Government of Ethiopia), June 1, 1993, at p. 4.

62 Ibid, at pp.4-5.

63 Julie V. Mayfield, "The Prosecution of War Crimes and Respect for Human Rights: Ethiopia's Balancing Act", 9 *Emory International Law Review* (1995), at p. 553.

64 Ethiopia signed on 11 December 1948, and ratified on 1 July 1949. See, Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948.

incorporated the basic ideas of the Convention into its national laws. In fact, Ethiopia went further and became, arguably, the first country to redefine the legal concept of genocide broadly to include protection of political groups—an important and vulnerable group that the framers of the Genocide Convention, for political reasons, left out of the list of protected groups in the international law on genocide. The Genocide Convention obliges its signatories to prevent and punish genocide. But the Ethiopian High Court trying Mengistu and his officials for genocide and crimes against humanity is not doing so under international law, rather under Ethiopia's own domestic laws on genocide. In other words, the suspects on the violations committed by the Derg regime in Ethiopia are accused of the commission of grave human rights violations, among others, genocide, crimes against humanity, torture, rape, and forced disappearances, which are crimes under the Penal Code of Ethiopia.⁶⁵ Under Ethiopian law, genocide and crimes against humanity are defined as acts committed “with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group”. Individual perpetrators or groups acting as such are guilty of genocide or crimes against humanity if, “in time of war or in time of peace,” they organize, order or engage directly, in:⁶⁶

- (a) killings, [or causing] bodily harm or serious injury to the physical or mental health of members of the [protected] group, in any way whatsoever; or
- (b) measures to prevent the propagation or continued survival of its members or their progeny; or
- (c) the compulsory movement or dispersion of peoples or children, or . . . placing [them] under living conditions calculated to result in their death or disappearance.

Ethiopia also ratified, among others, the International Convention on Civil and Political Rights (ICCPR) on 11 June 1993,⁶⁷ and the African Charter on Human and Peoples' Rights, on 22 June 1998.⁶⁸ Failure on the part of the Ethiopian Government to investigate and bring justice to those grave human rights violators will be a violation of the right to equal protection of the law enshrined in Article 7 of the Universal Declaration of Human Rights, Articles

65 Art. 281 Ethiopian Penal Code 1957; Trial Observation and Information Project (2000), Consolidated Summary and Reports from observations made in 1996, 1997, 1998 and 1999, compiled and distributed by NIHR's Project 'Ethiopia's Red Terror Trials: Africa's First War Tribunal', 5.

66 Ethiopian Penal Code, 1957, p. 87.

67 UN General Assembly Resolution 2200, UN GAOR 21 Session, Supp. No. 16 at 59, NU Doc. A/6316

68 For ratification, see <http://www.africa-union.org/root/AU/Documents/Treaties/treaties.htm>.

9(4) and 26 of the International Covenant on Civil and Political Rights (ICCPR), as well as Article 3 of the African Charter on Human and Peoples' Rights, all of which are part of the law of Ethiopia.⁶⁹ Moreover, Ethiopia is a party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁷⁰ The obligation assumed by the Government, that is, the protection of persons under its jurisdiction from crimes without any discrimination is an affirmation of its very reason of existence. Obviously, many of the crimes committed by the Derg regime are described in international customary law.

d. The Derg Officials Trials

The charges against the Derg were contained in eight thousand pages of legal documents. In them, the Ethiopian Court alleged that the Derg had jailed, tortured and ordered the killing of members of opposition political groups and caused "bodily harm or serious [physical and mental] injury" to their leaders and supporters.⁷¹ The Derg officials were not only prosecuted for what are collectively called the 'Red Terror' campaign but also for various crimes including violation of the law of war, genocide, crimes against humanity, unlawful detention, rape, forced disappearances and abuse of power.⁷² Amongst the crimes listed with which the accused were charged were the murders of 1823 identifiable victims, one being the former Emperor, outrages upon personal dignity of 99 identifiable victims, and the enforced disappearances of 198 identifiable persons. The policy of forcible displacement of the civilian population, which resulted in the death of around 100,000 people in the mid-eighties also appeared on the Bill of Indictment.⁷³

The SPO finally began laying charges against some detainees of the Derg regime in late October 1994. The Red Terror and other Derg officials' trials were carried out all over the country. Trials of the majority of the defendants were carried out before the Federal High Court (at the time called Central High Court) in Addis Ababa. Regional Supreme Courts are responsible for

69 Art.9 Proclamation 1/1995, Proclamation of the Constitution of the federal Democratic Republic of Ethiopia, 1995.

70 Ethiopia accessed to the Convention on 14 Mar 1994. See also, General Assembly Resolution 39/46.

71 Transitional Government of Ethiopia, 1994, p. 8. See also, IRINnews.org, 2003; Amnesty International, 2004.

72 The Government of Ethiopia, "Trial Observation and Information Project (2000), 5; Art. 281 Ethiopian Penal Code 1957; Girmachew Alemu Aneme, 'Apology and Trials, at p.76.

73 The Government of Ethiopia, "Trial Observation and Information Project (2000), 5; Art. 281 Ethiopian Penal Code 1957.

Red terror trials in the regional States. A trial for the Ethiopia's former head of State Mengistu Haile Mariam, who fled into exile in Zimbabwe, his top officials and many supporters and mid-level bureaucrats of the ousted regime began before the High Court in Addis Ababa on 13 December 1994. The names of Mengistu appeared on a long list of individuals who were put under indictment, notably, crimes of genocide. In this year, the SPO filed the first charges against 73 Derg members and later, in 1997, it further filed charges against a total of 5,198 public and military officials of the of Derg regime. Out of the total of 5,198 charged, 2,246 were charged while in detention and 2,952 were charged in *absentia*. The SPO classified the defendants into three main categories: the *policy-makers* (top commanders and administrators), the *field commanders* (investigation departments, mass organisations, committee of revolutionary guards) and the *material offenders* (members of the revolutionary guard, death squads, and members of special forces).⁷⁴

The SPO charged these defendants, as the first category, the top officials of the Derg with committing crime of genocide by deliberately authorising and systematically planning to exterminate opposition political groups [extra-judicial killings], which is a violation of article 281 of the 1957 Ethiopian Penal Code. Interestingly, Article 281 of the 1957 Ethiopian Penal Code, unlike the Genocide Convention, extends its protection to political groups in addition to national, ethnic, racial and religious groups.⁷⁵ The Second categories were low-level bureaucrats who implement criminal orders or commit such killing on their own without state authority. The Third categories were ordinary people who support extra-judicial killings even if they did not directly or actively participate in them.⁷⁶ On 13 August 2004, 33 top former Derg officials, on trial for terror, wrote a letter to the Prime Minister to be given a forum where they may 'beg the Ethiopian public for their pardon for the mistakes done knowingly or unknowingly' during the Derg regime.⁷⁷ The government has not officially responded.

Mengistu was accused of genocide, crimes against humanity and war crimes by Special Prosecutor's Office in Ethiopia. In the autumn of 1994, Zimbabwe refused to extradite him to Ethiopia to be presented to the Ethiopian court.

74 The Government of Ethiopia, "Trial Observation and Information Project (2000), 5.

75 Art. 281 Ethiopian Penal Code 1957.

76 Transitional Government of Ethiopia, 1994, p. 8. See also, IRINnews.org, 2003; Amnesty International, 2004.

77 The letter was first published by the *Ethiopian Reporter* on 26 June 2004. Among the derg officials who signed the letter are former Vice-President Colonel Fiseha Desta, former Prime Minister Captain Fikreselassie Wogederes and the notorious henchmen of dictator Mengistu, Captain Legesse Asfaw and major Melaku Tefera. See Girmachew Alemu Aneme, 'Apology and Trials, at p.67, note 21.

Mengistu is a close friend of Mugabe, holds a diplomatic passport and lives in a heavy-guarded mansion in Harare. On 28 December 1999, in an interview with the South African daily, *The Star*, he said that the Red Terror was merely ‘a fight between two different social groups’, one of which was trying to overthrow the government. ‘The so-called genocide was this war in defence of the revolution’.⁷⁸ Three of the defendants – Mengistu Hailemariam, former Prime Minister Fikre-Selassie Wogdedereyes, and former second Lieutenant Tesseam Belay – have publicly denied any wrongdoing. From his home in Zimbabwe, Mengistu said, “[W]e were not perpetuating the Red Terror in our country. [...] It was not the Derg, not the Workers Party, not my Government. We were bogged down defending our territory, trying to keep our country united”.⁷⁹ In court on the third day of the trial, former Prime Minister Fikre-Selassie Wogdedereyes said, “[W]e stepped in to save the country. [...] We did not conspire; we were welcomed; everything was done according to the law and the will of the people”.⁸⁰ Former second Lieutenant Tesseam Belay, while in detain, stated, “[C]onsidering the situation at the time and to defend the socialist revolution to which the Derg was committed, there was no alternative but to eliminate our opponent”.⁸¹

The first death sentence was passed in absentia in 1999 on Getachew Terba, former Derg security officer, for crimes against humanity.⁸² Colonel Tesfaye Woldeselassie, the ex-security head of Derg, and General Legesse Belayneh, former head of the Central Investigation Department of Derg, were sentenced to death in August 2005;⁸³ and the Major Melaku Tefera of Derg (also known as the ‘Butcher of Gondar’ (Northern Ethiopia)) was sentenced to death in December 2005 for genocide and crimes against humanity.⁸⁴ On 12 December 2006, the Court rendered its judgment and Mengistu was convicted by majority vote (two vote to one on the three-judge panel) of genocide and crimes against humanity pursuant to Article 281 of the 1957 Ethiopian Penal Code, which includes ‘political groups’ among the groups protected against genocide. A dissenting judge took the position that the accused should have

78 Riccardo Orizio, *Talk of Evil* (London: Secker & Warburg, 2003), pp. 29, 146, 149; Martina Fletcher, “Mengistu Allegedly Refused a US Offer to Pay for his Expenses While in Zimbabwe”, *Africa News*, 5 February 2009. See also, *Le Monde*, August 17-18, 2003; *International Herald Tribune*, August 18, 2003; and <http://www.moreorless.au.com/killers/amin.htm> (accessed: 07/11/2003).

79 Andrew Meldrum, *Ethiopia's Ex-Ruler in Exile but Not Cut Off*, the *Guardian*, December 6, 1994, p. 11.

80 A. Hartley, *Ethiopian Junta Leader Defends his Record at Trial*, Reuters World Service, December 15, 1994, (available in: LEXIS, News Library, REUWLD File).

81 *Africa News Highlights*, Reuters World Service, November 17, 1994, (available in: LEXIS, News Library, REUWLD File).

82 See <http://www.amnesty.org/library>.

83 See <http://www.news24.com> (accessed: 11/08/2005).

84 <http://www.int.iol.co.za> (accessed: 09/12/2005).

been convicted of aggravated homicide because the relevant part of the provision had been repealed. A few weeks later, on 11 January 2007, the Court, by majority, sentenced Mengistu and the top tier of the accused to life in prison, taking into account certain extenuating circumstances. After his conviction, Zimbabwe, where he received sanctuary due to friendship with Robert Mugabe, said it would not extradite him to face trials in Ethiopia,⁸⁵ and, under Mugabe's protection, Mengistu has even exempted himself from his country's justice on the basis that Mengistu still enjoys asylum.⁸⁶ It was, therefore, unlikely that this sentence would ever be carried out against Mengistu who remains in exile. The government's special prosecutor appealed against the sentence on the grounds that the penalty Mengistu and his henchmen received was not commensurate to the crimes they committed and sought to raise it to the death penalty. The appeals procedure started on 12 June 2007. On 26 May 2008, the Ethiopian Supreme Court followed the Prosecutor's appeal and converted the life sentence on Mengistu and his 17 co-accused (one of whom live in the Italian Embassy in Addis Ababa and 16 in Ethiopian prisons) into a death sentence.⁸⁷

Special Prosecutor Girma Wakjira recently stated that the Red Terror Trial has been concluded. The Special Prosecutor's Office (SPO), set up in 1992, dealt with the cases of 5119 accused (some *in absentia*) and the courts found 3589 of the accused guilty and sentenced to death, life in prison, and prison for a number of years, freed 658, called 8047 witnesses and compiled 15214 pages of evidence. Some of the accused conveniently died before and during the trial.⁸⁸ The trial took 12 years, making it one of the longest ever trials for genocide. The SPO admitted about 658 innocent people were languishing in prison for years, but are freed now. This admission confirms in part that the US Department of State report which noted that opposition groups alleged that some of the persons detained by the SPO were held for political reasons, an allegation that the TPLF denied. In 2010, SPO reportedly presented its long awaited report to the Parliament of Ethiopia; the report by the SPO was mainly focused on the criminal Prosecution of the Previous Government Officials.

85 "Mengistu is Handed Life Sentence", BBC News, January 11, 2007.

86 See Yves Beigbeder, *Judging Criminal Leaders*, pp. 129-132. "Mugabe Defends 'Red Terror'", BBC News, December 28, 1999, see at, <http://news.bbc.co.uk/1/hi/world/africa/581098.stm> (accessed: 08/11/2003); Amnesty International *Reports 2003*, p.102; M. Redae, "The Ethiopian Genocide Trial", *I Ethiopian Law Review* (2000), at p. 8.

87 "Court Sentences Mengistu to Death", BBC News, May 26, 2008. See also, "Mengistu's Defence of Red Terror Opens", Africa News, The Independent, see at: <http://www.independent.co.uk/news/world/africa/mengistus-defence-of-red-terror-opens-576896.html> (accessed: 15/04/2010).

88 Kjetil Tronvoll, Charles Schaefer & Girmachew Alemu Aneme, *The Ethiopian Red Terror Trials – Book Review* (Oxford: James Currey, 2009).

Ethiopia retains death penalty.⁸⁹ The possibility of the use of the death penalty for defendants charged with genocide, crimes against humanity, war crimes and first-degree of homicide under the Ethiopian Penal Code was an issue of the international community and human rights activists. There have been calls to the Ethiopia Government to abolish death penalty. For instance, apart from Zimbabwe, Italy has repeatedly refused to hand over Derg officials who took refuge in its Embassy in Addis Ababa after the fall of the Derg in 1991. Recently, the Italian Embassy in Addis Ababa stated that principles of international law and the Italian Constitution do not allow it to hand over the two Derg officials unless there assurances that the former officials will not face the death penalty.⁹⁰ The SPO, however, tried these officials *in absentia*. The absence of an extradition treaty was also used as a reason for. Ethiopia signed extradition treaty with Djibouti and Sudan only. However, the US Federal agents used the new authorities of the Intelligence Reform Act of 2004 to arrest Kelbessa Negewo, a former Derg security officer who was sentenced to life in prison by an Ethiopian court for the commission of crime against humanity during the Red Terror in his native Ethiopia. In October 2006, the US Government extradited Kelbessa Negewo. Upon the arrival in Ethiopia, he began life sentence in his former homeland where in 2002 he was convicted in absentia of human rights violations including torture and 13 killings. He was also the target of a civil case in the early 1990s.⁹¹

The SPO was reported to be in favour of the death penalty for a ‘limited number’ of the Derg officials who were found guilty of genocide and crimes against humanity.⁹² It is known that the ICTY, ICTR and ICC do not provide for the death penalty. Article 6(2) of the ICCPR, to which Ethiopia is also a party, prohibits the use of the death penalty. But Ethiopian officials argue that Ethiopians support the use of the death penalty, especially in these cases, because the defendants may be found guilty of serious and terrible crimes.⁹³ Given the widespread support for the death penalty, in Ethiopia, the SPO apparently felt that the newly created democratic institutions would not be compromised by its use and that the public would not consider its use in a

89 Art. 281, 282 & 522 Ethiopian Penal Code 1957.

90 Ethiopian Reporter, June 23, 2004, Press Release from the Italian Embassy in Addis Ababa.

91 *Ethiopian man suspected of torture ordered deported from U.S.* Associated Press, July 29, 2005; New York Times, June 4, 2006. See also: <http://www.washingtontimes.com> (accessed: 05/01/2005). See Yves Beigbeder, *Judging Criminal Leaders*, pp. 129-132. “Mugabe defends “Red Terror” BBC News, December 28, 1999, <http://news.bbc.co.uk/1/hi/world/africa/581098.stm> (accessed: 08/11/2003) – Amnesty International Reports 2003, p.102.

92 Dadimos Haile, *Accountability for Crimes of the Past*, p. 42; Julie V. Mayfield, “The Prosecution of War Crimes, at p. 574.

93 “Tens of thousands of Ethiopians were tortured, murdered, or ‘disappeared’ after arrest during the period from 1994 to 1991”. Africa Watch, Ethiopia: Reckoning UN-Der the Law (1994), at p. 24.

violation of human rights. The Chief Special Prosecutor, Gima Wakjira, has said, however, that his office “would not go to the extent of embarrassing the international community by seeking the death penalty to every case”.⁹⁴

2. Challenges of the Prosecution of the Derg

The SPO and trials of the Derg (‘Red Terror’) was ambitious, historical and complicated: it is the first of their kind on the African continent. These are different even from the case of Rwanda which has national trials (including both regular Courts and Gacaca) in front of the ICTR, and trials held in third States (in particular in Belgium). The PSO and the trial of the Derg, however, faced major challenges and a number of setbacks that eventually affected the trials from the very beginning. The challenges of the PSO were, among others, an acute shortage of human (judge) and financial resources crucial for the work of investigating and prosecuting the criminals and human rights violators during the Derg regime. Other criticisms to the PSO were the politicization and the delay of the trial, the low moral competence and low capacity and wrong expectations.

The judiciary shortage derives from the fact that, under the Derg regime the judicial independence was inexistent; they were directly controlled by the Derg executive. Upon coming to power, the Transitional Government dismissed most of the senior judges alleging that they were in one way or another connected to the defunct regime.⁹⁵ This action created a gap that led to an acute shortage of skilled and experienced judges. As a result, the duty to preside over the complicated and demanding Derg trials fell to junior and inexperienced Ethiopian judges. In contrast to Sierra Leone, Rwanda, Cambodia and East Timor, the trial of the Derg criminals were Ethiopian judges, with only few foreigner advisors at the early stage of the trial.⁹⁶ The judges spent most of their time handling court administration, conducting their own research without assistant, writing down the words of witnesses and oral arguments which could have been done by court clerks.⁹⁷ The gathering of evidence of those complicated human rights violations that occurred during the Derg regime, the investigation of cases and the framing of charges tasks necessitate an efficient system of prosecution.

94 The Government of Ethiopia, Office of the Special Prosecutor, Transitional Government of Ethiopia, Addis Ababa, August 29, 1994, Issue 8, at p.1.

95 Julie V. Mayfield, “The Prosecution of War Crimes, at p. 590.

96 *Ibid*, at p. 585.

97 M. Redae, “The Ethiopian Genocide Trial”, *1 Ethiopian Law Review* (2000), at p. 7.

Another challenge to the trial of the Derg criminals had been the right to have “competent, independent and impartial tribunal” sit in judgement of the case.⁹⁸ In accordance with these requirements, the aspect of the trial could be called into question. Concerns about these have already been expressed by human rights groups. The perception exists that many of the judges appointed by the EPRDF since May 1991 were in fact quite closely affiliated with the EPRDF and were susceptible to political pressure.⁹⁹ The Judicial Administration Commission (JAC), which appoints the Judges, was viewed as unable to challenge the EPRDF Government and fully examine if the judges fulfil the requirements of the appointment.¹⁰⁰ Thus, while no substantive proof exists, all these issues mentioned here raised the question on the right to fair trial provisions of the ICCPR (Art. 14 (1)). The Public Defenders’ Office, which was established in 1993, was a new institution with a few lawyers.¹⁰¹ The number of these public defenders involved was completely out of proportion to the number of the defendants who needed service from the office.¹⁰² Initially, some of the top Derg officials were better off than the prosecution, as they were provided with the best lawyers the country could provide. However, the majority of the defendants in the Derg trials were left to the newly created public defenders’ office of 1994. The provision of assistance of the Public Defenders’ Office to those detainees, who cannot afford their own counsel, was improved.

The Chief Prosecutor of the SPO, Girma Wakjira (himself the former member of the EPRP), was appointed by the Transitional Government of Ethiopia, and accountable to the Prime Minister of Ethiopia, and habeas corpus was ignored. The accused did not have easy access to defence witnesses and the whole trial took a very long time. Many of the detained officials filed habeas corpus petitions (i.e. remedy for unlawful detention). The Federal High Court (at the time called Central High Court) was granted the power to consider habeas corpus petitions by Proclamation No. 40/1993, Art. 6(15) (January 11, 1993).¹⁰³ Many of the respondents mentioned the public’s perception of the trials as being politicized and undermined the rule of law. The actors involved in the Ethiopian trial process, especially the SPO, had the desire to have institutional level effects, to influence the shape and substance of future justice administration in Ethiopia.

98 Art 14 (1) of the ICCPR.

99 Transitional Government of Ethiopia, 1994, p. 9-13.

100 Transitional Government of Ethiopia, 1994, p. 10.

101 The Government of Ethiopia, “Trial Observation and Information Project (2000), 10.

102 Ibid.

103 Appendix B, Special Prosecutor’s Office Document 1 & 2; Human Rights Watch, 1994, 19-20.

The Prosecution of the Derg Criminals in Ethiopia

Many defendants were not in the country and were tried *in absentia*, which put into question the provision of Article 14(3)(d) of the ICCPR. The SPO had an affirmative obligation to see that “due notification has been made to inform [the defendant] of the date and place of his trial and to request his attendance”. However, as stated in *Mbenge* case, a defendant, however, can waive the right to be present, and the proceedings against him may go forward “in the interest of the proper administration of justice”.¹⁰⁴ In the *Mbenge* case, the authorities knew of the defendant’s address in Belgium, so there was no reason that notification could not be given to him. But the case in Ethiopia is different. However, if the SPO knows where the defendants are, the SPO must give notice or be held to violate Article 14 (3) (d) of the ICCPR.

All these shortcomings led to the very slow progress of the Derg trials and to long adjournments. These inefficiency and long years in handling the cases have already put the symbolic important of the SPO trials into oblivion. The lack of a speedy and effective investigation and prosecution also caused the loss of interest and support for the trials from the international community.

The Derg’s trials were amongst the longest trials. Due to the inefficiency in the judicial system and the profusion of cases and the great number of witnesses to be heard that local courts can’t always cope, the trials took over an extended period, for almost 12 years.¹⁰⁵ The delay in the process led to negative effects such as lack of trust in the justice system. It was highly relevant to understand the mechanisms behind why the delay was transformed into negative effects. The momentum for believing and hoping that the trials could be the beginning of responsive and vital justice institutions was lost. The reasons for the delay were multiple and complex, most of which were linked to the issue of capacity of the judiciary.

Generally speaking, however, the EPRDF Government became willing to accept its international legal obligations to investigate and bring to justice those involved in human rights crimes and embark on a policy choice regarding how a society can productively deal with past abuses to create a more democratic future was applauded by international human rights activists. Be this as it may, the EPRDF is democratically and financially weak hence the ability to deliver performance as it had promised via Proclamation No. 22/1992 is limited. Thus, innovative solutions have to be found: among these

104 *Monguya Mbenge v. Zaire*, 78 I.L.R.1983 (UN Human Rights Commission, 1983), at p. 24.

105 Anthony Mitchell, “Ethiopian ex-Dictator’s Trial Drags on, 9 Years in, Seen as Lesson in Difficulties of Local Art 20 Proclamation 1/1995, Proclamation of the Constitution of the federal Democratic Republic of Ethiopia, 1995.

there are Truth Commissions. The main argument for the Ethiopia's Derg trials is that the national courts may have benefited from the acceptance of assistance of the international community, for instance, additional financing and research capacity, as well as ensuring that international standards of justice will be met, so that the country's justice system to gain more understandable for and visible to the local population.

Conclusion

Since 1991, the Ethiopian Government and judiciary have undergone a complete reincarnation challenging a set of obstacles no other country has faced in attempting to prosecute similar crimes. Despite the difficulty the trial encountered, the trial of Mengistu and 69 of his aides has become a lesson in the challenges of resurrecting a local justice system to prosecute crimes committed by a former dictator and his government. That the Transitional Government was initially, and has remained determined to punish these defendants under the rule of law instead of extra-judicially testifies to the respect Ethiopians have for their new institutions and their desire to live by the rule of law. The Government did not opt to extra-judicial or arbitrary execution to and did not negotiate with the former officials for amnesty from legal liability in exchange for a full exposition of the facts and a public administration of responsibility for past human rights violations. Moreover, as the Ethiopian Federal Constitution provided that the State should assist an indigent defendant in the provision of legal counsel,¹⁰⁶ the Ethiopian Government has preserved and created new systems, such as the public defender's office as a basic right of the defendant. By doing this, the Ethiopian Government demonstrated its obligations, under the ICCPR, to attempt to join the group of nations which strives to protect their citizens' human rights.

The trial of the Derg officials constitutes a contrast to the custom of unlawfully executing government officials in the history of the country. Indeed, the Derg officials underwent through a process completely absent in the case of millions who were summarily executed by the same officials.¹⁰⁷ As a detailed historical record of human rights violations committed in the country, the trials and prosecutions inform the public of what happened in a bid to deter future recurrences of similar atrocities. The Red Terror was a bloody orgy that scarred the history, psyche and soul of Ethiopia. The Red

106 Art 20 Proclamation 1/1995, Proclamation of the Constitution of the federal Democratic Republic of Ethiopia, 1995.

107 Girmachew Alemu Aneme, "Apology and Trials, at pp.64-68.

Terror torture victims and the relatives of the martyrs are also alive. Its repercussions are still being felt as the Terror has affected the living more than the dead. The Ethiopian Government and the SPO view the trial of the Derg regime as being primarily for the moral and psychological benefit of the Ethiopian people and to establish the rule of law in their 'new' country. However, despite the Government of EPRDF's action on the matter remains unique for which the EPRDF deserves praise, the process may not be sufficient enough for full-fledged transitional justice in Ethiopia due to the institutional weakness and resources shortages. Whilst the investigation and prosecution of crimes and human rights violations are duties upon States, a wide national reconciliation of all stakeholders could also better complement to the SPO's remedial process. This complementary action may well contribute to the transformation of violence in Ethiopian society in the sense that related to political authority and social structure.

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