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Apology and trials: The case of the Red Terror trials in Ethiopia

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Summary

The Red Terror was a campaign of terror by the military government (Derg) that ruled Ethiopia from 1974 to 1991. The Derg era was characterised by massive human rights violations, including crimes against humanity. The Red Terror trials are the prosecutions of the Derg officials who are suspected of committing mass human rights violations. The trials are unique in the sense that they have largely taken place in Ethiopia, with local impetus and without the involvement of the international community, as was the case in Rwanda, Sierra Leone or the former Yugoslavia. The author argues in favour of retributive justice, making the prosecution of mass human rights violations the duty of the state. In this regard, the author provides the major arguments in favour of the prosecution of human rights violations. The article also examines the major problems in prosecuting human rights violations in general, and the problems presented by the Red Terror trials in particular. However, the author also argues that the recent request on the part of the Derg officials to make a public apology to the Ethiopian people needs to be part of the remedial process. It is argued that apology should be part of the acceptance of responsibility and accountability for mass human rights violations (as retributive justice demands) and not necessarily as part of an incipient strategy of amnesty.

1 Introduction: Background to the 'Red Terror'

While the pre-1974 Ethiopia experienced different human rights violations, the most severe human rights violations in the country's recent

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history were in connection with the 1974 revolution. In 1974, the acute economic poverty and political suppression led to mass uprisings of sections of society against the rule of Emperor Haile Selassie I. The popular movement, primarily carried out by students, peasants and workers, in the same year led to the break-down of Ethiopia's monarchy.

However, there was no organised political group to assume leadership so as to respond to the acute political and socio-economic problems of the country. The student movement was divided into leftist radical groups, which were not able to forge an agreement and assume the leadership that was badly needed. During the revolutionary disarray, the military — under the name of Derg[1] — seized power in September 1974. In the same year, the Derg suspended the Constitution and established a military government.[2] The Derg soon established itself as a 'permanent and irrevocable self-perpetuating group', rejecting all calls for civilian rule.[3] In November 1974, the Derg executed 60 officials of the former imperial government without a court hearing.[4] This event marked the beginning of 17 years of state-sponsored terror and violence against the people of Ethiopia.

Following the summary executions of the 60 former officials of the imperial government of Haile Selassie I, the next period, spanning from 1975 to 1988, was ruled by 'the law of the jungle' and was characterised by the most atrocious human rights violations.[5] In the days leading up to May Day in 1977, the Ethiopian Peoples' Revolutionary Party (a leftist political party opposed to the military junta) youth committees planned a nationwide demonstration demanding civilian government.[6] The Derg, however, managed to thwart their plan in what later became known as 'the May Day Massacre': Hundreds of young people, planning to participate in the demonstration, were executed on 29 April 1977.[7] The massacre was a manifestation of the Derg's unparalleled brutality. The massacre continued for days and, according to an eye witness, over 1 000 young people had been executed by 16 May. Their bodies were left in the street and ravaged by hyenas at night.[8]

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1 'Derg' is the name assumed by a committee of 120 commissioned and non-commissioned low-rank officers of the air force, police force and the territorial army.

2 Y Haile-Mariam 'The quest for justice and reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court' (1999) 22 *Hastings International and Comparative Law Review* 667 674.

3 F Halliday & M Molyneux *The Ethiopian revolution* (1981) 87.

4 TS Engelschin 'Prosecutions of war crimes and violations of human rights in Ethiopia' (1994) 8 *Yearbook of African Law* 43.

5 Haile-Mariam (n 2 above) 677.

6 Engelschin (n 4 above) 43.

7 As above.

8 D Haile *Accountability for crimes of the past and the challenges of criminal prosecution: The case of Ethiopia* (2000) 15.

Some families, who were fortunate enough to identify the bodies of the murdered youth, were required to pay for the bullets that were used to kill their sons and daughters before they could claim the corpses.[9]

In July 1977, the *Zemecha Menter* or ferreting-out campaign was directed and conducted by the Derg against what it called anti-revolutionary and reactionary elements. The action resulted in the death of over 1 000 people and the arbitrary detention of 1 503 persons accused of belonging to one or other political party.[10]

The worst came in the days of the notorious urban Red Terror — 'a term borrowed from the Russian revolutionary lexicon meaning the liquidation of counter revolutionaries'.[11] The Red Terror in Ethiopia was the largest and best-known campaign of official violations of human rights perpetrated by the Derg.[12] The Red Terror Massacre was officially launched in November 1977 and lasted until 1980.[13]

During its campaign of Red Terror, the Derg officially killed a generation that had no resort to the rule of law. The Red Terror resulted, amongst other crimes, in summary executions, arbitrary detentions, disappearances and torture. A writer described the terror as follows:[14]

> Thousands of young people were gunned down on sight and in peaceful, public demonstrations in Addis Ababa and other towns. Bodies littered the streets of Addis Ababa with Marxist slogans pinned to them. Rural towns did not fare any better. Some who escaped the cities and took refuge in their hometowns were caught and executed by peasant and urban dwellers associations' militia. Thousands more disappeared and are still missing. In 1977, it was estimated that 30 000 to 50 000 people were executed without ever having charges brought against them. Most of the victims were young, between the ages of 14 and 30.

Amnesty International reported that the total of persons killed by the end of the Red Terror campaign alone ran as high as 150 000 to 200 000. The killings continued well into 1980.[15] In response to the call made by Amnesty International to stop the killings, the Derg was quoted as follows: 'If they [Amnesty International] say we do not have to kill people, aren't they saying we have to quit the revolution? The cry to stop the killing is a bourgeois cry.'[16] The entire period was characterised by serious human rights violations; these constituted state-sponsored terror in the form of sexual abuse, summary execution, torture,

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9 As above.
10 Engelschin (n 4 above) 43.
11 Haile-Mariam (n 2 above) 677.
12 Engelschin (n 4 above) 43.
13 As above.
14 Haile-Mariam (n 2 above) 678.
15 As above.
16 Haile (n 8 above) 13.

arbitrary arrest and detention, disappearance, unlawful dispossession of property and forced settlement.[17]

At the end of 17 years of brutal human rights violations marked by terror and violence, the Derg was finally overthrown on 8 May 1991 by the Ethiopian People's Revolutionary Democratic Front (EPRDF). In May 1991, the EPRDF arrested and detained approximately 1 900 individuals suspected of violating human rights during the Derg.[18] The EPRDF called for the establishment of a transitional government in which all political parties could participate. Upon the establishment of the transitional government, the Special Prosecutor's Office was established in 1992 to investigate and prosecute the massive human rights violations of the Derg era.[19] The Special Prosecutor's Office immediately investigated the human rights violations and submitted the first charges in October 1994 before the Central High Court of the transitional government. These trials are the first of their kind in Africa and elsewhere, as they have taken place in Ethiopia, through local impetus and without the involvement of the international community as in Rwanda or the former Yugoslavia. The trials are still continuing at federal and regional courts.[20]

This article is written in the wake of a call to the government by top Derg officials on trial to be given a forum to 'apologise' to the Ethiopian people. On 13 August 2004, 33 top former Derg officials, on trial for genocide and other serious human rights violations during the Red Terror, wrote a letter to the Prime Minister to be given a forum where they may 'beg the Ethiopian public for their pardon for the mistakes done knowingly or unknowingly' during the Derg regime.[21] There has been no official response from the government as of this date.

The article attempts to show why the Derg officials should be allowed to expose what had happened and apologise to the Ethiopian people.

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17 Not only the Red Terror period, but also the entire Derg regime was characterised by massive human rights violations. For instance, a forced resettlement programme of the Derg, purportedly carried out for military purpose as a counter-insurgency strategy, resulted in the death of approximately 100 000 rural people between 1984 and 1986. Food relief for the 1984 famine in the country was prevented from reaching the victims, causing many thousands to perish. For further details, see Trial Observation and Information Project 2000.

18 Trial Observation and Information Project (2000), Consolidated Summary and reports from observations made in 1996, 1997, 1998 and 1999, compiled and distributed by NIHR's project 'Ethiopia's Red Terror trials: Africa's first war tribunal' 1.

19 Proclamation 40/92, the Proclamation for the Establishment of the Special Prosecutor's Office, 1992.

20 For some details, see part 4 below.

21 The letter was first published by the *Ethiopian Reporter* on 26 June 2004. Among the Derg officials who signed the letter are former Vice-President Colonel Fiseha Desta, former Prime Minister Captain Fikreselasie Wogederes and the notorious henchmen of dictator Mengistu Hailemariam, Captain Legesse Asfaw and Major Melaku Tefera.

The writer does not argue in favour of apology at the expense of the judicial process. Rather, the writer argues that the investigation and prosecution of the human rights violations during the Red Terror, and public apology by the violators, are all part of the remedial process. In other words, the paper argues that the duty to investigate and prosecute and public apology by the violators are not mutually exclusive.

In line with the central theme, the second section of the article attempts to provide moral and legal reasons to show why the prosecution of Derg officials for massive human rights violations is a duty of the state. In the third and fourth sections, the article highlights some of the major problems faced during the investigation and prosecution of past human rights violations in general, and the major problems faced by the Red Terror trials in particular. The fifth section of the article attempts to illustrate why former Derg officials need to apologise and tell the facts to the Ethiopian people. As such, the fifth section attempts to show why apology is an equally valid and important part of the remedial process and why it is not excluded by the duty to investigate and prosecute. The link between the trials and the process of apology will also be analysed under this section. The last part of the article concludes the argument.

2 The obligation to investigate and prosecute

The purpose of the investigation and prosecution of human rights violations is not all about the provision of 'just desert'.[22] The investigation and prosecution of human rights violations are important parts of remedial justice, not only for purposes of deterrence, but also for upholding the rule of law. The fact that the rule of law is one of the most cherished principles of humanity has been affirmed time and again. Government is the entity responsible for ensuring respect for the rule of law in a society. The responsibility of the government to uphold the rule of law has been expressed as follows:[23]

> In a government of laws, the existence of the government will be imperilled if it fails to observe the law scrupulously . . . For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.

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[22] M Maiese *Retributive justice* (2004) http://www.beyondintractability.org/essay/retributive.justice (accessed 1 March 2006) refers to retribution as a way of returning what one deserves in line with his or her actions.

[23] D Shelton 'Reparations for victims of international crimes' in D Shelton (ed) *International crimes, peace, and human rights: The role of the International Criminal Court* (2000) 49.

The purpose of the investigation and prosecution of human rights violations, like the aims of punishment in criminal law, is to be an effective insurance against future repression. As such, officials and the public would learn that crime is punishable and that nobody is above the law. Orentlicher aptly stresses that 'when we neither punish nor reproach evildoers, we are not simply protecting their trivial old age, we are thereby ripping the foundations of justice from beneath new generations'.[24]

The prosecution of human rights violations serve as a way of publicising the atrocities committed. It is true that publicity may be achieved in other ways. But as Nagel points out:[25]

> It is the difference between knowledge and acknowledgment. It is what happens and only happens to knowledge when it becomes officially sanctioned, when it is made part of the public cognitive scene.

Moreover, for individual victims, prosecutions have a symbolic meaning. For the victims, justice is only served if the proper investigation and prosecution are carried out by the state. For the victims, 'doing justice means to uncover the truth of what took place, establish the identities of those responsible and subject them to the appropriate sanctions'.[26] For instance, the women who were made sexual slaves by the imperial army of Japan during the Second World War rejected an offer of compensation and argued that only prosecution by the Japanese government would redress the abuse committed upon them.[27] An absence of justice on the part of victims means betrayal by the state and a major setback for victims trying to put the past behind them and continue with their lives. Failure to investigate and prosecute human rights violations may also encourage individual victims to take the law into their own hands, leading to a spiral of conflict in a society.

Under international law, the explicit obligation of states to prosecute is provided for in the Convention on the Prevention and Punishment of the Crime of Genocide[28] and in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[29] The United Nations (UN) Human Rights Committee has repeatedly stressed that the investigation and prosecution of human rights violations are part of states' obligations of redress to the victims. The UN Human

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24 DF Orentlicher 'Settling accounts: The duty to prosecute human rights violations of a prior regime' in NJ Kritz (ed) *Transitional justice — General considerations* (1995) 375.

25 Cited in L Huyse 'Justice after transition: On the choices successor elites make in dealing with the past' http://caswww.elis.ugent.be/avrug/pdf01/zuidaf03.pdf (accessed 1 April 2006).

26 HS Ardiles 'The absence of justice' in C Harper (ed) *Impunity: An ethical perspective* (1996) 107.

27 M Minow *Between vengeance and forgiveness* (1998) 105.

28 General Assembly Resolution 260 A (III) art VI.

29 General Assembly Resolution 39/46 art 7.

Rights Committee explains that, in cases of torture, article 2(3) of the Convention against Torture obliges the government to 'conduct an inquiry into the circumstances of the victim's torture, to punish those found guilty of torture and to take steps to ensure that similar violations do not occur in the future'.[30] The UN Human Rights Committee also expressed its opinion that states are obliged to investigate and prosecute cases involving arbitrary executions and disappearances.[31] In the case *Bautista de Arellana v Colombia*, the UN Human Rights Committee found further that[32]

> disciplinary and administrative remedies alone were not 'adequate and effective' to redress the violation, suggesting that anything short of criminal prosecution would not comply with the requirements of the Covenants.

Under the Inter-American human rights system, the Inter-American Court of Human Rights interpreted the obligation to 'ensure' found in article 1(1) of the American Convention on Human Rights as inclusive of the state's obligation to prevent, investigate and punish violations of the rights recognised by the American Convention on Human Rights.[33] Furthermore, the Inter-American Commission found that the Chilean response was inadequate in relation to the violations that occurred during the Pinochet regime. In the case of *Garay Hermosilla et al v Chile*, the Inter-American Commission on Human Rights found that[34]

> the government's recognition of responsibility, its partial investigation of the facts and subsequent payment of compensation were not enough, in themselves, to fulfil its obligations under the Convention. Instead, the state has the obligation to investigate all violations that have been committed within its jurisdiction, for the purpose of identifying the persons responsible, imposing appropriate punishment on them, and ensuring adequate reparations for the victims.

The UN Commission on Human Rights also stressed that investigation and prosecution are part and parcel of the process of redressing human rights violations. Under the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the Commission stated that the duty to investigate and prosecute is part of the obligation of states to respect, ensure respect and enforce international human rights norms.[35] The document also

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30 D Shelton *Remedies in international human rights law* (1999) 324.
31 As above.
32 As above.
33 Orentlicher (n 24 above) 396.
34 Case 10.843, Report 36/96, cited in Shelton (n 30 above) 324.
35 UN Doc E/CN 4/2005/L 148, art 3 (adopted by the UN Commission on Human Rights at its 56th meeting, 19 April 2005).

states that statutes of limitations shall not apply to human rights violations that constitute crimes under international law.[36]

The interpretation given by major human rights bodies to the right to an effective remedy and the moral perspectives mentioned above show that the investigation and prosecution of human rights violations are part of the obligations of states to provide an effective remedy to victims of human rights violations. Again, it should be emphasised that the investigation and prosecution of violations are not only useful for specific victims, but also for society at large in upholding the very crucial principle of the rule of law. Failure to investigate and prosecute human rights violations on the part of states brings the victims to the conclusion that there is 'absence of justice'.[37] The reoccurrence of violations will also be highly probable, as past violators walk free with impunity and potential violators learn from such failure of the state to uphold its duty.[38]

3 Problems in the execution of the duty to investigate and prosecute

There are numerous problems involved in the effective investigation and prosecution of the violations at national level in the case of past human rights violations. The state apparatus creates some of these obstacles and others result from long-standing political, social and economic problems in society. For the purpose of this article, only some of the major problems will be touched on in the following paragraphs.

In states that suffered state-sponsored human rights violations, the duty to prosecute is often relinquished in favour of impunity. Impunity is 'exemption from punishment or penalty',[39] in this case exemption from being charged, tried and punished for human rights violations. Impunity may be given by way of amnesty laws, presidential pardons, or it may also happen by default, that is, 'the deliberate lack of any action at all'.[40] One reason given in favour of impunity is the need for national reconciliation. Silva rightly laments that, under the guise of reconciliation, people who had been responsible for atrocious human rights violations, such as summary executions, mass crimes, massacres of children and old people, are allowed to go free.[41] Reconciliation is a process that is based on forgiveness on the part of victims of human

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36 n 35 above, art 6.
37 Ardiles (n 26 above) 105.
38 Shelton (n 30 above) 326.
39 PR Baeza 'Breaking the human link: The medico-psychiatric view of impunity' in Harper (n 26 above) 73.
40 C Harper 'From impunity to reconciliation' in Harper (n 26 above) ix.
41 RG Silva 'Some ethical and pastoral reflections: Towards a citizens' movement against impunity' in Harper (n 26 above) 21.

rights violations and an acknowledgment of guilt and the acceptance of punishment on the side of the violators.[42] On the other hand, impunity allows human rights violators to go free and unpunished, in many instances without any acknowledgment of what they had done. Impunity 'institutionalises evasiveness, the concealment of the offender and contempt for the suffering of the victim'.[43] Thus, the idea that impunity may be used to achieve national reconciliation is very difficult to justify.

Another motivation for impunity is the reality of the situation faced by successive governments and emerging democracies. One form of transition is when a dictatorship gives way to democratic government by way of negotiations. The other is the democratisation of the government when part of a dictatorship still maintains a good grip on political and economic power. In both cases, new governments are faced with 'Hobson's choice' between their survival and that of democratic principles such as the rule of law, upon which their existence was founded.[44] These governments consider impunity as the best way to maintain a democratic transition and their grip on power by attempting to disregard past human rights violations. Their appeal seems like saying 'there is a dragon living on the patio and we had better not provoke it'.[45] The reality faced by governments in a delicate process of transition to democracy and by governments that are not free of all dictatorial institutions such as the army is unequal political power. It would be a contradiction in terms to let human rights violators go free as if what they have committed is acceptable. Rosenberg points out this anomaly when she describes 'the desire for maintaining short-term equilibrium can have great long-term costs. It can damage the legal system, the rule of law and future civilian control of security forces.'[46]

Even when impunity is rejected, the process of investigating and prosecuting human rights violations is not an easy task. In connection with the duty of investigation, a crucial problem is the lack of skilled manpower needed for effectively investigating the violations within a reasonable period of time. The problem becomes crucial where large-scale human rights violations were committed under systematic government structures, over a long period of time. A lack of skilled manpower is also a big problem at the stage of prosecuting human rights violators. Whilst prosecutions need to be carried out by highly-skilled

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42 n 41 above, 23.
43 As above.
44 Orentlicher (n 24 above) 376.
45 T Rosenberg 'Reconciliation and amnesty' in A Boraine *et al* (eds) *Dealing with the past: Truth and reconciliation in South Africa* (1997) 66.
46 n 46 above, 68.

and efficient prosecutors, this is not always the case in many prosecutions of past human rights violations.[47]

Prosecution also presupposes a well-established judicial system. The system needs not only be well equipped, but it must also be run by qualified judges and prosecutors with an awareness of human rights and an ability to pursue new issues in human rights law. This is an important problem in an economically poor country during a transition from dictatorship to democracy. New governments usually attempt to reform the judicial system. To reform the judicial system, one needs qualified and educated persons lest any reshuffling may leave the court empty. The complete absence of a viable court system or the unwillingness to use the national court for prosecution of human rights violations is a major reason for the establishment of an international court to prosecute violations.[48]

The high number of suspects is another problem when prosecuting human rights violations. The perpetrators involved in a single crime are usually large in number. Starting with top officials in government, the chain of command reaches the lowest person who executed the order or the decision of the high-ranking officials. The chain of command is complicated and the number of people involved is large, especially in a country where the whole state apparatus is engaged in official and systematic human rights violations. As a result, one has to reach a decision as to whom to prosecute and whom not to. This is a very difficult task. It is pointed out that[49]

> if those who pulled the trigger or ran the torture chambers are prosecuted while those who gave ambiguous or unwritten orders to 'take care of' putative political or social opponents are let free, both the credibility of the process and the hopes of non-repetition suffer.

It is difficult to give an adequate solution to the problem of whom to prosecute. It may suffice to point out that the prosecution process should not be an ambitious venture that attempts to charge every single person directly or indirectly affiliated with a regime, without any record of participation in human rights violations.[50]

Another major problem in the prosecution of human rights violations is the problem that no laws prohibited these crimes at the time when violations occurred. Through the principle *nullum crimen sine lege*, legal

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47 This is a problem of national prosecutions in particular. See eg some of the problems of the Ethiopian Red Terror trials under part 4 below.

48 See the rationale behind the establishment of the International Courts for the former Yugoslavia and Rwanda.

49 N Roht-Arriaza 'Sources in international treaties of an obligation to investigate, prosecute, and provide redress' in N Roht-Arriaza (ed) *Impunity and human rights in international law and practice* (1995) 287.

50 See part 4.1 below on how the Ethiopian Special Prosecutor classified defendants in the Red Terror trials.

theory has recognised that there is no crime without a specific sanction by the law. The state in which the violations occurred may not be party to the international human rights treaties which make the violations illegal and prosecution of the violators a duty. The domestic laws of the state may be silent on many human rights violations. Some of the violations may even have been legal or barred by statutes of limitations under existing domestic laws. Nevertheless, in these situations human rights treaties and the Nuremberg precedents have given courts power to bypass *ex post facto* problems to at least prosecute suspects of violations of general principles of law.[51] Moreover, the silence of domestic laws cannot bar the prosecution of international crimes such as genocide and crimes against humanity. The elements of these heinous crimes are recognised as customary international law, needing to be punished wherever they occur.[52]

4 The 'Red Terror' trials in Ethiopia

4.1 Investigation and prosecution

The duty to investigate and prosecute human rights violations committed by the Derg regime on the part of the Ethiopian state emanates from the arguments outlined above and the following additional legal obligations under national and international law. The suspects of the violations committed by the Derg regime in Ethiopia are accused of the commission of grave human rights violations, among others, genocide, crimes against humanity, torture, rape and forced disappearances, which are crimes under the penal code of the country.[53] Failure on the part of the government to investigate and punish these crimes will be a violation of the right to equal protection of the law enshrined in article 7 of the Universal Declaration of Human Rights, article 26 of the International Covenant on Civil and Political Rights, as well as article 3 of the African Charter on Human and Peoples' Rights, all of which are made part of the law of Ethiopia.[54]

The principle of equal protection of the law requires the uniform application of existing laws of the country.[55] The obligation assumed

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51 Roht-Arriaza (n 49 above) 288.

52 See W Czaplinski 'State responsibility for violations of human rights' in S Yee & W Tieya (eds) *International law and the post-Cold War world — Essays in memory of Li Haopei* (2001) 177.

53 Trial Observation and Information Project (n 18 above) 5. See also art 281 Ethiopian Penal Code 1957.

54 Art 9 Proclamation 1/1995 Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, 1995.

55 J Th Möller 'Article 7' in G Alfredsson & A Eide (eds) *The Universal Declaration of Human Rights — A common standard of achievement* (1999) 170.

will be an affirmation of a government's very reason of existence, that is, the protection of persons under its jurisdiction from crimes without any discrimination. Protection involves not only prevention, but also the investigation and prosecution of crimes. Ethiopia has signed and ratified the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) long before the occurrence of the Red Terror and other human rights violations. Thus, the government has a duty to investigate, prosecute and punish all acts of genocide under the Genocide Convention.[56] What is more, many of the crimes alleged to have been committed during the Red Terror are described in international customary law.[57] This entails the duty of any government to investigate and prosecute the specific crimes of genocide, crimes against humanity and torture and all their manifestations, regardless of which local laws exist, which treaties have been adhered to, or when the crime occurred.

Recognising its duty of investigating and prosecuting the perpetrators of the Red Terror and other systematic human rights violations committed by the Derg regime, the transitional government of Ethiopia expressed its commitment to realising its duty in a letter in 1994 to the UN Assistant Secretary-General for human rights. The relevant part of the letter reads as follows:[58]

> The fight against impunity is a legitimate concern of the international community as stated in the Vienna Declaration adopted by the World Conference on Human rights . . . 'The World Conference on Human Rights reaffirms that it is the duty of all States, under any circumstances, to make investigations whenever there is reason to believe that an enforced disappearance has taken place on a territory under their jurisdiction and, if allegations are confirmed to prosecute its perpetrators.' According to these principles, it is the duty of the Transitional Government of Ethiopia to bring to justice those persons with respect to whom there are serious reasons for considering that they are responsible for serious violations both of international law and domestic law that can be assimilated in some cases to crimes against humanity . . . The crimes committed under the former regime were not only crimes against the victims and the Ethiopian people; in many cases they were crimes against humanity — crimes that the international community has a particular interest to prevent, to investigate and to punish. *The Transitional Government of Ethiopia is aware of its obligations concerning the duty to prosecute the systematic violations of human rights and the grave breaches of humanitarian law.*

In a bid to realise its duty, the transitional government established the Special Prosecutor's Office (SPO) in 1992 to investigate and prosecute

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[56] Genocide Convention (n 28 above) art IV.

[57] n 53 above.

[58] See E/CN 4/1994/103, letter dated 28 January 1994 from the Permanent Representative of the Transitional Government of Ethiopia to the United Nations Office at Geneva addressed to the Assistant Secretary-General for Human Rights (my emphasis).

persons who were suspected of human rights violations during the former military regime.[59] In February 1993, the SPO received about 1 900 detainees from the police commission, a month after it officially began to perform its functions.[60] It took the transitional government almost a year to reform the judiciary and establish an independent office of investigation and prosecution.

The importance of carrying out the trials internally as part of a healing process and of establishing a new era of the rule of law was restated by the head prosecutor of the SPO, Girma Wakjera:[61]

> Some think a country like Ethiopia cannot afford such actions. The opposite is the fact: As a nascent democracy we cannot afford a continuation of governmental impunity, we cannot afford a lack of confidence in democratic institutions, like courts. We cannot afford old wounds to fester and infect our society for years to come.

In 1994, the SPO filed the first charges against 73 Derg members and later, in 1997, it filed charges against a total of 5 198 public and military officials of the former government, proceeding with what are collectively called the 'Red Terror trials'.[62] The Red Terror trials are the first of their kind on the African continent. Out of the total of 5 198 charged, 2 246 were charged while in detention and 2 952 were charged *in absentia*.[63] The defendants are classified into three main categories by the SPO:[64]

> *The policy makers*: those who deliberated and designed the plan of genocide and other human rights violations (top commanders and administrators, heads of police and security forces); *the field commanders*: those who were instrumental in the implementation of the plan by transmitting orders from the policy makers to the material offenders including their additional orders (investigation departments, mass organisations, committee of revolutionary guards); and *the material offenders*: those involved in the material commission of the crimes in line with the nation wide plan (members of the revolutionary guard, death squads, members of special forces).

The charges brought against the defendants include genocide and crimes against humanity, torture, murder, unlawful detention, rape, forced disappearances, abuse of power and war crimes.[65] The main charge against the top officials of the Derg regime is the crime of genocide. The SPO charged the former officials with committing

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59 See Proclamation 40/92 (n 19 above).

60 Trial Observation and Information Project (n 18 above).

61 JV Mayfield 'The prosecution of war crimes and respect for human rights: Ethiopia's balancing act' (1995) 9 *Emory International Law Review* 553.

62 As above. Note that the Derg officials are not only prosecuted for the Red Terror campaign but also for various crimes including violations of the laws of war.

63 F Elgesem *The Derg trials in context — A study of some aspects on the Ethiopian judiciary* (1998) 7-8.

64 Trial Observation and Information Project (n 18 above) 5 (my emphasis).

65 n 53 above, 6.

genocide by deliberately and systematically planning to exterminate opposition political groups, which is a violation of article 281 of the 1957 Ethiopian Penal Code.[66] It is interesting to note that article 281 of the 1957 Ethiopian Penal Code, unlike the Genocide Convention, extends its protection to political groups in addition to national, ethnic, racial and religious groups.

The Red Terror trials are carried out all over the country. The trials of the majority of the defendants are carried out before the Federal High Court in Addis Ababa. Regional Supreme Courts are responsible for Red Terror trials in the regional states. The trials illustrate a belief against impunity for human rights violators. The trials constitute a contrast to the custom of unlawfully executing government officials in the history of the country. Indeed, the Derg officials are going through a process completely absent in the case of millions who were summarily executed by the same officials.[67]

The trials are also meant to be detailed historical records of human rights violations carried out by the Derg regime. The prosecutions inform the public of what happened in a bid to deter future recurrences of similar violations of human rights. The Preamble of the Proclamation establishing the SPO affirms this purpose by stating that the establishment of the SPO is meant to be[68]

> in the interest of a just historical obligation to record for the posterity the brutal offences committed and the embezzlement of property perpetrated against the people of Ethiopia and to educate the people to make them aware of those offences in order to prevent the recurrence of such a system of government.

For the victims, the trials symbolise that justice can be served even after a regime of anarchy. For victims of horrifying violations, the investigation and prosecution of the violators are also ways of finding out what actually happened to their families and to themselves. Many victims' families, even to this date, do not know what really happened to their family members.[69]

4.2 Major problems of the 'Red Terror' trials

As ambitious and historical as they are, the Red Terror trials are faced with crucial problems. Highlighting some of the main problems of the trials would help to contextualise section 5 of this article.

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66 n 53 above, 3.
67 See part 1 above for some of the atrocities.
68 Preamble Proclamation 40/92 (n 19 above).
69 See Trial Observation and Information Project (n 18 above) 49.

4.2.1 The judiciary

In Ethiopia, judicial independence and continuity have never been the hallmark of the legal system. The judiciary under the Derg regime was controlled directly by the executive. Upon coming to power, the transitional government dismissed most senior judges, alleging that they were in one way or another connected to the defunct regime.[70] This action created a gap that led to an acute shortage of skilled and experienced judges. Thus, the duty to preside over the complicated and demanding Red Terror trials fell to junior and inexperienced judges. Some of the new judges, especially in the regional states, were persons who were either trained for a very short time or without any training in law or experience in the courts.[71]

There were also not enough judges. Moreover, most judges, especially those working outside of the capital city (Addis Ababa), were faced with a serious shortage of legal materials crucial for their work. There is no system of consolidating laws and distributing them to judges in the country. The judges spend most of their time handling court administration, writing down the words of witnesses and oral arguments which could have been done by court clerks.[72] The judges also conduct their own research without any assistants.[73] All these shortcomings led to the very slow progress of the Red Terror trials and to long adjournments. A good number of former Derg officials and collaborators of the defunct regime are still awaiting verdicts from the courts. The absence of speedy trials for the accused is one failure of the trials. What is more, the lack of efficiency and the long years in handling the cases have already put the symbolic importance of the trials into oblivion.

4.2.2 The Special Prosecutor's Office

The SPO also suffered a number of setbacks that eventually affected the trials. The SPO was established in 1992 to investigate and prosecute human rights violations that occurred during the Derg regime.[74] From the very beginning, the SPO suffered from an acute shortage of skilled human and financial resources to carry out the huge task of investigating and prosecuting the human rights violations of the Derg regime. The complicated violations that occurred during the Derg regime and the number of directly and indirectly implicated persons in the violations were all huge tasks to deal with. The gathering of evidence, the

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70 Mayfield (n 61 above) 590.
71 As above.
72 M Redae 'The Ethiopian genocide trial' (2000) 1 *Ethiopian Law Review* 1 7.
73 As above.
74 n 18 above.

investigation of cases and the framing of charges were tasks that required an efficient system of prosecution.

Apart from the top officials who were arrested in 1992, many suspects were still at large when the trials began in 1994. The duty to apprehend suspects was being carried out by the SPO after the federal and regional police were reluctant to collaborate with the SPO, under the pretext that their powers of investigation were usurped by the SPO.[75] Because of the lack of co-ordination and collaboration between the police and the SPO, many suspects were tried *in absentia*, thereby affecting their right to defend themselves. The trial process was also affected by long adjournments caused by the procedural requirements that had to be satisfied before a suspect is tried *in absentia*. The lack of a speedy and efficient investigation and prosecution also caused the loss of interest and support for the trials from the international community.

4.2.3 Public defenders

A basic right of the accused is the right to counsel. The Ethiopian Federal Constitution and international human rights treaties ratified by the country provide that the accused have the right to legal counsel. In cases of serious offences, the Federal Constitution provides that the state should assist an indigent defendant in the provision of legal counsel.[76] In the case of the Red Terror trials, the state provided legal counsel at its own expense to the defendants who asserted that they were indigent and who were accused of serious human rights violations, including genocide and crimes against humanity. Initially, some of the top Derg officials were better off than the prosecution, as they were provided with the best lawyers the country could provide. However, the majority of the defendants in the Red Terror trials were left to the newly established public defender's office.[77]

The public defender's office was a new institution which was established in 1993 with a few lawyers, most of whom had no formal training and experience in high level proceedings.[78] Public defenders lacked formal skills to deal with the complex national and international legal concepts involved in the trials. Moreover, the number of public defenders involved is completely out of proportion to the number of the defendants who needed service from the office. The shortage of public defenders caused the assignment of one public defender to represent defendants with conflicting interests, such as superior defendants and subordinate defendants in a given action.[79] Thus, the lack of institutionalised public defence experience in the country and the lack of skilled

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75 n 18 above, 11.
76 Art 20 Proclamation 1/1995 (n 54 above).
77 Trial Observation and Information Project (n 18 above) 10.
78 As above.
79 As above.

and efficient human resources had a negative impact on the rights of the defendants in the Red Terror trials.

4.2.4 The issue of capital punishment

Ethiopia retains capital punishment.[80] There have been calls to the Ethiopian government to abolish capital punishment. Since 1999, the Federal High Court has sentenced Red Terror convicts to death for the commission of genocide and crimes against humanity.[81] The possibility of capital punishment and the lack of an extradition treaty remain the main reasons behind the refusal of many states to hand over suspected former Derg officials, including the top Derg leader, Mengistu Hailemariam. For instance, Italy has repeatedly refused to hand over Derg officials who took refuge in its embassy in Addis Ababa after the fall of the Derg in 1991. Recently, the Italian Embassy in Addis Ababa stated that principles of international law and the Italian Constitution do not allow it to hand over the two Derg officials unless there are assurances that the former officials will not face the death penalty.[82] The governments of the USA and Zimbabwe also refused to extradite the most wanted former Derg officials to face trials in Ethiopia.[83]

To date, all the above governments refused to bring the accused Derg officials to their courts to face trials for genocide and other serious human rights violations. In Ethiopia, however, these officials are being tried *in absentia*. In January 2005, US federal agents used the new Intelligence Reform Act to arrest Kelbesa Negewo, a former Derg security officer who was sentenced to life imprisonment by an Ethiopian court for the commission of crimes against humanity during the Red Terror in his native Ethiopia. Kelbessa is now facing deportation proceedings in the United States.[84] The SPO is reported to be in favour of

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80 Arts 281, 282 & 522 Ethiopian Penal Code 1957.

81 There is no official record of the total of death sentences passed by the courts during the Red Terror trials in the country. The first death sentence was passed *in absentia* in 1999 on Getachew Terba, former Derg security officer, for crimes against humanity (see http://www.amnesty.org/ library). Colonel Tesfaye Woldeselasie, the ex-security head of Derg, and General Legesse Belayneh, former head of the central investigation department of Derg, were sentenced to death in August 2005 (see http://www.news24.com, 11 August 2005). The latest death sentence was handed down to Major Melaku Tefera of Derg (also known as the 'Butcher of Gondar' (Northern Ethiopian town)) in December 2005 for genocide and crimes against humanity (see http://www.int.iol.co.za, 9 December 2005).

82 *Ethiopian Reporter* 23 June 2004, press release from the Italian Embassy in Addis Ababa.

83 Redae (n 72 above) 8. The absence of an extradition treaty is also used as a reason.

84 See http://www.washingtontimes.com, 5 January 2005. It was reported that Kelbesa Negewo made false statements about his involvement in the Red Terror to obtain US citizenship. This led to the revocation of his US citizenship by a US District Court in Atlanta in October 2004.

the death penalty for a 'limited number' of the Derg officials who are found guilty of genocide and crimes against humanity.[85]

5 Apology and trials — Mutually exclusive?

At the beginning of 2004, 33 former top government officials of the Derg regime, who are on trial for serious crimes, including genocide, wrote a letter to the incumbent Prime Minister of Ethiopia asking to be provided with a national forum where they can apologise to the Ethiopian public for the grave human rights violations during the Red Terror. Part of the letter read:[86]

> We, the few who are being tried for what happened, realise that it is time to beg the Ethiopian public for their pardon for the mistakes done knowingly or unknowingly.

Whilst the request is a surprising move by the Derg officials, the response to the question depends on an understanding of the meaning and relevance of apology and the relation of the request to the ongoing Red Terror trials.

Apology results after a feeling of remorse over what happened. As such, apology is a revelation of the facts around a situation and an admission that the events were wrong. The expected outcome of the whole process of apology is the lessening of hatred and the building of a better society based on the lessons learnt. Apology gives victims the chance to heal and wrongdoers the chance for forgiveness and for acceptance of their responsibility for wrong actions. Schultz describes the process of apology in the following terms:[87]

> First, a genuine apology implies that the party feels responsible and is therefore taking responsibility. While this might imply an admission of a mistake, it can also effectively mean a reversal of previously held views or policies. Secondly, a genuine apology is fuelled by sincere regret for the past harm caused. In other words, if given the chance to go back and do it all again, the party would act differently. In this respect, the apology would include little or no defense of one's past actions. Lastly, a genuine apology might require that reparations be made — especially in the case that those who are being apologized to are still being harmed as a result of past actions. Otherwise, the offended party is likely to think of the apology as just words.

However, not all words and acts of apology have genuine goals.

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85 See Haile (n 8 above) 42; Mayfield (n 61 above) 574. Note also that the International Tribunals for the former Yugoslavia and Rwanda and the International Criminal Court do not provide for the death penalty.

86 n 21 above.

87 N Schultz *Apology and forgiveness* The Conflict Resolution Information Source, University of Colorado (2003, http://www.crinfo.org/CK.Essays/ck.apology.jsp) (accessed 1 March 2006) 1.

Apology can be made for different tactical reasons.[88] Taken at face value, the request of former Derg officials for a chance to apologise to the Ethiopian people is a positive step towards reconciliation that is needed in the country. However, a true apology presupposes a genuine remorse and an admission of wrong actions with full exposition of what happened. The facts of the Red Terror and other massive human rights violations of the Derg era are still unclear for many. A full account of the events will be helpful to come to terms with the past. Historical records will also benefit from a full account of the facts. A public admission about how the Derg regime carried out mass murder and violence will also help to boost the public confidence sapped by the Red Terror. It will help curb the continued grave human rights violations that persisted for almost a generation.

All these positive aspects of the process of apology cannot be accommodated by the trials because of the very nature of court proceedings. Even though trials are a clear sign of upholding the rule of law and may serve as a form of revealing the truth, they suffer shortcomings in so far as an account of the whole truth is concerned. Trials are mostly about ascertaining individual responsibility through the application of rules of law and the presentation of relevant evidence. In law, the truth is a claim that is supported by evidence. The standards to be met and the procedural requirements of the law may or may not coincide with a revelation of the whole truth. Thus, the use of other methods of exposing the facts, such as the process of apology, will strengthen the remedial process.

The processes of apology and that of trials need to be seen as complementary rather than opposed to each other. In dealing with the case of the request to be able to apologise of the former officials of the Derg regime in Ethiopia, it is instructive to show that an effective remedy for past human rights violations goes beyond prosecution and investigation. The right to an effective remedy for past human rights violations encompasses duties of investigation, prosecution, compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition on the part of the state. The right to an effective remedy for human rights violations constitutes all the aforementioned components. Each component of the right to an effective remedy has different foundations under international law.[89] Compensation, restitution and rehabilitation

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88 See eg Mayfield (n 61 above) 569 for the justifications of the Red Terror in the defence presented by the former Derg Prime Minister, who is also one of the officials who made the request for apology.

89 See Basic Principles (n 35 above); see also General Assembly Resolution 39/46 art 14; General Assembly Resolution 2200(XXI) arts 6 & 16; see also DJ Harris *Cases and materials on international law* (1983) 40; P Malanczuck *Akehurst's modern introduction to international law* (1997) 256; T Meron *Human rights and humanitarian norms as customary law* (1989) 42.

are concerned with helping victims in terms of economic, social and psychological factors. Satisfaction and guarantees of non-repetition include:[90]

- verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim(s) or others;
- the search for the bodies of those killed or who disappeared and assistance in the identification and reburial of bodies in accordance with the cultural practices of the families and communities; and
- apology, including public acknowledgments of the facts and acceptance of responsibility.

Even though the Red Terror trials and the process of apology may be described as components of the same remedial process, the relationship between them remains unclear. The relationship between the request of the Derg officials to be given a forum to apologise of their own free will and the ongoing trials needs to be analysed. Should a genuine process of apology by the Derg officials be a reason for amnesty? The answer is in the negative for the following reasons: Amnesty for Derg officials will be against the legal duty of the government to investigate and prosecute the persons responsible for violations. The process of apology should not be used as a tactical move on the side of former officials to evade punishment and responsibility rather than exposing the truth for genuine reconciliation. A constitutional rule which bans amnesty for persons who are convicted of crimes against humanity also reinforces the case against amnesty for the former officials.[91]

If amnesty is not a trade-off for apology, does it mean that the process of apology may give rise to legal liability when the Derg officials admit to actions and facts which they might not have admitted to during trial? Legally, apologies are not automatically taken as admissions of legal liability because of the possibility of undue influences. The issue is whether to exempt the former officials from legal liability due to their free admission of facts during the process of apology or to use admitted facts against them during trial. In other societies, the process of finding the truth through different bodies such as truth commissions has gathered relevant evidence for subsequent prosecutions.[92]

In the case of Ethiopia, the question of amnesty or impunity was settled already when the government opted to investigate and prosecute the human rights violations. As such, the government did not negotiate with the former officials for amnesty in exchange for a full exposition of the facts and a public admission of responsibility for past

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90 Basic Principles (n 35 above) art 22.
91 Proclamation No 1/1995 (n 54 above) art 28.
92 PB Hayner *Unspeakable truths — Facing the challenge of truth commissions* (2002) 102.

human rights violations. Exemption from legal liability for the Derg officials will simply be against the ongoing trials. Thus, the prosecution or any interested party should not be banned from using any fact or relevant information in criminal or civil suits against the Derg officials.

If the Derg officials are looking for a process where they can apologise to the public, while at the same time receiving exemption from liability, their request to apologise is hardly genuine. After all, a genuine apology is not only to admit mistakes and to feel remorse; it is also a decision to take responsibility for one's actions. However, it is worth noting that a genuine apology as a result of a full disclosure of the facts and an acceptance of responsibility for these facts may be taken as a sign of reformation on the side of the former officials. This may in turn lead to mitigation during sentencing.

6 Conclusion

Unlike the popular misconception, the process of apology does not result in automatic amnesty for perpetrators of human rights violations. Rather, the processes of apology and prosecution are equally valid and relevant parts of the remedial process when dealing with past human rights violations. As such, one does not exclude the other. Whilst the investigation and prosecution of human rights violations are duties upon states, the process may not be successful. A lack of skilled man-power, dire financial resources and institutional inefficiency in the national legal system are all problems that count against speedy and efficient trials. Due to these and other problems inherent to trials, apology is essential in the remedial process. However, apology should not be used as a pretext to evade punishment and responsibility for human rights violations. The Ethiopian Red Terror trials, with all their shortcomings, are justified in terms of the duty of the state to investigate and prosecute past human rights violations. However, the recent request for apology made by the Derg officials needs to be given due attention as part of the remedial process, as it is essential for a full disclosure of the facts around the Red Terror and other massive human rights violations in the recent past.