Transitional Justice Through Prosecution: The Ethiopian Red Terror Trials in Retrospect

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Abstract

Ethiopia is perhaps the first African country which brought the entire regime before the national court for the heinous crimes committed while in power. In this regard, it is said that the Red Terror Trial is considered as Africa's glaring example of retributive justice; just as the Truth and Reconciliation Commission (TRC) was Africa's contribution to restorative justice.[1] Soon after the demise of the Derg regime, the new government of Ethiopia decided to address the past state-sponsored human rights violations through judicial means. In accordance with this decision, the Office of Special Prosecutor charged over 5000 members of the defunct regime for the past human rights violations. At the beginning, the decision to prosecute the perpetrators received a great appreciation from inside and outside thinking that the process would heal the wounds of the society, prevent the recurrence of such kind of atrocities in the future, and bring the culture of impunity to an end. However, through the passage of time, it appears that the process has failed to ensure accountability for the past human rights violations while respecting the rights of the defendants in conformity with the international human rights standards and domestic law. Specifically there had been lengthy pre-trial detentions, violations of the rights of speedy trial and of the rights to counsel. Besides, the process has received low public attention. This, in turn, limits significance of the process in providing a lesson to the public. In this article, it is intended to canvass Red Terror Trials as response to past gross human rights violations, and to examine the process from the perspective of the defendants' rights. In view of this, this article has two parts: part I will begin with an overview of transitional justice; and part II will deal with Red Terror Trials.

1 Introduction

1.1 The Notion of Transitional Justice

The notion of transitional justice has captured much attention and begun to be considered as subfield of human rights that addresses past human rights violations by using judicial and/or non-judicial mechanisms. According to Charles T. Call, transitional justice holds broader significance for giving birth

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[1] Kjetil Tronvoll et al, The Red Terror Trials: the Context of Transitional Justice in Ethiopia, in Kjetil et al. (eds.), The Ethiopian Red Terror Trials: Transitional Justice Challenged, Oxford, James Currey Publishers, (2008), p.13.

to "an array of innovative and evolving instruments to expose and punish human rights abusers," and having had "an unexpected influence on state sovereignty and on hopes for global justice."[2] In the past, bringing a head of state or leaders of a country to justice was inconceivable. However, there have recently been an unprecedented number of indicted political leaders in the dock, or, the shadow of its threat: Slobodan Milosevic, Saddam Hussein, Augusto Pinochet, Charles Taylor, Alberto Fujimori, and Omer alBashir.[3]

Although the origin of transitional justice can be traced back to World War I, it came to be understood as both extraordinary and international in the post war period after 1945.[4] In the aftermath of World War II, the establishment of International Military Tribunals in Nuremberg and Tokyo as a reaction to the holocaust was one of the innovation of the international community. The prosecution of German and Japanese soldiers and their leaders for the crimes committed during the war has been remarkable from historical perspective, even though critics charged the tribunals with selective and politicized prosecutions and retroactive punishment.[5]

The term transitional justice does not have a single definition. It has been defined in various ways. According to Teitel, transitional justice can be defined as "conception of justice associated with periods of political change, characterized by legal responses to confront the wrong doing of repressive predecessor regimes."[6] This definition is criticized for ignoring war-torn societies and overvaluing legal responses. As the wording of the definition suggests it is confined to legal mechanism like prosecution without taking in to account other mechanism like truth commission. Besides, it presupposes repressive regime, which may not always be required for transitional justice. It disregards political transition from civil conflict in case of anarchism to peace.

In its broadest sense, "transitional justice refers to how societies 'transitioning' from repressive rule or armed conflict deal with past atrocities, how they overcome social divisions or seek reconciliation, and how they create

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[2] Charles Call, Is Transitional Justice Really Just?, *The Brown Journal of World Affairs*, Vol. XI, issue 1, Watson Institute for International Studies, (2004), p.101.

[3] Ruti Teitel, Transitional Justice: Post War Legacies, *Cardozo Law Review*, Vol.27:4, (2006), P.1.

[4] Ruti Teitel, Transitional Justice Genealogy, *Harvard Human Rights Journal,* Vol.16, (2003), p.1.

[5] Martha Minow, Innovating Responses to the Past: Human Rights Institutions, in Nigel Biggar(ed.), Burying the Past: Making Peace and Doing Justice After Civil Conflict, Washington, D.C., Georgetown University Press, (2003), p.88.

[6] Ruti Teitel, *supra note* 4, p.1.

justice system so as to prevent future human rights violations."[7] This definition appears to solve the shortcoming of the previous definition.

Furthermore, the United Nations Secretary General, in his 2004 report on transitional justice and rule of law, has given a comprehensive definition for transitional justice in the following terms.

> *The full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.*[8]

As per this definition, transitional justice refers to a range of mechanisms or processes that societies in transition may use to address past human rights wrongs caused by conflict, repressive rule or state failure and includes both judicial and non-judicial approaches like trials, truth commissions, memorials and institutional reform initiatives. Transitional societies have attempted various approaches to serve justice and to attain either individual or collective accountability for the past human rights violations. These approaches are seen to clarify the human rights records, identify victims and perpetrators, to provide reparations to the former and prosecute the latter.

1.2 Models of Transitional Justice

As the name suggests transition involves a passage or journey from one stage to another. This, of course, begs the question of transition from what to what and how. The transformation can be either from repressive rule to the democratic order or from armed conflict to peace. In some cases these two may overlap. The divergence of opinion comes to exist in relation to the question of how to transit or how to deal with the past during transition. In this regard, scholars do not agree on how to deal with the past human rights atrocities even

[7] Charles Call, *supra note* 2, p.101.
[8] The UN Secretary General Report, the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies, (2004), S/2004/616, para. 8.

if they appear to hold similar opinion in addressing the legacies of human rights violations. Particularly there is strong debate among scholars on the most effective ways of achieving justice, peace and reconciliation, suggesting a dichotomy between judicial approaches (what some authors call retributive justice) and non-judicial approaches (what some authors call reconciliatory justice or restorative justice).[9] Some others advocate the combination of the two mechanisms by reconstructing the truth, reconciling the parties and prosecuting those responsible for committing massive breaches of human rights. Various transitional societies have attempted one or both of these approaches to discover the truth about the past human rights wrongs, to attain some form of accountability, and thereby to create a stable future.

As noted above, the debate revolves around the question of either to prosecute or forgive or combine the two during transition. It has recently been understood as a dilemma between justice and peace. Put differently, the key issue that emerged in transitional justice has been the question of making peace or doing justice: should we punish massive human rights violations committed under old regimes or give amnesty for the sake of peace and reconciliation? Should transitional regimes buy peace at the price of justice or vice-versa? Are peace and justice mutually exclusive? The tension between peace and justice is the extension of the debate on the mechanisms of transitional justice. Arguments forwarded by proponents of each models of transitional justice are as follows.

1.2.1 Prosecution

Transition to democratic order is usually linked with prosecution and punishment of the old regime. The use of judicial prosecutions is ranging from entirely domestic prosecution by national courts to international intervention through hybrid courts, ad hoc tribunals and permanent courts. Many advocate that prosecution and punishment is the best response to human rights abuses. For them, failure to prosecute such crimes amounts to a tacit endorsement. Besides, it is usually perceived that non-prosecution of gross human rights violations of prior regimes constitutes a subjugation of justice to political compromise.[10] Prosecution, they argue, promotes stability, the rule of law,

[9] Yolanda Gamarra Chopo, Peace with Justice: the Role of Prosecution in Peace Making and Reconciliation, a paper, (2007), p.2.

[10] Kobina Daniel, Amnesty as a Tool of Transitional Justice: the South African Truth and Reconciliation Commission in Profile, Dissertation, Law Faculty of Pretoria University, South Africa, (2001), p.1.

democracy, and deterrence of the commission of atrocities; ensures accountability; and appropriately punishes atrocity perpetrators.[11] And hence failure to prosecute and punish offenders of human rights abuses in times of transition is detrimental to the rule of law and reconciliation at the interpersonal level and to the society at large in its quest for future accountable democratic order. Besides, as one can understand, for instance, from article 4 of the Convention on the Prevention and Punishment of the Crime of Genocide, article 7 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or punishment, and the four Geneva Conventions, states are duty bound to prosecute and punish the perpetrators of the atrocities. Hence, states should include criminal investigation and prosecution as a means to provide justice for the victims and their survivors.

According to this line of argument, prosecution helps legitimate the new government and demonstrates its commitment to address the past and to respect human rights. If the new democratic regime does not establish a precedent for punishing gross violations of human rights, then at some future date the new regime may resort to authoritarianism, or that the democratic order may be toppled by those who believe that there is no cost to human rights violations.[12]

Prosecution is very important for the determination of individual responsibility and not assigning that responsibility to the entire group so that the latter not be blamed for the atrocities committed by just certain members.[13] This, in effect, avoids the trap of collective guilt which inevitably falls along ethnic lines or a group and forestalls collective revenge. This option focuses on pursuing justice through individual responsibility which has an important role in preventing the recurrence of human rights violations. By prosecuting individual perpetrators and holding them criminally responsible for their actions, the aim is to deter them and others from committing such crimes again in the future.[14] Moreover, it is important to create historical record of events and atrocities. In sum, the advocates of this option have the following to say:

[11] Zachary Kaufman, The Future of Transitional Justice, Stair 1, No.1, (2005), p.66.

[12] Maryam Kamali, Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa, *Columbia Journal of Transnational Law*, (2001), p.100

[13] Mieter Magsam, Coming to the Terms with Genocide in Rwanda: the Role of International and National Justice, in Walfgang Kaleck *et.al.*(eds.), International Prosecution of Human Rights Crimes, German, Berlin Heidelberg press, (2007), p.164.

[14] Yolanda Gamarra Chopo, *supra note* 9, p.24.

> *Seeking justice through the institutions of the law is the best means of determining responsibility for acts of genocide, war crimes, and other politically motivated violations of human rights. Criminal prosecutions of crimes of this magnitude not only punish the individual who committed them, demonstrating that impunity does not exist, but also help to restore dignity to their victims. They can provide a cathartic experience not only for individual victims, but also for the society as a whole. By holding individuals responsible for their misdeeds, criminal trials may also deter the commission of abuses in the future. Moreover if conducted in strict accordance with legal due process, prosecutions of war crimes can help to strengthen the rule of law and establish the truth about the past through accepted legal means.*[15]

1.2.2 Amnesty and Reconciliation

The second option is amnesty and reconciliation a mechanism whereby an authority grants a pardon for the past offenses.[16] This approach may entail the establishment of a truth commission aiming to uncover the truth about the past atrocities, rather than to punish the perpetrators. There are two amnesty options: conditional and unconditional amnesties. Conditional amnesty is granted in exchange for truthful testimony, including the option of prosecution if that testimony were judged incomplete or untruthful.[17] The Truth and Reconciliation Commission of South Africa can be cited as an example of this kind. For granting of amnesty for the wrongs of apartheid, political motivation for the crime and full disclosure of the facts in a public hearing under cross-examination were required.[18] Those who failed to meet these two conditions were exposed to prosecution. Whereas unconditional amnesty (which usually

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[15] Donald Hafner and Elizabeth King, Beyond Traditional Notions of Transitional Justice: How Trials, Truth Commissions, and Other Tools for Accountability can and should Work Together, *Boston College International and Comparative Law Review,* Vol.30:91, (2007), p.93.

[16] Zachary Kaufman, *supra note* 11, p.63.

[17] *Ibid*

[18] Yolanda Gamarra Chopo, *supra note* 9, p.10.

does not entail truth commission) grants a general amnesty to alleged atrocity perpetrators not based on the breadth or accuracy of testimony or any other condition.[19] Amnesty and reconciliation focuses on the healing and renewal of community relationships.

Advocates argue that overcoming past crimes and injuries will necessitate forward-looking strategies associated with truth telling, forgiveness, reconciliation and rehabilitation. They criticize the proponents of prosecution for assuming that prosecution will be possible in the wake of human rights disasters. Besides, prosecution may prove to be expensive and slow, and may also perpetuate a cycle of vengeance. Not only is an amnesty for human rights abuses often a precondition for securing a smooth political transition, they argue, but many fledgling democracies have simply not had the power, popular support, legal tools, or conditions necessary to prosecute effectively.[20] They contend that prosecution has only worked in cases where the military has lost power. Where the old regime's military is powerful, attempts to prosecute its members may spark rebellion. In support of this some argue that the South African reasonably peaceful transition from repression to democracy would instead have become a bloodbath if prosecution had been used without some amnesty provisions.[21] It is mainly because the transitional South African government relied on the military and police of the former white minority regime, and their demands for amnesty had to be met before any change in the government could take place. In such cases, a policy of amnesty and reconciliation is the best way to protect the new democracy. Fragile democracies may be undermined by politically charged trials by increasing rather than decreasing the possibility of renewed conflict.[22] They also put their fear saying that after transition such trials may be politically motivated against opponents of the new regime (so called victor's justice).

In sum, truth and reconciliation commissions are very important to:

> *(i) further understanding in lieu of vengeance, reparation in lieu of retaliation, and reconciliation instead of victimization; (ii) promote a kind of*

[19] Zachary Kuafman , *supra note* 11, p. 63.

[20] Miriam Aukerman, Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice, *Harvard Human Rights Journal,* Vol. 15, (2002), p.1.

[21] Maryam Kamali, *supra note* 12, p.121.

[22] Christine Bell, Peace Agreements and Human Rights, New York, Oxford University Press, (2000), p.271.

> *historical catharsis through public exposure of crimes; (iii) delve into historical, social, and political roots of the crimes; (iv) establish a historical record of the atrocities committed; and (v) prevent or render superfluous long trials against thousands of the alleged perpetrators.*[23]

On the other hand, opponents argue that the flaws of these commissions should not be underestimated; they have proved unable to bring about real and lasting reconciliation in many cases.[24] In addition, amnesty undermines the international legal regime on the protection and promotion of human rights and rule of law. Such process tends to send the wrong signal that impunity is an accepted culture; thereby setting the stage for future abuses by political leaders. Owing to this, the viability of amnesty as alternative to a predominantly prosecution-based transitional policy has become more doubtful in light of recent developments in international law.[25] Particularly, third-country prosecution (universal jurisdiction on core crimes) and prosecution before the International Criminal Court (ICC) could lead to a decline in the attractiveness of amnesty as an alternative mechanism.

1.2.3 A Combined Model

As it can be understood from the above arguments, the two approaches of transitional justice are deemed to be fundamentally at odds with each other without having anything in common. And it is traditionally believed that a society must choose one or the other.[26] This view has, however, been challenged by a third alternative approach arguing that transitional societies must strive to realize both retribution and restoration, and balance them in appropriate way. This approach is to combine retribution and reconciliation, with selective prosecutions those who committed egregious crimes or of those who did not step forward to ask for amnesty as in the case of South Africa.[27]

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[23] Antonio Cassese, International Criminal Law, New York, Oxford University Press, (2003), p.10.

[24] *Ibid*.

[25] Antje du Bois_Pedain, Transitional Amnesty in South Africa, United Kingdom, *Cambridge University Press*, (2007), p.300.

[26] Frank Hadmann, A Different Kind of Justice: Transitional Justice as Recognition, a paper, (2006), p.4.

[27] Maryam Kamali, *supra note* 12, p.100.

Transitional justice should not only be understood as backward-looking: punishing wrong-doers, compensating victims for their losses and revealing the truth about the past; but as forward-looking terms.[28] Pursuant to this alternative, peace and justice are not mutually exclusive, but rather mutually reinforcing imperatives. Each model of transitional justice addresses a particular need on the part of victims, and indeed for the society at large.[29] Thus, our approach to transitional justice must be comprehensive.

The purpose of the discussion is not to champion any of the specific alternatives. Rather it is hoped to elucidate the ongoing contrasts different models of transitional justice. As a matter of fact, there is no single formula applicable for all transitional societies. Some argue that the choice between prosecution and non-prosecution alternatives should depend on what one is seeking to achieve. For instance, some societies emerging from mass trauma may demand retribution, while others may focus on compensation; still others may concentrate on strengthening democratic institutions.[30] If different societies want different things, and if prosecution is a more effective tool for achieving some goals than others, we can not presuppose that all societies in transition should choose prosecution.[31] Here one should not be unmindful of the role and the interest of the international community in affecting the choice of mechanisms since grave human rights violations, as opposed to ordinary crimes, are not merely offenses on the particular traumatized society but on humanity as whole. The choice can not be left solely to either the local society or the international community. Thus, transitional justice must reflect the needs, desires, and political realities of the victimized society, while at the same time recognizing the international community's rights and responsibility to intervene.[32] In view of this, some authors state that the key to achieving lasting peace is broadening and incorporating various approaches in order to include restitution, acknowledgement, apology, forgiveness, institutional reform and equality to retributive character of justice.[33]

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[28] Eric Posener and Adrian Vermeul, Transitional Justice as Ordinary Justice, *Harvard Law Review,* Vol.117:761, (2004), p.766.

[29] Andrea Armstrong, The Devil is the Details: the Challenges of Transitional Justice in Recent African Peace Agreements, *African Human Rights Law Journal,* vol.6 No.1, (2006), p.3.

[30] Miriam Aukerman , *supra note* 20, p.45.

[31] *Ibid*

[32] *Ibid*, p.47

[33] Yolanda Gamarra Chopo, *supra note* 9, p.31.

Various approaches of transitional justice are complementary. Bearing this in mind, in the next part we are going to discuss how Ethiopia has dealt with its past.

2. Transitional Justice in Ethiopia: Prosecution

2.1. Atrocities at a Glance

Ethiopia is a diverse country consisting of more than eighty ethnic groups with numerous languages.[34] From 1930-1974, despite its diversity, the country was under an autocratic monarchy ruled by one-man, Emperor Haile Selassie. Nevertheless, the Emperor created a modern state constituting of a structured, centralised government, local governments and a judicial system, all of which were governed by codified laws and a constitution.[35] However, there were no independent legislature and judiciary. The constitution gave recognition for the absolute power and prerogatives of the Emperor in lieu of putting restrictions. In the countryside, peasants were reduced into serfs forced to hand over more than half of their produce to their landlords. Thus, his long reign witnessed varied acts of political opposition including a couple of assassination attempts (in 1925 and in 1969).[36] Only a handful of his opponents were however executed since the Emperor's preferred mode of punishment was imprisonment, marginalization and banishment.[37]

In 1960s and 1970s, opposition to the rule of the Emperor crystallised among the educated in the capital city, Addis Ababa, and abroad in part as people became frustrated with the Emperor's lack of attention to economic development and his refusal to end the feudal system.[38] Several different groups including the military staged widespread protest while the government continued to be unresponsive to the political and economic demands of its people. The Provisional Military Administration Council (in Amharic *Derg*) was formed by junior officers of the Ethiopian army on the eve of the 1974 Popular Revolution. Finally the *Derg* managed to overthrow the monarchy through a widespread uprising without bloodshed and came to power on September 12, 1974.

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[34] Julie Mayfield, The Prosecution of War Criminals and Respect for Human Rights: Ethiopia's Balance Act, *Emory International Law Review,* Vol. 9, (1995), p.556.

[35] *Ibid* p.557.

[36] Bahru Zewde, The History of the Red Terror, in Kjetil Tronvoll et al. (eds.), *supra note 1*, p.28.

[37] *Ibid*

[38] Julie Mayfield, *supra note 34*, p.557.

The revolution appeared to be successful without any bloodshed at the beginning. However soon after the change of the regime, the *Derg* cracked on the military units which precipitated the death of Lt.General Aman Andom (the first leader of the *Derg*) and the execution of sixty former government officials in November 1974.[39] From then on, the *Derg* abandoned the slogan of bloodless revolution; and much blood had to follow.

Following the revolution, splits appeared between different radical elements as reflection of pre-existing divisions in student movement: the Ethiopian People's Revolutionary Party (EPRP) as one group, and the All-Ethiopia Socialist Movement (Amharic acronym MEISON) another.[40] While two of them espoused an almost indistinguishable brand of Marxism, MEISON supported and worked with the *Derg*, and the EPRP opposed the idea of revolution imposed from above, instead called the establishment of provisional people's government.[41] The EPRP thus became enemy of the *Derg*.

After having crushed the ruling class of the monarchy including the emperor, members of the royal family, ministers, senior officers of the army, landed aristocrats and the patriarch, the *Derg* turned face to the 'anti-revolutionaries' and 'anti-unity' elements which were accused of sabotaging the revolution.[42] The *Derg* began a campaign of the "Red Terror" against the EPRP (supported by most students and elites) claiming that the latter had started the "White Terror." The Red Terror was a campaign of urban counter-insurgency waged in the capital, Addis Ababa, and provincial towns against the campaign of which the *Derg* called White Terror advanced by EPRP.[43] At beginning of the Red Terror, the *Derg* and its ally MEISON launched a massive campaign against EPRP which resulted in hundreds of members and sympathizers of the latter to be incarcerated. The EPRP, on its part, began to kill the cadres and leaders of the opposite camp by invoking the act of self-defence. As result, the *Derg* brutally began to kill people suspected of EPRP membership and left the bodies on the streets as a warning to others. After some time, the EPRP lost its prominent members and leaders, and the *Derg* turned its attention to its own ally, MEISON. As a consequence, many

[39] Bahru Zewde, *supra note* 36, p.31.
[40] Human Rights Watch, Evil Days: 30 Years of War and Famine in Ethiopia, New York, An African Watch Report, (1991), p.101.
[41] Julie Mayfield, *supra note* 34, p.559.
[42] Firew Kebede, The Mengistu Genocide Trial in Ethiopia, *Journal of International Criminal Justice*, (2007), p.3.
[43] Human Rights Watch/Africa, Ethiopia: Reckoning under the Law, New York, Human Rights Watch, (1994), p.7.

members of MEISON were killed. At the climax stage of the terror, every revolutionary became a law unto him and had an unrestricted license to kill "counter-revolutionaries".[44] Both EPRP and MEISON became the target of the terror.

During the Red Terror, thousands of people were arrested, disappeared, tortured, and murdered. In some instances, families of the disappeared and murdered had to pay the government for the bullet wasted to kill their family member, and only by doing this could they recover the body.[45] No one knows how many people were exactly killed, imprisoned, or forced to flee abroad on account of the campaign of the Red Terror. According to Bahru Zewde, the generation gap left behind this Terror is akin to the gap that attended the Graziane's massacre of February 1937 during fascist Italy's occupation of Ethiopia, when the most agile and promising minds were targeted for liquidation.[46] The main target of the Red Terror was a generation of urban people with at least minimal education. Most agree that the best and the brightest perished in the process. In addition to the campaign of Red Terror, the *Derg* was fighting terrible wars with different ethnic-based insurgencies and with Somalia, which were marked by widespread human rights and humanitarian law violations.[47] Between 1976 and the late of 1980s, 1.5 million Ethiopians are estimated to have died, disappeared or been injured as a result of the Red Terror (1976-1978), famine manipulation, forced relocation, and collectivization programmes.[48]

2.2. Dealing with the Past

In May 1991 the communist/military regime headed by the former president Mengistu Hailemariam was overthrown by the military forces of the Ethiopian People's Revolutionary Democratic Front (EPRDF) and the Eritrean People's Liberation Front (EPLF), ending seventeen years of repressive rule by the *Derg* regime. Among the immediate problems facing the EPRDF was what to do with the high ranking *Derg* officials who carried out the Red Terror and were accused of committing atrocities against students, intellectuals and other

[44] Bahru Zewde, *supra note* 36, p.37.
[45] Julie Mayfield, *supra note* 34, p559.
[46] Bahru Zewde, *supra note* 36, p37.
[47] Human Rights Watch/Africa, *supra note* 43, p.7
[48] Firew Kebede, *supra note* 42, p.4

persons deemed a threat to the military junta.[49] The issue of how to address the past injustices became a crucial test of the newly established Ethiopian government as a transitional regime. The EPRDF had different choices to opt for in order to deal with the past human rights wrongs. Nonetheless, it decided to pursue criminal justice without, at least publicly, discussing other models of transitional justice, amnesty and reconciliation. In fact, there were indigenous options like amnesty that the Ethiopian government could have considered as an alternative or complementarily to the retributive justice.[50] According to the leaders of the current government of Ethiopia, there were three reasons to opt criminal prosecution during transition: first, the scope of human rights abuses is as heinous as to be a concern of the international community; second, a line needed to be drawn between the present and the past; and third, a court trial is a legal process that all Ethiopians were accustomed to and for which its judgement would be respected and perceived as impartial.[51] Actually, the contributory factors for the choice of criminal prosecution were the legacy of the past, the entire shift of balance of power and the international context at the time of the transition.[52]

When the EPRDF took power in 1991, it detained roughly 2000 former government officials, including *kebele* (smallest administrative units in the country) leaders and members, on the suspicion that they authorised or were in some way involved in the brutality of the *Derg* regime.[53] After a year of detention, the transitional government began to put a mechanism in place for handling the detainees who had to wait to be charged. Thus, in accordance with Proclamation No.22/92 of 8 August 1992, the Special Prosecutor's Office (SPO) was established and mandated to investigate and prosecute "any person having committed or was responsible for the commission of an offence by abusing his position in the party, the government or mass organisations under the *Derg* – Workers' Party of Ethiopia (WPE) regime."[54] As envisaged in article 6 and the preamble of the proclamation, the SPO mandate has two objectives: (1) to bring those criminally responsible for human rights violations

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[49] Chuck Schaefer, The Derg Trial Versus Traditions of Restorative Justice in Ethiopia, in Kjetil Tronvoll et al. (eds.), *supra note* 1, p.88.

[50] *Id,* p.89.

[51] *Ibid*

[52] Dadimos Haile, Accountability for Crimes of the Past and the Challenges of Criminal Prosecution: the Case of Ethiopia, Leuven, Leuven University Press, (2000), pp. 31-33.

[53] Human Rights Watch/Africa, *supra note* 43, p.14.

[54] Proclamation No. 22/92, Proclamation No. 22/1992, a Proclamation for the Establishment of the Special Prosecutors Office, *Negarit Gazeta*, (1992), article 6..

and/or corruption to justice, and (2) to establish for public knowledge and for posterity a historical record of the abuses of the *Derg* regime.

Pursuant to its mandate the SPO began the process of gathering evidence and interviewing witnesses. In fact, the initial stages of the SPO were also occupied with strengthening the office by hiring enough staff and raising money to expand its operation. The SPO created four teams, each of which focuses on the gathering of evidence relevant to a particular abuse committed by the *Derg* regime: the Red Terror, forced relocation, war crimes, and manipulation of famine relief.[55] In effect, the SPO came up with dozens of documentary evidence and a substantial amount of eyewitness testimony. In this respect, Mayfield pointed out that the SPO has done an immense amount of work in collecting and cataloguing evidence: 309,215 pages of relevant government documents (many with clear signatures of high ranking officials) were collected, and 3,000 witnesses were prepared.[56] In addition to this, forensic teams were searching for and exhuming dozens of mass graves which contain the bodies of murdered civilians.[57]

In view of the first objective, the SPO has brought over 5000 former leaders and other officials to justice for crimes allegedly committed while they were in power from 1974-1991.[58] The defendants were categorised into three main groups: (a) policy makers (146 defendants) - senior government officials and military commanders – those who deliberated on and designed the plan of genocide in their effort to eliminate their political opponent; (b) field commanders (2133 defendants) - both military and civilians who commanded the forces, groups and individuals that carried out the violations; (c) material offenders – individuals perpetrators (soldiers, police, officers, interrogators) who involved in material commission of the crime in line with the nation wide plan.[59]

In relation to its second objective, the SPO has not yet done anything separately. Article 6 of the enabling proclamation of the SPO has declared that investigating and instituting proceedings against any person responsible for the atrocities is within the power of the Office. However, this particular provision is silent about the task of establishing a historical record. Instead of being listed

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[55] Julie Mayfield, *supra note* 34, p.564.

[56] *Ibid.*

[57] *Id,* p.565.

[58] Trial Observation and Information Project, Ethiopia's Red Terror Trials: Africa's First War Tribunal, Consolidated Summery and Reports from Trail Observations made from 1996-1999, Compiled by NIHR's Project, p.1.

[59] *Id*, P.5-6.

within the powers of the Office, such objective is only found in the preamble of the proclamation; which reads as follows: "it is in the interest of a just historical obligations to record for posterity the brutal offences, the embezzlement of property perpetrated against the people of Ethiopia and to educate the people and make them aware of those offences in order to prevent the recurrence of such a system of government."[60] Some argue that the omission of establishing a historical record from article 6 implies that establishing a historical record is not in the office's priority.[61] In this regard, this writer is of the opinion that the legislature deliberately omitted the task of establishing and recording the truth about the past from the said article, for such objective can be served through investigation and prosecution. In fact, large volumes of documentary evidence along with the testimonies of witnesses, and evidence from defendants' side can play a significant role in establishing a historical record. Thus, the omission is not to make the task of establishing historical record a secondary matter, rather to avoid an overlapping function of the Office.

2.3. Red Terror Trials

2.3.1. Charges

As said, with the missions to create a historical record of the alleged abuses of human rights of the former military regime, and to bring to justice those criminally responsible for heinous human rights violations, the Office of Special Prosecutor (SPO) carried out investigation and collected evidence. Following the investigation, in October 1994, the SPO launched charges against the 73 top *Derg* officials including the former president Mengistu before the Federal High Court. The charges filed against these officials were based on genocide in violation of article 281 of the 1957 Penal Code of Ethiopia or alternatively on aggravated homicide, and wilful bodily injury in violation of articles 522 and 538 of the same code respectively, for it is possible to file alternative charges as per article 113 of the Ethiopian Criminal Procedure Code where it is doubtful as to what offence has been committed..[62]

[60] Proclamation No. 22/92, *supra note* 54, preamble.
[61] Dadimos Haile, *supra note* 52, p.29.
[62] *Special Prosecutor v. Mengistu Hailemariam et al*., Ethiopian Federal High Court, File No. 1/87, (2007)

Additionally, they were charged for the crimes of abuse of power and unlawful detention in violation of articles 414 and 416 of the Penal Code of Ethiopia.[63]

Three years later in December 1997, the SPO also charged a total number of 5,198 people (of whom 2,246 were already in detention, while 2,952 were charged in absentia) before the Federal High Court, and before regional Supreme Courts through delegation which otherwise falls under the jurisdiction of the Federal High Court.[64] The vast majority of defendants were charged with genocide and war crimes, and faced alternative charges of having committed aggravated homicide and wilful injury. For instance, the SPO prepared charges against fifty four defendants with war crimes as per article 282 of the Penal Code.[65] Under the 1957 Ethiopian Penal Code, war crimes are defined by cross-reference to customary international law and international humanitarian conventions.

According to Mayfield, at the beginning there was the question of whether domestic or international law should apply as a basis for charges; however, the SPO later decided to use the Ethiopian Penal Code.[66] The use of the domestic code in lieu of international law to file charges of genocide and war crimes was believed to provide the following advantages to the SPO.[67] First, the definition of genocide under article 281 of the Ethiopian Penal Code is broader than the generally accepted definition of genocide under international law. As defined under Genocide Convention, genocide consists of acts committed "with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group…"[68] The Ethiopian Penal Code has expanded the list of targeted groups by adding political groups. Using the domestic code allowed the SPO to cast a more inclusive net, for the acts of the defunct regime had been directed at political groups like EPRP, MEISON and other insurgents. Article 281 of the Penal Code goes:

Genocide; Crimes against Humanity

> *Whosoever, with the intent to destroy, in whole or in part, a national, ethnic, racial, religious or political*

[63] *Ibid*
[64] Trial Observation and Information project, *supra note* 58, p. 1.
[65] *Ibid*, P. 8.
[66] Julie Mayfield, *supra note* 34, p.572
[67] *Ibid*
[68] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, article II.

> *group, organises, orders, or engages in, be it in time of war or in time of peace:*
> *(a) killings, bodily harm, or serious injury to the physical or mental health of members of the group in anyway 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 people or children, or their placing under living conditions calculated to result in their death or disappearance, is punishable with rigorous imprisonment from five years to life, or, in cases of exceptional gravity, with death.*[69] *(*Emphasis added)

From the heading and the whole wording of this article, one can easily note three distinctive features of the Ethiopian Penal Code that are not envisaged in the 1948 Genocide Convention to which Ethiopia is a party since 1949. The first unique feature is inferred from the title of the provision which appears to treat genocide and crimes against humanity as a single offence. When we read the content of the article, it is more or less similar to the definition of genocide under international law. The inclusion of crimes against humanity under the definition of genocide severely limits the scope of application of the provision on a range of heinous violations of human rights that do not fit into the definition of genocide, but which would validly constitute crimes against humanity.[70] However, one can argue that crimes against humanity as an international crime has already acquired the status of customary law and existed as a distinct crime under international criminal law. Hence, the very strange merge of the two crimes under Ethiopia Penal Code can mean nothing in practice. The other unique feature of this article is the incorporation of the act of transferring people or children as constituting genocide which is not the case under international law; the latter refers only the transfer of children. Lastly, as per the Penal Code of Ethiopia, the crimes of genocide may be perpetrated against political groups in addition to ethnic, national, racial or religious groups. Acts targeting politically defined groups are excluded from the purview of article II of the Genocide Convention. The inclusion of political groups makes the Ethiopia criminal law different from the

[69] The Penal Code of the Empire of Ethiopia, *Negarit Gazeta*, Addis Ababa, (1957) article 281.
[70] Dadimos Haile, *supra note* 52, p.50-51.

Genocide Convention. In this regard, the Ethiopian Penal Code goes beyond what is stipulated in the Genocide Convention.

Second, the use of international law as an independent basis for charges of war crimes might pose problem since it has traditionally been conceived that international law requires the armed conflict to be international in scope.[71] And the alleged offences in Ethiopia had taken place in an internal armed conflict. To escape such limitation, the only way to charge the detainees with war crimes was to charge them by domestic law, which does not require the conflict to be international.

Third, the SPO might want to lay charges under the domestic code in order to use the death penalty, for the Ethiopian Penal Code provides for death penalty for crimes of homicide, genocide, crimes against humanity, and war crimes.[72] In fact, several death sentences were passed in the long series of Red Terror Trials.[73]

2.3.2. Proceedings

The main Red Terror Trial against the 73 top officials came to an end when the Ethiopian Federal High Court, after 12 years of trial, convicted all but one of the accused on 12 December 2006 for genocide, crimes against humanity and wilful bodily injury.[74] They were sentenced on 11 January 2007 for terms ranging from life to 23 years' of rigorous imprisonment. One defendant was acquitted.[75] Having been dissatisfied with the decision of the Federal High Court, the SPO filed an appeal before the Federal Supreme Court. So did the defendants for leniency of punishment. Eventually, the appellate court sentenced the former president Mengistu Hailemariam to death in his absence on 26 May 2008, along with 17 senior officials of his regime, overturning a previous life term on appeal. Of all the people originally charged, 33 had been in custody since 1991, 14 others had died in custody and 25 were tried in their absence including the former president Mengistu Hailemariam, who had asylum in Zimbabwe.[76]

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[71] Julie Mayfield, *supra note* 34, p.572.

[72] The Penal Code, *supra note* 69, articles 522, 281, 282.

[73] Amnesty International Report: the State of the World's Human Rights - Ethiopia, UK, The Alden Press, (2007), p.116.

[74] *Special Prosecutor V. Col. Mengistu Hailemariam et al., supra note* 62.

[75] *Asir Aleqa* Begashaw Goremessa (the 41th accused in the list) was acquitted since he defended the charges to the satisfaction of the court.

[76] Amnesty International Report, *supra note* 73, p.116.

Mengistu and his co-accused were charged with 211 counts of genocide and crimes against humanity, or alternatively with aggravated homicide and wilful bodily injury. After having been served with the statement of charges and given time to prepare their defence, the defendants through their legal counsels defended the charges on several grounds, including: immunity of the head of state, the status of article 281 of the penal code, illegal political groups, and statutory limitations. Now let us see the objections of the defence counsels, the counter-arguments of the SPO and the rulings of the court.

By citing article 4 of the 1955 Ethiopian Constitution, the defence counsels raised the immunity of the head of state as an objection against the charges.[77] They claimed that the Provisional Military Administrative Council (*Derg)* as a head of state has right not to be charged. Thus, the defendants as members of the said Council are not accountable for acts they committed since deeds of a head of state are acts of the state. The SPO, on its part contended that such immunity did not apply in case of genocide as per article 4 of the Genocide Convention, and the defendants could not be granted such immunity by any measure of law.[78] The SPO supported its argument by raising the principles of individual criminal responsibility, equality before the law, and international precedents. It was also stressed that the defendants were not heads of states; and article 4 of the 1955 Revised Constitution of Ethiopia gave immunity to the emperor alone and there could be no other beneficiary of the provision.[79] After having examined the arguments of both, the court overruled the defence of immunity based on the principle of equality before the law and the personal nature of the immunity due to the emperor.[80]

The defence counsels also argued in favour of their clients on the ground of statutory limitations mainly related to charges of bodily injury, abuse of power and unlawful detention whose period of limitation is fifteen years at most as per article 226 of the Penal Code.[81] On the contrary, the SPO argued that the period of limitation should begin to be counted after the fall of the regime, for the *Derg* era warranted the acts of the defendants.[82] And this defence was rendered unacceptable.

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[77] Trial Observation and Information project, *supra note* 58, P.3.

[78] The Special Prosecutor's Investigation File No.401/85 on the Case of Col. Mengistu Hailemariam *et al*., Addis Ababa, (May 23, 1995), p. 5.

[79] *Ibid* p.10.

[80] Trial Observation and Information Project, *supra note* 58, p.8.

[81] *Ibid* p.13.

[82] *Ibid* p.14.

Furthermore, the defence counsels objected to the charges based on the content of article 281 of the Penal Code. As said above, the Genocide Convention and the Ethiopian Penal Code define genocide differently in scope. Genocide under the latter is broad enough to include the acts of targeting political groups. The defence counsels were against the inclusion of political groups within the ambit of article 281 of the Ethiopian Penal Code, saying that it is rendered void by the 1955 Constitution of Ethiopia.[83] This Constitution made international treaties ratified by Ethiopia as supreme as itself in the hierarchy of law. That is to say the Genocide Convention, which was ratified by Ethiopia in 1949, is on equal footing with the 1955 Constitution as opposed to other ordinary laws including the Penal Code. And in case of inconsistency between the Convention and the Penal Code, the former obviously prevails over the latter. And hence, they objected the inclusion of political groups as a targeting group under the definition of genocide. Alternatively, if it were said that it validly includes political groups, the victims were not, they argued, members of one or other political groups. The political parties listed in the charges were not formally registered and enjoyed legal protection. In order to refute the defence of the accused, the SPO presented its counter argument against the objection as follows. The 1955 Constitution, which made the Convention overriding the provision of the penal code and in effect rendered the inclusion of political group as a targeted group void, was suspended when the defendants came to power.[84] Thus, the defendants could not use the already suspended law in their defence. Their argument appears to imply that when the 1955 Constitution was suspended, the stipulation about the act of targeting political group under article 281 of the Penal Code which had been repealed by the Constitution would revive. As to the alternative defence of the accused, the SPO argued that the defendants had branded every victims as members of one or the other political party or group.[85] That those who were killed were members of an unregistered underground organization cannot be excuse.

Regarding the allegation of inconsistency between the Penal Code and the Convention, the Court ruled that Ethiopia could go beyond the minimum standards laid down in the Genocide Convention. In favour of the ruling of the court, one can argue that human rights are minimum standards to maintain a decent or minimum good life for human being. States are duty bound to comply

[83] *Ibid* p.12.
[84] *Ibid* p.7.
[85] The Special Prosecutor's Investigation, *supra note* 78, p.32.

with these minimum standards. Any unjustifiable deviation below the minimum norms is prohibited. But states can go beyond the minimum standards to achieve the best for human beings. In this regard, it is correctly pointed out that:

> *Article 281 of the Ethiopian Penal Code framed to give wider human rights protection should not be viewed as if it is in contradiction with Genocide Convention. As long as Ethiopia does not enact a law that minimizes the protection of rights accorded by the convention, the mere fact of being state party to the Convention doesn't prohibit the government from enacting a law which provides a wider range of protection than the convention. Usually international instruments provide only minimum standards and it is the duty of a state party to enact a law that assist their implementation.*[86]

In addition, the defence counsels raised another objection saying that part of article 281 was repealed by Proclamations No.110/1976 and 129/1976 which provided government authorities at all levels with the authority to destroy and take any necessary measures against anti-revolutionary and anti-unity political groups.[87] Since the defendants were under legal duty of agitating and rallying the broad mass for the purpose of attacking and destroying anti-revolutionary and anti-unity forces, they should not be penalized. The SPO response on this issue was that there was no such a law authorising or requiring the commission of genocide; even if it were said that there was a law permitting such acts, it could only be a law of the jungle, not that of the civilised world.[88] The centre of this controversy was whether the Proclamations that allowed the authorities to take actions against anti-revolutionary and anti-unity forces repealed that part of article 281 of the Penal Code that labels targeting political groups in view of destroying in part or in full, as acts of genocide.[89]

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[86] Firew Kebede, *supra note* 42, p.6.
[87] Trial Observation and Information project, *supra note* 58, p.13
[88] The Special Prosecutor's Investigation, *supra note* 78, pp.13-14.
[89] Firew Kebede, *supra note* 42, p.8.

On this issue, the Court ruled that no such repeal had occurred. However, one dissenting judge concluded that part of article 281(labelling the acts of targeting political groups as genocide) was inconsistent with the aforementioned Proclamations. The judge invoked article 10 of Proclamation No.1/1974 which declared all prior laws including the Penal Code remain in force so long as they are in line with the laws enacted by the Provisional Military Administrative Council (PMAC) - *Derg*.[90] Looking at the contradiction between part of article 281(regarding the act of targeting political groups as genocide) and the Proclamations (authorising the defendants to destroy anti-revolutionaries), the dissenting judge held that the latter laws had to prevail over the former. Nonetheless, he maintained that the notion of genocide under article 281 is also recognised in international law.

This dissenting opinion was also upheld when the Court issued its judgment on the merits of the case. The Court, by majority, found the accused guilty of 211 counts of genocide, homicide, illegal imprisonment and illegal confiscation of property. In contrast to the majority, the dissenting judge was of the opinion that the accused should have been convicted of homicide and causing wilful bodily injury, not genocide, for the actions of the accused at the time were lawful and measures taken against members of political groups did not amount to genocide in international law.[91] The dissenting judge was criticised for his failure to justify why the laws that purportedly repealed part of article 281 could not have also repealed article 522 on homicide so long as homicide was committed in order to eliminate political groups as authorised by Proclamations No.110/1976 and 129/1976.[92] Against this criticism, this writer found out in decision of the court that the dissenting judge already justified why the alternative charges of homicide and wilful bodily injury were not repealed. In line with the dissenting judge argument, one can argue that the defendants should have been convicted by alternative charges of homicide and wilful bodily injury, rather than genocide. The reason being: it is possible, without violating international obligations, to enact a law which does not consider the act of targeting political groups as genocide. Contrary to this, we can not legalize the act of homicide or wilful bodily injury by promulgation of law, without violating the minimum standards of human rights. Thus the aforementioned Proclamations did not and could not repeal article 522 on

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[90] *Special Prosecutor V. Col. Mengistu Hailemariam et al, supra note* 62.
[91] *Ibid.*
[92] Firew Kebede, *supra note* 42, p.8.

homicide and article 538 on wilful bodily injury while they did so part of article 281 of the Penal Code.

2.3.3. The Rights of Defendants

The swift decision of EPRDF to prosecute the members of the defunct regime for atrocities allegedly committed, rightfully earned the respect of the international community at the start. As time went on, however, it became clear that the criminal proceedings would not be or could not be held in conformity with the international human rights standards. Some observers were concerned by the slow pace of the proceedings. In the summer of 1994, a segment of the international community argued that since these former *Derg* officials had remained in prison for three years without having formally been charged, there was a danger that their rights were being violated.[93] In response to this, the SPO filed its first charge against the top *Derg* officials in October 1994. The initial detention of 2000 prisoners occurred before the creation of the SPO; by the time it was created, staffed and went operational, they had already been detained for up to 18 months.[94] The prolonged detention without charge, the delay of trial as result of many and long lasting adjournments, and lack of resources for defence preparation became the most pressing human rights concerns of the Red Terror Trial process.

The detainees have a number of rights recognised in the domestic law as well as in international human rights instruments. According to the Universal Declaration of Human Rights, every one has the right to a fair and public hearing by an independent and impartial tribunal in the determination of any criminal charges against him; and has also the right to be presumed innocent until proven guilty according to the law in a public trial at which he has had all the guarantees for his defence.[95] The Transitional Period Charter of Ethiopia (which was later replaced by the 1995 Constitution) domesticated those rights by saying that "individual rights embodied in the Universal Declaration of Human Rights shall be respected fully without any limits whatsoever."[96] By the same fashion, the new Constitution also extends the same protection by stating that the interpretation of rights and freedoms enshrined in the constitution shall

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[93] Peter Bach, War Crimes and the Establishment of a Public Defender's Office in Ethiopia, Field Report (1996).

[94] Human Rights Watch/Africa, *supra note* 43, p.19.

[95] Universal Declaration of Human Rights, GA Res.217A (III) (10 December 1948) Articles 10 and 11.

[96] Transitional Period Charter of Ethiopia (1991), Article 1.

be in line with the international instruments adopted by Ethiopia.[97] In June1993, Ethiopia ratified the International Covenant on Civil and Political Rights (ICCPR) which entered into force after three months. As a party to the Covenant, Ethiopia has undertaken to respect and ensure for all individuals within its jurisdiction the rights recognised in Covenant as indicated in article 2 of this covenant. Besides, there are procedural safeguards stipulated in the 1961 Criminal Procedure Code of Ethiopia. The arbitrary arrest and the prolonged detention without charge are in violation of the Charter and the Criminal procedure Code of Ethiopia. However, until 1993 the Ethiopian government was not under obligation to honour acts which could be violations of ICCPR and not covered by the domestic law.

In many instances, the procedural safeguards accorded to the detainees were not adhered to in the process. For instance, as discussed, a considerable number of people were kept in detention without having been charged. Pursuant to article 9 of the ICCPR, an arrested person has the right to be informed the reasons for his arrest and promptly informed any charge against him. Following his arrest, he should be brought promptly before court and be entitled to trial within reasonable time or to release. Besides, he can apply before court of law for his release (habeas corpus) if he is deprived of his liberty unlawfully. As a party to the Covenant, Ethiopia has a duty to observe international standards prohibiting prolonged arbitrary detention. Putting aside the prior detention, even after the entry into force of the ICCPR, those people who were charged in 1994 (save those being tried in absentia) were detained for one year without charge. Furthermore, the vast majority of the detainees waited to be charged until 1997. The UN Working Group on Arbitrary Detention declared the detentions to be arbitrary and requested that Ethiopian government takes steps to conform the situation with articles 9 and 10 of the UDHR, and articles 9 and 14 of the ICCPR.[98]

The Ethiopian government, on its part, tried to justify the detention by raising the danger of the defendants' flight, risk of further offence, suppression of evidence and suborning of witnesses.[99] Article 7 of the SPO Establishment Proclamation No.22/92 further restricts the rights of the detainees by barring

[97] Proclamation No. 1/1995, the Constitution of the Federal Democratic Republic of Ethiopia, *Negarit Gazeta*, (1995), Article 13.

[98] Report of the Working Group on Arbitrary Detention, E/CN.4/1994/27, Decision Nos.45/1992 and 33/1993.

[99] Julie Mayfield, *supra note* 34, p.579.

them from filing habeas corpus petitions for six months which in effect legalised the detention. This article reads as:

> *The provisions of habeas corpus under article 177 of the Civil Procedure Code shall not apply for persons detained prior to the coming into force of this proclamation for a period of six months starting from the effective date of this proclamation in matters under the jurisdiction of the special prosecutor as indicated in article 6 thereof.*[100]

Upon the expiry of the time limit, the detainees submitted the writ of habeas corpus to the Federal High Court since they had been arrested without warrant and not brought before court for long time. Consequently, 200 detainees were released.[101] At this moment, the SPO applied to a lower court for arrest warrant and remand for sufficient time to complete its investigations, which more or less closed the petition of habeas corpus. Later, the permission that the lower court gave to the SPO to detain such individuals indefinitely was endorsed by the higher courts.[102] Here, it is appropriate to cite the decision of the Federal Supreme Court given on one suspect. In that case, the Supreme Court held that the 15 days limitation for filing a charge provided in article 109 (1) of the Criminal Procedure Code would not apply to cases which fall with in the jurisdiction of the Office of Special Prosecutor by virtue article 7(2) of Proclamation No.22/92.[103]

Article 20(1) of the 1995 Constitution of Ethiopia stipulates that an accused has the rights to be tried within a reasonable time after having been charged. Similar entitlement is enshrined under article 9(3) of the ICCPR. However, the Red Terror Trials have taken more than a decade. For instance, the trial of the 73 top officials, which was opened in 1994, came to an end in 2008. And here we should not forget the fact that several defendants have been put in custody since 1991. For those people, the judgment was given after sixteen years of imprisonment. It is clear that there was undue delay of trial in contradiction to the international human rights instruments ratified by Ethiopia as well as the constitutional guarantees. One may raise the number of

[100] Proclamation No. 22/92, *supra note* 54, Article 7.
[101] Trial Observation and Information project, *supra note* 58, P.1.
[102] Ethiopian Human Rights Council, the Administration of Justice in Ethiopia, Special Report No.9 (January, 1996) Addis Ababa.
[103] *Ibid.*

defendants, the complexity of gathering immense amount of evidence, interviewing thousands of witnesses, and securing of adequate personnel as justifications for delay in trials. But it may yet be hard to justify such delay by any means in any legal jurisdiction. The defendants' right to be tried within reasonable period of time was violated although adequate safeguards exist both under domestic and international law for the protection of the rights of the defendants.

Another central issue relating to the rights of the defendants is the right to be represented by legal counsel. In regard to the 73 top *Derg* officials, the issue of legal representation came to exist after the charge was read out to the defendants. When they were asked how they would defend their case, most of them pleaded that a state appointed counsels be assigned to them, for they were in no financial position to hire a legal counsel.[104] As stipulated in the ICCPR and the Ethiopian Constitution, an accused has the right to be represented by legal counsel of his choice or to have legal assistance assigned to him if he does not have sufficient means to pay for it.[105] The Public Defender's Office (PDO) was established in 1994 under the supervision of the Ethiopian Federal Supreme Court.[106] Originally the office consisted of five attorneys, only one of whom was an experienced trial attorney, but later the staff had grown to twenty attorneys.[107] The operation of the office suffered from administrative and financial problems.

Given the grave nature of the charges, the means of proving the innocence of each defendant would undoubtedly require a qualified defence lawyer. However, except those who hired their own defence counsels, all the indigent defendants were represented by counsels who do not have formal legal training and experience in serious trial proceedings.[108] In addition, a single public defender was assigned to defend more than fifty defendants, which is unlikely that the defender could analyze the case of each defendant individually before the defence.[109] Those who could afford to defray the cost for privately hired lawyer were able to defend themselves through experienced lawyers while others were not able to do so.

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[104] Trial Observation and Information project, *supra note* 58, p.10.
[105] International Covenant on Civil and Political Rights, (19 December 1966), article14 (3) (d); and The Constitution of Federal Democratic Republic of Ethiopia (1995), article 20(5).
[106] Human Rights Watch/Africa, *supra note* 43, p.49.
[107] Julie Mayfield, *supra note* 34, p.584.
[108] Trial Observation and Information project, *supra note* 58, P.11.
[109] *Ibid.*

2.4. Shortcoming of the Red Terror Trials

As pointed out in the preceding section, the most fundamental flaw of the Red Terror Trial was failure to ensure accountability while respecting the rights of the defendants in conformity with the international human rights standards and domestic law. There have been breaches of the rights of the defendants since the pre-trial stage. In the process, the rights of defendants have been violated while trying to address the past wrongs and ensure the protection of human rights. The scope of prosecution, the relative absence of infrastructure, the shortage of qualified lawyers, and the questionable impartiality and competence of the court have contributed to violations of the basic rights of the defendants.[110] In relation to the Red Terror Trials, one commentator has said the following:

> *The justifications for a policy that deals with systematic human rights violations lie in its fairness and effectiveness, and in the wider lessons to be learnt from the process of reckoning. The crucially important task confronting the new Ethiopian government was ensuring accountability for the past human rights violations, while upholding due process and fundamental human rights in the process. The government thus far has failed in this dual task. Another disquieting and perhaps singular feature of the Ethiopian experience is the apparent popular indifference about the trials. This is a serious limitation given the fact that the importance of the lessons to be learnt from such trials very much depends on the quality of debate they generate and the opportunity they provide for a new beginning that is based on a society-wide self re-examination. Failure in these respects may only postpone the controversy for the future; thereby depriving the society of the pivotal opportunity to achieve genuine reconciliation and a closure to the country's contested past.*[111]

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[110] Dadimos Haile, *supra note* 52, p.62.
[111] *Ibid,* p.9.

As pointed out in the preceding quote and reported at different times, the process received low public attention. The atrocities committed in the past are no longer fresh in the psyche of the population. The indifference of the public in the trial can be attributable to everyday political, social and economical challenges faced by the Ethiopian people.[112]

The other problem of the trial is its sole focus on the members of the *Derg* regime. As indicated in article 6 of Proclamation No. 22/1992, the SPO is mandated to investigate and institute an action only against the members of the defunct regime. The crimes were committed within the context of a revolution, and the political parties that were targeted were allegedly themselves assassinating top military officers of the *Derg* while the country was also fighting against external invaders, liberation fronts and secessionist movements.[113] The brutal measures taken by the targeted political groups have not been investigated by the SPO. In effect, many more, who took part in the atrocities, remained unpunished.

At this juncture, one may wonder whether or not the option chosen by Ethiopia to address its past is a just solution that is acceptable to the victims of the atrocities and is suitable to create stable future. It is very hard to answer this question in abstract, for there is no single formula for coming to terms with years of human rights abuses. Neither prosecution nor amnesty is capable of handling the complexity of a post conflict situation in all circumstances. As discussed in the introductory part, in addressing such issue, we should take into account among other things the needs, the desires and the political realities of the traumatized society. And we should, to the extent possible, look at the past to correct grievances while creating a viable present and future for every group after a conflict.

Arguably one can say that given the ill-equipped Ethiopian judiciary, the complexity of the matter and the huge number of people charged (5271 defendants throughout the country),[114] relying fully on the criminal justice alone should have been seen unaffordable. That is to say amnesty and reconciliation could have been considered along with criminal justice like in South Africa. As one commentator put it, sometimes a collective form of accountability may be a less costly way of healing the wounds of the society

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[112] Kjetil Tronvoll, A Quest for Justice or the Construction of Political Legitimacy? The Political Anatomy of the Red Terror Trials, *supra note* 1, p.119.

[113] Firew Kebede, *supra note* 42, p.16.

[114] Trial Observation and Information Project, *supra note* 58, p.1.

than conducting individualised criminal trail.[115] In such a case, it is reasonable to pursue amnesty with certain conditions.

In the course of the trial, 33 top former *Derg* officials formally asked the government to give them a public forum so that they could beg the society for a pardon for mistakes made knowingly or unknowingly while in power.[116] However, no official response was given to them.[117] Even at this stage, it could have been gone beyond prosecution. Had they been given a forum, the forum might have been used to facilitate reconciliation between the victims and the perpetrators by acknowledging and publicising what truly happened. Besides, the process might have got public attention and thereby given a lesson to the society. It would also have enabled the defendants to tell their version of the story.

3. Conclusion

Transitional justice is a process of addressing the past human rights wrongs (caused by conflict, repressive rule or state failure) through judicial means or non-judicial means. In dealing with the legacies of human rights violations, transitional societies should use either of these approaches or a combination of them. In fact, there is no agreement as to which approach is suitable to heal the wounds of the victims and create stable future. And yet it is indispensible to consider the desires and political realities of the traumatized society and to some extent the interest of the international community in choosing any of the approaches.

Regardless of such controversy, Ethiopia decided to address the past state-sponsored human rights violations through judicial means. In accordance with this decision, the Office of Special Prosecutor charged over 5000 members of the defunct regime for the past human rights violations. The commitment of the country to prosecute the perpetrators received a great appreciation from inside and outside, for most believed that the process would heal the wounds of the society, prevent the recurrence of such atrocities in the future, and bringing the culture of impunity to an end. However, through the passage of time, it has become clear that the process would not ensure accountability for the past human rights violations while respecting the rights of the defendants in conformity with the international human rights standards

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[115] Maryam Kamali, *supra note* 12, p.141.

[116] Girmachew A. Aneme, Apology and Trials: the Case of the Red Terror Trials in Ethiopia, *African Human Rights Law Journal*, vol.6 No.1 (2006) p.67.

[117] *Ibid.*

and domestic laws. More specifically, there have been lengthy pre-trial detentions, violations of the rights of speedy trial and of the rights to counsel.

Furthermore, the Red Terror Trials have solely focused on prosecuting the members of the Derg regime even if the human rights wrongs were also allegedly committed by the targeted political groups as well, including EPRP and others. This let the alleged perpetrators go free. Besides, the process has received low public attention.[118] This, in turn, limits significance of the process in providing a lesson to the public.

[118] Perhaps, the newly inaugurated Red Terror Victims' Memorial Museum may play its own role in capturing the attention of the public, and thereby giving a lesson to the whole society.