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1 Introduction

The Chief Special Prosecutor in his latest report to the House of Peoples Representatives (Federal Parliament) on 4 February 2010 indicated that the trials which started eighteen years ago against former Ethiopian government officials accused of committing various international crimes would come to an end in two months’ time. In his report – which appears to be the last major report of such nature – he indicated that 384 criminal investigation files were opened in various regions of the country in Addis Ababa (Federal Court) and in the Oromia, Amhara, Tigray, Harari and South Regional states. The case of Special Prosecutor v Colonel Mengistu Haile-Mariam & Others is the most prominent of these. This essay examines these trials by the federal courts and their contributions to post-conflict justice in Ethiopia.

2 Brief history

The historical events the trials aim to address are the results of the political upheaval that followed the 1974 revolution which brought down the several thousand year-old monarchy. By historical accident, more than one hundred junior officers who were spontaneously sent to Addis Ababa from various divisions of the Army and Police to negotiate with the Emperor about various administrative matters, unexpectedly ended up
becoming collective heads of state. There was no plan to their rise to power, but they were aided by the deteriorating conditions and the popular anger against the ageing monarch’s inability to solve various deep-rooted problems faced by the country. They called themselves the Derg (committee or council). Long before Derg members got proficient in the language of Marxist-Leninism and tried to ally themselves with or against various radical students and intellectuals-led groups of similar persuasion, they had started their killing spree by summarily executing sixty officials of the former regime and by carrying out purges within their own ranks. The sixty former officials that included the former long-time Prime Minister, Ministers, various army generals and feudal Lords, were killed by a decision of the Derg committee members. Emperor Haileselassie himself was killed in prison sometime later.

The Derg-led revolution started to claim more victims when an ideological battle between various factions started - drawing from Marxist interpretations. Political parties started mushrooming. The Haileselassie I University, later renamed Addis Ababa University, was one of the main breeding grounds of student political movements. Some activists who were in exile saw an opportunity and returned home, forming their own political parties and even advising the junta. All sought to influence the direction of the revolution. Strategy wise, while some were directly opposed to the Derg from the start; others saw a short-cut to power, piggybacking the Derg. In the end, the junior officers, led by Mengistu Haile-Mariam, managed to destroy their opponents until it was their turn to be ousted from power seventeen years later.

The ideological battle of controlling the hearts and minds of the populace reached a new level when adversaries from both sides decided to physically eliminate each other’s key figures. The lexicons of White Terror and Red Terror, copycats from the brutal Russian and other revolutions, became the staples of Ethiopian ‘revolutionaries’. To this date, many Ethiopian political parties – including the governing party – carry the word ‘revolutionary’ as part of their official names.

At the height of this abuse of power the Derg empowered its security apparatus – urban and rural dweller associations of militias – to kill, torture and maim with impunity anybody they labeled ‘subversives’, ‘anti-revolutionaries’, ‘counter-revolutionaries’, or ‘anti people’. At the end of the campaign, tens of thousands of people were either killed or had disappeared. Leaving other controversial figures aside, the charges filed by the Special Prosecutor, obviously a conservative figure, lists 12315

1 The history of the Red Terror is very contentious with regards as to who started it, how many people suffered and the respective roles of the various warring parties. See B Zewde The history of the Red Terror: Contexts and consequences in K Tronvoll, C Schaefer & GA Aneme (eds) The Ethiopian Red Terror trials: Transitional justice challenged (2009)7-32.
individuals as killed and the courts thus far have found that 9546 of these were indeed victims of the crimes perpetrated during this period. Of these, 228 victims were females. Furthermore, 1500 victims were confirmed by the courts as having suffered bodily injury. The charges also included 2681 individuals as victims of torture, and the courts have confirmed 1687 of these cases. Of these, 172 were females. These numbers do not necessarily represent the actual number of victims; as in addition to those directly killed, those whose lives were cut short due to misguided policies of the Derg could run into millions.

3 Post-conflict justice

The notion of post-conflict justice is sometimes used interchangeably with concepts such as ‘transitional justice’, ‘strategies for combating impunity’, ‘peace building’ and ‘post conflict reconstruction.’ Post-conflict justice is a delicate matter. There is no formula that applies to all countries. An ideal model of post-conflict justice has to balance the demands of justice, peace and reconciliation in society. These three demands do not necessarily sit together in harmony. The Chicago Principles of Post-Conflict Justice put together by eminent legal and transitional justice experts indicate that the following factors need to be taken into account: ‘human suffering and demands for justice; grounding in international law; accountability, peace and democracy; victim centered approach; context-specific strategies; interdisciplinary nature and long term commitment.’ Undoubtedly, the legal process is but only one way of addressing the past. Thus:

The Chicago Principles on Post-Conflict Justice present the search for accountability in the aftermath of conflict as a complex, multifaceted, interdisciplinary process that extends beyond a formal legalistic approach. Domestic and international prosecutions on their own rarely provide victims and a suffering society with a complete approach to justice for past atrocities. Relying solely on formal legal action generally fails to fully address victims'

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3 Report (n 2 above).

4 As above.


6 As above, 15.
needs and may reveal serious limitations within a transitional government that weakens society’s faith in the legitimacy of judicial processes.

That is why several measures ought to be considered cumulatively in addressing legacies of past human rights violations. These consist of prosecution; truth telling and the investigation of past violations; consideration for victims’ rights, remedies and reparations; vetting, sanctions and administrative measures; memorialisation, education and the preservation of historical memory; traditional, indigenous and religious approaches to justice and healing; institutional reform and effective governance.

As has been made abundantly clear, Ethiopia chose to deal with impunity by prosecuting those responsible. Prosecution alone, however, is not a solution for the post-conflict reconstruction. There are other associated measures one must take to bring about peace, justice and reconciliation. The following seven measures – including prosecution – will be addressed briefly within the framework of post-conflict justice.

3.1 Prosecution

As noted above, Ethiopia’s response to the violence during the Derg has chiefly been engaging in a massive project of prosecuting suspects who planned the crimes and those who carried out those criminal plans. Ethiopia, among others, opted for this solution as a matter of political expediency. For what it is worth, the Ethiopian trials represent one of the most known, yet under-reported, completely domestic initiatives that sought to hold perpetrators of gross human rights abuse accountable. It is true that no post conflict justice measure would be complete without at least prosecuting those individuals most responsible for the major human rights violations. All other initiatives will be discredited if major actors are sheltered from prosecution. On that account alone these trials deserve to be hailed. In the next section the various components of the prosecution project are examined.

3.1.1 Special Prosecutor’s Office (SPO)

The Special Prosecutor’s Office (SPO) was established in 1992 by a proclamation issued by the House of Representatives of the Transitional Government of Ethiopia (TGE). The House of Representative was not a popularly elected body. It was a collection of individuals and political

\[7\] See detailed discussion in K Tronvoll ‘A quest for justice or the construction of political legitimacy? The political anatomy of the Red Terror trials’ in Tronvoll et al (n 1 above) 84-97.

\[8\] For detailed accounts of the SPO, see S Vaughan ‘The role of the Special Prosecutor’s Office’ in Tronvoll et al (n 1 above) 51-67.
entities that formed the Transitional Government after the collapse of Mengistu’s regime. The TGE lasted for two years. However, the collection is relatively more representative than the post-transition parliament which came to be fully controlled by the Ethiopian Peoples Revolutionary Democratic Front (EPRDF).

As its designation ‘special’ indicates, the prosecution’s office was specifically constituted for this purpose and directly reports to the Prime Minister, bypassing the Minister of Justice to which other regular prosecutors report. Furthermore, unlike regular prosecutors, the SPO enjoys powers to investigate the crimes it is empowered to prosecute.

The SPO, in addition to investigating and prosecuting the crimes perpetrated, also has the mandate of producing a historic record of what had happened. Thus, its foundational proclamation states that ‘it is in the interest of just historical obligation 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 these offences in order to prevent the recurrence of such a system of government’. This is a laudable objective, but critics blame the SPO for having used the forum to introduce too many witnesses to allow them to air their grievances, while he could have gotten the job done with fewer witnesses or even through the use of documentary evidence as the crimes perpetrated were meticulously recorded by the perpetrators themselves.

In terms of political persuasion, the only excluding factor for the appointment to Chief Special Prosecutor, is the fact of being a member of the Worker’s Party of Ethiopia (WPE) or its security forces. However, in light of the parties involved in conflict during the Red Terror, this should have excluded others who were members of any of the parties that took part in the conflict. In this regard, critics often point to the past membership of the Chief Prosecutor in Ethiopian Peoples Revolutionary Party (EPRP), a party which is accused of firing the first shot which started the Red Terror. Although it is the members and supporters of this party who faced the full force of the Derg’s crackdown, the party, in the eyes of many observers, committed a strategic blunder by starting urban warfare and targeting leading members of the Derg for assassination. Thus, appointing as a prosecutor a person who had allegedly directly or indirectly suffered at the hands of the Derg is like appointing a holocaust survivor as a prosecutor for the Nuremberg Tribunal.

10 n 9 above, art 6.
11 n 9 above, Preamble.
12 n 9 above, art 5(4).
13 Parliamentary discussion (n 2 above).
Perhaps, it is not the mere fact of being a supporter or even a member of a party that played a part in the conflict that one should be concerned about. The Chief Special Prosecutor appears in public only on rare occasions, is known for using highly emotive language against suspects, and sometimes even against the bench, so putting his credibility and objectivity on the line. This impression is strengthened by the fact that the Prosecutor was not given the mandate to investigate crimes allegedly committed by various non-state actors during the Red Terror, including a party he once belonged to or supported. It is a historical fact that crimes were committed by various parties to the conflict; however, singling out the _Derg_, which is responsible for the bulk of the crimes, does not do justice to the truth of what happened.

### 3.1.2 The charges

In his report of February 2010, the Special Prosecutor indicated that charges were filed against 5119 suspects for genocide, crimes against humanity, war crimes of murder and rape; the abuse of power and various other crimes. These suspects were charged and later convicted for violations of various pre-existing provisions of the 1957 Penal Code. The Ethiopian Penal Code at the time was progressive in its inclusion of the prevailing international criminal law and international humanitarian law standards. In fact, in certain respects, it went beyond what was and still is customarily provided in genocide-related provisions in international treaties and various domestic laws. In particular, one notes the expanded protection given to members of political groups against genocide. The controversy surrounding this unique provision has probably been the bane of the trials, especially in light of the political context.

The serious crimes committed during the seventeen-year-rule by the military are too many to be prosecuted in such a short period of time. The acts of killing and torture committed qualify as some of the most horrendous acts of savagery committed by men against men. The following lists demonstrate this savagery. The killings as revealed to Parliament by the Special Prosecutor are the following: executions; beatings with sticks; throwing people off cliffs; throwing people into rivers alive; strangling with a cord or nylon rope; injection of poison; electric shock; suffocation with an anesthetic agent and then strangulation (particularly used against the former Emperor Haile Selassie). Forms of torture include: whipping with an electric cable or leather whip after

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14. In his last report to Parliament this came to light when an MP pointed this out. He was once sentenced to a few months in prison for contempt of court when he alleged that one of the judges on the bench was a member of Mengistu’s defunct Workers Party of Ethiopia (WPE).

15. Report (n 2 above).

binding the victim’s legs and hands and stuffing objects into their mouths; whipping while the victim is suspended; keeping a bound victim suspended for long time; torture by electric shock; applying a burning newspaper to the body; pulling out hair; mutilating the body; rubbing a dry body or bones with a wooden board; stretching nails and nipples with pincers; pulling out fingernails; killing or torturing others in the presence of the victim; frightening by setting dogs on a person; taking victim for a false execution; suspending heavy objects from men’s genitals; inserting heavy objects into a woman’s uterus; forcing a victim with wounded feet to walk on gravel; as well as other forms of torture not included here.

The accused persons were grouped into three categories. The first category included policy-makers, senior government, and military officials of the Derg. The two other groups were ‘military and civilian field commanders who carried out orders as well as passed orders down, and the individuals who actually carried out many of the brutal and deadly orders’. The cases of the accused persons in the first category were heard by the Federal High Court First Criminal Division. The trials of those in the second category were conducted in Addis Ababa in the Federal High Court Sixth Criminal Division and in the Regional Supreme Courts.

In *Special Prosecutor v Mengistu Haile-Mariam*, against top-tier accused persons, four charges were filed. The first charge of public provocation and preparation to commit genocide in violation of articles 32(1)(a) and 286(a) of the 1957 Penal Code reads:

The defendants in violation of Articles 32 (1) (a) and 286(a) of the then 1957 Penal Code of Ethiopia beginning from 12 September 1974 by establishing the Provisional Military Administration Council, organising themselves as the general assembly, standing and sub-committees; while exclusively and collectively leading the country, agreed among themselves to commit and caused to be committed crimes of genocide against those whom they identified as members of anti-revolution political groups. In order to assist them carry out these, they recruited and armed various keftegna and kebele [administrative units] leaders, revolutionary guards, cadres and revolutionary comrades whom as accomplices, they incited and emboldened in public meeting halls, over the media by calling out the names of members of political groups calling for their elimination using speeches, drawings and writings until 1983 in various months and dates thereby causing the death of thousands of members of political groups.

The second charge of the commission of genocide in violation of article 281 of the 1957 Penal Code reads:

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18 n 17 above, 37-41.
20 n 19 above, 17 (my translation).
The defendants in violation of Articles 32 (1)(a) and 281 of the 1957 Penal Code of Ethiopia, beginning from 12 September 1974 while exclusively and collectively leading the country by establishing the Provisional Military Administration Council or government, organising themselves as the general assembly, standing and sub-committees, planned, participated and ordered the destruction in whole or in part, members of politically organised socio-national groups thereby committed genocide. To accomplish this goal, they created various investigation, torturing and execution institutions, hit squads and Nebelbal army divisions; carried out campaign ‘clearing fields’, ‘free measures’ and ‘red terror’ to kill or cause the killings of members of political groups and cause injury to their physical and mental health or cause their total disappearance by banishing them in a manner calculated to cause them social harm or cause their death.

This second charge had four components (murder; bodily harm, serious injury to physical and mental health; placement under living conditions calculated to result in death or disappearance; and the alternative charges of aggravated homicide and grave and willful injury). As regards the second charge, the prosecutor alternatively filed charges of homicide and causing grievous bodily injury. The third charge was carrying out unlawful detention in violation of articles 32(1)(b) and 416 of the 1957 Penal Code; while the fourth charge was abuse of power by illegally confiscating private property worth millions of Birr in contravention of articles 32(1)(b) and 414 of the same Penal Code.

3.1.3 The trials

The Special Prosecutor filed charges against Colonel Mengistu Haile-Mariam and others in December 1994 while most of the accused were in detention since May 1991. The trials of some accused, including Colonel Mengistu Haile-Mariam, were conducted in absentia. The trials are currently being finalised after eighteen years. A number of death penalties have been imposed. At the time of writing, none of the imposed capital punishments has been carried out. Under Ethiopian law, the President must certify that such a punishment may be carried out.21

3.1.4 The verdicts

In this section, the verdicts of the Ethiopian courts in major Red Terror cases, notably those involving Colonel Mengistu and his co-accused, are briefly examined.22 The first obstacles to the viability of the charges filed were overcome on 9 October 1995 with the Federal High Court First

22 The decisions in Special Prosecutor v Colonel Mengistu Haile-Mariam have been covered elsewhere. See K Tronvoll, C Schaefer & GA Anème ‘Concluding the main Red Terror Trial: Special Prosecutor v Colonel Mengistu Haile-Mariam et al’ in Tronvoll et al (n 1 above) 136-152; Tiba (n 16 above).
Criminal Division’s rulings on the preliminary objections mounted by the defendants. The defendants’ lawyers raised various objections, ranging from technical matters relating to the charges to that of the sustainability of the charge of the crime of genocide.

The objections raised by the defence were briefly as follows: the inclusion of political groups as protected groups against genocide under article 281 of the 1957 of the Ethiopian Penal Code is incompatible with international law; the victims’ political groups allegedly targeted were not legally registered political parties; the charges did not distinguish between the crimes of genocide and crimes against humanity as article 281 of the 1957 Penal Code itself lumps the two crimes together; the accused persons should not concurrently be charged for crimes of provoking (inciting) the commission of the crimes of genocide and for actually committing them; it is improper to charge the accused both for genocide and alternatively for aggravated homicide due to the significant differences between the nature of both crimes, the number of victims and the consequences of conviction; that the accused enjoyed immunity from prosecution; that the accused should be tried by an international court as the national court established by a transitional government lacked legitimacy and the accused have the right to choose a court according to article VI of the Genocide Convention and article 10 of the Universal Declaration of Human Rights. These objections were rejected one after another by the Federal High Court, paving the way for the continuation of the case to the merits phase. Similar objections were also rejected by the Federal Supreme Court of Appeal as will be shown later.

Many years later in 2006, in a landmark decision, the Federal High Court returned a verdict in the case of Special Prosecutor v Colonel Mengistu Haile-Mariam & others, convicting the accused. In a majority judgment of two to one, the court convicted the accused of genocide while the dissenting judge found them guilty of aggravated homicide. The sentencing judgment was not unanimous, with the majority going for life while the dissenting judge favoured capital punishment. Both parties appealed. The Special Prosecutor thought that the imposition of a life sentence was too lenient, while the accused contested both the conviction and the sentence.

The Federal Supreme Court in 2008 upheld the conviction of the accused, reversed the life sentence and imposed the death penalty on the persons most responsible, including Mengistu Haile-Mariam (in absentia). The judgments and sentencing decisions have been covered elsewhere and

23 For a discussion of the rulings, see S Yeshanew on www.oxfordlawreports.com (subscription required) International Law in Domestic Courts (ILDC) on the Case of Special Prosecutor v Colonel Mengistu Haile-Mariam & Others.

24 Tiba (n 16 above).
will not be repeated here. It is only necessary to pose critical remarks about the judgments as indicated below.

3.2 Critique of the trials

As has been indicated before, the trials are not without their problems. Without denying their symbolic significance, it is prudent to highlight some of the most-often cited weaknesses. These critiques relate to the rights of the accused; the issue of victor’s justice; their length; problems relating to defense legal counsel; and that some of the trials were held in absentia.

3.2.1 The rights of the accused

Some of the most trenchant critiques of the Derg trials as well as other Red Terror trials relate to protections offered to suspects. Commentators have roundly criticised the new regime for failing to accord full fair trial guarantees to those accused. Here, one considers among others, the right to an expeditious trial, access to and choice of counsel and the right to be present at one’s trial and its corollary – the right to confront one’s accusers and witnesses. Before considering these issues, the general accusation of victor’s justice, which has a bearing on the broader question of justice and the role or impact of politics on criminal prosecutions, is addressed below.

3.2.2 Victor’s justice and the role of politics

Like many trials conducted after a change in regimes in Africa at the end of an armed conflict, and like its historical antecedent – Nuremberg - the prosecution of the Derg era crimes has not been immune to accusations of ‘victor’s justice. These accusations mainly stem from the historical circumstances surrounding the beginning of the ‘Red Terror’ which the Derg portrayed as a reaction to the ‘White Terror’ initiated by the Ethiopian People’s Revolutionary Party (EPRP) that targeted officials of the Derg in the cities. Although EPRP and its alleged members were met with unmatched brutality for their infractions in the cities, the Derg believed that it was defending itself and the revolution. Nevertheless, it bears noting that EPRP was not part of the coalition that overthrew the Derg, and it was in fact undermined and outmaneuvered by the TPLF (a core within the EPRDF coalition) early on. However, a previous split within the EPRP created a splinter group that later joined the EPRDF.

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25 n 22 above.

26 This section is based on my yet unpublished work, ‘Mengistu and Red Terror Trials’ in G Musila Domestic prosecution of international crimes and the role of regional organizations: Some African case studies Institute of Security Studies, South Africa (forthcoming). I would like to thank Godfrey Musila for his comments on this section.
Most of the leaders of this coalition partnership were high-ranking officials of the TGE, including a Prime Minister. Some of these still wield significant power in the government. Although there has not been any public information about the individual culpability of these former members of the EPRP who became part of the TGE, it was thought unfair that the actions of those who belonged to the EPRP and other radical groups were not subjected to investigation and prosecution.

The other complaint relates to crimes committed in the context of the armed conflict. Accordingly, even if the Derg sought to stamp out the armed resistance in various parts of the country using brutal tactics in violation of the laws and customs of war, it could not be said for sure that the rebels themselves never resorted to such tactics. Thus, an honest and objective prosecutor could not have proceeded against only one side of the conflict. In short, the selective prosecution of members of the Derg, while there are also other people who could have been made to bear responsibility for the ultra-radicalisation of a generation and their victimisation, is an example of victor’s justice in operation. Although it was legally imperative and the right thing to prosecute Derg officials, one could argue that the process was not designed to get to the bottom of the country’s past problems. The idea that the trials were aimed at bringing about internal reformation of the system by punishing perpetrators loses some credibility due to the perceived partiality of the process.

### 3.2.3 Problems related to delay, pre-trial detention and the right to expeditious trial

International human rights and international criminal law guarantee the accused’s right to a free, fair, and expeditious trial. The International Covenant on Civil and Political Rights as well as the African Charter on Human and Peoples’ Rights to which Ethiopia is a party, unequivocally affirm these guarantees. These rights also have an equivalent protection in the statutes of the various international criminal tribunals. The Constitution of the Federal Government of Ethiopia that came into effect in 1995 contains similar rights.


The Derg trials as well as the other Red Terror trials were criticised for delays in their completion. The Derg-WPE trial alone took 13 years to complete, excluding two to three years of pre-trial detention for suspects arrested when EPRDF took over in 1991. The majority of suspects were arrested by triumphant EPRDF forces without warrants and did not appear in court for three years after their arrest. They had been incarcerated for more than 10 years before judgment was rendered. Some were also kept in detention without being charged for a lengthy period of time during the early phases of the prosecution. That is a long time by any standard, and far removed from the test of a ‘reasonable period of time’ demanded by all human rights standards and treaties. However, one misses the point by simply focusing on numbers alone. Trials of such magnitude are not easy to prosecute. Even the International Criminal Tribunals for the former Yugoslavia and Rwanda are still in business, despite the large number of resources they enjoy and the limited number of suspects they have been able to try. As will be shown below, the usual suspects – lack of resources and the complexity of the cases – are present in Ethiopia’s case too. The question would then be whether there was anything the SPO or courts could have done to speed up the process within the bounds of the resources and goodwill they had at the beginning.

At the beginning, suspects were not arrested through the usual process by means of court-issued arrest warrants. The prosecution’s decision to seek the mass arrest of all those implicated meant that the Prosecutor himself was bound to be overwhelmed by the number of cases he had to investigate. There was a risk of flight of suspects. In fact, many who feared arrest did flee at the beginning. Apart from clogging the system and dividing the attention of the SPO, the mass detention of suspects increased the risk of prolonged detention of individuals against whom there was no sufficient evidence. There have been cases where individuals were in detention for 10 years, but received only a six-year jail sentence. Neither the SPO, nor the Ethiopian courts had any remedy for those unduly detained for a long time. The unusual decision to prosecute both high ranking and low ranking members of the Derg in part created the situation such that there were far too many to be tried. The lesson here is that the SPO should first have focused on the most serious cases.

Apart from the number of perpetrators, the prosecutorial strategy was in general problematic. Once the trial started in 1994, the strategy devised by the SPÖ in presenting its evidence, mainly witness testimony, ensured that the trial would take longer than was necessary. The SPO introduced far too many witnesses to prove certain issues. For instance, the SPO has

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30 For possible causes that contributed to the delay, see Vaughan (n 8 above) 52-53.
been criticised for calling many witnesses who testified about ‘the commission of the alleged acts without an identification of who the actors were’. Haile-Mariam records that by 1998, the Prosecutor had called more than 500 witnesses and was promising to call another 500, in addition to physical evidence. Kidane has pointed to the limited utility of the many witnesses being called noting the following:

Of the 581 prosecution witnesses, about 90% of them testified about isolated incidents that happened over an extended period of time. For example, more than 300 witnesses testified that they saw, one or more of the victims listed in any of the 211 counts in prison, and either heard the killing on the radio, read in the newspaper, or saw the corpses at one or another place. Many of them were relatives of the victims who witnessed the taking of their loved ones from their homes and their death or disappearance. And others told the Court about the prison conditions and the severity of the torture.

Given that the accused were top policy and decision-makers and in consideration for the need for a speedy trial, the preferable strategy for the SPO would have been to present evidence that showed the existence of a common plan among the co-accused to commit the alleged acts. It was also imperative to prove that the accused was not only implicated in his leadership capacity but also personally had committed or ordered the commission of such acts or had participated in the commission in a certain capacity. However, very few prosecutor witnesses were able to point to the direct participation of most of the accused in the act. In other words, the witnesses probably contributed little to the trial which the prosecutor might have proved with documentary and physical evidence, as well as records of the triumphant radio and television broadcasts that followed most executions of the so-called counter revolutionaries or enemies of the revolution.

It appears that the SPO, by choosing this strategy wanted to create a forum for witnesses, most of whom were affected in some way, to vent their sorrow and testify in public against leaders who were responsible for some of the most atrocious crimes. In a sense, it is like trying to ‘kill two

35 n 35 above, 685-686.
36 n 35 above, 685.
37 However, testimonies of the 3rd, 4th, 5th, 6th and 7th witnesses were found to be well organised. The 43rd witness had also testified to an event that directly implicated Captain Legesse Asfaw and Major Berhanu Bayeh; the 183rd witness testified about the death of her very well known novelist husband (Behalu Girma); the 356th witness saw the execution of 13 detainees in an interrogation room; the 482nd who was Mengistu Haile-Mariam personal guard (himself in prison) who testified about the killing of the former Derg Chairman, General Teferi Benti and other Derg officials. See Kidane (n 33 above) 688-689.
birds with one stone’ at the expense of a speedy trial. Views vary on whether these two goals may be achieved at once. The defence team objected to the prosecutor’s strategy, arguing that the approach suited a truth commission, rather than an adversarial courtroom scenario. Expressing displeasure, one defence counsel noted that ‘if what SPO is trying to do is record keeping, it could be done more effectively by a truth commission; it need not be done in a court room’. 38

The SPO originally enjoyed a lot of goodwill and was able to attract donor’s direct assistance to help it prosecute cases in line with international standards. The assistance consisted in direct financial support as well as technical assistance. 39 Although not significant in monetary terms, the continued support nonetheless waned due to the deterioration of the relationship between the SPO and international donors. 40 The deterioration in their relationship was chiefly attributed to factionalism and an internal power struggle within the SPO. 41 Eventually, donors either reduced or withdrew from the programme. One of the donors to withdraw its support was the Carter Center, which had in the past assisted the SPO by sponsoring forensic experts from Argentina. 42 Foreign consultants were also fired for suspicious activities. 43 Clearly, the SPO could have benefited from support from the donor community. As it turned out, the honeymoon did not last more than two years and the SPO had to continue on its own thereafter.

Ethiopian courts are generally plagued by backlogs and a lack of sufficient trained personnel. Although the trials in Addis Ababa were assigned to at least three divisions (1st, 2nd, and 6th) of the Federal High Court, the judges’ task was not limited to trying such cases. They had to juggle these high profile cases with their other judicial commitments. On balance, however, the delay is rather because of the Prosecutor’s strategy that led to his inability to wrap up the prosecution’s case in time. In hindsight, however, talking about delays in relation to those convicted and sentenced to life in prison or death may seem academic. What about those acquitted after a lengthy detention? The truth is that it has been done for those people; no apology has been offered and there have been no instances of reparation for unjustified detention. In terms of international criminal law as currently codified by the Rome Statute, anyone who has been the victim of unlawful arrest, detention or miscarriage of justice has an enforceable right to compensation. 44 Failure to compensate suspects

38Kidane (n 33 above) 688.
40As above, 419, for the committed support.
41n 39 above, 422-423.
42n 39 above.
43n 39 above, 423 (fn 46).
44Art 85 Rome Statute of the International Criminal Court.
who suffered a long period of detention or a miscarriage of justice is another significant way that the Ethiopian trials failed to meet international standards.

3.3.4 Right to adequate legal counsel

Adequate legal counsel is a right guaranteed to accused persons in criminal trials under domestic and international law. This right entails that the accused person be allowed to be represented by a legal counsel of his/her choice, and be provided with one at the state’s expense if he/she is unable to afford one.

The court appointed thirty-six attorneys for some of the high-profile suspects from among private law practitioners, while a few others were retained by their clients. The court-appointed lawyers were paid five thousand Ethiopian Birr (750USD at the then prevailing exchange rate) to defend an accused. This was the only payment they received for a trial that took nearly thirteen years. Furthermore, they were not reimbursed for the expenses they incurred in connection with the preparation of their cases. This clearly shows the relative position of disadvantage in which the defence teams stood.

The government also established the Public Defenders Office (PDO) in January 1994 under the supervision of the Ethiopian Supreme Court. The PDO was to provide legal assistance to the indigent accused. The PDO started its work with five Ethiopian lawyers early in 1994, only one of whom was an experienced trial attorney. This pales in comparison to thirty lawyers and four hundred investigators put at the disposal of the SPO at the beginning of the trial. The PDO was established mainly to defend low-level suspects. At its early stages, it was reported that the PDO suffered from lack of resources. The PDO was also staffed with newly graduated and inexperienced staff. Clearly, the quality of the services and the resource allocated to defend indigent accused were inadequate.

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46 Haile-Mariam (n 34 above) 723.
47 n 39 above.
49 Haile-Mariam (n 34 above) 724.
50 Human Rights Watch/Africa (n 32 above) 49.
51 As above, 49-50.
52 Haile-Mariam (n 34 above) 723.
53 Human Rights Watch/Africa (n 34 above) 50
54 As above.
55 For prosecutorial resources and assignment of counsel at the Ethiopian Court, see Haile-Mariam (n 36 above) 722-724.
The work of the defence counsel was also made difficult because no right to discovery existed in criminal trials in Ethiopia.\(^{56}\) This meant that the Prosecutor was under no obligation to share incriminatory or exculpatory evidence with the defence before the trial.

In general, although the defence was put at a relative disadvantage in terms of resources, there has always been the impression that they carried out their jobs with integrity and in the interest of their clients. There were, however, certain instances in which some of the accused dismissed their assigned lawyers to conduct their own defence. It is also worth mentioning that lawyers representing the accused are thought not to have been harassed by members of the public or by the government.

### 3.3.5 Trials in absentia

As noted already, a number of those suspected of *Derg* era crimes had fled the country by the time EPRDF took Addis Ababa or did so soon thereafter. Mengistu fled to Zimbabwe where he still lives. The SPO decided to charge those who fled anyway and they were subsequently tried *in absentia*. Trials in absentia are controversial under both international and domestic law. Most international instruments provide for the accused’s right to be present at his or her trial, although they do not outrightly prohibit trials *in absentia*. Treaty rules on trial proceedings, such as the International Covenant on Civil and Political Rights (article 14(3)) and the European Convention on Human Rights (article 6(1)) have been interpreted by the relevant tribunals as not ruling out trials *in absentia*.\(^ {57}\)

While article 12 of the Charter of the International Military Tribunal allowed trials *in absentia*, the Statute of the ICC in article 63(1) requires the accused to be present for the trials to commence. The Statutes of the ICTY (article 21(4) (d), and ICTR (article 20(4) (d)) also provide that the accused has the right ‘to be tried in his presence.’

However, the position seems different under a number of domestic jurisdictions.\(^ {58}\) In terms of articles 160 and 161 of the Ethiopian Criminal Procedure Code, a trial *in absentia* is allowed if the accused fails to show up for his trial after being summoned and notified to do so, including publication of summons in a widely-circulated paper, provided the offence committed is punishable with rigorous imprisonment not less than twelve years.\(^ {59}\) This is a common feature of criminal trials in most civil law countries that follow the inquisitorial system of criminal litigation, unlike

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56 See also Human Rights Watch/Africa (n 32 above) 50-51.
58 As above, 390.
59 In terms of art 162, where the court decides to hear the case in the absence of the accused, the judge must order the publication of the summons showing the date fixed for the hearing and a notification to the accused that he will be tried in his absence if he fails to appear.
the adversarial systems.\textsuperscript{60} Antonio Cassese gives two reasons why trials \textit{in absentia} are admissible in Romano-Germanic legal traditions.\textsuperscript{61} Firstly, the investigating judge gathers evidence not only for the prosecution but also for the defence, which means that when the trial proceedings begin, the court has exculpatory evidence available, and is therefore in a position to evaluate both the evidence against and that in favour of the accused. Secondly, in most civil law systems (including those such as Italy where the accusatorial system has been adopted) it is considered that the interest of the community adjudicating alleged criminal offences should prevail over the right of the accused to be present in court, at least whenever the accused voluntarily tries to evade justice.

Although Ethiopia follows a predominantly civil law system with regards to its substantive law, its procedural law is mainly adopted from common law jurisdictions.\textsuperscript{62} That means its Criminal Procedure Code does not include an investigative judge, a feature common to inquisitorial systems. In the same breath, it also has to be pointed out that the role of the judge in criminal trials in Ethiopia is not as limited as its adversarial counterpart. It incorporates features from both systems. But this mix does not make up for the lack of an investigative judge, who in other civil law systems is responsible for collecting both exculpatory and incriminatory evidence for the sake of seeking the truth. Furthermore, the Ethiopian prosecutor is not under any special legal duty to reveal any exculpatory evidence to the court, a matter that is critical in trials \textit{in absentia}.

As we noted previously, certain accused persons have been found guilty \textit{in absentia} and have been given the death penalty. There has so far been only one instance, which this author is aware of, where a convicted person was deported back to Ethiopia to serve a sentence imposed \textit{in absentia}. The accused, Kelbesa Negewo, was found guilty and sentenced to life imprisonment by the Federal High Court on 20 May 2002. He was deported from the United States in October 2006, stripped of his US citizenship on the ground that he lied to immigration officers about the human rights violations he had committed. He was also found liable to his former victims under the Alien Tort Claims Act. He is currently serving life in prison.

Courts have also rejected the plea by another accused through his lawyer to have his \textit{in absentia} decision set aside. This happened in the case of \textit{General Embibel Ayele v Special Prosecutor}, where the Federal High Court refused to set aside the accused’s \textit{in absentia} conviction and life

\begin{footnotes}
\item[60] Cassese (n 57 above) 360.
\item[61] n 57 above, 360-361.
\item[62] Its 1961 Criminal Procedure Code was drafted by Sir Charles Mathew was mainly based it on the Malayan Criminal Procedure Code, while its Civil Procedure Code, drafted by Ato Nerayo Isayas, was heavily inspired by its Indian counterpart.
\end{footnotes}
sentence. On appeal, the Federal Supreme Court ruled that in absentia decision can only be set aside when the accused appears before the court - either in person or accompanied by his lawyer according to article 127(1) of the Criminal Procedure Code.

3.3 Truth telling and investigation of past violations

Because of the trials, we now know more about what had happened. At least some of the relatives who did not know about the fate of their loved ones were for the first time made to face the truth of what had happened. Many bodies were exhumed and laid to rest. The remains of the Emperor Haile Selassie I had to be exhumed from beneath Mengistu Haile-Mariam Secretary’s Office. Former government archives have been opened up to the prosecution and some of these documents have been submitted to the courts and have become part of the official account of who committed some of these crimes. It is hoped that these documents will be digitised and put in a museum, be it physically or electronically.

On the other hand, prosecution by its very nature does not reveal the entire truth. The adversarial nature of the process naturally prompts the parties to use or vie for winning strategies. Calls for the establishment of a truth and reconciliation commission (TRC) were never given serious thought by the EPRDF which formed and run the government since Derg lost power. There has not been any public consultation on the matter. Members of the transitional parliament who passed the SPO Proclamation were not elected by the public. It seems that the ruling party is dead-set against a TRC. The Federal High Court in its ruling of 9 October 1995 made the point that courts are not legally empowered to decide whether national reconciliation is the best option. Prosecution and TRCs need not be mutually exclusive. In fact, some of those convicted had indicated a willingness to seek forgiveness from the public by telling the truth unconditionally. For unexplained reasons this has not been accepted by the government either. This leaves one with a question of why the government is afraid of the truth.

3.4 Consideration for victims’ rights, remedies and reparations

Principle three of Chicago’s Principles on Post-Conflict Justice requires that states shall acknowledge the special status of victims, ensure access to justice, and develop remedies and reparations. The Ethiopian trials have to

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63 General Embibel Ayele v Special Prosecutor Criminal Appeal File 34459 Federal Supreme Court. The application to set aside could be made pursuant to arts 196 and 201(1) of the Criminal Procedure Code.

64 Special Prosecutor v Col Mengistu Haile-Mariam & Others Federal High Court, First Criminal Division, Ruling on Preliminary Objections 9 October 1995 para 90.
The trial of Mengistu and other Derg members in Ethiopia

a large extent allowed victims and victims’ families access to the courts. At the beginning, the SPO’s investigation was assisted by the victims’ and their families who came forward and provided information about the crimes committed and those responsible. At a later stage, some have appeared before courts and provided their testimonies.

The participation of victims go only to the point of assisting the prosecution. So far there has not been any mention of remedies or reparation for the victims individually or collectively. Restitution of illegally confiscated property in the context of red terror is not known. The judgment of the courts do not provide for any reparation measures for the victims. The government has no plans to compensate the victims of these violations, nor has it apologised to the public although it is not responsible for these violations. Given the destitution of most of the suspects, there has not been any civil suit against them for compensation. For the same reason, it is unlikely that any future civil suits will be filed.

3.5 Vetting, sanctions and administrative measures

As an aspect of post-conflict justice, states should carry out vetting, sanctions and administrative measures against suspects of human rights violations during transition. The defeat of the Derg was total: among others, the government was dismantled; the constitution was suspended and courts reconstituted; the Workers Party of Ethiopia (WPE) was declared illegal; and its security, intelligence, police and military forces were disbanded. At the end, all key positions were filled by the members and loyalists of the rebels who ousted the Derg.

When it comes to the judiciary, most if not all experienced judges were dismissed from their jobs on the ground that they belonged to the Marxist Worker’s Party of Ethiopia. This took its toll on the judiciary which was already understaffed. It is understandable that the judiciary has to be free of partisan politics. However, in those days, it was unlikely to find any key government official who was not a party member. Some care should have been exercised before depriving the judiciary of its most experienced personnel.

Overall, the vetting exercise has made it difficult for individuals with questionable human rights records in the past government to be involved in the transitional government and afterwards. However, it also created a situation whereby all key positions were given to partisans of the new regime.
3.6 Memorialisation, education and the preservation of historical memory

According to the Chicago Principles, states should support official programmes and popular initiatives to memorialise victims, educate society regarding political violence and preserve historical memory. These memorialisations may include:

- built memorials such as monuments, statues and museums;
- sites of memorialisation such as former prisons, battlefields or concentration camps;
- and, commemorative activities including official days of mourning, renaming streets, parks and other public sites and various forms of artistic, social and community engagement with past violations.

There is no question about the relevance of such programs. Post-conflict measures have to go beyond merely dealing with the past. The new generation has to be taught about the horrors of the past so as not to repeat them.

Memorialisation efforts regarding the victims of the Red Terror have usually been spearheaded by the victims' associations themselves. There is no doubt that they receive some government support to that effect. However, it needs to be pointed out that the government has so far taken a back-seat in regards to efforts of memorialisation and preserving the historical memory.

3.7 Traditional, indigenous and religious approaches to justice and healing

The justification for encouraging such forms of dispute settlement is their legitimacy. Thus, 'traditional, indigenous and religious approaches to justice have high levels of local legitimacy and are generally integrated into the daily lives of victims, their families, communities and the larger society'. The majority of Ethiopians are deeply religious people and in touch with their diverse cultures. It is hardly possible to imagine that these religions and cultures have nothing to contribute to the healing and reconciliation process if they were allowed to play a role. However, the purely legalistic approach adopted by the government made it impossible for this to happen. On the other hand, even organised religious groups rarely venture out of their comfort zone and engage in such meaningful national exercises. This, in part, could be explained by the past and

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65 n 5 above, 34.
66 n 5 above, 36.
67 For an attempt to show the existence of restorative justice traditions in Ethiopia which the legalist approach sidelined, see C Schaeffer ‘The Red Terror trials versus traditions of restorative justice in Ethiopia’ in Tronvoll et al (n 1 above) 68-83.
continued association of these religious establishments with the ruling regime. In the current Ethiopia, this association pervades all aspects of civic life where it is rare to find an independent institution which dares to question the official line and proposes an alternative approach.

3.8 Institutional reform and effective governance

The last of these important Chicago Principles of Post-Conflict Justice urges states to engage in institutional reform to support the rule of law, restore public trust, promote fundamental rights and support good governance. Again, the importance of these is not hard to see. The gains from well-planned and executed accountability mechanisms could easily be reversed if these efforts are not followed through by institutional reform and effective governance that can restore the public’s trust in government. How has the Ethiopian government fared on these issues?

It would be irresponsible not to admit that there have been some fundamental structural changes towards a better future. Regardless of the political disagreement about the government structure, the 1994 Constitution of the Federal Democratic Republic of Ethiopia entrenched fundamental rights and freedoms, established key institutions and guaranteed their independence, at least on paper. However, the human rights practice of the incumbent regime has been subjected to severe criticism to the extent of prompting some to openly claim that the Derg had been better since it did not recognise human rights to begin with, let alone mowing down people who believed it was their right do so under the Constitution as has happened in post-Derg era. In other words, the rights in the Constitution are there only to enhance the democratic credentials of the incumbents in the eyes of western donors without whose support the regime could not survive and could not have become what it is today. This is a serious indictment of the regime’s performance.

4 Concluding remarks

The human rights abuses committed by the Derg in Ethiopia from 1974 to 1980, including the Red Terror era, represent only a portion of the human rights violations that occurred during the Derg’s seventeen-year-rule. Ironically, the prosecution of the suspects took nearly eighteen years, longer than the Derg’s stay in power. The big fish, Colonel Mengistu Haile-Mariam, is still at large, sheltered by Zimbabwe. Given his key role in what had happened during his rule, one cannot underestimate the impact his capture and surrender will have on the Ethiopian justice system as well as on the victims.

This brief essay examined the Ethiopian process in light of the Chicago Principles of Post–Conflict Justice which provide a holistic and interdisciplinary approach to the business of transitional justice. Seen in light of this framework, Ethiopia’s endeavor is found wanting. In its favour it may be said, however, that the Ethiopian experience represents a home-made, albeit legalistic, response to a legacy of human rights abuses. Despite the trials’ shortcomings, it is fitting to say ‘better late than never’. Furthermore, no two wrongs make a right. Some have been tempted to delve into a comparison of the incumbent regime’s bad human rights record with that of Mengistu’s to downgrade the symbolic significance of the Red Terror trials both for Ethiopia and Africa.

Despite the fact that the Ethiopian judiciary had to deal with this novel issue, it wasted an ideal opportunity for dialogue with the burgeoning jurisprudence of international criminal courts. In fact, it could be said that the courts progressively lost touch with international and comparative materials as the trials progressed. While the Federal High Court in its first ruling on preliminary issues in 1995 engaged with substantive international law, albeit in favour of the prosecution’s case, its decision on merit in 2006 as well as the decision of the Federal Supreme Court in 2008, are both found wanting with respect to their legal rigour and international comparative significance. Nevertheless, it is important to note that the Ethiopian courts have rendered an important contribution to the law on genocide, especially at the domestic level.